

Fact Sheet on Canadian Military Justice¹

1. Introduction. During the Senate Armed Services Committee Hearing on June 4, 2013, some witnesses suggested that the Canadian military justice system might be a good model to mirror with a central prosecutor rather than command referred courts-martial. This fact sheet provides an overview of the Canadian military justice system and compares Canada's military prosecution statistics with those of the United States Department of Defense (DoD), with an emphasis on sexual assault prosecutions.

2. The Canadian System.

a. The Canadian Forces (CF) active duty strength is approximately 70,000.²

b. The Canadian military justice system is primarily based on the *Canadian Charter of Rights and Freedoms* and the *Code of Service Discipline* (CSD) at Part III of the *National Defence Act* (NDA).³

c. The Canadian military justice system underwent modifications based on a Supreme Court of Canada decision. Specifically, in 1992, the Supreme Court of

¹ This document reflects the personal opinion of the author and does not represent the views of George Washington University or the Law School.

² National Defence and the Canadian Forces website, July 19, 2013. This website was subsequently revamped. Public Sector Statistics, Financial Management System 2007/2008, Catalogue no. 68-213-X, shows National Defence regular forces: 64,884, and National Defence reserve forces: 25,716 for 2007. *Id.* at 104, http://publications.gc.ca/collections/collection_2008/statcan/68-213-X/68-213-XIE2008000.pdf.

The Department of National Defence, Report on Plans and Priorities 2013-14, indicates a Canadian

Government goal of "[m]aintaining an overall [Canadian Armed Force] strength of 68,000 (+/- 500)." *Id.* at

34, http://publications.gc.ca/collections/collection_2013/dn-nd/D3-25-2013-eng.pdf.

³ *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces, A Review from Apr. 1, 2009 to Mar. 31, 2010* (Mar. 2012) at 2. <http://publications.gc.ca/pub?id=411031&sl=0> [hereinafter *2010 Canadian JAG Report*]; National Defence and Canadian Armed Forces website, *Military Justice Summary Trial Level 2.2*, B-GG-005-027/AF-011 (Updated, Jan. 12, 2011), <http://www.forces.gc.ca/en/about-reports-pubs-military-law-summary-trial-level/index.page> (providing a detailed description of Canadian military justice system) [hereinafter *Military Justice Summary Trial Level*]; Canada Consolidation National Defence Act (June 25, 2013) Part III, Code of Service Discipline, <http://laws-lois.justice.gc.ca/PDF/N-5.pdf>.

Canada ruled that the Canadian general court-martial structure violated judicial independence and impartiality standards mandated in Section 11(d) of the Canadian Charter of Rights and Freedoms.⁴ Subsequent legislation dramatically reduced the role of the chain of command and convening authority in courts-martial to protect the accused's rights and eliminate the appearance of command influence.

d. The CSD is equivalent to the United States' Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial (MCM)*. The CSD sets forth disciplinary jurisdiction, pretrial and trial procedures, offenses, punishments, and post-trial and appellate procedures. The Canadian military justice system provides for jurisdiction over offenses worldwide, and it applies to regular and reserve CF members as well as to civilians in limited circumstances. The CSD includes unique military offenses as well as violations of civil criminal statutes.⁵

e. The Canadian Forces National Investigative Service (NIS) "normally investigate[s] offences of a serious and sensitive nature."⁶ A commanding officer, or delegee, or a Military Police officer or delegee, assigned to duties with the Canadian Forces NIS may charge a person, who is subject to Canadian military justice.⁷ The charge then goes to an initial referral authority (an officer in the chain of command), who serves the charge on the accused, registers the charge, refers the charge to a summary proceeding or sends the charge to a higher level for disposition, disposes of the charge by deciding not to proceed, or defers final action on the charge.⁸ The referral authority may, but is not required to, "forward the [charges and file] to the Director of Military Prosecutions together with any recommendation concerning the disposal of the charge

⁴ *R. v. Généreux*, [1992] 1 S.C.R. 259, <http://www.law.yale.edu/Genereaux.pdf>. See also Lindsay Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 Duke J. Comp. & Int'l L. 169, 175-177 (2006) (describing the events causing changes in the Canadian military justice system), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1110&context=djil&sei-edir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Drole%2520of%2520commanders%2520in%2520canadian%2520military%2520justice%2520system%26source%3Dweb%26cd%3D1%26ved%3D0CCoQFjAA%26url%3Dhttp%253A%252F%252Fscholarship.law.duke.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1110%2526context%253Ddjil%26ei%3DxkHtUdieJcv84AOvtoCQCA%26usq%3DAFQjCNH7BHX1FEJkut8J7LNbKopHnVEHkg%26bvm%3Dbv.49478099%2Cd.dmg#search=%22role%20commanders%20canadian%20military%20justice%20system%22>.

⁵ 2010 *Canadian JAG Report*, *supra* note 3, at 13.

⁶ *Military Justice Summary Trial Level*, *supra* note 3, at Ch. 3, Section 3, ¶¶ 48-50 (defining when the Canadian Forces National Investigative Service (NIS) investigates allegations).

⁷ *Id.* at ¶¶ 44-46 (citing *Queen's Regulations and Orders* Sections 107.015, 107.02, and 107.02, Note).

⁸ *Id.* at Ch. 8, Section 4.

that the referral authority considers appropriate.”⁹ Although a referral authority is not required “to obtain legal advice prior to considering an application for disposal of a charge, . . . legal advice is recommended.”¹⁰

f. The Canadian Forces Provost Marshal reported sexual assault crime statistics, which include all incidents that came to the attention of the Military Police, whether the Military Police or a civilian law enforcement agency was the lead investigating agency as follows: 2007 – 176, 2008 – 166, 2009 – 166, and 2010 – 176.¹¹ For disposition information the Provost Marshal Report states, “[f]ive CF members were sentenced to imprisonment for more serious criminal charges of ‘sexual interference,’ ‘sexual touching,’ and other non-sex offenses.”¹²

g. The Canadian military justice system consists of two levels of service tribunals. The “service tribunal” or “summary trial” is presided over by military commanders and is an expeditious means of resolving minor offenses at the unit level. Jurisdiction and punishments are very limited. A commanding officer presiding over a summary trial may impose: detention (to a maximum of 30 days); reduction in rank, but for one substantive rank only; reprimand; fine (to a maximum of 60% of member’s monthly basic pay); confinement to ship or barracks (to a maximum of 21 days); extra work and drill (to a maximum of 14 days); stoppage of leave (to a maximum of 30 days); and caution.¹³ The unit legal advisor provides advice on disposition. “Should the presiding officer decide not to act on the advice of the unit legal advisor, then the presiding officer must state the decision and provide written reasons for that decision.”¹⁴ Findings of guilty and

⁹ *Id.* at Annex N, ¶¶ 25-26 (“The referral authority’s letter is intended to assist the Director of Military Prosecutions in putting the alleged offence into the specific military context from which it originates. The Director of Military Prosecutions requires this contextual analysis to assist in making a decision on whether to prefer the charge to court martial, refer the matter back to the unit for disposal by summary trial or to not proceed with the charge at all. The letter represents the referral authority’s best opportunity to set out why he or she believes that the matter ought or ought not to be preferred.”).

¹⁰ *Id.* at Annex N, ¶ 24.

¹¹ *2010 Annual Report of the Canadian Forces Provost Marshal*, Canadian Forces Provost Marshal 8, http://publications.gc.ca/collections/collection_2012/dn-nd/D3-13-2010-eng.pdf.

¹² *Id.* at 20.

¹³ Queen’s Regulations and Orders for the Canadian Forces, Table to Art. 108.24, 34, <http://www.admfincs-smafinsm.forces.gc.ca/qro-orf/vol-02/doc/chapter-chapitre-108.pdf>. See also National Defence and the Canadian Forces, *Guide for Accused and Assisting Officers*, OPI: JAG/DLaw/MJP&R (updated Oct. 6, 2009), Annex A, <http://www.forces.gc.ca/en/about-reports-pubs-military-law/guide-for-accused-and-assisting-officers.page> (briefly summarizing the various levels of disciplinary proceedings, rights of accused, and maximum punishments).

¹⁴ Military Justice Summary Trial Level, *supra* note 3, at Ch. 8, Section 4, ¶ 54 (citing *Queen’s Regulations and Orders* Section 107.11(2)).

sentences awarded at a summary trial are subject to review by a superior officer independent of the command trying the case. Under some circumstances, the accused can elect trial by courts-martial in lieu of summary trial. (In 47.83% of cases involving the right to elect trial by courts-martial, only 2.35% of accused ultimately chose courts-martial.¹⁵) Summary trials are most similar to DoD's nonjudicial dispositions under Article 15, UCMJ.¹⁶ Under the Canadian system, 84 charges of a sexual nature made against 51 accused were resolved utilizing summary trial.¹⁷ Jurisdiction for the most serious sex crimes is limited to courts-martial.¹⁸

h. The second type of service tribunal is the court-martial. Military judges preside over courts-martial which function similar to Canadian civilian criminal courts. The accused is entitled to publicly-funded legal representation by Defence Counsel Services (DCS), or the accused may hire a civilian lawyer at his own expense. Legal officers from the Canadian Military Prosecution Service (CMPS) conduct the prosecutions. Rules of evidence apply to the proceedings, and courts-martial findings and sentences may be appealed to the Court Martial Appeal Court of Canada, and then to the Supreme Court of Canada (SCC).¹⁹

i. From Apr. 1, 2009 to Mar. 31, 2010, 1,998 Canadian service tribunals were held, of which 1,942 were summary trials and 56 were courts-martial. The total number of summary trials and courts-martial has been relatively constant over the last three years. Summary trials represented approximately 97% of all service tribunals.²⁰

j. There are currently two types of courts-martial. In a standing court-martial, a military judge decides the findings and the sentence.²¹ General courts-martial have a

¹⁵ 2010 Canadian JAG Report, *supra* note 3, at 15.

¹⁶ *Id.* at 13-14.

¹⁷ *Id.* at 15 note 30.

¹⁸ *Military Justice Summary Trial Level*, *supra* note 3, at Ch. 11, Sections 2 and 3, ¶¶ 31-63. "Offences of a 'sexual nature' heard at summary trial generally involve sexual harassment, inappropriate comments, inappropriate use of the internet and fraternization. Serious offences of a sexual nature such as sexual assault are dealt with at courts martial." Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces, A Review from A Review from April 1, 2007 to March 31, 2008 at 21 note 9, <http://publications.gc.ca/pub?id=411031&sl=0>.

¹⁹ 2010 Canadian JAG Report, *supra* note 3, at 14.

²⁰ *Id.* at 14.

²¹ Global Legal Research Center, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 23 (citation omitted).

military judge and a panel or jury of five military members.²² The accused has the right to choose trial forum, either general court-martial or standing court-martial.²³

k. The Director of Military Prosecutions (DMP) has authority to determine which charges, if any, should be tried by courts-martial, or sent back for disposition at summary trial. The DMP has two deputies, eight prosecutors work at four regional offices for the DMP, and several reservists work in individual offices.²⁴ The current DMP is a Navy Captain who was appointed to a four-year term on September 19, 2009. He is under the general supervision of the Judge Advocate General, and he is expected to exercise his duties and functions independently.

l. From Apr. 1, 2009 to Mar. 31, 2010, referral authorities submitted 78 referral applications for disposal of a charge or charges to the DMP. Charges were referred to courts-martial in 49 cases. In 8 of those cases, the DMP withdrew charges after they had been referred to trial, but before trial. In 17 cases, the DMP elected not to refer any charges to trial by court-martial. During the reporting period, a total of 181 charges were tried before 56 courts-martial.²⁵

m. From Apr. 1, 2009 to Mar. 31, 2010, there were 48 judge-alone courts-martial and 8 jury trials, resulting in 45 convictions and 11 acquittals. 37 cases were guilty pleas and 19 cases were not guilty pleas. Of those who pleaded not guilty, 59% were found guilty. Only 10 courts-martial cases resulted in any confinement and in 3 cases all confinement was suspended, in 4 cases the accused received 6 months or less confinement, and in the last 3 cases the accused received 9 months, 20 months, and 4 years of confinement.²⁶

n. The following table depicts the annual Canadian courts-martial for the last five years:²⁷

²² *Id.*

²³ *R v MacLellan*, 2011 CM 3005 (May 20, 2011), http://www.jmc-cmj.forces.gc.ca/assets/CMJ_Internet/docs/en/2011cm3005.pdf.

²⁴ *Id.* at 39-42.

²⁵ *Id.* at 45-46.

²⁶ *Id.* at 46-48, 56-76.

²⁷ *Id.* at 46-48 (data for 2010); *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces, A Review from April 1, 2008 to March 31, 2009* at 93, 94, 97, 137, http://publications.gc.ca/collections/collection_2010/forces/D1-16-2009-eng.pdf [hereinafter *2009 Canadian JAG Report*]; Canadian Chief Military Judge, *2012 Results and Decisions*, <http://www.jmc-cmj.forces.gc.ca/en/2012/res.page?> [hereinafter *2012 Canadian Results and Decisions*]; Canadian Chief Military Judge, *2011 Results and Decisions*, <http://www.jmc-cmj.forces.gc.ca/en/2011/res.page?> [hereinafter *2011 Canadian Results and Decisions*].

Canadian Courts-Martial						
	2008	2009	2010	2011	2012	Average
Standing Court-Martial	63	51	48	55	59	55.2
Disciplinary Court-Martial	15	10	0 ²⁸	0	0	5.0
General Court-Martial	0	6	8	4	5	4.6
Total	78	67	56	59	64	64.8

o. As for sex offenses, from Apr. 1, 2009 to Mar. 31, 2010, nine Canadian military personnel were referred to courts-martial with sexual assault charges; five were found not guilty; two were withdrawn; two were found guilty; and both of those who were convicted received confinement. One received 20 months confinement for sexual assault, and one received 3 months for sexual interference and other offenses.²⁹

p. The following table depicts the Canadian sexual abuse investigations and courts-martial for 2009 to 2012:³⁰

²⁸ On July 18, 2008, the Canadian government reduced the number of types of courts-martial from four to two, and eliminated disciplinary and special courts-martial. *2009 Canadian JAG Report, supra* note 27, at 135.

²⁹ *2010 Canadian JAG Report, supra* note 3, at 46-48, 56-76. See also Global Legal Research Center, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 27-28 (noting that on September 1, 2009, service tribunals received jurisdiction to dispose of sexual assault offenses because of the adverse impact on morale, discipline and military efficiency).

³⁰ The Canadian Provost Marshal report did not include information about investigations in 2011 and 2012. See paragraph 2.f, *supra* (sex offenses investigated). The court-martial information is from four sources: (1) *2010 Canadian JAG Report, supra* note 3, 46-48, 56-76, 89, 107; (2) *2009 Canadian JAG Report, supra* note 27, at 93, 94, 97, 137; (3) *2012 Canadian Results and Decisions, supra* note 27; (4) *2011 Canadian Results and Decisions, supra* note 27. See also Global Legal Research Center, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 27-28 (noting that on September 1, 2009, service tribunals received jurisdiction to dispose of sexual assault offenses because of the adverse impact on morale, discipline and military efficiency).

Canadian Sexual Abuse Investigations and Courts-Martial					
	2009	2010	2011	2012	Average
Investigated Sexual Offenses	166	176	Unk	Unk	171
Rate Per Thousand Investigated	2.37	2.51	Unk	Unk	2.44
Referred to Courts-Martial	3	9	6	5	6
Tried by Courts-Martial	3	7	5	4	5
Percent Investigated Tried by Court-Martial	1.8%	4.0%	Unk	Unk	2.9%
Convictions	1	2	5	3	3
Percent Convicted	33%	29%	100%	75%	31%
Incarceration	1 (7 days)	2 (20 months; 3 months)	3 (34 months; 9 months; 9 months)	2 (6 months; 12 months)	2 (12 months)

3. Analysis.

a. In FY 2012, the active duty strength of the U.S. Department of Defense (DoD) was 1,388,028 or 20 times as large as the Canadian active duty forces.³¹ The DoD completed 2,510 courts-martial, including 1,183 general courts-martial and 1,327 special courts-martial. Without including the 1,346 summary courts-martial tried in FY 2012, the DoD had 39 times as many courts-martial as Canada (2,510/65), and twice as many per capita as Canada.

b. In FY 2012, DoD investigated 2,661 instances of sexual abuse by military suspects for a rate per thousand of 1.92, and the Canadian rate of investigation of 2.44 is 27% higher than the U.S. rate per thousand of 1.92.³² In FY 2012, 302 DoD military personnel were tried by courts-martial, and 238 were convicted of sexual assault offenses for a conviction rate of 79% (238/302), as compared to an average of 3 Canadian sexual assault courts-martial convictions for 5 courts-martial tried over the previous four years for a conviction rate of 60% (3/5).³³ The rate per thousand of DoD

³¹ On September 30, 2012, the total population on active duty was 1,388,028. DoD Personnel and Procurement Statistics, *Military Personnel Statistics*, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm> (click "Total DoD - December 31, 2012 (DMDC data)).

³² Department of Defense, *1 Annual Sexual Assault Report 58* (2012), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [hereinafter *2012 DoD Report*].

³³ *Id.* at 73.

personnel tried by courts-martial for sexual assault offenses was .22 (302/1,388,000) and the rate per thousand of Canadian personnel was .07 (5/70,000). More than three times as many DoD personnel were tried by court-martial for sex offenses per capita as for Canadian Forces, even though Canadian active duty personnel were investigated at a 27% higher rate.

c. As indicated previously, in Canada over the last two years only 3.5% (6/171) of those investigated faced the possibility of more than 30 days confinement for sexual abuse or assault. In the last two years, only two Canadian military personnel were sentenced to more than 10 days of confinement.³⁴ Numerous DoD military personnel received over five years confinement for sex crimes, and six DoD military personnel received 20 years confinement for sex crimes.³⁵

d. Some U.S. military installations have tried more courts-martial, obtained more convictions, tried more sexual assault cases, obtained more sexual assault convictions, and sent more sexual assault perpetrators to confinement than the entire Canadian Forces, even though they have substantially fewer assigned personnel than Canada.

e. As an example, the Army installation of Fort Hood, Texas has 45,414 active duty military personnel,³⁶ compared to Canada's 70,000. In FY 2011, Fort Hood prosecuted 115 courts-martial (including 18 sex offenses), resulting in 112 convictions (including 13 sex offense convictions—the number of convictions would be higher, if cases were included where the accused was acquitted of a sex offense and convicted of a non-sex offense).³⁷

f. In FY 2012, Fort Hood prosecuted 121 courts-martial (including 26 sex offenses), resulting in 114 convictions (including 21 sex offense convictions). More importantly, in FY 2011, 10 Fort Hood military personnel were sentenced to more than one year of confinement for committing a sex offense; in FY 2012, 17 military personnel were sentenced to more than one year of confinement. Whereas, in the entire Canadian active duty forces, only one person received over one year of imprisonment for a sex offense (one accused received 20 months in jail-and that sentence is under appeal).³⁸ In sum, Fort Hood by itself in FY 2012, tried 3.7 times (26/7) as many sex

³⁴ 2010 Canadian JAG Report, *supra* note 3, at 46-48, 56-76.

³⁵ 2012 DoD Report, *supra* note 29, at 232, 245, 245, 246, 533, and 657 (Case Numbers 291, 486, 487, 532, 533 and 1).

³⁶ Fort Hood Fact Sheet No. 0703, <http://www.hood.army.mil/facts/FS%200703%20-%20Fort%20Hood%20Overview.pdf>.

³⁷ Fort Hood prosecution statistics provided from Clerk of Court's Office, Army Court of Criminal Appeals on July 15, 2013.

³⁸ 2010 Canadian JAG Report, *supra* note 3, at 89.

offenses by courts-martial as the entire Canadian military and obtained ten times (21/2) as many sex offense courts-martial convictions.

g. If the goal is to establish a military justice system for the U.S. Armed Forces that: treats allegations of sexual assault as serious offenses; ensures efficient adjudication of allegations and convictions; and, provides deterrence through significant punishment of convicted offenders, then mirroring the Canadian system would not be an improvement. Using Fort Hood as an example, even though its active duty population is 35% lower than the Canadian armed forces, Fort Hood obtains ten times as many courts-martial convictions for serious sex offenses. Furthermore, numerous DoD military personnel were sentenced to over five years confinement for sex offenses.