

The Evolution and Reform of Summary Trials in Canadian Military Justice

By

Pascal Lévesque

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## Abstract

There is a place where a Canadian citizen can be sent to 30 days detention, by someone who is not a judge, without being represented by counsel, and without having a meaningful right to appeal. It is the summary trial system of the Canadian Armed Forces. This thesis analyses that system and suggests reforms. It is aimed at those who have an interest in improving the administration of military justice at the unit level but want to sufficiently understand the issues before doing so.

Through a classic legal approach with elements of legal history and comparative law, this study begins by setting military justice in the Canadian legal firmament. The introductory chapter also explains fundamental concepts, first and foremost the broader notion of discipline, for which summary trial is one of the last maintaining tools. Chapter II describes the current system. An overview of its historical background is first given. Then, each procedural step is demystified, from investigation until review.

Chapter III identifies potential breaches of the *Charter*, highlighting those that put the system at greater constitutional risk: the lack of judicial independence, the absence of hearing transcript, the lack of legal representation and the disparity of treatment between ranks. Alternatives adopted in the Canadian Armed Forces and in foreign jurisdictions, from both common law and civil law traditions, in addressing similar challenges are reviewed in Chapter IV.

Chapter V analyses whether the breaches could nevertheless be justified in a free and democratic society. Its conclusion is that, considering the availability of reasonable alternatives, it would be hard to convince a court that the current system is a legitimate impairment of the individual's legal rights.

The conclusion Chapter presents options to address current challenges. First, the approach of 'depenalization' taken by the Government in recent Bill C-71 is analysed and criticised. The 'judicialization' approach is advocated through a series of 16 recommendations designed not only to strengthen the constitutionality of the system but also to improve the administration of military justice in furtherance of service members' legal rights.

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## List of Abbreviations

AWOL	Absence Without Leave
BOI	Board of Inquiry
CAF (or CF)	Canadian Armed Forces (or Canadian Forces)
CB	Confinement to Barracks (or to Ship)
CDS	Chief of the Defence Staff
CFNIS	Canadian Forces National Investigation Service
CFSPDB	Canadian Forces Service Prison and Detention Barracks
CMAC	Court Martial Appeal Court
CMJ	Chief Military Judge
CO	Commanding Officer
CRO	Custody Review Officer
CSD	<i>Code of Service Discipline</i>
DAOD	<i>Defence Administrative Orders and Directives</i>
DDCS	Director of Defence Counsel Services
DMP	Director of Military Prosecutions
DND	Department of National Defence
JAG	Judge Advocate General
MP	Military Police
NCM	Non-Commissioned Member
NCO	Non-Commissioned Officer
NDA	<i>National Defence Act</i> , RSC 1985, c N-5
NJP	Non-Judicial Punishment (US)
POCT	Presiding Officer Training Course
POW	Prisoner of War
QR&O	<i>Queen's Regulations and Orders</i>
RCAF	Royal Canadian Air Force
RCN	Royal Canadian Navy
RDP	Record of Disciplinary Proceedings

RMP	Regional Military Prosecutor
SAC	Summary Appeal Court (UK, Ireland)
SACNZ	Summary Appeal Court of New Zealand
SCM	Summary Court Martial (US)
STWG	Summary Trial Working Group
UCMJ	<i>Uniform Code of Military Justice (US)</i>

# Canadian Armed Forces Rank Structure

<b>Canadian Army</b>		<b>Royal Canadian Navy</b>	
<b>Royal Canadian Air Force</b>			
<u>Rank</u>	<u>Abbreviation</u>	<u>Rank</u>	<u>Abbreviation</u>
<b><u>Officers</u></b>			
General	Gen	Admiral	Adm
Lieutenant-General	LGen	Vice-Admiral	VAdm
Major-General	MGen	Rear-Admiral	RAdm
Brigadier-General	BGen	Commodore	Cmdre
Colonel	Col	Captain	Capt(N)
Lieutenant-Colonel	LCol	Commander	Cdr
Major	Maj	Lieutenant-Commander	LCdr
Captain	Capt	Lieutenant	Lt(N)
Lieutenant	Lt	Sub-Lieutenant	SLt
Second Lieutenant	2Lt	Acting Sub-Lieutenant	A/SLt
Officer Cadet	Ocdt	Naval Cadet	NCdt
<b><u>Non-commissioned members</u></b>			
Chief Warrant Officer	CWO	Chief Petty Officer 1 <sup>st</sup> Class	CPO1
Master Warrant Officer	MWO	Chief Petty Officer 2 <sup>nd</sup> Class	CPO2
Warrant Officer	WO	Petty Officer 1 <sup>st</sup> Class	PO1
Sergeant	Sgt	Petty Officer 2 <sup>nd</sup> Class	PO2
Master Corporal <sup>1</sup>	MCpl	Master Seaman	MS
Corporal	Cpl	Leading Seaman	LS
Private <sup>2</sup>	Pte	Able Seaman	AS
		Ordinary Seaman	OS

<sup>1</sup> Master corporal is not a rank but an appointment. Although they have authority and powers of command over all other corporals, their rank remains that of corporal. See QR&O, art 3.08.

<sup>2</sup> Depending on the unit type, there are other more specific designations: Trooper, Gunner, Sapper, Signaller, Guardsman, Fusilier, Rifleman, Voltigeur, Craftsman, Musician, Piper, Drummer, Ranger.

# Chapter I: General Introduction

## *A. Summary Justice Scenarios*

This thesis sets out to examine summary justice in Canada's military and to argue for changes. Consider the following three scenarios. You are a young private (Pte) having served in the Canadian Armed Forces (CAF) for the past year. You have an undistinguished career so far and are currently on a basic military occupation course. You were doing relatively well until last week. One morning you are ill and attend 'sick parade' at the base clinic. The physician excuses you from duty for a day. When you give the form to Sergeant (Sgt) Alpha he tells you to go back to your quarters for the remainder of the day until your return to the course next morning. In the evening, your friend invited you to the Tim Horton's coffee shop. After a coffee, you spend the night at his place and go back to your quarters at 0600 hours to resume the course.<sup>1</sup>

Being made aware by a course-mate, Sgt Alpha informs you that he suspects you were absent of your quarters without authorization and that he reported the matter to Warrant Officer (WO) Bravo. During the next day the unit's disciplinary investigator Sgt Charlie offers you an opportunity to provide a statement, with a caution as to your rights to remain silent and the opportunity to talk to a lawyer. Seeing no point in talking to a lawyer at this time, you explain that you did not do anything wrong by going to your friend's place as you felt the 'day' was over. 48 hours later, you are charged with absence without

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<sup>1</sup> The facts of that scenario are inspired by the case of *R v Balint*, 2011 CM 1012 (CanLII). In that case, the accused was an officer cadet.

leave or AWOL.<sup>2</sup> Sgt Charlie explains to you that as you are not exposed to a punishment more severe than a minor fine, you are not entitled to elect to be tried by court martial. After meeting with your assisting officer, Captain Delta a young but dedicated and smart officer, you determine your best course of action is to admit the particulars of the charge and focus on mitigating factors to avoid any punishment more than a \$200 fine. If it goes according to the plan, the entry would be removed from your conduct sheet at the completion of your military occupation course.<sup>3</sup> During the hearing before the delegated officer, Major Echo, everything goes well but one thing. Major Echo explains that he considers the blatant disregard to military discipline as aggravating. Acknowledging you are going well on the course so far he decided to give you a \$200 fine but added with a period of 4 days of confinement to barracks (CB). Not entirely happy with the decision, you nevertheless do not want to challenge it. What would be the point? By the time you obtain a decision on the review you would have served your CB time anyway. Plus, it will soon be nothing more than a bad memory. So you accept your fate and carry on with the punishment.

Here is another scenario. You are a master warrant officer (MWO) in the Royal Canadian Air Force (RCAF). Your career of 25 years has been unblemished so far. Recently however you made a fool of yourself. During a troop lunch at your unit's mess, you drank a bit too much. You sat next to a civilian guest Ms Foxtrot who was much younger than you. Disinhibited by alcohol, you made a number of crude and inappropriate sexual remarks to her. In addition, you touched her by putting your hand on her thigh

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<sup>2</sup> *National Defence Act*, RSC 1985, c N-5, s 90 [NDA].

<sup>3</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 7006-1, *Preparation and Maintenance of Conduct Sheets*, (Ottawa: National Defence, 31 March 1998).

without her consent. Shocked, Ms Foxtrot pulled away from you and reported the incident to the duty officer.<sup>4</sup>

Few days later you are invited to the local military police detachment (MP Det) by Master Corporal (MCpl) Golf, who is conducting the investigation. After the usual caution, he offers you the opportunity to make a statement. You call the duty counsel, Lieutenant Commander (LCdr) Hotel from the Defence Counsel Services, a seasoned legal officer of 15 years of experience, 5 as a defence counsel. Based on her advice, you decide to remain silent and leave the MP Det. One month later, you are served with a Record of Disciplinary Proceedings (RDP) containing three charges namely, assault<sup>5</sup> and in the alternative a charge of drunkenness<sup>6</sup>, and 'conduct to the prejudice to good order and discipline'<sup>7</sup> in that you breached the CAF policy against harassment.<sup>8</sup> Because of the nature of the offences, you have the right to elect to be tried by a court martial and are given two days to make your choice as to the mode of trial. As you know you are entitled to an assisting officer, you ask for Capt India, a buddy of yours since boot camp, who commissioned from the ranks 2 years ago and who is notorious for knowing and playing with regulations to his advantage. You are told that because of your rank if you were to choose summary trial, Colonel (Col) Juliet, the base commander would hear your case.

On Capt India's advice you call back LCdr Hotel. Without going too much into the details of the allegations, she recommends that you choose summary trial. She stresses

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<sup>4</sup> This scenario is based on the circumstances of *R v Tremblay*, 2013 CM 4031 (CanLII) at paras 5-6. In that case, the offender was a major.

<sup>5</sup> *Criminal Code*, RSC 1985, c C-46, s 266.

<sup>6</sup> *NDA*, s 97.

<sup>7</sup> *NDA*, s 129.

<sup>8</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 5012-0, *Harassment Prevention and Resolution*, (Ottawa: National Defence, 20 December 2000).

that as Col Juliet is a 'superior commander', only three punishments are available in the worst case scenario: fine, reprimand, and severe reprimand, probably a combination of a fine with one of the other two. She tells you that if you were to choose court martial you would be exposed to greater risk and negative impact, even though it is a better place to raise legal issues. First, a court martial has more punishment powers, including reduction in rank, dismissal, and imprisonment. Second, it would take longer for the proceedings to unfold, a year she anticipates. But more importantly, by choosing court martial, your case would be referred to a regional military prosecutor (RMP) who may ask for an additional investigation report and who may modify or add charges. It is not impossible that a more 'zealous' prosecutor would change the assault charge to a sexual assault one, in particular in the aftermath of the Deschamps Report which identified a perception that sexual misconduct is condoned in the CAF.<sup>9</sup> "Operation Honour is on the way; the higher a file goes, the higher the pressure not to be seen as sweeping, even remotely, such misconduct under the rug", she adds. By choosing court martial, not only would you be exposed to more severe punishments, but you run the risk if found guilty of being put on the National Sex Offenders Registry, in addition to the usual stigma and bad publicity that are normally attached to court martials. LCdr Hotel further suggests that as the assault and drunkenness charges are alternative to each other, admitting the particulars of the former charge would prevent a conviction on the latter, hence applying the protection against double jeopardy. Following her advice, you choose the summary trial. At the hearing, you admit particulars of the second and third charges and are found guilty of those. On sentencing Col Juliet imposed a sentence of a reprimand and a \$1500 fine.

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<sup>9</sup> Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, (Ottawa: National Defence, 2015) at 20-21 [*Deschamps Report*].

Although this incident would stall your career progression, you consider yourself 'lucky' in the circumstances. It could have been much worse.

Last scenario. You and your buddy Private (Pte) Kilo have joined the CAF less than two years ago. After your boot camp and your infantry phases in CFB Gaagetown, you were both posted to CFB Edmonton with a combat unit preparing for an upcoming deployment in the next year or so in a hostile environment where drugs are rampant. Everything goes well until one morning, each member of the company is ordered to undergo a urine test. All unit's positions have been designated as 'safety sensitive'. You feel nervous as last week you went to a party with Pte Kilo where you both smoked a joint of marijuana. Having no other option but to perform the test, you hope your metabolism rate has been high enough so that the drug would not show up. Unfortunately for you one week later, Chief Warrant Officer (CWO) Lima and your supervisor Sgt Mike meet with you. They both look disappointed and severe. CWO Lima tells you your test came back as positive. You are so nervous that your hands shake. Being naturally honest and ready to take responsibility, you break an awkward silence and spontaneously explain what happened at the party. CWO Lima then ask you if it happened any time before. As you suspect that if you lie you would be in worse trouble that you are already in, you tell him that it also happened 4 months ago at your girlfriend's place. Then CWO Lima tells you something about remaining silent and the option to contact a counsel. As you are not a 'weasel' you tell him that you understand, do not want a lawyer for the moment, and sign the form accordingly. Then he gives you a blank form and asks you to provide details of the two incidents, in particular where you got the drug. You write a statement but do not sign it, as you think (wrongly) it would protect your right. Before you left the room you are

ordered not to talk to anyone about these incidents. They also inform you that you would be met by the Base Addiction Counsellor. Besides, other members of the unit were interviewed, including your 'buddy' who does not want to talk to you anymore. The day after, a search is conducted in your quarters but nothing is found. One week later, they lay two charges of 'conduct prejudice to good order and discipline' in that you used illicit drugs.<sup>10</sup> Brand new Second Lieutenant (2Lt) November, recently promoted from Royal Military College (RMC) is appointed as your assisting officer. You are given the right to elect to be tried by court martial and are given 24 hours to make your decision. You call the duty counsel line and speak with Captain (Capt) Oscar, a young legal officer who had just been posted with DCS. He first tells you that as he does not have access to the investigation report, he can only provide general advice. He describes the differences between summary trials and courts martial. When you ask where you should go, Capt Oscar tells you: "Hard to say. You have pros and cons for each option. At the end of the day, it's up to you!" "Not much of a legal advice" you think. Meeting with 2Lt November, he tells you that this is his first time as an assisting officer. "But don't worry", he adds. "I have 'heard through the grapevine' that if you were to 'plead guilty', the commanding officer would not be harsh on you." When you inquire as to what he means by that, he replies that although unit's policy is to send drug users to detention barracks (DB) for two or three weeks, you might save a week or two, even having the detention suspended by admitting to the particulars of the charges. When you ask what would happen if you choose court martial, 2Lt November tells you that it would impede your deployment for sure as the unit would avoid holding a court martial in the theater of operations. Having

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<sup>10</sup> *NDA*, s 129 in conjunction with *Queen's Orders and Regulations*, art 20.04 [QR&O].

forgone your deployment, you are more concerned about your career. 2Lt November tells you dismissal is not within the commanding officer's punishment powers, so 'you are safe'. He adds that even if you are awarded detention, you would *normally* be returned to your unit without any lasting effect on your career.<sup>11</sup> Eager to move on, you decide you will 'man up', swallow the bitter pill and be the 'good boy' at the summary trial held the following month. After you admit the particulars of the charges your commanding officer, Lieutenant Colonel (LCol) Papa finds you guilty and proceeds with the sentencing phase. 2Lt November does his best to argue mitigating factors, in particular that you took your responsibility in admitting your guilt. In his decision, LCol Papa considers aggravating the fact that you used illegal drugs twice, in blatant disregard of the well-known CAF Drugs policy. Normally, he would have given you 28 days detention but as you admit the particulars, he imposes 21 days to be served at Canadian Forces Service Prison and Detention Barracks (CFSPDB), the military jail located near the base. Once your time is served, you are notified of the unit's intent to administratively recommend your release from the CAF for two distinct abuses of drugs. Totally shocked and confused, you contact 2Lt November to seek a review of the summary trial. He reminds you that you were told you had only 14 days after the trial to proceed. Then you call Capt Oscar to see how you can challenge the release. Capt Oscar politely informs you that unfortunately, it is not within DCS mandate to provide legal advice and represent individual CAF members for "respecting matters not likely to be tried under the Code of Service Discipline" such as 'administrative' release for drug use.<sup>12</sup> Months later you hear that your 'buddy' pleaded

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<sup>11</sup> QR&O, art 104.09 note A.

<sup>12</sup> Canada, National Defence, *DDCS Manual*, (Ottawa: OJAG, np) ch 4 at 2.

guilty at a court martial for two charges of possession of illegal drugs, namely marijuana and cocaine. He received only a \$1500 fine and stays in the CAF.<sup>13</sup>

In the current system of summary trials in Canadian military justice these three above scenarios can happen. They share common characteristics: hearings are presided by non-lawyers, there are no counsel from either side and no transcripts. The first scenario would likely occur early in someone's career, at a time where people are still adapting to military life and culture. In terms of the type of offence, the rank of the accused, and the outcome (finding and punishment) it is reflective of the most common cases.<sup>14</sup> The system works relatively well for circumstances of that kind. The second scenario is an optimistic scenario from an accused's perspective. For certain higher ranks, although the summary trial would be presided over by higher authority, it often means less negative impact on someone's career than for lower ranks. A fluke for the offender, such situation could be perceived as unfairly lenient both from service members of lower rank and from an outsider's point of view. The last scenario is a pessimistic one from an accused's perspective. Although rare, it could occur where unit's interest is the primary objective and compliance with the interests of justice is considered secondary. Often, checks and balances play their roles so those situations are avoided. However a combination of unethical conduct, inexperience and ignorance can lead to those kind of situations.

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<sup>13</sup> See for example *R v Private SC Johnstone*, 2007 CM 4007 (CanLII).

<sup>14</sup> Canada, National Defence, *A Report to the Minister of National Defence on the Administration of Military Justice from 1 April 2014 to 31 March 2015*, (Ottawa, OJAG, 2015) annex A at 26-29 [JAG Annual Report 2014-15].

In 2014-2015, 19 persons served the punishment of detention.<sup>15</sup> Overall, 494 individuals were detained as a result of a summary trial since the current system was put in place in 1999.<sup>16</sup> Were they all justified outcomes? Would courts martial have produced the same result? Were those offenders returned to their unit 'without any lasting effect on their career'?

### ***B. Purpose of this Thesis***

The purpose of this thesis is to examine whether the summary disciplinary system of the Canadian Armed Forces can be improved, in particular to avoid justice distortions like the last two types of scenarios without losing its essence in dealing with circumstances of the first type. It will provide a comprehensive review the Canadian summary trial system and will seek to go beyond ideological assumptions and political agendas. In general, those who are the most influential as it pertains to military justice (government officials, parliamentarians, military authorities, judges) may not have sufficient time or candor to methodically study it. By giving them the most accurate picture as to what the system is, where it comes from, what its strengths and weaknesses are, and where it should go based on other jurisdictions' experience, it is expected they will be in a better position to make fully informed decisions with regards to its future.

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<sup>15</sup> *Ibid* at 29.

<sup>16</sup> This number is the sum of service members who have served detention for each year from 1<sup>st</sup> Sept 1999 to 31 March 2015 as reported in JAG annual reports.

### ***C. Military Justice in Canadian Law***

At the outset, it appears essential to define and clarify basic terms and expressions. Sometime similar realities in civilian and military environments are defined differently. Sometimes the same word means different realities in those environments. Within the military organization a concept might even be perceived differently amongst service members. Furthermore, amongst jurists interested in military law there is debate about what certain legal terms mean in military context. In some cases different notions are confused.

#### **1. Definition**

What is military justice? Simply put it is the law dealing with service members' misconduct through a formalized penal process. It is a branch of military law, the body of laws governing the organization, administration and operation of the armed forces. In the popular culture, some might describe military justice by referring to the well-known Clémenceau's quote drawing a parallel between music and military music, suggesting military justice is similarly a pale reflection of its civilian counterpart.<sup>17</sup> This catchy characterisation is a misrepresentation of the reality. First, what Clémenceau had in mind was the French military system of the late nineteenth-early twentieth century, the same system that committed a profound injustice against Alfred Dreyfus which was followed by

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<sup>17</sup> Former French statesman Georges Clémenceau (1841-1929) is attributed to have said "*Il suffit d'ajouter "militaire" à un mot pour lui faire perdre sa signification. Ainsi la justice militaire n'est pas la justice, la musique militaire n'est pas la musique*" which can be translated by: "It suffices to add "military" to a word for it to lose its meaning. [Thus] military justice is to justice what military music is to music." See Fred Garner, *The Unlawful Concert : An Account of the Presidio Mutiny Case* (New York : Viking, 1970) at 111 where Paul Halnovik of the American Civil Liberties Union is reported to have used Clémenceau's quote to describe courts martial of US military prison 'mutiners' in the late sixties.

the Aernoult-Rousset Affair, a “proletarian Dreyfus Affair”.<sup>18</sup> Second, the quote was summarized and used by Robert Sherrill – an American journalist – as the title of his book criticizing the harsh conditions of US Army military prisons in the late sixties.<sup>19</sup> Therefore, using the epigram to describe modern Canadian military justice system is a fallacy that may be savvy in a political speech but has little value in legal academic research.

Although they do not precisely define “military justice”, the *National Defence Act* and *Queen’s Regulations and Orders* refer to the term, often coupling it with the words “administration of”.<sup>20</sup> In the context it is used, the term relates to matters before ‘service tribunals’, which consist of ‘courts martial’ and ‘persons presiding at a summary trial’.<sup>21</sup> These tribunals have jurisdiction over ‘service offences’, defined as offences under the *NDA*, ‘the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the *Code of Service Discipline*’, in Canada or abroad.<sup>22</sup> The only exceptions are some serious crimes when allegedly committed in Canada, notably murder and manslaughter.<sup>23</sup> This exercise of penal jurisdiction also covers crimes against the law of armed conflict, through the *Geneva Convention Act*.<sup>24</sup> Although the proceedings are often qualified as being ‘disciplinary’, military justice is limited to those penal matters. It does not include other fields of military law, such as non-penal ‘remedial measures’<sup>25</sup> another

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<sup>18</sup> See generally John Cerullo, *Minotaur: French Military Justice and the Aernoult-Rousset Affair*, (DeKalb, IL: Northern Illinois University Press, 2011).

<sup>19</sup> Robert Sherrill, *Military Justice is to Justice as Military Music is to Music*, (New York: Harper & Row, 1969).

<sup>20</sup> *NDA*, ss 9.2(1)(2), 9.3(2), 165.17(5), 180(2)(b), 196.14(2)(3); QR&O, arts 101.19, 107.14 Note A, 107.15 Note, 112.10, 112.56, 119.313(5).

<sup>21</sup> *NDA*, s 2.

<sup>22</sup> *Ibid.*

<sup>23</sup> *NDA*, s 70.

<sup>24</sup> RSC 1985, c G-3.

<sup>25</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 5019-4, *Remedial Measures*, (Ottawa: National Defence, 13 July 2007).

way to correct service members' misconduct and deficiencies.<sup>26</sup> It does not yet include military grievances, although addressing such claims by services members and providing them with remedies may well be included in the notion of what a 'military justice system' should be about.<sup>27</sup> It does not cover law of military operations, although circumstances triggering military justice proceedings occur in part during those operations. Even if it would be more appropriate to use 'military penal law' this research will keep using the term 'military justice'.

## 2. Purpose

The existence of military justice is recognized in the *Charter*, as section 11(f) establishes an exception to the right of trial by jury 'in the case of an offence under military law tried before a military tribunal'.<sup>28</sup> Its purpose has been summarized by Chief Justice Lamer in the landmark case of *R v Généreux* in the following terms:

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the 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

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<sup>26</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 5019-0, *Conduct and Performance Deficiencies*, (Ottawa: National Defence, 22 December 2004).

<sup>27</sup> *NDA*, ss 29-29.28; QR&O, ch 7.

<sup>28</sup> *R v Généreux*, [1992] 1 SCR 259 at 296, 1992 CanLII 117 (SCC) [*Généreux*].

military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.<sup>29</sup>

This purpose of military justice does not create much of a controversy nowadays. In general, the rationale of having a particular justice system to deal with misconduct in the service is accepted. However, there is currently a vivid debate on its scope. Consider the use in the above quote of the adverb ‘directly’ when discussing about those ‘matters that pertain to the discipline, efficiency and morale of the military.’ Did Chief Justice Lamer purposely use the adverb to indicate a restriction in military jurisdiction or was it inconsequential?

### **3. Scope**

To which extent should the military justice system capture service members’ misconducts? Obviously, it pertains to offences typically associated with military life, such as disobedience of a lawful command, absence without leave, or striking a superior officer. But what about a misconduct that is not generally attached to military life? Would domestic violence, for example, be ‘attached to military’ if it occurred in Private Military Quarters (PMQ), between a service couple, especially if the violence is caused by a difficulty to cope with a post-traumatic stress disorder as a result of an operational deployment? For some – usually defence counsel and some commentators – the adverb ‘directly’ in the *Généreux* quote indicates that military jurisdiction should be limited. For others – usually military prosecutors and authorities – the definition of ‘service offence’ in the *NDA* is broad and captures all kind of circumstances, beyond military context. The

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<sup>29</sup> *Ibid* at 293.

determination as to where the proceedings will be initiated is a matter of prosecutorial discretion. From accused persons' point-of-view it matters because being dealt with by military justice represents a departure from what they would have been normally exposed to if facing the ordinary criminal justice system. For example, in addition to the loss of the right to a trial by a jury of 12 in most serious cases, being dealt with by court martial means no preliminary inquiry and no possibility of conditional sentences.

The Supreme Court of Canada answered the debate in the case of *R v Moriarity*.<sup>30</sup> That case combined two applicants. The first individual was at the time a Cadet Instructor Cadre officer (*Second Lieutenant Moriarity*) who is charged with several sexual offences under the *Criminal Code* for engaging in inappropriate sexual relationships with cadets while he was in a position of authority towards them. The second (*Private Hannah*) is charged with trafficking of a controlled substance that he purchased and delivered to another service member contrary to section 5(1) of the *Controlled Drugs and Substances Act*. The main issue was whether section 130(1)(a) of the *National Defence Act* – by which military jurisdiction is exercised over ordinary offences – violates section 7 of the *Charter* because it was drafted more broadly than necessary.

For a unanimous Court of nine justices, Justice Cromwell answered no. The Court held that “there is no explicit limitation in the text of s. 130(1)(a) to the effect that the offence must have been committed in a military context.”<sup>31</sup> Quite the contrary, even when an offence was committed outside military context it was not “irrational to conclude that the prosecution of the offence is related to the discipline, efficiency and morale of the

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<sup>30</sup> [2015] 3 SCR 485, 2015 SCC 55 (CanLII) [*Moriarity*].

<sup>31</sup> *Ibid* at para 8.

military.”<sup>32</sup> In other words, the status of the accused suffices to confer jurisdiction. A more recent Supreme Court decision in *Canadian*, pertaining to the authority of the Minister of National Defence over appeals in military justice, has not altered that state of affairs.<sup>33</sup>

#### 4. Impact of debate on summary trials

*Moriarity* did not only confirm jurisdiction of courts martial over ordinary offences; it indirectly did so for summary trials. The vast majority of services offences are dealt with through summary proceedings. In 2014-2015, about 92% of all cases were summary trials.<sup>34</sup> The vast majority of those cases pertains to offences typically associated with military life. Few of them involve ordinary or public offences. As we will see in more details in Chapter II those offences are not minor; the right to elect to be tried by a court martial must be offered prior to dealing with them by summary trial. This is where the disparity between summary trial and ordinary criminal law is the most manifest; an individual charged with an ordinary criminal offence tried by someone who is not judicially independent, with no defense counsel, with no transcript and with no appeal. That disparity with ordinary criminal law is of the greatest concern and was not addressed in *Moriarity* and is still open for debate.<sup>35</sup>

Some might argue that ordinary offences at summary trial are so insignificant in numbers that it should not matter in the overall scheme. Indeed, considering the total of charges dealt with by summary trial, their number is very low. In 2014-15 only 25 out of

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<sup>32</sup> *Ibid* at para 52.

<sup>33</sup> *R v Cawthorne*, 2016 SCC 32 (CanLII).

<sup>34</sup> *JAG Annual Report 2014-15*, *supra* note 14 annex A at 24.

<sup>35</sup> *Moriarity*, *supra* note 30 at para 30.

1182 were charges relating to ordinary offences which represents about 2% of the total.<sup>36</sup> But those numbers, instead of making the disparity irrelevant, suggest that military summary jurisdiction over ordinary criminal offences should perhaps be abandoned.

#### ***D. Military Discipline***

Military discipline is a broader concept than military justice. The latter is the ultimate tool to maintain the former. Military discipline is different from its civilian counterpart. They share the observance to a particular set of rules for a particular group. However due to the unique circumstances which military organization operate under, military discipline is maintained with more intensity; in case of breach, response comes faster and the sanction is heavier. While ‘disciplinary’ sanctions are administrative in nature for a civilian professional body, it is penal even criminal in a military context.

Sometimes described as the ‘soul of the military’ or the ‘mother of all armies’, discipline is essential for military forces. But what discipline? Are we talking here of the kind of discipline that is used to impose obedience to an authority through rebuke and punishment? Or is it the one that comes from within because we are genuinely convinced this is the best way for group cohesion and efficiency? Traditionally, military discipline has been justified by the need to control the troops. First they must carry out orders. But also – and more importantly during political crises – those troops must not threaten the State. In current military law doctrine, there is still a quote of the eighteenth century French general Maurice de Saxe who states that without discipline:

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<sup>36</sup> *Ibid* at 26-27.

Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy.<sup>37</sup>

In contrast, it has been suggested more recently that the requirement for military discipline is 'no different from the discipline expected of public servants or adherents of a profession, a university, a political party, a religious organization, a baseball league, or a labor union."<sup>38</sup>

The reality is in between. It is doubtful to contend that services members would act as a crowd of lawless and violent individuals if rules were removed. At the same time, we cannot completely rely on the fact that service members would independently act as self-regulated members of a profession, especially in the early stages of their career.

### **1. Combination of collective and self-discipline**

In modern CAF, discipline is a combination of both collective and self-discipline. Their respective proportion would vary according to the circumstances, in particular the task to be accomplished, the environment it takes place, and the personal characteristics of subordinates and leaders.<sup>39</sup>

The first type of discipline is the collective one which can be defined as the discipline imposed by a group. An example of collective discipline occurs typically on a military parade square. During drill, commands are sharp, loud, and clear. Any spotted

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<sup>37</sup> Maurice de Saxe, *Reveries on the Art of War*, translated and ed by Thomas R Phillips (Mineola , NY: Dover Publications, 2007) at 77.

<sup>38</sup> Michel W Drapeau & Joshua M Juneau, "Is It Time For Canada to Follow Europe And Allow A Professional Military Association?", *Ottawa Citizen* (23 February 2014).

<sup>39</sup> Canada, National Defence, B-GG-005-027/AF-011 *Military Justice at the Summary Trial Level*, v 2.2 (Ottawa: Canadian Defence Academy, 12 January 2011) ch 1 at paras 33-36.

deviation leads to immediate rebuke. All participants are 'pawns', irrespective of their background. Each individual might eventually think that the drill has an intrinsic beneficial value on the overall perception by others on the unit's level of discipline, efficiency and morale. But as military training goes, there is no time for such consideration when you are in it; you obey because otherwise the sergeant will give you a 'blast' and your platoon might have to pay for your mistakes.

Self-discipline – which is by definition the discipline individually developed after collective discipline has been accepted - usually occurs when services members are left alone, with no immediate and direct supervision. For example, you are on a temporary duty, traveling to location far from your base to give a training to a group. You arrive one day prior the event, do a quick reconnaissance to see the room and confirm a projector and a laptop are there for your slide deck. In the evening, you review your material for the next day. On D-Day, you arrive early to do a last minute check. After your presentation, you assist in cleaning and securing the room. You drive back to your base, fill up the staff car and return it to the transport section, reporting any scratch to it. Few days after, you complete your travel claims with justification pieces, not trying to include any personal activities unrelated to military duties. During the entire operation, no one was behind your shoulder telling you what to do. You know it intrinsically as you have been taught by a mentor, have read the rules pertaining to travel and are confident that this is what your supervisor – who trusts you as a seasoned journeyman - would expect you to do. And above all, you want to look professional.

## **2. Internalized discipline for a unique environment**

Both types of discipline eventually increase service members' efficiency in accomplishing the mission while reducing the inherent risk to their life in a hostile environment. Consider the scenario where you are deployed abroad in a support capacity at a Forward Operating Base (FOB). You are at your station, doing the daily routine of your particular trade. Suddenly, there's a siren and you hear someone screaming 'stand-to'. You quickly react by putting on your helmet, load bearing vest, flak vest, putting your pistol in its holster, and grabbing your personal radio and your rifle within seconds. You are good at it: you have done the drill so many times, both in collective training but also on your own time. Having a quick look around to ensure no one needs help, you leave the place and run like hell to the shelter. Even loaded, you are pretty fast. Not only years of required physical training (PT) has made you fit but the 'extra mile' you always do by professionalism finally pays. When the Rocket Propelled Grenade (RPG) hit the FOB, you are safe in the shelter, nervous in realizing what has just happened but being ready to assist the primary defenders, if needed.<sup>40</sup> Discipline made you efficient and protected you in face of peril because you have internalized it, both in your mind through reason and in your body through physical training, as a result of collective and self-discipline.

## **3. Evolution of maintenance discipline and its impact for summary trials**

There has been an evolution in how military discipline is maintained in the forces. Due to the evolution of modern warfare which has required an increasing degree of level

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<sup>40</sup> This scenario is based on what it should have happened but did not in the case of *Billard v R*, 2008 CMAC 4 (CanLII).

of skills and autonomy in operating combat systems<sup>41</sup> the focus in the CAF is currently on self-discipline which has been characterized as ‘one of the most important components of discipline in the military context’<sup>42</sup> or even ‘the most essential form of discipline in the military environment.’<sup>43</sup> In doctrine, self-discipline is presented as being fundamentally what is expected from service members considered as professionals, irrespective of the rank.<sup>44</sup> It is the same discipline expected from each service member in preventing and fighting against a culture of sexual misconduct to preserve the dignity of all persons. Yet ‘disciplinary’ proceedings in the military at the summary trial level reflects a certain conception where the troops are rather a potential ‘mob’ to be controlled by a social elite than ‘professionals’ who mostly self-regulate. The fact that lower and higher ranks are dealt with differently in particular as to the type of punishment available is indicative of that conception. This study seeks to close the gap so that the summary trial system is in harmony with CAF’s primary reliance on self-discipline in individuals considered as members of a professional organization.

## ***E. Sources of Military Law***

### **1. Primary Sources**

This present research adopts a classic legal approach with elements of comparative law. The approach is ‘classic’ as the scope of analysis will be focused on the primary sources which are legislation and cases in Canadian military justice as it pertains

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<sup>41</sup> See generally Canada, National Defence, *Duty with Honour, 2009*, A-PA-005-000/AP-001 (Kingston: Canadian Defence Academy, 2009) ch 1 “The Military Profession in Canada” section 2 “Evolution of the Profession of Arms” at 5-9 [*Duty with Honour*].

<sup>42</sup> *R v Blinn*, 2015 CM 2024 (CanLII) at para 8.

<sup>43</sup> *Stewart v R*, 1993 CanLII 8745 (CMAC) at 9.

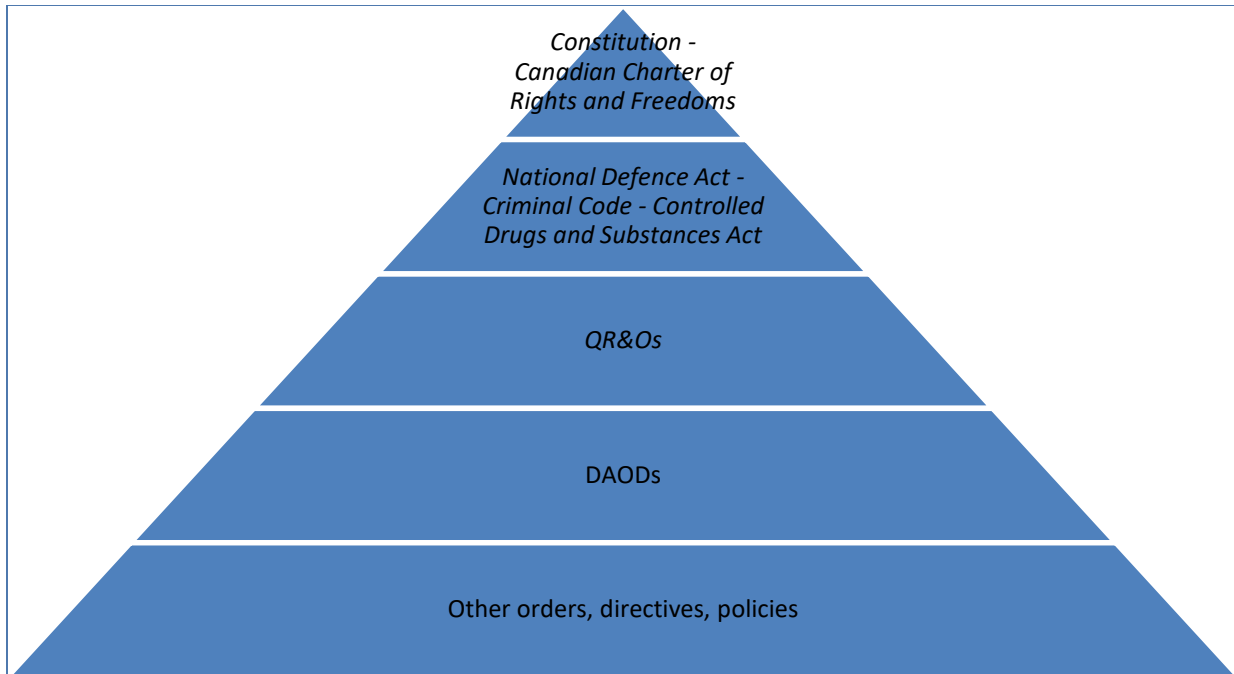
<sup>44</sup> *Duty with Honour*, *supra* note 41 at 14, 28.

to summary proceedings (Figure 1). At the paramount of the legal hierarchy sits the *Canadian Charter of Rights and Freedoms* which is applicable in military context, except for the right to be tried by a jury. Then the body of statutes consists mainly of the *National Defence Act*, in particular its part III known as the '*Code of Service Discipline* (CSD), and to a lesser extent the *Criminal Code* and the *Controlled Drugs and Substances Act*. Subordinate legislation under the *NDA* consists first of the *Queen's Regulations and Orders* (QR&Os), in particular volume II titled "Discipline" which is essential for this research as it provides the detailed mechanics of the summary trial system. Below we can add the *Defence Administrative Orders and Directives* (DAOD) issued under the authority conferred by the *NDA* to the Chief of the Defence Staff (CDS) to give effect to the decisions and carry out the directions of the Government of Canada. Finally, at any level of the chain of commands and in any units, orders, instructions, and directives pertaining to military justice and disciplinary matters may be issued, as long as they are in accordance with the above other sources. Among those more local or specific directives, we can find the rules governing persons undergoing minor punishments<sup>45</sup> or Judge Advocate General's and Director of Military Prosecution's policy directives.<sup>46</sup>

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<sup>45</sup> QR&O, art 104.13(3).

<sup>46</sup> Canada, National Defence, Office of the Judge Advocate General, online: National Defence and the Canadian Armed Forces <[www.forces.gc.ca/en/about-policies-standards-legal/index.page](http://www.forces.gc.ca/en/about-policies-standards-legal/index.page)>.



*Figure 1 Legal Hierarchy in Canadian Military Justice*

Relevant case law in military justice are first the decisions of the Supreme Court of Canada to which all other courts, including military courts and tribunals, are bound to according to the rule of precedent, also known as *stare decisis* (Figure 2). Until very recently, a case pertaining to military justice was a rarity before the Supreme Court. However, its decisions raised principles and legal norms in other matters, in particular in penal and constitutional law, that receive application in military justice context through legal reasoning: by arguing from a similarity (*a pari*), from a yet stronger reason (*a fortiori*), or from the opposite of an accepted conclusion (*a contrario*). Among decisions of appellate courts, those of the Court Martial Appeal Court (CMAC) are generally the most relevant as they specifically pertain to military justice. Although they almost exclusively pertain to courts martial, some of the CMAC's decisions might receive application in a summary trial context. To a lesser and more general extent, decisions from other

appellate courts of the provinces and of the Federal Court of Appeal are also relevant and may receive application, again through legal reasoning. Finally, courts martial decisions are relevant as primary sources although they usually cover summary proceedings incidentally. All decisions from Supreme Court to courts martial are notably available on the Canadian Legal Information Institute (CanLII) website.

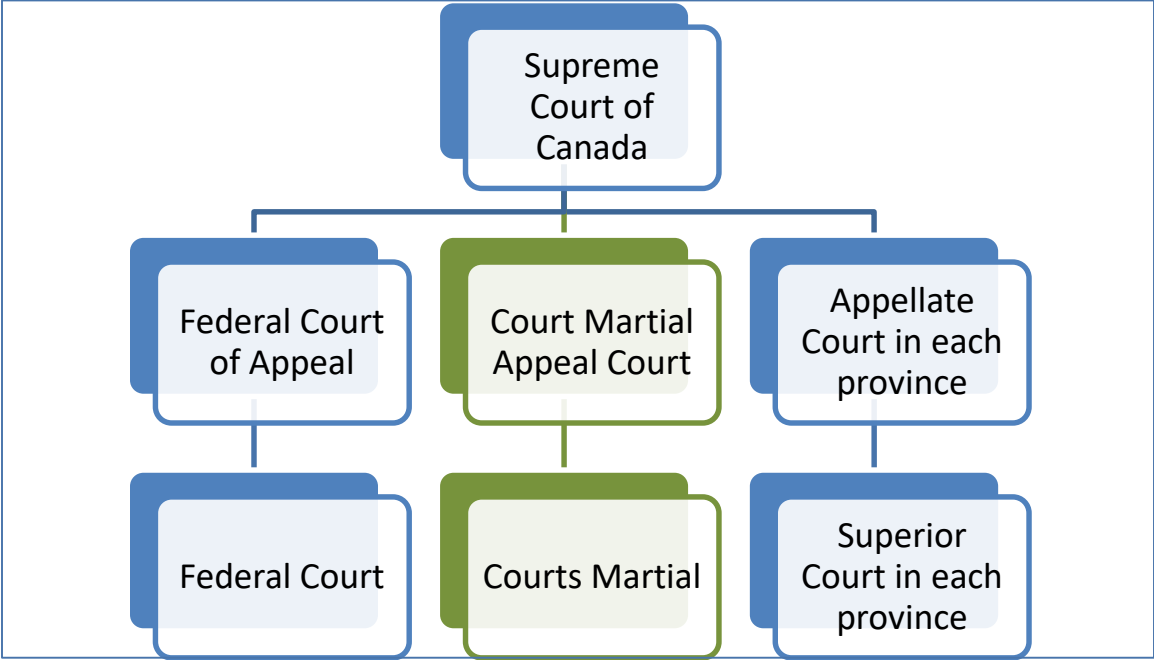


Figure 2 Judicial Hierarchy in Canadian Military Justice

**2. Secondary sources**

These consist of commentaries, scholarly work and government documents, such as JAG annual reports and training material, pertaining to Canadian military justice. Reports of working groups on summary trials or external reviews on the operation of the *National Defence Act* conducted by independent authorities in 2003 and 2011 are also relevant.

### 3. Legal Theory Model for Military Justice

To better describe the dynamics of how Canadian military justice evolves, this research suggests a legal theory model based on four components (Figure 3). The first is *law in books* which consists mainly of the *National Defence Act*, the *QR&Os* and courts' rulings – mostly from appellate courts – that shape military penal law. The second component is *law in classrooms* as *law in books* must be disseminated to those non-jurists who operate the summary trial system on a daily basis and to their legal advisors. *Law in classrooms* is provided by looking at training material, to both legal officers and operators, by course feedback and sometimes during external reviews. The third component of the model is *law in the field* which focuses on military justice as it happens at unit's level. *Law in the field* is provided by case law – usually from courts martial - which relate factual situations on how law is applied, by JAG annual reports which provide systemic statistics on summary trials, by qualitative surveys conducted by JAG with military justice stakeholders, by external reviews conducted periodically and by academic research. The fourth is *law in forums*, which is military justice as presented in public venues like before parliamentarians, in official government documents, in political speeches, in legal arguments before courts, in commentaries, in mass media or also in academic research. Although the present research is primarily interested in *law in books* and *law in the field*, the two other components are important. For example, if there is a disparity between what the *QR&Os* prescribe (*law in books*) and what concretely occurs at summary trial hearings (*law in the field*), it may be a failure in training (*law in classrooms*) or what happens in the field is misrepresented or under-reported (*law in*

forums) which might impede necessary or advance unnecessary change in statutes or lead to erratic case law.

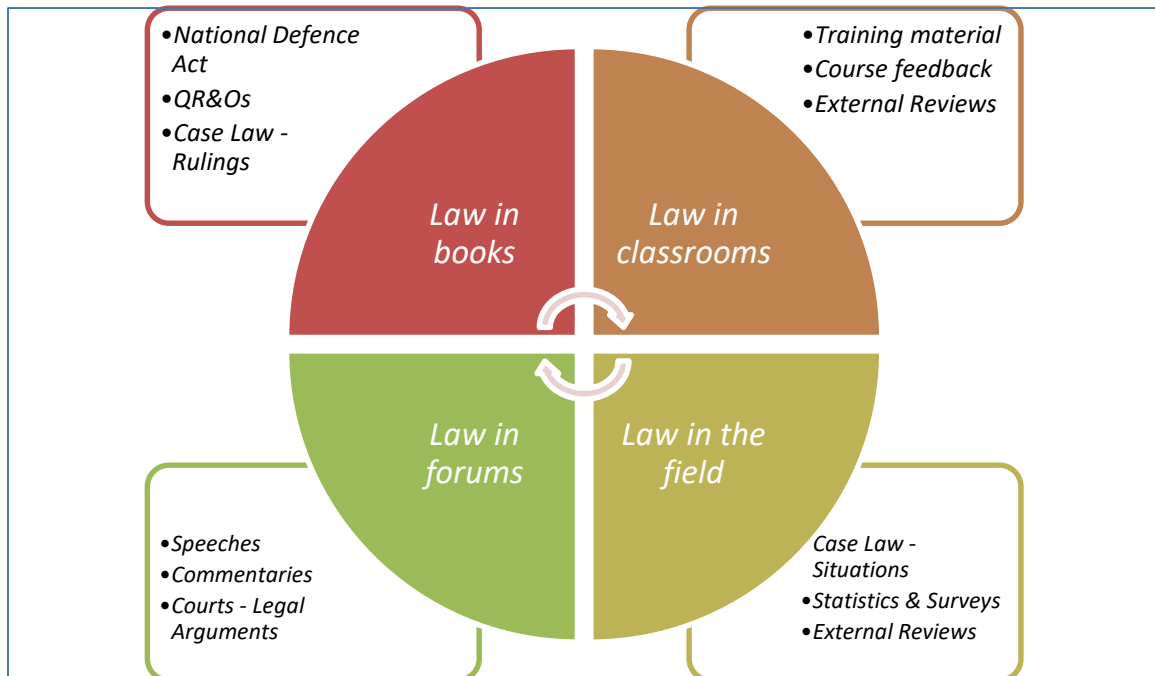


Figure 3 Canadian Military Justice Evolution Cycle

#### 4. Comparative Law

Military justice is so specialized that comparative approach is almost inevitable. Moreover it is particularly on point between democratic States which have professionalized their forces. Since the Second World War, all have been facing the delicate challenge of protecting soldiers' human rights without diminishing military efficiency. But careful consideration should be made before importing foreign jurisdictions' experience, even if sharing a common root with such jurisdiction. As stated by the Supreme Court of Canada in response to proposal to import the *Miranda* rule about the presence of a lawyer during police interview "adopting procedural protections from other

jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by Canadian courts and legislatures.”<sup>47</sup>

For law reformers, comparison is useful as it provides a broad spectrum of experiences to draw from new ideas for their own national system.<sup>48</sup> Proponents of changes in military justice such as Eugene R. Fidell in United States and Gilles Létourneau and Michel W. Drapeau in Canada extensively advocate for use of the comparative approach. For Fidell, military justice is going through transformation that goes beyond boundaries; specialists are aware of the need for cross-border collaboration in finding new ideas.<sup>49</sup> He also sees that as an opportunity to better understand his own system and to help in conducting its periodic reassessment.<sup>50</sup> For Drapeau and Létourneau comparative approach comes as a self-evident choice as Canada military justice system resemble those of other common law military jurisdictions which are under similar obligations in terms of human rights, in particular as it pertains to summary trials.<sup>51</sup>

By contrast, proponents of a conservative approach like Victor Hansen in United States and Mike Madden in Canada are reluctant to rely on a foreign system as a model to follow. Quite the contrary, Hansen uses Australian, Canadian and UK experiences to caution what he called ‘unintended consequences’. According to him civilian court

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<sup>47</sup> *R v Sinclair*, [2010] 2 SCR 310, 2010 SCC 35 (CanLII) at para 38.

<sup>48</sup> Alan Watson, *Legal Transplants – An Approach to Comparative Law*, 2nd ed (Athens, GA: University of Georgia Press, 1993) at 17.

<sup>49</sup> Eugene R Fidell, “A Worldwide Perspective on Change in Military Justice” in Eugene R Fidell & Dwight H Sullivan, eds, *Evolving Military Justice* (Annapolis, MD: Naval Institute Press, 2002) at 209.

<sup>50</sup> *Ibid* at 213.

<sup>51</sup> Gilles Létourneau & Michel W Drapeau, *Military Justice in Action : Annotated Defence Legislation*, 2nd ed (Toronto : Carswell, 2015) at 59-60 [Létourneau & Drapeau]; Michel Drapeau, “Bill C-15: strengthening the military justice system, more questions than answers”, *The Hill Times* (23 July 2012); Gilles Létourneau, *Introduction to Military Justice: an Overview of Military Penal Justice System and Its Evolution in Canada* (Montréal: Wilson & Lafleur, 2012) at 36-9 [Létourneau].

decisions, which are often at the source of reform, overlook sometimes an important aspect of military law, in that case the commander's obligations to ensure compliance with law of armed conflict.<sup>52</sup> Madden contends that unconsidered transplantation of aspects of foreign military justice systems without proper consideration of the disparity between national contexts, "can represent a hazard to the principled and coherent evolution of Canadian [military] law."<sup>53</sup> In a subsequent article, Madden further argues that international human rights commentators have even a tendency to select 'only the most expansive aspects of human rights doctrines around the world' to advocate for reforms.<sup>54</sup> He calls that phenomenon 'comparative cherry-picking' which can be counter-effective in advancing human rights. One of the two examples he uses to illustrate his point is precisely the way certain commentators – namely Drapeau and Létourneau – have misrepresented as binding changes in European military jurisdictions to advocate for reform of the summary trial in Canada.<sup>55</sup>

This thesis takes into consideration the 'perils' of comparative law.<sup>56</sup> The first one is superficiality; comparatists (or comparativists) may not study foreign systems as thoroughly as they would do for their own national system.<sup>57</sup> In the present research however the imbalance would not come as a surprise; the emphasis is already put on the

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<sup>52</sup> Victor Hansen, "The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences" (2013) 21:2 Mich St Intl L Rev 229 at 260 (HL).

<sup>53</sup> Mike Madden, "Keeping Up With the Common Law O'Sullivan's? The Limits of Comparative Law in the Context of Military Justice Law Reforms" (2013) 51 Alta L Rev 125 at 149 (HL).

<sup>54</sup> Mike Madden, "Comparative Cherry-Picking in a Military Justice Context: The Misplaced Quest to Give Universally Expansive Meaning to International Human Rights" (2014) 46 Geo Wash Intl L Rev 713 at 714 (HL).

<sup>55</sup> *Ibid* at 716-24.

<sup>56</sup> Watson, *supra* note 48 ch 2 'The perils of Comparative Law' at 10-15.

<sup>57</sup> *Ibid* at 10.

Canadian system. Another peril is that comparative approach is usually unsystematic.<sup>58</sup> That concern will be reduced by focusing the study to primary legislation pertaining to summary proceedings or their equivalent in each country. Case law will also be analyzed although it should be kept in mind that summary trials do not in general end up in published or reported decisions. And where available, secondary sources will be consulted (mainly official training doctrine material and articles) although some countries do not have a high volume of literature. The comparative approach also runs the risk of being inaccurate as embedment of each military system within its national law is often overlooked.<sup>59</sup> Here the focus is put on a specific aspect of a specialized field of law in jurisdictions which share, for the most part, a legal tradition with Canada. Besides, the specialization of military law is such that two military justice systems may have more in common than with their own respective civilian counterparts. Therefore, if there is a risk of inaccuracy, it is a calculated one.

In sum, despite of its 'perils', the comparative approach has 'virtues' that outweigh them.<sup>60</sup> Notably it is suitable in order to provide ideas – neither panacea nor bane - on how other similar jurisdictions have dealt with similar issues. Even more so as it pertains to summary trials; the challenge of protecting human rights without impeding military efficiency at the lowest level is common to many countries. In conducting such a comparative review, this research will seek to avoid the greatest peril for law reformers:

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<sup>58</sup> *Ibid* at 11.

<sup>59</sup> Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge, UK: Cambridge University Press, 2006) at x.

<sup>60</sup> Watson, *supra* note 48 ch 3 'The virtues of Comparative Law' at 16-20.

to select only elements of foreign jurisdictions that favor reform or certain options for reform, discarding the others.

## ***F. Reform in Military Justice***

### **1. To ‘Civilianize’ or to ‘Not Civilianize’**

Currently in Canada, evolution in military penal law is mainly contemplated through the lens of a dualistic approach. For some, the ultimate objective is the maximal mirroring of the military justice system with its civilian counterpart. For example Létourneau would eliminate ‘useless disparities between the civil penal justice system and the military penal justice system’ as it would be the best way for Canadian military justice to be compliant with the *Charter*.<sup>61</sup> In his views, that approach is aligned with an international trend in furtherance of equality before the law.<sup>62</sup> In response, Michael Gibson<sup>63</sup> strongly objects that the Supreme Court of Canada recognized that a separate military justice system exists due to the unique needs it has to fulfil.<sup>64</sup> In that regard he is closer to those who believe military justice is one of its kind or *sui generis*. Stating that “Canada has one of the best military justice systems in the world”, Gibson argues that differences are there for a reason. In any event, the real issue for him are not the differences but whether military justice is *Charter* compliant and effective in fulfilling its purpose.<sup>65</sup>

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<sup>61</sup> Létourneau, *supra* note 51 at 55. See also Létourneau & Drapeau, *supra* note 51 at x-xi.

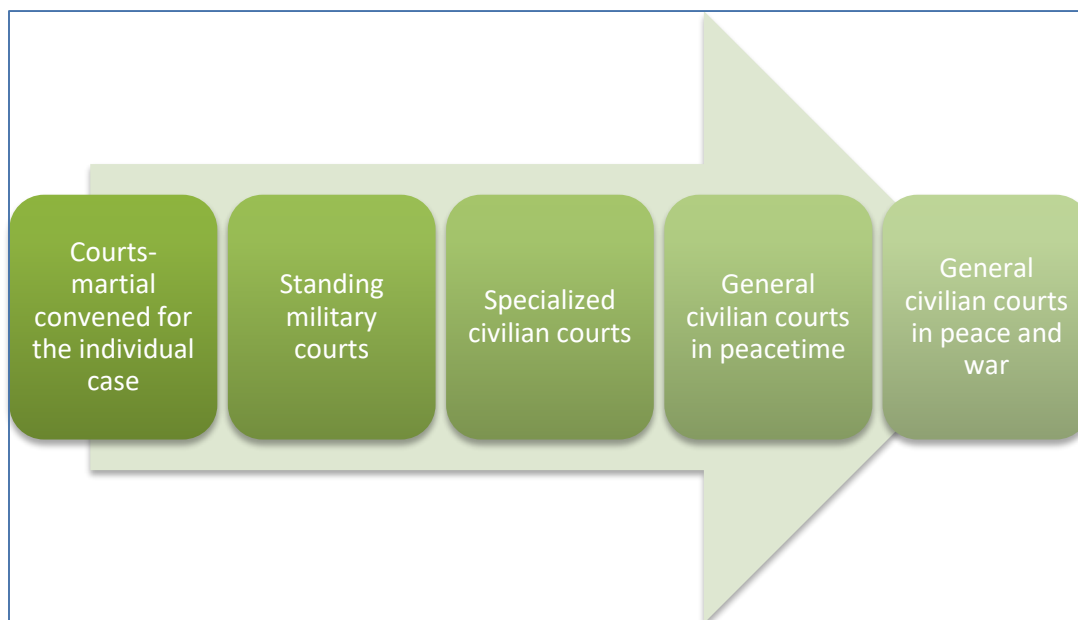
<sup>62</sup> Létourneau, *ibid*, at 56.

<sup>63</sup> Colonel (*Retired*) Gibson was at that time the Deputy Judge Advocate General in Military Justice. Appointed as a military judge after, he is currently a judge of the Ontario Superior Court of Justice.

<sup>64</sup> Michael R Gibson, “Canada’s Military Justice System” (2012) 12:2 Can Mil J 61 at 62.

<sup>65</sup> *Ibid* at 61-62.

Létourneau's reference to an 'international trend' is an allusion to a model by Willy Arne Dahl.<sup>66</sup> Having reviewed and assessed changes in several military justice systems since 2001, Dahl has come up with a simplified classification which distributes diverse systems along a spectrum (Figure 4).<sup>67</sup> Systems in which courts martial are convened on a case-by-case basis are on one end. Those completely relying on civilian courts are on the other. Using that model – developed mainly from responses from a systematic survey – Dahl notes that changes in systems that he reviewed were generally from left to right.



*Figure 4 Dahl's Axis – International Trends in Military Justice*

Although useful in the descriptive discourse (*where it is*), such dualistic model is incomplete in the normative discourse (*where it should go*), in particular as it pertains to

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<sup>66</sup> Former JAG of Norway and honorary chair of the International Society for Military Law and The Law of War.

<sup>67</sup> Arne W Dahl, "International trends in Military Justice", (Presentation delivered at international law lunch meeting, Oslo University, 23 November 2011) [unpublished], online: Generaladvokaten <[generaladvokaten.no/dokumenter\\_lenker\\_1/content\\_2/filelist\\_eba384ff-2732-4a9d-827f-c2029dfd1bf0/1380821281548/\\_2011\\_11\\_international\\_trends\\_in\\_military\\_justice.pdf](http://generaladvokaten.no/dokumenter_lenker_1/content_2/filelist_eba384ff-2732-4a9d-827f-c2029dfd1bf0/1380821281548/_2011_11_international_trends_in_military_justice.pdf)>.

military summary proceedings. Dahl's model describes the court martial system, conceptually closer to ordinary courts and representing a low portion of disciplinary cases. It does not appear to be suitable to tell how military summary trials should evolve. More broadly, it tends to limit the military law reform debate to a simple dichotomy: "to civilianize or not to civilianize".

This creates two concerns. First, the term 'civilianization' has created confusion over time, in particular as to its scope. Does it mean making military justice should resemble civilian justice in every possible aspects? Or does it mean simply adhering to basic legal principles that are both applicable in military and civilian justice, such as 'due process of law'? To borrow Gerry Rubin's definition, 'civilianization' is "*the conscious borrowing by the court-martial system of substantive and procedural rules which had (usually recently) been introduced within the civilian law system*" or more broadly "*the (consensual) incorporation into military law of perceived beneficial civilian legal norms.*"<sup>68</sup> Therefore, it involves integrating 'due process of law' but it could go beyond that. Besides, Rubin warns against unconsidered 'civilianization' that could lead to 'juridification': imposing unnecessary external legal norms "*to the armed forces in situations where such legal norms had hitherto been absent*" despite the fact that they were already governed by "*other values and expectations.*"<sup>69</sup>

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<sup>68</sup> Gerry R Rubin, "United Kingdom Military Law: Autonomy, Civilianisation, Juridification" (2002) 65 Mod L Rev 36 at 37-38 (HL) [Rubin, "UK Military Law"].

<sup>69</sup> Rubin, "UK Military Law", *supra* note 68 at 37-38 citing in part Colin Scott, "The Juridification of Regulatory Relations in the UK Utilities Sectors" in J Black, P Muchlinski & P Walker, eds, *Commercial Regulation and Judicial Review* (Oxford: Hart Publishing, 1998) at 19.

The other concern raised by the dichotomy is that it imposes fruitless even counterproductive conceptual constraints, discouraging innovation and originality. In a specialized field of law such as military law, changes are complex and come from multiple sources; they are not driven only by a reaction to an external evolution of human rights.<sup>70</sup>

## 2. New Paradigm

Where should military justice evolve? In *R v O'Toole*, Chief Justice Edmond Blanchard wrote that "Parliament intended to bring the military justice system into alignment with the civilian justice system."<sup>71</sup> He further stated that "the military justice system should therefore resemble the civilian justice system insofar as there is no military rationale for adopting a different approach."<sup>72</sup> Previously McIntyre J wrote in *MacKay v The Queen* that the question is to determine if the different treatment "is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle."<sup>73</sup> We should note that Blanchard and McIntyre JJ use 'different' and 'variation' which refers to a broader concept than mere opposition. Besides, being 'different' from civilian justice does not necessarily mean being behind it. Due to military context, it could sometimes mean being ahead of it, even beyond constitutional standards.<sup>74</sup>

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<sup>70</sup> See generally Gerry R Rubin, "Observations on Change in Military Law" in UK, HC, Defence Committee, "The strategic defence review: policy for people" vol 29 (2000-01) 249.

<sup>71</sup> *R v O'Toole*, 2012 CMAC 5 (CanLII) at para 32 [O'Toole].

<sup>72</sup> *Ibid.*

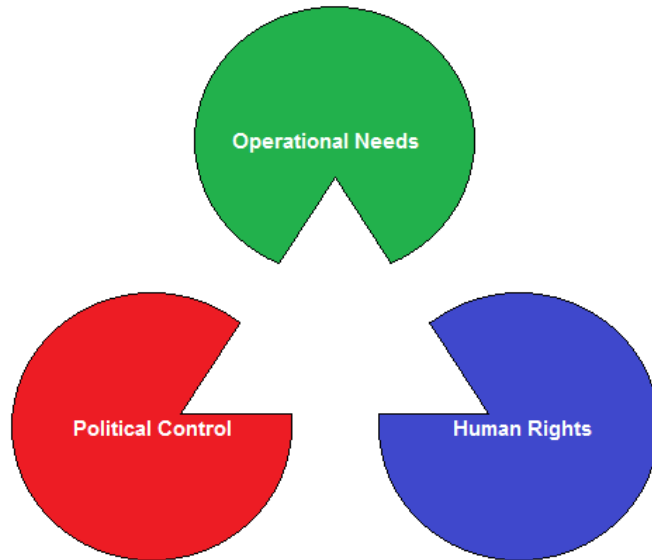
<sup>73</sup> *MacKay v The Queen*, [1980] 2 SCR 370 at 406, 1980 CanLII 217 (SCC).

<sup>74</sup> For example services members facing court martial may be represented by legal counsel of the Defence Counsel Services free of charge; see QR&O, arts 101.11 and 109.04(2)(a).

To identify how military justice at summary trial level should be 'different' from the civilian system I suggest a new paradigm (Figure 5). It is based on a trinity of forces between three legitimate interests: political control, human rights and operational needs. Human rights are of primary importance due to supremacy of the *Charter* "with the exception as to jury trial in paragraph 11(f)".<sup>75</sup> Political control is essential for forces to remain accountable, in particular in a democracy where that control is exercised by civilians. Military operational needs must also be fulfilled otherwise a reform could be inapplicable, counter-effective or impede military efficiency. Although those forces are sometimes competing, it is believed that the ideal military justice system is at the point of equilibrium where all legitimate interests are met. Reform of the summary trial system should therefore make every efforts to reconcile them. But if conflict is unavoidable, precedence should be given to protection of human rights and civilian political control, in that order.

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<sup>75</sup> *R v Reddick*, 1996 CanLII 12041 (CMAC), 5 CACM 485 at 504.



*Figure 5 Trinity in Military Justice*

### ***G. Thesis Outline***

The general approach of this study is to go from what it is to what it should be. Chapter II will describe the summary trial system designed to deal with minor offences. Particular attention will be given to carefully explain the procedural safeguards currently in place. An overview of the evolution of the system will be provided to explain the initial intent in developing summary proceedings and the most recent changes that took place in the aftermath of the 'Somalia Affair'.

The following three chapters focus on legal challenges that the system is facing, primarily as it pertains to the *Canadian Charter of Rights and Freedoms*.<sup>76</sup> The previous academic works and boards' reports conducted in the first part of 1990 decade - in

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<sup>76</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982 [Charter]*.

particular the thesis of Brigadier General (*Retired*) Kenneth Watkin<sup>77</sup> - will be reviewed and further expanded to take into considerations developments in legislation and case law, both in military and civilian justice systems, here and abroad. Chapter III analyzes the potential breaches of the *Charter* by the current system. Some of those claims have been identified for a while, first being that presiding officers are not sufficiently independent to impose 'true penal consequences' or that accused persons are not represented by counsel. Some others are novel arguments, such as the absence of hearing transcript and the systemic differentiation in dealing with service members based on their ranks, contrary to prohibition against discrimination.

In Chapter IV other reasonable alternatives will be considered. Other adjudicating processes in the CAF will be compared with the summary trial. Aspects of foreign summary trial systems will be also explored to see if Canada can draw from their experience. Most of those allied jurisdictions are of 'Anglo-American' type, (United States, United Kingdom, Australia, New Zealand, Ireland) as Canada share a common law tradition with them, and the same origins as it pertains to their military law. As Canada is a bijuridical country, systems of 'Euro-Continental' or civil law tradition (France, Germany), will also be reviewed. Particular focus will be put on recent reforms, their results and their potential importation in Canadian law. Those systems will be divided in three groups, each representing the general approach taken in trying to strike the right balance between effectiveness and human rights.

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<sup>77</sup> Kenneth Watkin, *Canadian Military Justice: Summary Proceedings and the Charter* (LLM Thesis, Queen's University Faculty of Law, 1990) [unpublished].

Chapter V will determine if summary proceedings, even though they may be in breach of the *Charter*, could be nevertheless justified under its section 1. Having the comparative study in mind will put in a better position to analyse each criteria of the *Oakes* test<sup>78</sup>. We will see first that, similarly to other jurisdictions, the maintenance of military discipline at unit level ‘relates to concerns which are pressing and substantial in a free and democratic society’. The comparative approach will also be relevant for the second part of the *Oakes* analysis, namely the proportionality test as each jurisdiction has to balance the interests of individual soldiers with first the military organisation and then the entire society. It will be argued that considering the availability of reasonable alternatives, the current system cannot be seen as a legitimate restriction on service members’ legal rights. The Chapter will further explain that under the prevalent circumstances surrounding the election of the mode of trial in the current scheme, choosing summary trial does not tantamount to a valid waiver of rights.

Lastly Chapter VI will offer options for reforms. The chapter first analyses the ‘depenalization’ approach recently taken by the Government with Bill C-71<sup>79</sup> that died on the Order Paper when last federal election was called. This legislation – which may or may not be re-introduced – clearly defines summary proceedings as being ‘disciplinary’ and not ‘criminal’. Bill C-71 will be however criticised as it is too much of a shift from the current system and many of its aspects remain uncertain. For example, having ‘disciplinary infractions’ not defined in the act but left to regulations might decrease transparency. In

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<sup>78</sup> *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) at paras 69-71 [*Oakes*].

<sup>79</sup> Bill C-71, *An Act to amend the National Defence Act and the Criminal Code*, 2nd Sess, 41st Parl, 2015 (first reading 15 June 2015), online: LEGISinfo <[www.parl.gc.ca/LEGISINFO/BillDetails.aspx?Language=E&Mode=1&billId=8045337&View=7](http://www.parl.gc.ca/LEGISINFO/BillDetails.aspx?Language=E&Mode=1&billId=8045337&View=7)> [*Bill C-71*].

addition, protection of service members' rights or judicial oversight are unclear. Chapter VI will then put forward 16 recommendations to reform the system by adopting the 'judicialization' approach. The first seven recommendations are designed to address the main potential constitutional challenges, which may or may not be recognized by courts: the lack of independence of the presiding officer, the insufficient legal assistance, the absence of transcript and the unequal treatment between ranks. The remaining nine recommendations go beyond mere compliance with the *Charter*, aiming at improving military justice at summary level generally speaking in the pursuit of protection of service member's legal rights.

## **Chapter II: A Description of the Summary Trial**

This chapter depicts the summary trial system in Canadian military justice as it is. Essentially descriptive, the chapter provides sufficient details to understand the legal issues of the following chapters. Primarily focused on summary trials' legal structure, the chapter will also describe how the system operates on a daily basis. But before, it is necessary to give a broad overview on the origins of the system.

### ***A. Evolution Overview***

Through the ages the essence of summary proceedings has not changed: offering a more flexible way to deal with lack of discipline than the more formalized court martial process. This is not unique to the military organization as the civilian justice system has also wanted an alternative to trial by jury to deal more expeditiously with lesser offences. Closer at the beginning, summary proceedings in civilian and military justice are currently substantially different. The disparity is mainly due to the different evolution (or lack thereof) of the summary trial system in comparison with its civilian counterpart.

#### **1. From origins until Somalia Inquiry**

In medieval England, there was no military justice system as we know it. Indeed there was no standing army; feudal armies were called upon by the Crown on a case by case basis. To maintain discipline, the Crown used to promulgate *Articles of War*, a set of rules issued to the troops that would cease to apply once conflict was over.<sup>1</sup> In

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<sup>1</sup> Mario Léveillé, *L'évolution de la justice pénale militaire et de l'Office du Juge-avocat général* (LLM Thesis, University of Ottawa Civil Law Section, 1997) [unpublished] at 15-18.

comparison with modern military codes, *Articles of War* were relatively short. Due to the provisional nature of those instructions, distinction between military and civilian jurisdictions was blurred. Often common law courts would deal with soldiers' misconduct as they would with any other individual.<sup>2</sup>

The social cleavage was less between soldiers and civilians than between aristocracy and peasantry. Rulers in civilian society were also military leaders. Maintaining discipline was the duty of members of the gentry, irrespective of the context, only institutions' names changed. To deal with low end criminality in civilian society, knights were appointed as early 1200 to keep 'King's peace' in localities.<sup>3</sup> It was later institutionalized to become the 'justices of the peace', a system that has been maintained until modern days.<sup>4</sup> In raised armies, control was exercised by Courts of Chivalry – a Norman institution - that were progressively replaced by councils of war.<sup>5</sup> Those have in turn transformed into the courts martial system, in particular the regimental court martial which gave commanders the power to impose punishments on their troops except for most serious offences.<sup>6</sup>

This system has maintained until the early 17<sup>th</sup> century when England created a standing army. That period of political turmoil which resulted in the establishment of a

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<sup>2</sup> RA McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" (1985) 1 CF JAG J 1 at 10-11.

<sup>3</sup> JH Baker, *An Introduction to English Legal History*, 4th ed (Oxford: Oxford University Press, 2007) at 24-25.

<sup>4</sup> *Justices of the Peace Act, 1361* (UK), 34 Edw 3, c 1, online: legislation.gov.uk <[www.legislation.gov.uk/aep/Edw3/34/1](http://www.legislation.gov.uk/aep/Edw3/34/1)>.

<sup>5</sup> Kenneth Watkin, *Canadian Military Justice: Summary Proceedings and the Charter* (LLM Thesis, Queen's University Faculty of Law, 1990)[unpublished] at 35-6 [Watkin, "Summary Proceedings"].

<sup>6</sup> *Ibid.*

constitutional monarchy at the end of the *Glorious Revolution*.<sup>7</sup> With the establishment of permanent land forces, it became apparent that constant control had to be exercised over them. Not only disciplined troops were more efficient on the battlefield but they were less dangerous when in contact with the civilian population.<sup>8</sup> The delicate balance was the extent to which the Crown and Parliament would have control over those forces, enough to protect the constitutional order – in particular ensuring troops’ loyalty to the new monarchs - but not to a point that paralyzes their action in defending the State.<sup>9</sup> The compromise is reflected in the *Bill of Rights (1688)*<sup>10</sup> and the preamble of the *Mutiny Act (1689)*. The creation of a standing army had to be approved by Parliament on a periodic basis, each time with a reissuance of *Articles of War*. In exchange although the most serious offences committed in Great Britain would be dealt with by civilian authorities, the maintenance of an ‘exact discipline’ was left to the Crown, exposing soldiers ‘to a more exemplary and speedy punishment’ than ordinary law.<sup>11</sup> In comparison Crown’s power over the naval forces was greater. First the Navy did not represent the same threat to Parliament’s sovereignty as it was located outside the country. Second, traditionally captains were already given a great deal of powers and independence to summarily deal with misconduct, sometimes in very stringent circumstances.<sup>12</sup>

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<sup>7</sup> See Léveillé, *supra* note 1 at 19-25; for the broader context see generally John Field, *The Story of Parliament in the Palace of Westminster* (London, UK: Politico’s Publishing, 2002) ch 4 “Two Revolutions 1629-1689” at 102-30.

<sup>8</sup> A grievance that was identified in the *Petition of Right, 1627* (UK), 3 Cha I, c 1, s VI, online: [legislation.gov.uk](http://legislation.gov.uk) <[www.legislation.gov.uk/aep/Cha1/3/1](http://www.legislation.gov.uk/aep/Cha1/3/1)>.

<sup>9</sup> Léveillé, *supra* note 1 at 24 citing Charles M Clode, *The Military Forces of the Crown; Their Administration and Government*, vol 1 (London, UK: John Murray, 1869) at 84.

<sup>10</sup> *Bill of Rights, 1688* (UK), 1 Will & Mary, c 2, online: [legislation.gov.uk](http://legislation.gov.uk) <[www.legislation.gov.uk/aep/WillandMarSess2/1/2](http://www.legislation.gov.uk/aep/WillandMarSess2/1/2)>.

<sup>11</sup> *An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service, 1689* (UK), 1 Will & Mar, c 5, preamble reprinted in McDonald, *supra* note 2 at 13.

<sup>12</sup> Watkin, “Summary Proceedings”, *supra* note 5 at 45-46; see generally McDonald, *supra* note 2 at 2-8.

In the mid-19<sup>th</sup> century both the British Army and the Royal Navy were put under pressure to reform their military justice systems due to two factors. The first one resulted from the rapid industrialization of the society since the end of the 18<sup>th</sup> century. There was an increase in the numbers of offences that could be tried by civilian courts. To alleviate the burden that those cases would put on the judicial system, summary jurisdiction was increased, in particular over some indictable offences in 1879, and its process simplified.<sup>13</sup> That process became known as ‘summary trial’. More specific to the forces, the second factor was a public concern that conditions of the service were too severe and would impede voluntary recruitment.<sup>14</sup> Moreover in the army, the Regimental Court Martial, the lowest form of military justice proceedings at the time, was considered inefficient.<sup>15</sup> Therefore, to both harmonize military justice with its civilian counterpart in dealing with minor offences and to reduce hardship on service personnel while enhancing efficiency, summary jurisdiction of commanding officers was expanded. British Army commanders were given the power to imprison up to 21 days without trial with the option for the individual to request court martial as a safeguard.<sup>16</sup> In the Royal Navy, commanders were given summary jurisdiction over a broader range of offences with greater powers of punishment.<sup>17</sup> Yet, in comparison with their civilian counterpart, military

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<sup>13</sup> *Summary Jurisdiction Acts, 1848* (UK), 11 & 12 Vict, c 42; *Summary Jurisdiction Act, 1857* (UK), 20 & 21 Vict, c 43; *Summary Jurisdiction Act, 1879* (UK), 42 & 43 Vict, c 49; *Summary Jurisdiction Process Act, 1881* (UK), 44 & 45 Vict, c 24; *Summary Jurisdiction Act, 1884* (UK), 47 & 48 Vict, c 43; *Summary Jurisdiction Act, 1899* (UK), 62 & 63 Vict, c 22. See generally David Bentley, *English Criminal Justice in the Nineteenth Century* (London, UK: Hambledon Press, 1998) at 19-28.

<sup>14</sup> Alan R Skelley, *The Victorian Army at Home* (Montreal: McGill-Queen’s University Press, 1977) at 145-47.

<sup>15</sup> *Ibid* at 140-41.

<sup>16</sup> *Army Discipline and Regulation Act, 1879* (UK), 42 & 43 Vict, c 33; *Army Act, 1881* (UK), 44 & 45 Vict, c 58.

<sup>17</sup> *Naval Discipline Act, 1860* (UK), 23 & 24 Vict, c 124; *Naval Discipline Act, 1866* (UK), 29 & 30 Vict, c 109. See also Watkin, “Summary Proceedings”, *supra* note 5 at 46-47.

summary trials were more beneficial from an individual standpoint. Their maximum punishment was lower than 6 months of imprisonment. In the Navy, they allowed for the individuals to be represented by 'an accused's friend' or the divisional officer, while civilians facing summary jurisdiction did not have the resources to afford legal representation. In the Army, they allowed for the cases to be elevated to higher level while the right of appeal was restricted for civilian offenders.<sup>18</sup> In that sense, military summary justice was then ahead of civilian summary justice.

Those summary systems were transplanted by legislation into the Militia – later the Canadian Army – just after the Confederation<sup>19</sup>, the Royal Canadian Navy (RCN) few years before World War I<sup>20</sup> and the Royal Canadian Air Force (RCAF) a few years after. At that time, each service had still its own summary system, although two were virtually identical, the RCAF having basically adopted the Canadian Army system with the necessary adaptations.<sup>21</sup> Therefore until the Second World War Canadian military justice mirrored the evolution of British military law.<sup>22</sup> In particular, army commanding officers' summary powers were increased to impose up to 28 days of detention, which replaced imprisonment and were designed as a last resort to save a soldier's career.<sup>23</sup> Meanwhile the Canadian criminal justice system abolished the distinction between 'felony' and

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<sup>18</sup> Bentley, *supra* note 13 at 24-25.

<sup>19</sup> *An Act respecting the Militia and Defence of the Dominion of Canada*, SC 1868, c 40 [*Militia Act, 1868*]; Watkin, "Summary Proceedings", *supra* note 5 at 39; McDonald, *supra* note 2 at 14-15; Léveillé, *supra* note 1 at 30-31.

<sup>20</sup> *The Naval Service Act*, SC 1909-10, c 43; Watkin, "Summary Proceedings", *supra* note 5 at 47-49; McDonald, *supra* note 2 at 10.

<sup>21</sup> *The Air Board Act*, SC 1919, c 11; Watkin, "Summary Proceedings", *supra* note 5 at 44-45; McDonald, *supra* note 2 at 19-20.

<sup>22</sup> J H Hollies, "Canadian Military Law" (1961) 13 Mil L Rev 69 at 69-70.

<sup>23</sup> Watkin, "Summary Proceedings", *supra* 5 at 42-43.

'misdemeanor' by adopting the summary conviction scheme where non-indictable offences could be dealt with summarily by a judge or a justice of the peace sitting alone.<sup>24</sup>

The post war era saw the creation of the first Canadian tri-service legislation: the *National Defence Act* with a unified *Code of Service Discipline*.<sup>25</sup> In terms of summary justice, a common system which combined elements of the navy and the army proceedings was created.<sup>26</sup> Irrespective of the service, there were three levels of summary trials: before a commanding officer, a delegated officer or a superior commander. The accused had the option to be represented by an assisting officer (a feature coming from the Navy) and a right to elect court martial (which came from the Army). Although imprisonment was removed for naval commanders as a punishment, the maximum period of detention was extended to 90 days for all commanding officers.<sup>27</sup> In 1952, the power to detain up to 14 days was given to delegated officers.<sup>28</sup> A few years later the summary trial system was modified to comply with the *Canadian Bill of Rights*.<sup>29</sup> The right to elect court martial was expanded to any service member charged with an ordinary criminal law offence.<sup>30</sup> In addition, that election was put prior hearing the evidence instead of at the end of it.<sup>31</sup> From an institutional point of view, this was not a cosmetic change. Put after the trial, the right to elect court martial is arguably a *de facto* appeal. Put before the trial, it is arguably a *de jure* waiver of rights.

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<sup>24</sup> Desmond H Brown, *The Genesis of the Canadian Criminal Code of 1892*, (The Osgoode Society, 1989) at 124-25.

<sup>25</sup> *National Defence Act*, SC 1950, c 43.

<sup>26</sup> Watkin, "Summary Proceedings", *supra* note 5 at 50-51.

<sup>27</sup> *Ibid* at 51.

<sup>28</sup> McDonald, *supra* note 2 at 24.

<sup>29</sup> SC 1960, c 44.

<sup>30</sup> Watkin, "Summary Proceedings", *supra* note 5 at 52.

<sup>31</sup> *Ibid*.

The enactment of the *Charter* brought a paradigm shift in the CAF. After an initial request to be given a general exemption was rejected by the Department of Justice<sup>32</sup>, the CAF adopted a series of modifications to accommodate military justice with the *Charter* keeping in mind its requirement to be operationally effective. In terms of summary trials there were two groups of changes. In the first group, the right to elect court martial was expanded to anyone exposed to a punishment of detention, reduction in rank or a fine in excess of \$200.<sup>33</sup> In addition, the power to impose detention was removed from the delegated officers, since they did not have the authority to offer the right to elect court martial.<sup>34</sup> Regulations were also modified to give more time for accused persons to prepare their defence and consider an opportunity to admit any particular of the charges.<sup>35</sup> In the second group, there were notably two changes to summary trials. The ‘right’ to an assisting officer was formally recognized and their role detailed while the potential involvement of a legal counsel was left at the presiding officer’s discretion.<sup>36</sup>

During that early post-*Charter* period, the summary trial system remained virtually unchallenged with notable changes, resulting from two court decisions.<sup>37</sup> In *Glowczeski v Canada (Minister of National Defence)* a junior rank sailor stationed in CFB Esquimalt, BC was convicted and sentenced to detention by his commanding officer. He was not released pending review, as regulations at that time gave only that option for warrant officers and above. He sought a prohibition order before the Federal Court against his

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<sup>32</sup> Andrew D Heard, “Military Law and the *Charter of Rights*” (1987-1988) 11 Dal LJ 514 at 532.

<sup>33</sup> Watkin, “Summary Proceedings”, *supra* note 5 at 53.

<sup>34</sup> *Ibid*; McDonald, *supra* note 2 at 26.

<sup>35</sup> Watkin, “Summary Proceedings”, *supra* note 5 at 53.

<sup>36</sup> *Ibid* at 54.

<sup>37</sup> Two other cases, *Belzile v R and Dufour v R* and *Veilleux v Canada (Minister of National Defence)* also seemed to have occurred but are unreported (see Canada, Office of the Judge Advocate General, *Summary Trial Working Group Report*, (Ottawa: OJAG, 1994) at 1, 32 [STWG Report]).

incarceration and a bail pending an appeal or determination of the constitutionality of the summary trial decision.<sup>38</sup> The individual claimed that sections 7, 9, 11(e) and 15(1) of the *Charter* were breached. The Department of National Defence responded that the *Charter* was not applicable as the applicant chose summary trial.<sup>39</sup> The Court rejected that argument, concluding the incarceration was unconstitutional and therefore illegal.<sup>40</sup> About one year later, a second case almost identical to the first one, *Fontaine v Canada (Minister of National Defence)*, occurred in CFB Valcartier, Qc.<sup>41</sup> A junior rank soldier had been sentenced to 45 days of detention but could not apply for bail pending review, again due to his rank. Applying *Glowczeski* the Court also concluded it would be unfair to let the individual serve his incarceration knowing that there were valid concerns raised about the constitutionality of the process.<sup>42</sup> Ultimately, those cases were not decided on the merits as the chain-of-command decided on its own motion to mitigate the sentence afterwards. Nevertheless *Glowczeski* is probably the reason that prompted a thoughtful military lawyer, Kenneth Watkin, to proactively conduct his LLM thesis on the constitutionality of the summary proceedings as it pertains to the *Charter*.<sup>43</sup>

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<sup>38</sup> *Glowczeski v Canada (Minister of National Defence)*, 1989 CarswellNat 114, 1989 CarswellNat 114F, [1989] 3 FC 281, 27 FTR 112 [*Glowczeski*].

<sup>39</sup> *Ibid* at para 10.

<sup>40</sup> *Ibid* at para 13.

<sup>41</sup> *Fontaine v Canada (Minister of National Defence)*, 1990 CarswellNat 1063, 12 WCB (2d) 509, 44 FTR 266.

<sup>42</sup> *Ibid* at para 6.

<sup>43</sup> Watkin, "Summary Proceedings", *supra* note 5. BGen (*Retired*) Kenneth Watkin, OMM, CD, QC was then Lieutenant-Colonel expressing views in his personal capacity. He would later become Judge Advocate General (2006-2010).

## 2. Since the Aftermath of Somalia Inquiry

The tragic events that took place in 1993 during the deployment of the Canadian Airborne Regiment in Somalia and the public inquiry commission that followed (1994-1997) brought a profound cultural and structural change in the CF. In terms of military justice, the *Somalia Commission of Inquiry Report* made recommendations to reform the summary trial, in particular to ensure its compliance with the *Canadian Charter of Rights and Freedoms*.<sup>44</sup> The report proposed a reclassification of misconduct in the service removing the concept of 'service offence' to be replaced by 'minor disciplinary', 'major disciplinary' and 'criminal misconduct'.<sup>45</sup> Commanding officers would have had jurisdiction to lay a charge and try only with regards to misconduct of the first group.<sup>46</sup> Detention and dismissal would have been removed from their punishment powers.<sup>47</sup> With no more exposure to such a deprivation of liberty, the standard of proof at summary proceedings would have been lowered to "balance of probabilities"<sup>48</sup> together with a formalization and generalization of the possibility of appeal by the way of redress of grievance.<sup>49</sup> A conviction for a 'minor disciplinary' misconduct would preclude criminal prosecution. In short, what was proposed was to 'depenalize' the process to make it similar to those regulating professional bodies.<sup>50</sup>

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<sup>44</sup> Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair* (Ottawa: Public Works and Government Services Canada, 1997), vol 5, ch "The Workings of a Restructured Military Justice System".

<sup>45</sup> *Ibid*, ch "Reclassifying Misconduct", recommendation 40.1.

<sup>46</sup> *Ibid*, ch "Charges", recommendation 40.19 *a contrario*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid*, ch "Trial of Charges", recommendation 40.29.

<sup>49</sup> *Ibid*, ch "Appeal Mechanisms", recommendations 40.32, 40.33.

<sup>50</sup> *Ibid*, ch "Reclassifying Misconduct".

Parallel to the work of the commission of inquiry, the CAF conducted an internal review. Mainly based on BGen Watkin's LLM thesis, the *Summary Trial Working Group (STWG) Report* of 1994 made 59 recommendations to improve summary proceedings.<sup>51</sup> Being less of a paradigm shift than what the *Somalia Commission of Inquiry Report* would be in 1997, the reform nevertheless proposed substantial changes. It suggested a limitation of presiding officers' jurisdiction over ordinary criminal offence.<sup>52</sup> As there were no distinction in the regulations as to how imprisonment and detention were served, the STWG also proposed that 'correctional custody' – more focused on re-training than on penalising – be the new maximum punishment.<sup>53</sup> And more importantly it recommended a right to appeal to an independent court martial – by way of a retrial – where an accused was awarded a punishment of correctional custody, reduction in rank or a significant fine.<sup>54</sup>

In 1997, before the *Somalia Commission of Inquiry Report* was tabled, the *Special Advisory Group on Military Justice and Military Police Investigation Services* tabled a report – known as the "Dickson Report I" as the group was chaired by former Chief Justice Dickson – that also recommended a series of modifications to the summary proceedings system.<sup>55</sup> Within less than two months, the group conducted rounds tables at various military bases, reviewed and analysed the legislation and produced a report with 35 recommendations pertaining to military justice, 11 more specific to summary trials.<sup>56</sup> It

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<sup>51</sup> *STWG Report*, *supra* note 37 at 17-26.

<sup>52</sup> *Ibid* at 88-96, recommendations 1 and 2.

<sup>53</sup> *Ibid* at 99-108, recommendations 3-8.

<sup>54</sup> *Ibid* at 195-197, 203, recommendations 43.

<sup>55</sup> Canada. Special Advisory Group on Military Justice and Military Police Investigation Services. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*. (Ottawa: Department of National Defence, 14 March 1997) (Chair: Rt. Hon. Brian Dickson) [*Dickson Report I*].

<sup>56</sup> *Ibid* at 86-91.

proposed that detention be retained as a punishment but reduced to a maximum of 30 days.<sup>57</sup> The group also recommended that each time someone is given a choice to be tried by court martial or summary trial he or she be afforded the right to consult with legal counsel.<sup>58</sup> And importantly, it recommended formal training for summary presiding officers about their roles in the military justice system.<sup>59</sup> A second report recommended a transfer from the Minister to the Chief of the Defence Staff (CDS) of the authority to appoint superior commanders and to review and alter convictions resulting from a summary trial.<sup>60</sup>

The Somalia Inquiry Commission's proposal can be characterized as a complete 'depenalization' of the summary trial process while STWG's proposal put the focus on a 'judicialization' of the appeal process. The *Dickson Report I* suggested more modest modifications to the system, maintaining the blurred distinction between 'disciplinary' and 'penal' nature of the proceedings. That approach was mainly due to an external legal opinion which concluded that, although section 7 and 11(d) of the *Charter* were infringed by the existing system, the breaches could be justified under section 1.<sup>61</sup> The legal opinion also concluded that to increase the chances that the summary trial procedure could be justified pursuant to section 1, "certain relatively minor improvements" had to be

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<sup>57</sup> *Ibid* at 56-59, recommendation 16.

<sup>58</sup> *Ibid* at 59-60, recommendation 17.

<sup>59</sup> *Ibid* at 62-63, recommendation 23.

<sup>60</sup> Canada, Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on the Quasi-Judicial Role of the Minister of National Defence*, (Ottawa: Department of National Defence, June 1997) (Chair: Rt. Hon. Brian Dickson) [*Dickson Report II*]. In essence, *Dickson Report II* recommended to remove the Minister of National Defence's involvement in military justice. However the Supreme Court has recently determined that the Minister's authority over appeals in military justice was not incompatible with the principle of prosecutorial independence (*R v Cawthorne*, 2016 SCC 32 (CanLII) at paras 31-33).

<sup>61</sup> *Dickson Report I*, *supra* note 55 Annex F at 17.

made.<sup>62</sup> Most of the changes prompted by the *Dickson Report I* were made through regulations, where feasible.

In 1998 Bill C-25 amended the military justice system essentially to harmonize it with its civilian counterpart.<sup>63</sup> The *NDA* was modified in several ways as it pertains to summary trials, trying to alleviate the lack of judicial independence and legal training of presiding officers, reducing their punishment powers, and protecting the process from undue command influence.<sup>64</sup> For example, it was expressly stated that officers cannot preside at a summary trial where they previously carried out or directly supervised the investigation, issued a warrant or laid the charges, even indirectly.<sup>65</sup> Consequently, they were given the power to refer the charges to another officer having jurisdiction.<sup>66</sup> The amendments also provided for the authority to circumvent a commanding officer who would not proceed with charges.<sup>67</sup> Concerning punishment powers, commanding officers were no more able to award loss of seniority, their power to reduce someone's rank limited to one rank and the maximum period of detention they could impose was reduced to 30 days.<sup>68</sup> To emphasize the prompt nature of the proceedings, the *NDA* was amended so that a summary trial had to begin within one year after the day on which the service offence is alleged to have been committed.<sup>69</sup> A legal training program designed for presiding officers was developed together with the introduction of publications to guide all

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<sup>62</sup> *Ibid.*

<sup>63</sup> Bill C-25, *An Act to amend the National Defense Act and to make consequential amendments to other Acts*, 1st Sess, 36th Parl, 1998 (assented to 10 December 1998), SC 1998, c 35 [*Bill C-25*].

<sup>64</sup> For an overview of those changes see Patrick Cormier, "La Justice militaire canadienne: le procès sommaire est-il conforme à l'article 11(d) de la *Charte canadienne des droits et libertés* ?" (2000) 45 McGill LJ 209 at 216-17 (QL).

<sup>65</sup> *Bill C-25*, cl 42 adding *NDA*, ss 163(2) and 164(2).

<sup>66</sup> *Ibid* adding *NDA*, ss 163.1(1) and 164.1(1).

<sup>67</sup> *Ibid* adding *NDA*, ss 163.1(3) and 164.1(3).

<sup>68</sup> *Ibid* adding *NDA*, s 163(3).

<sup>69</sup> *Ibid* cl 21, adding *NDA*, s 69(b).

actors as to their role in the modified system. The most comprehensive of those documents was the *Military Justice at Summary Trial Level*<sup>70</sup> manual which remains the main reference on the matter for those who operate the system on a daily basis. Except for few changes, the legislation supporting the summary trial system has remained substantially unchanged.

To keep pace with the evolution of Canadian law, Bill C-25 included a review mechanism. In 2003, the First Independent Review of the NDA was conducted by former Chief Justice Lamer. Although not the primary focus, summary proceedings were partially covered by his report. From the outset he made a general comment that, as a result of 1998 reform “Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence”.<sup>71</sup> Having said that, he indirectly expressed concerns about summary trial jurisdiction when he commented on the proposal from the Office of JAG to add an offence to the list of those for which an election to court martial was not mandatory as those are considered ‘minor’.<sup>72</sup> The said offence was any breach to unit or local orders, which is deemed to be “to the prejudice of good order and discipline”.<sup>73</sup> Former Chief Justice Lamer refused to concur with the proposal for two reasons. First, those ‘unit or local orders’ that may appear minor sometimes engage fundamental rights.<sup>74</sup> Second, to be applicable to accused persons, those ‘unit or local

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<sup>70</sup> Canada, National Defence, B-GG-005-027/AF-011 *Military Justice at the Summary Trial Level*, v 2.2 (Ottawa: Canadian Defence Academy, 12 January 2011) [MJSTL].

<sup>71</sup> First Independent Review by the Right Honorable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, *An Act to amend the National Defense Act and to make consequential amendments to other Acts*, as required under section 96 of the Statutes of Canada 1998, c 35, (September 2003), “Foreword”, at (1) [Lamer Report].

<sup>72</sup> QR&O, art 108.17(1)(a).

<sup>73</sup> NDA, s 129(2)(c). However, a recent court martial decision declared that that deemed provision is unconstitutional, see *R v Korolyk*, 2016 CM 1002 (CanLII) at paras 20-28.

<sup>74</sup> Lamer Report, *supra* note 71 at 56.

orders' had to be duly published, which was the commanding officers' responsibility. Using an example, Lamer explained that that defence have more chances to succeed in a court martial than in a summary trial where there are no formal rules of evidence or representation by a lawyer.<sup>75</sup> Consequently, former Chief Justice Lamer recommended to not expand the circumstances where the right to elect court martial is not offered.<sup>76</sup> On the other hand he agreed with OJAG's recommendations to expand summary jurisdiction over offences<sup>77</sup> and over persons.<sup>78</sup> Lastly, former Chief Justice Lamer recommended assisting officers be provided with standardized legal training once they were appointed to a particular case, going further to what the *Dickson Report I* recommended.<sup>79</sup>

The legislative response to the *Lamer Report* took considerable time mainly due to a particular political context resulting from a minority government between 2006 and 2011. There were Bills C-7 in 2006, C-45 in 2008 and C-41 introduced in 2010. All died on the Order Paper. Although similar, those bills were not identical. In particular Bill C-41 was a modified version of Bill C-45 that included recommendations made by the Standing Senate Committee on Legal and Constitutional Affairs following the enactment of Bill C-60.<sup>80</sup> One was to reduce the limitation period for summary trials from one year between the time of the alleged offence and the trial to six months between the alleged offence and the laying of the charge.<sup>81</sup>

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<sup>75</sup> *Ibid* at 57.

<sup>76</sup> *Ibid*, Recommendation 40.

<sup>77</sup> *Ibid* at 58, Recommendation 41.

<sup>78</sup> *Ibid*, Recommendation 42.

<sup>79</sup> *Ibid* at 59-61, Recommendation 44; *Dickson Report I*, *supra* note 55 at 63.

<sup>80</sup> Bill C-60, *An Act to amend the National Defence Act (court martial) and to Make a Consequential Amendment to Another Act*, 2nd Sess, 39th Parl, 2008 (assented to 18 June 2008), SC 2008, c 29.

<sup>81</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Equal Justice: Reforming Canada's System of Courts Martial, Final Report: A Special Study on the Provisions and Operation of An Act to*

Ultimately the legislative response to the *Lamer Report* was assented to in June 2013.<sup>82</sup> On military justice in general, Bill C-15 proposes to statutorily set out the purposes, objectives and principles of military justice in the *NDA*, putting the emphasis on its dual nature as identified by Lamer C.J. in *Généreux*.<sup>83</sup> On sentencing, it provides for additional options, including absolute discharges, intermittent sentences and restitution order.<sup>84</sup> More specifically on summary trial, it adds lieutenant-colonels within the summary jurisdiction.<sup>85</sup> Notably for certain offences, provided the sentence has not passed a certain threshold, a conviction before a military tribunal would not constitute an offence for the purpose of the *Criminal Records Act*.<sup>86</sup> According to government officials' estimation, that would cover 95% of the cases dealt with summarily.<sup>87</sup> However, at the time of writing those amendments are not yet in force.

Before Bill C-15 was enacted, the Second Independent Review of the *NDA* was conducted. In his report, former Justice LeSage stated that summary trials are 'vital to the maintenance of discipline at the unit level and therefore essential to the life and death work the military performs on a daily basis'.<sup>88</sup> He echoed former Chief Justice Dickson's assessment that the system is likely to survive a constitutional challenge.<sup>89</sup> Nevertheless, he was concerned that a summary trial conviction may translate in a criminal record for

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*amend the National Defence Act and to Make a Consequential Amendment to Another Act*, SC 2008, c 29 (May 2009) at 19-22, Recommendation 4.

<sup>82</sup> Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 41st Parl, 2013 (assented to 19 June 2013), SC 2013, c 24 [*Bill C-15*].

<sup>83</sup> *Bill C-15*, cl 62 adding *NDA*, ss 203.1-203.4.

<sup>84</sup> *Bill C-15*, cl 24 replacing *NDA*, s 148.

<sup>85</sup> *Bill C-15*, cl 36(2) replacing *NDA*, s 164(1.1).

<sup>86</sup> *Bill C-15*, cl 75 adding *NDA*, s 249.27.

<sup>87</sup> Bill C-15, House of Commons, Committee, Standing Committee on National Defence, 41st Parl, 1st Sess, No 66 (13 February 2013) at 1640.

<sup>88</sup> The Honourable Patrick J. LeSage, *Report of the Second Independent Review Authority to the Honourable Peter G. MacKay*, (Minister of National Defence, December 2011) at 12.

<sup>89</sup> *Ibid.*

the individual. He considered a criminal record too severe a consequence considering that a summary trial “although constitutional for its purposes, does not provide the panoply of safeguards of a civilian criminal trial.”<sup>90</sup> Therefore, he recommended that “there ought to be a full review of the issue of criminal records flowing from convictions at summary trial.”<sup>91</sup> On assisting officers, he described their role as ‘pivotal’ adding that those who are not sufficiently knowledgeable about the military justice system and their role “threaten the integrity of the summary trial.”<sup>92</sup> Consequently, he recommended that “there should be a certification requirement for assisting officers similar to that for presiding officers”.<sup>93</sup> On jurisdiction, he recommended that it would be more efficient to have Second Lieutenants in training tried by their commanding officers instead of superior commanders.<sup>94</sup> He found that administrative measures were sometimes used as a substitute to summary trial, perceived as “more cumbersome”.<sup>95</sup> He added that service members sometimes elect summary trial to avoid what they perceived to be more negative consequences if they were to choose court martial.<sup>96</sup> Former Justice LeSage made recommendations to reduce both aspects.<sup>97</sup> In 2012 the majority of the 55 recommendations were accepted by the previous government although it indicated that DND/CAF officials were either implementing or studying them.<sup>98</sup>

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<sup>90</sup> *Ibid* at 12, 28-29.

<sup>91</sup> *Ibid* at 30, Recommendation 15.

<sup>92</sup> *Ibid* at 23.

<sup>93</sup> *Ibid* at 24, Recommendation 11.

<sup>94</sup> *Ibid* at 25, Recommendation 12.

<sup>95</sup> *Ibid* at 27.

<sup>96</sup> *Ibid* at 30-31.

<sup>97</sup> *Ibid*, Recommendations 14 and 16.

<sup>98</sup> Canada, National Defence, “Second Independent Review of the National Defence Act” (8 June 2012), online: National Defence and the Canadian Armed Forces <[www.forces.gc.ca/en/news/article.page?doc=second-independent-review-of-the-national-defence-act/hgq87xrp](http://www.forces.gc.ca/en/news/article.page?doc=second-independent-review-of-the-national-defence-act/hgq87xrp)>.

Lastly, Bill C-71 was introduced before the House of Commons on 15 June 2015 but died on the Order Paper when the last federal elections were called.<sup>99</sup> No analog piece of legislation has been introduced since. A substantial part of Bill C-71 pertained to the summary trial system and proposed a major overhaul toward 'depenalization'. That bill will be further analysed at Chapter VI.

In retrospect, the main difference between military and civilian summary justice is that the former is still run by officers of the Crown while the management of the latter has been transferred to the judiciary over time. At the origins, as there was no distinction between military and civilian societies and no separation of powers in government, aristocrats managed the entire summary justice system, in time of peace as in time of war. The emergence of the military society in the 17<sup>th</sup>-19<sup>th</sup> centuries brought a clearer delineation between military and civilian justice. Yet they were similar in many aspects. They both needed - and still need - an alternative to full trial by jury in dealing with minor offences. Decision-makers in both were appointed more because they belong to the upper class rather than because of their legal knowledge. Both systems were relatively at par in terms of procedural safeguards. However after the Second World War, measures to protect human rights have progressively transferred the administration of civilian summary justice under judicial power. That has not occurred in Canadian military justice yet although, since the adoption of the *Charter*, several measures have been taken to reduce the gap. The hesitation of military authorities could be explained by greater

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<sup>99</sup> Bill C-71, *An Act to amend the National Defence Act and the Criminal Code*, 2nd Sess, 41st Parl, 2015 (first reading 15 June 2015), online: LEGISinfo <[www.parl.gc.ca/LEGISINFO/BillDetails.aspx?Language=E&Mode=1&billId=8045337&View=7](http://www.parl.gc.ca/LEGISINFO/BillDetails.aspx?Language=E&Mode=1&billId=8045337&View=7)> [*Bill C-71*].

concerns for prompt disposition, portability and flexibility due to unique needs in maintaining discipline, efficiency and morale of the troops. It could also be explained by reluctance from agents of the executive branch to allow judicial control over military justice.

## ***B. Current System***

The second part of this Chapter will give an overview of the summary trial as it currently stands. The main features of the process will be explained step-by-step, following a chronological order, from investigation until request for review. For more precise details, volume II of the *Queen's Orders and Regulations* (in particular chapters 105, 106, 107, and 108), and the latest version of the guide *Military Justice at Summary Trial Level* (in particular chapters 5 to 15) should be consulted.

### **1. Investigation**

As soon as practical after a complaint is made or there are reasons to believe that a service offence may have been committed, an investigation is conducted.<sup>100</sup> Most of offences dealt with by summary proceedings are investigated within the units where they have allegedly occurred. In general, allegations pertain to minor disciplinary breaches, circumstances are straightforward and involve few witnesses. After being appointed to a particular case, investigators “collect all reasonably available evidence”<sup>101</sup> such as documents and potential witnesses, including interviewing any suspect in exceptional

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<sup>100</sup> QR&O, art 106.02(1). The only exception is when a complaint is frivolous or vexatious, QR&O, art 106.02(2).

<sup>101</sup> QR&O, art 106.03.

circumstances.<sup>102</sup> Under commanding officer's authority, they can also conduct searches, although this is a rarity in practice.<sup>103</sup> The investigation is supposed to cover not only facts that prove the commission of the offence but also those that disprove it.<sup>104</sup>

Persons appointed to conduct 'unit investigations' are usually not military police officers. In fact, regulations do not require any particular qualification or rank. Having said that, it is common practice in the Canadian Armed Forces to appoint senior non-commissioned officers (or NCOs)<sup>105</sup> as maintenance of discipline is part of their normal attributions, irrespective of their professional military trade. Although not legally required to complete a particular investigator course, senior NCOs have received training on the conduct of unit investigations within their professional development training through their career progression. In addition, they are usually required by their chain-of-command to take the Presiding Officer Certification Training (POCT) course.

Unit investigators ultimately produce a report that would be sent to the person appointed to lay charges also known as the charge-layer. Military Police (MP) and Canadian Forces National Investigation Service (CFNIS) can also generate reports that can be the basis of a charge that would be dealt with at summary level. But as those investigative bodies are normally dedicated to relatively more serious, sensitive and complex cases, which would normally go to court martial, such situations seldom occur.<sup>106</sup> That being said, irrespective of the type of investigation the report should cover the same essential elements.<sup>107</sup>

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<sup>102</sup> On the conduct of unit investigations, see generally *MJSTL*, *supra* note 70 ch 5 at paras 13-19.

<sup>103</sup> QR&O, art 106.04.

<sup>104</sup> *Ibid.*

<sup>105</sup> Warrant officer/petty officer 1<sup>st</sup> class, master warrant officer/chief petty officer 2<sup>nd</sup> class, chief warrant officer/chief petty officer 1<sup>st</sup> class.

<sup>106</sup> For more details on the different types of investigation, see *MJSTL*, *supra* note 70 ch 5 at paras 6-12.

<sup>107</sup> QR&O, art 106.02, Note (B).

## 2. Arrest and Pre-Trial Custody

In few instances, there is a need to put suspected service members under arrest to detain them. Under conditions, military law gives authority to service members to arrest persons with or without a warrant.<sup>108</sup> Usually those tasks are performed by the military police unless those resources are not readily available. As a default rule, the person arrested is released unless the conditions to retain in custody are met.<sup>109</sup> If retained, military law provides for automatic reviews by an officer – known as the custody review officer (CRO) - first within 48 hours after arrest and again if no charge is laid within seventy-two hours after the person in custody was arrested.<sup>110</sup> If not released with or without conditions by the CRO, the individual would be brought before a military judge as soon as practicable to determine if the person is to be retained in custody.<sup>111</sup> The hearing is analogous to a bail hearing in civilian criminal justice.<sup>112</sup> That judicial decision is also reviewable by the Court Martial Appeal Court.<sup>113</sup>

In the vast majority of cases, service members dealt with by summary proceedings have neither been arrested nor detained prior trial. When that occurs, the most typical scenario are individuals arrested and detained for a sufficient period of time to sober up and later charged with drunkenness and tried in a summary trial.<sup>114</sup> In the rare cases where a CRO and a military judge have decided that individuals would be detained prior

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<sup>108</sup> See generally *NDA*, ss 154-158; QR&O, arts 105.01-105.11; *MJSTL*, *supra* note 70 ch 6.

<sup>109</sup> *NDA*, s 158; QR&O, art 105.12

<sup>110</sup> *NDA*, ss 158.2, 158.5; QR&O, arts 105.18,105.21.

<sup>111</sup> *NDA*, s 159; QR&O, art 105.24 and *MJSTL*, *supra* note 70 ch 7.

<sup>112</sup> *Criminal Code*, s 515.

<sup>113</sup> *NDA*, s 159.9; QR&O, art 105.30. See for example *R v O'Toole*, 2012 CMAC 5 (CanLII).

<sup>114</sup> *NDA*, s 97.

trial, circumstances or offences are generally too serious for the case to be dealt with by summary trial. Therefore, that phase of the proceedings would not constitute the primary focus of the present research. Nevertheless, an interesting comparison could be made between the power to put under arrest, the pre-trial custody review by CRO and summary trial before presiding officers. Those processes – where agents of the executive branch play a central role - expose individuals to potential deprivation of liberty by State action.

### 3. Laying of the Charges

Investigation reports are sent to service members who have authority to lay charges under the *Code of Service Discipline*. Although commanding officers have that authority already<sup>115</sup>, they do not in practice lay charges as it would preclude them from presiding over the summary trial.<sup>116</sup> Various factors are considered in choosing persons having authority to lay charges. It is common practice to select few individuals within each unit, usually senior NCOs.<sup>117</sup> Often the charge-layer is the unit investigator.

After reviewing the investigation report, charge-layers may lay charges if they have an actual belief that the accused has committed the alleged offences. But that belief must be reasonable.<sup>118</sup> Except in some circumstances, charge-layers are required by regulations to obtain a legal advice – known as the ‘pre-charge legal advice’ - before making that determination.<sup>119</sup> As a matter of policy, each CAF unit usually imposes that

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<sup>115</sup> QR&O, art 107.02(a).

<sup>116</sup> NDA, s 163(2)(c).

<sup>117</sup> See *MJSTL*, *supra* note 70 ch 8 at paras 6-8.

<sup>118</sup> QR&O, art 107.02, Note.

<sup>119</sup> QR&O, art 107.03.

requirement in every case. Charges are set on part I of a document called the ‘Record of Disciplinary Proceedings’ or RDP which can be found online<sup>120</sup>.

In drafting charges, a certain level of discretion is left to charge-layers providing they meet basic elements and, at minimum, contain “sufficient details to enable the accused to be reasonably informed of the offence alleged”.<sup>121</sup> Chapter 103 of the QR&Os provides specimen charges for each offence. Alternative charges can also be laid, for example “where an essential element of an offence is in doubt but the remaining elements constitute conduct to the prejudice of good order and discipline.”<sup>122</sup> Once Part I of the RDP is completed and signed by the charge-layer, the charge is laid.<sup>123</sup> This is the starting point of the disciplinary proceedings, in particular in computing post-charge delay when determining whether the right to be tried within a reasonable time has been complied with.<sup>124</sup> Besides, military law imposes a requirement to deal with a charge laid “as expeditiously as the circumstances permit”.<sup>125</sup> As previously noted, a recent amendment would impose that charges would have to be laid within six months after the commission of the service offences to be dealt with by summary trial but is not in force yet.<sup>126</sup>

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<sup>120</sup> QR&O, art 107.06. Articles 107.07, 107.075, provide blank form and specimen of RDP. See online: National Defence and the Canadian Armed Forces – Queen’s Regulations and Orders <[www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/toc-107.page](http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/toc-107.page)>.

<sup>121</sup> QR&O, art 107.04.

<sup>122</sup> QR&O, art 107.05, Note (A)i.

<sup>123</sup> *NDA*, s 161; QR&O, art 107.015(2). See *R v Warrant Officer AS Laity*, 2007 CM 3011 (CanLII) at paras 10-16.

<sup>124</sup> *R v Lachance*, 2002 CMAC 7 (CanLII) at para 4.

<sup>125</sup> *NDA*, s 162; QR&O, art 107.08.

<sup>126</sup> *Bill C-15*, *supra* note 82 cl 35 and 36(2).

#### **4. Appointment of an Assisting Officer and Pre-Trial Determinations**

Once a charge is laid, a copy of the signed RDP is served on the accused. The language of the proceedings is confirmed.<sup>127</sup> An officer is then appointed to assist the accused.<sup>128</sup> The name and rank of the assisting officer are added to Part 1 of the RDP. In exceptional circumstances it could be a senior NCO. No other qualification is required to act as an 'assisting officer' although officers - like senior NCOs – are required to complete module on military law as part of their professional development. Sometimes, assisting officers have completed the Presiding Officer Certification Training (POCT) course. The accused may request an individual in particular, providing the exigencies of the service permit and the individual agrees.<sup>129</sup> In practice, when the RDP is served to accused persons, units confirm if they have already identified someone. The assisting officer will assist the accused in making a choice as to the mode of trial, in preparing the case and will be there during the trial to speak on accused's behalf.<sup>130</sup> Although assisting officers are not lawyers, their communications with the accused persons are considered as a matter of policy like communications between a lawyer and their client.<sup>131</sup>

The charge is referred to an officer having jurisdiction over the accused.<sup>132</sup> For non-commissioned members below the rank of warrant officers and officers-cadets, commanding officers have jurisdiction.<sup>133</sup> That authority is often delegated to other

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<sup>127</sup> QR&O, art 108.16, Note (A).

<sup>128</sup> QR&O, art 108.14(1).

<sup>129</sup> QR&O, art 108.14(3).

<sup>130</sup> QR&O, art 108.14(4),(5).

<sup>131</sup> *MJSTL*, *supra* note 70 ch 9 at paras 29-30.

<sup>132</sup> *NDA*, s 161.1; QR&O, art 107.09(1).

<sup>133</sup> *NDA*, s 163(1).

officers within the unit.<sup>134</sup> The delegated officers – not lower than captains - have a more limited jurisdiction in terms of rank of the accused and nature of the offences they can deal with and punishments they can impose.<sup>135</sup> For non-commissioned members of warrant officers and above and for officers from second lieutenants to major, superior commanders have jurisdiction. Offences allegedly committed by Lieutenant-Colonels, Colonels and General officers cannot be dealt with by summary proceedings; they can be tried only by court martial. A classic scenario is when an officer of higher rank commits a negligent discharge of a weapon.<sup>136</sup> As previously said, a recent legislative amendment proposes to include Lieutenant-Colonels within summary jurisdiction.

The officer must then determine – or recommend in the case of a delegated officer - if the charge would be proceeded with or not.<sup>137</sup> In doing what is called ‘post-charge review’, those officers have higher level of discretion than charge-layers in adopting alternative measures in lieu of disciplinary proceedings. For example, a commanding officer may determine that for a young soldier having committed negligent discharge of a weapon on a firing range, an initial warning and extra training will suffice to restore discipline. In circumstances where alternatives measures would not be appropriate, commanding officers/superior commanders and delegated officers would proceed with the charges. Any charge that are not proceeded with are indicated at Part 5 of the RDP.

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<sup>134</sup> NDA, s 163(4); QR&O, art 108.10(1),(3).

<sup>135</sup> QR&O, art 108.10(2).

<sup>136</sup> For examples see *R v Lieutenant-Colonel B C McManus* 2012 CM 3019 (CanLII); *R v Lieutenant-Colonel J.L.M. Ouellet*, 2013 CM 3019 (CanLII); *R v Lieutenant-Colonel DC Nauss*, 2013 CM 3008 (CanLII); *R v Colonel (Retired) P E Scagnetti*, 2011 CM 4030 (CanLII); *R v Colonel D A Patterson*, 2011 CM 4028 (CanLII); *R v Brigadier-General D Ménard*, 2010 CM 1012 (CanLII).

<sup>137</sup> QR&O, art 107.09(2)(3).

Before making that determination, officers are required to obtain another legal advice, known as the 'post-charge legal advice'.<sup>138</sup> In essence, it is a recommendation on whether there is a reasonable prospect of conviction and if it is in the public interest to proceed with the charges. Officers having jurisdiction can disagree with that recommendation, providing their written reasons to both the lawyer and their superiors within 30 days in doing so.<sup>139</sup> In practice, it is a rarity.

Where it is recommended to press the charges, the legal advice also provides guidance to the presiding officer on how conducting the summary trial in the particular circumstances of the case. If the recommendation is to not proceed with the charges, the advice provides reasons that can be used by commanding officers to justify their decision. Like for the pre-charge legal advice, regulations do not require to obtain the advice in each case although that is what each unit generally requires by instruction.

One important aspect for the presiding officer to determine is if the trial can be conducted in the official language chosen by the accused. Although witnesses can testify in the official language of their choice with an interpreter<sup>140</sup>, presiding officers must know the language themselves.<sup>141</sup> Otherwise, presiding officers are expected to refer the charge to an officer who is sufficiently fluent.<sup>142</sup> In the vast majority of cases the choice made by the accused is accommodated. However there are few instances where the

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<sup>138</sup> QR&O, art 107.11.

<sup>139</sup> QR&O, art 107.11(2), 107.12.

<sup>140</sup> QR&O, art 108.20, Note (D).

<sup>141</sup> QR&O, art 108.16, Note (A).

<sup>142</sup> QR&O, art 108.16(3).

charge on the RDP is not in the language of the trial. In 2014-15 there were 13 such cases.<sup>143</sup>

## 5. Jurisdiction and Election

Summary trial can be held anywhere where the CAF are located. This is its greatest advantage. However its jurisdiction is limited in type of offences, time and person. The majority of service offences listed in the *National Defence Act* can be dealt with by summary trial.<sup>144</sup> As explained in Chapter I summary trials also have jurisdiction over only a few offences under the *Criminal Code* and the *Controlled Drugs and Substances Act* (CDSA)<sup>145</sup> notably assault, assault causing bodily harm, theft and possession of substance.<sup>146</sup> The list of offences that can be dealt with summarily is at article 108.07 of the QR&O which can be found online.<sup>147</sup> As for time, summary trial must commence within a year after the commission of the alleged offences.<sup>148</sup> Only active service members can be tried summarily.

All other situations could only be tried by court-martial. For example, should there be at least one offence of sexual assault, an offence committed more than one year ago, or committed by someone who had retired from the CAF, the RDP would be sent to the

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<sup>143</sup> Canada, National Defence, *A Report to the Minister of National Defence on the Administration of Military Justice from 1 April 2014 to 31 March 2015*, (Ottawa, OJAG, 2015) at 30 [JAG Annual Report 2014-15].

<sup>144</sup> QR&O, art 108.07(2).

<sup>145</sup> SC 1996, c 19.

<sup>146</sup> QR&O, art 108.07(3).

<sup>147</sup> See online: National Defence and the Canadian Armed Forces – Queen’s Regulations and Orders <[www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-07](http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-07)>.

<sup>148</sup> NDA, ss 163(1.1), 164(1.1).

referral authority to be then forwarded to the Canadian Military Prosecutions Service for potential court martial. Part 4 of the RDP will be filled in accordingly.

Offences within summary jurisdiction give a right to elect to be tried by court martial unless they are considered 'minor offences'. A 'minor offence' is an offence contrary to five sections of the *National Defence Act* namely: section 85 (Insubordinate Behaviour), section 86 (Quarrels and Disturbances), section 90 (Absence Without Leave), section 97 (Drunkenness), and section 129 (Conduct to the Prejudice of Good Order and Discipline), but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment.<sup>149</sup> In military legal community, those 'minor offences' are colloquially known as 'the baby five'. In addition, the circumstances surrounding the commission of the offence must be sufficiently minor that the officer having jurisdiction concludes that if the accused were to be found guilty, a punishment of detention, reduction in rank or a fine in excess of 25 per cent of monthly basic pay would not be warranted.<sup>150</sup>

In practice, both units and their legal advisors try as much as possible to take advantage of the 'baby five' so that disciplinary matters are dealt with at the lowest appropriate level. For example, a common assault could turn into a quarrel and disturbance if it occurs between two service members. Another example is a drunk soldier opposing his arrest by military police. He would not likely be charged with obstructing a peace officer or resisting his arrest but only with drunkenness. Those 'minor offences' represent the vast majority of cases dealt with by summary trial and therefore do not give

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<sup>149</sup> QR&O, art 108.17(1)a.

<sup>150</sup> QR&O, art 108.17(1)b.

any right to elect to be tried by court martial. In 2014-2015, 62% of summary trials were without any election.<sup>151</sup>

For those cases where there is an election, accused persons are provided with no less than twenty-four hours to determine which type of trial they would choose.<sup>152</sup> In practice, units give more time. During that period, the assisting officer is required by regulations to ensure that the accused is aware of the nature of the offence and the main differences between a summary trial and a court martial.<sup>153</sup> In order to make their choice, the accused person and the assisting officer are provided with copy, or access to, information that is to be relied on as evidence at the summary trial or tends to show that the accused did not commit the offence charged.<sup>154</sup> A form listing that information is provided to the accused person, attached with the RDP.<sup>155</sup> Blank form and an example of that list of information are available online.<sup>156</sup> In making their choice, the accused person is provided with a reasonable opportunity to consult with a legal counsel of the Defence Counsel Services, free of charge.<sup>157</sup> At the end of the period the accused informs of her or his choice and Part III of the RDP is completed accordingly. If summary trial is chosen, hearing can begin forthwith.

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<sup>151</sup> *JAG Annual Report 2014-15*, *supra* note 143 at 25.

<sup>152</sup> QR&O, art 108.17(2).

<sup>153</sup> QR&O, art 108.14(5).

<sup>154</sup> QR&O, art 108.15.

<sup>155</sup> QR&O, art 108.15, Note (D).

<sup>156</sup> National Defence and the Canadian Armed Forces – Queen’s Regulations and Orders <[www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-15](http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-15)>.

<sup>157</sup> QR&O, art 108.18.

## 6. Hearing

Hearing at summary trial level has the same two phases as any criminal trial: 1) the guilt determination phase and 2) if needed, the sentencing phase. Overall, the procedure follows same basic steps. The important difference is that main actors are non-lawyers, subject to very rare exceptions. Thus, proceedings are less focused on legal debate. In addition the decision-maker plays a more active facts gathering role than a judge.

Before hearing any evidence, the presiding officer first takes an oath<sup>158</sup> and causes the charges to be read.<sup>159</sup> The presiding officer then: 1) confirms that the accused was provided with the required information for the purpose of the election; 2) asks the accused if more time is needed to get prepared, and; 3) asks if the accused wants to admit any particular of the charge.<sup>160</sup> There is no guilty plea at summary trial. At the most, the accused admits all particulars of the charge. It is for the presiding officer to go through the process and ultimately finds the accused person guilty.

During the guilt determination phase, the presiding officer first hears the evidence against the accused.<sup>161</sup> Each witness is questioned by the presiding officer and then by the accused and/or the assisting officer. Subsequently, the presiding officer hears evidence on behalf of the accused.<sup>162</sup> Here again each witness – including the accused if he or she testifies - is questioned now first by the accused/assisting officer and then by

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<sup>158</sup> QR&O, art 108.27.

<sup>159</sup> QR&O, art 108.20(2).

<sup>160</sup> QR&O, art 108.20(3).

<sup>161</sup> QR&O, art 108.20(4).

<sup>162</sup> QR&O, art 108.20(5).

the presiding officer. Then the accused/assisting officer can make representations concerning the evidence.<sup>163</sup> The presiding officer then considers the evidence and determines if the offences are proven beyond reasonable doubt.<sup>164</sup> The presiding officer pronounces the finding in respect of each charge.<sup>165</sup> In about 90% of the time, the accused is found guilty.<sup>166</sup> Part 6 of the RDP, under the sub-heading 'Findings-Verdicts' is completed accordingly. As per their training in military justice, presiding officers would normally provide reasons in rendering their decisions.<sup>167</sup> However, there is no requirement for those reasons to be written.

If the accused is found guilty of any charge, the presiding officer enters in the sentencing phase. Offenders may present evidence by testifying themselves or calling witnesses.<sup>168</sup> The presiding officer may question each witness, including the offender when he or she testifies.<sup>169</sup> After the evidence is heard on sentence, the offender and/or the assisting officer make representations about it.<sup>170</sup> After various factors have been considered<sup>171</sup> the sentence is passed by presiding officers, which have different powers of punishments, depending who they are. Commanding Officers have the broadest spectrum of options, including up to 30 days of detention.<sup>172</sup> Delegated Officers have less powers, such as a reprimand, a fine of no more than 25% of the basic monthly pay or up

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<sup>163</sup> QR&O, art 108.20(6).

<sup>164</sup> QR&O, art 108.20 (7).

<sup>165</sup> QR&O, art 108.20 (8),(9).

<sup>166</sup> *JAG Annual Report 2014-15*, *supra* note 143 at 28.

<sup>167</sup> *MJSTL*, *supra* note 70 ch 1 at paras 17-18.

<sup>168</sup> QR&O, art 108.20(10)a.

<sup>169</sup> QR&O, art 108.20(10)b.

<sup>170</sup> QR&O, art 108.20(10)c.

<sup>171</sup> QR&O, art 108.20, Notes (F),(G),(H),(I),(J).

<sup>172</sup> QR&O, art 108.24.

to 14 days of confinement to ship or barracks.<sup>173</sup> Paradoxically, Superior Commanders having to deal with higher ranks have only three punishments available: severe reprimand, reprimand and fine up to 60% of monthly basic pay.<sup>174</sup> Tables describing punishments powers for each role are available online.<sup>175</sup> The sentence – which may include more than one punishment – is indicated at the bottom of Part 6 of the RDP. In the majority of the time (55%) it involves a fine and in one time of four, a confinement to ship or barracks.<sup>176</sup> Here again, presiding officers are expected to provide reasons in imposing sentence although not in writing. Before ending the hearing, presiding officer must inform the offender that he or she has the right to request a review to challenge the finding, the sentence or both.<sup>177</sup>

## 7. Review

There are two types of review of summary trials. As stated above, the first one is on request made by the offender.<sup>178</sup> The second is generally initiated on chain-of-command's own motion.<sup>179</sup> While the former is a more formalized and detailed process, the latter is more flexible.

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<sup>173</sup> QR&O, art 108.25.

<sup>174</sup> QR&O, art 108.26.

<sup>175</sup> National Defence and the Canadian Armed Forces – Queen's Regulations and Orders, Art 108.24 (Commanding Officer) <[www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-24](http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-24)>, Art 108.25 (Delegated Officers) <[www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-25](http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-25)>, Art 108.26 (Superior Commanders) <[www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-26](http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page#cha-108-26)>.

<sup>176</sup> *JAG Annual Report 2014-15*, *supra* note 143 at 29.

<sup>177</sup> QR&O, art 108.20(11).

<sup>178</sup> See generally *MJSTL*, *supra* note 70 ch 15 at paras 5-28.

<sup>179</sup> *Ibid* at paras 29-33.

Under article 108.45 of the QR&O, the offender may request a review authority to:

a) set aside the finding of guilty on the ground that it is unjust; and b) alter the sentence on the ground that it is unjust or too severe.<sup>180</sup> The offender has up to 14 days after the summary trial to put the request for review<sup>181</sup>, a period that can be extended ‘in the interests of justice’.<sup>182</sup> The ‘review authority’ would depend on who was the presiding officer; generally speaking, it is the next superior officer to whom the presiding officer is responsible in matters of discipline.<sup>183</sup> The request is made in writing – with a copy to the presiding officer who heard the matter - and enunciates why the finding and/or the sentence should be altered or quashed.<sup>184</sup> The offender can be assisted by an assisting officer, akin to the one during the hearing phase but not necessarily the same individual.<sup>185</sup> When the offender is detained, the punishment will be suspended until the review is decided.<sup>186</sup> Otherwise punishments will continue to be carried pending the completion of the review.

The reception of the request for review is a starting point of a ‘procedural shuttle’ between the offender, the presiding officer and the review authority. Upon receiving the copy of the request for review the presiding officer has up to 7 days to make comments to the review authority, with a copy to the offender.<sup>187</sup> The latter has in turn 7 days to make additional representations.<sup>188</sup> Where the information is sufficient, the review

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<sup>180</sup> QR&O, art 108.45(1).

<sup>181</sup> QR&O, art 108.45(5).

<sup>182</sup> QR&O, art 108.45(16).

<sup>183</sup> QR&O, art 108.45(2),(3).

<sup>184</sup> QR&O, art 108.45(4).

<sup>185</sup> QR&O, art 108.45(18).

<sup>186</sup> QR&O, art 108.45(17).

<sup>187</sup> QR&O, art 108.45(6).

<sup>188</sup> QR&O, art 108.45(7).

authority determine the review within 21 days after receiving the request.<sup>189</sup> If it is insufficient, the review authority will seek additional information and notify the offender accordingly.<sup>190</sup> The latter would have another delay of 7 days to make representation concerning the additional information.<sup>191</sup> The review authority would have then up to 35 days after the request to determine the review.<sup>192</sup> In any case before making any decision, the review authority has to obtain a legal advice by a legal advisor who was not previously involved in the matter.<sup>193</sup> Once decision is made, Part 7 of the RDP is completed accordingly and the offender, the presiding officer and the offender's commanding officer are notified in writing.<sup>194</sup> The commanding officer's takes action to give effect to the decision.<sup>195</sup> For example, if detention is confirmed, the offender is put back into custody.<sup>196</sup>

The other mechanism is a review under article 116.02 of the QR&O. It has no particular procedure and no time limitation. It can be initiated by the review authority directly, a role that can be played by more officers than in the previous review process.<sup>197</sup> While circumstances could vary for that review to be justified, it usually occurs when, on a monthly basis, the unit's legal advisor reviews all RDPs of the past month and spots "errors on the face of the record and non-compliance with procedural requirements".<sup>198</sup> For example, if the RDP reveals that the accused had less than 24 hours to make his or

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<sup>189</sup> QR&O, art 108.45(10).

<sup>190</sup> QR&O, art 108.45(11).

<sup>191</sup> QR&O, art 108.45(12).

<sup>192</sup> QR&O, art 108.45(13).

<sup>193</sup> QR&O, art 108.45(8),(9).

<sup>194</sup> QR&O, art 108.45(14).

<sup>195</sup> QR&O, art 108.45(15).

<sup>196</sup> QR&O, art 108.45(17.1).

<sup>197</sup> NDA, s 249(4); QR&O, art 116.02(2),(3).

<sup>198</sup> QR&O, art 107.15 (2).

her choice or that the trial commenced more than 1 year after the facts, the legal advisor would recommend to the review authority to quash the trial. However, the review would not identify a lack of procedural fairness in conducting the hearing, such as a failure to appropriately consider a valid legal defense or a mitigating factor.

Both processes give review authorities several options. On findings, a review authority can quash<sup>199</sup> or substitute<sup>200</sup> any of them. Quashing can be partial<sup>201</sup> or complete.<sup>202</sup> In the latter case, the *National Defence Act* provides that “the person who had been found guilty may be tried as if no previous trial had been held”.<sup>203</sup> Concerning punishments, review authorities may also substitute any of them.<sup>204</sup> They could also mitigate, commute or remit any punishment.<sup>205</sup> Mitigation is awarding a lesser amount of the same punishment while commutation is awarding a lesser punishment.<sup>206</sup> Besides, although confinement to barrack or ship is legally speaking a ‘lesser’ punishment than fine, it is a restriction on liberty. In addition, although reduction in rank is ‘lesser’ than detention, it has much lasting negative impact. Remission is dispensing the offender to be subjected to a portion or the totality of the punishment.<sup>207</sup>

Legally speaking, review authorities cannot put offenders in a ‘worse’ situation than were before review. For example, no review authority can act on a charge for which the

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<sup>199</sup> *NDA*, s 249.11; *MJSTL*, *supra* note 70 ch 15 at paras 36-37.

<sup>200</sup> *NDA*, s 249.12; *MJSTL*, *supra* note 70 ch 15 at paras 38-42.

<sup>201</sup> *NDA*, s 249.11(3).

<sup>202</sup> *NDA*, s 249.11(2).

<sup>203</sup> See for example *R v Thompson*, 2009 CMAC 8 (CanLII) at paras 29-31 [*Thompson*].

<sup>204</sup> *NDA*, s 249.13; *MJSTL*, *supra* note 70 ch 15 at para 43.

<sup>205</sup> *NDA*, s 249.14; *MJSTL*, *supra* note 70 ch 15 at paras 44-45.

<sup>206</sup> QR&O, art 116.02, Note (C),(D).

<sup>207</sup> QR&O, art 116.02, Note (E).

accused has been found not guilty.<sup>208</sup> Punishment cannot be added or increased. From an offender's perspective, the 'worst' that can result from a review is that the decision is upheld. As a matter of fact, reviews requested by offenders seem beneficial in about two thirds of the time, most of time by quashing findings.<sup>209</sup> However, requests for review represent a relatively low proportion of all summary trials held in a year. In 2014-15 about 6% (49 out of 827) of all summary trials were reviewed following a request under QR&O 108.45.<sup>210</sup> For some it illustrates that offenders are pleased with presiding officers' initial decision. It could also be explained by a reluctance to be perceived as a troublemaker within the unit, even if the outcome is beneficial legally speaking. The risk of having the sentence potentially 'commuted' from a fine to confinement or from detention to reduction in rank might also be a source of discouragement in some circumstances.

If someone still disagrees with the outcome, it can be further judicially reviewed by either the Federal Court or the Superior Court of a Province where the summary trial occurred.<sup>211</sup> However this is an extreme rarity as service members are neither aware nor have the resources to efficiently seek intervention of the courts.

This is overall how the summary trial system in Canada currently works. It is basically a mini-criminal trial but without the formalism as lawyers are absent from the process, unless when providing advice to the main actors. Although designed for a military context, it still has some resemblance to the former civilian justice system of summary justice (justice of the peace) from which it draws the same origin.

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<sup>208</sup> *MJSTL*, *supra* note 70 ch 15 at para 31.

<sup>209</sup> *JAG Annual Report 2014-15*, *supra* note 143 Annex A at 30.

<sup>210</sup> *Ibid* at 29-30.

<sup>211</sup> *Federal Court Act*, RSC 1985, c F-7, s 18.1; *MJSTL*, *supra* note 70 ch 15 at paras 50-52.

## **Chapter III: Charter Breaches**

This chapter identifies and analyses possible Charter challenges to the summary trial system. It will be suggested that there are four strong potential breaches. First, the right to a fair trial seems not to be met as adjudicators do not appear to be sufficiently independent. With regard to procedural fairness, the challenge is double: the absence of transcript of the proceedings makes any review process meaningless, a situation aggravated by the relatively limited legal assistance accused persons could benefit during the proceedings. In terms of equality before the law, the difference of treatment between senior and junior ranks when facing summary proceedings seems unjustifiable. Other challenges to procedural aspects will be discussed but it will be suggested that they are not strong. Whether viable challenges can be demonstrably justified under section 1 of the *Charter* will be postponed until Chapter IV which will draw relevant comparisons to military summary proceedings in other jurisdictions.

Some might question the relevance of this exercise as the system has remained virtually unchallenged since the late 1990s. The absence of challenges so far is not indicative that the system is on firm ground as it pertains to those potential breaches. It is rather explained by a combination of factors mainly related to the improbability that individual service members currently embark in such a litigation as only a handful of lawyers could represent them in such a task. Defence Counsel Services' lawyers know but they lack a clear mandate and resources to do so. Civilian practitioners do not know yet and have as much resources as their clients are willing to pay. Individual service members, not necessarily aware of the potential *Charter* infringements but yet mindful of

the costs of litigation in terms of financial resources, time and impact on their career, would likely perceive that such legal action is not even worth doing.

There are two exceptions, first being *Legassick*<sup>1</sup> where a captain raised a constitutional challenge before the Quebec Superior Court against his summary trial conviction decided under the pre-1998 regime. Although acknowledging that the applicant mainly raised constitutional issues, the Superior Court declined to hear the matter, considering it lacked territorial competence.<sup>2</sup> More recently was *Private Nicholas Detre v Attorney General of Canada*.<sup>3</sup> In that case a self-represented service member was convicted and sentenced to a \$250 fine and 3 days of confinement to barracks during a summary trial presided by a delegated officer. After an unsuccessful review to a lieutenant-colonel, he sought the intervention of the Federal Court through a judicial review. Initially arguing the lack of jurisdiction of the delegated officer, the applicant raise constitutional aspects later in his submission. As the chain-of-command decided to review the file and quash the decision on its own motion prior hearing, the prothonotary of the court granted the motion to strike of the AG Canada, considering the matter was moot.

## ***A. Preliminary considerations***

### **1. Charter Applicability**

Because of the specialized nature of the military service some might perceive that the *Charter* generally does not apply to it, or at least not to the same extent. Some might

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<sup>1</sup> *Legassick c Ministère de la Défense nationale*, 2002 CanLII 11485 (QC Sup Ct).

<sup>2</sup> *Ibid* at paras 43-48.

<sup>3</sup> *Private Nicholas Detre v Attorney General of Canada* (18 June 2015), Montreal T-2145-14 (Prothonotary Richard Morneau) aff'd (14 August 2015), Ottawa T-2145-14 (FCTD).

suggest that legal rights enshrined in the *Charter* are not relevant as those proceedings are ‘summary’ and ‘disciplinary’ in nature. Some might even suggest that by voluntarily joining the Canadian Armed Forces, individuals have consensually agreed to put themselves outside the realm of the *Charter*. To dissipate any doubt, it is worth explaining here why the *Charter* applies.

In short, the *Charter* is applicable to summary trials as service members are potentially exposed to deprivation of liberty. The simple fact that an individual has voluntarily joined the Canadian Armed Forces does not equate to a valid waiver of his or her legal rights guaranteed by the *Charter*. When we refer to summary proceedings as being ‘disciplinary’ is not determinative of the essence of the system. The adjective ‘disciplinary’ does not have the same meaning that the civilian legal community usually understand. True, ‘discipline’ both in the service and in a civilian context refers to rules observance designed for a particular group and to some sort of sanction or punishment should those rules not be followed. However, misconduct in a military context could involve much more serious consequences for the wrongdoers than in any other private organizations or professional regulatory bodies. No one should be lured by any attempt to tone down or conceal the true essence of the summary proceedings by simply using ‘disciplinary’ rather than ‘penal’. We need to go beyond those words and further analyse the inner structure of this system to properly characterize it.

For years, the analysis grid to determine if a given regulatory professional body is a penal system triggering *Charter* legal rights was established in *R v Wigglesworth*.<sup>4</sup> For

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<sup>4</sup> [1987] 2 SCR 541, 1987 CanLII 41 (SCC), 45 DLR (4th) 235; [1988] 1 WWR 193; 37 CCC (3d) 385; 60 CR (3d) 193; 81 NR 161; 28 Admin LR 294; [1987] SCJ No 71 (QL) [*Wigglesworth*].

the majority, Wilson J. determined that section 11 is engaged when a person faces a prosecution involving “*punitive sanctions*” for having allegedly committed a “*criminal, quasi-criminal and regulatory offences, either federally or provincially enacted*”.<sup>5</sup> She refined the test by stating that proceedings could fall under section 11 either because they are “*criminal in nature*” or alternatively because it may lead to “*true penal consequences*”.<sup>6</sup> This two-tier approach was applied in *Martineau v M.N.R.*<sup>7</sup> where the Court set further criteria on the first part of the test which determines whether a process is criminal in nature: 1) the objectives of the legislation; 2) the purpose of the sanction; and 3) the process leading to imposition of the sanction.<sup>8</sup>

However in 2015, the Court altered that test. In *Guindon v Canada*, a family lawyer was assessed penalties of \$546,747 by the Minister of National Revenue for her involvement in a charity scam.<sup>9</sup> She argued that section 11 was engaged as she was “charged with an offence”, the penalties being criminal in nature.<sup>10</sup> Applying the *Wigglesworth/Martineau* approach<sup>11</sup> the majority of the Supreme Court made two changes to it. First, the *Martineau* criteria were moved from the ‘criminal nature’ to the ‘true penal consequences’ part of the test. Moreover, other considerations were added in determining if a sanction, in particular one of a monetary nature, is a ‘true penal consequence’: 1) its magnitude; 2) to whom it is paid; 3) how is it determined (by regulatory considerations as opposed to principles of criminal sentencing); and 4) is there

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<sup>5</sup> *Ibid* at 554.

<sup>6</sup> *Ibid* at 559.

<sup>7</sup> [2004] 3 SCR 737, 2004 SCC 81(CanLII) at para 19 [*Martineau*].

<sup>8</sup> *Ibid* at para 24.

<sup>9</sup> [2015] 3 SCR 3, 2015 SCC 41 (CanLII) at para 2 [*Guindon*].

<sup>10</sup> *Ibid* at para 3.

<sup>11</sup> *Ibid* at paras 48-50.

a stigma associated with the penalty.<sup>12</sup> The Court added that the magnitude of the sanction – for example a large penalty– is not by itself determinative.<sup>13</sup> Nevertheless, the Court confirmed that “imprisonment is always a true penal consequence” and that “a provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed”.<sup>14</sup> Recently, in the context of determining if retroactive amendments to the *Criminal Code* violated section 11(i) of the *Charter* - giving “the benefit of the lesser punishment” to a person when the punishment is varied after the commission of the offence but before sentencing - the Supreme Court reformulated in *R v KRJ* the ‘punishment test’ by adding in the list of criteria, a measure that “*has a significant impact on an offender’s liberty or security interests.*”<sup>15</sup>

Even with the alterations of the test by *Guindon*, summary proceedings in Canadian military justice are criminal and engage legal protections of the *Charter*. On the ‘criminal nature’ part of the test, it seems what Watkin<sup>16</sup> and Cormier<sup>17</sup> concluded in 1990 and 2000 respectively is still valid if we analyse numerous aspects. First, the terminology and nomenclature in legislation refers to “*terms which are classically associated with criminal proceedings.*”<sup>18</sup> In the *National Defence Act* summary proceedings are qualified as ‘*summary trial*’ and ‘*service tribunal*’ [emphasis added].<sup>19</sup> As we saw in Chapter II,

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<sup>12</sup> *Ibid* at para 76.

<sup>13</sup> *Ibid* at para 77.

<sup>14</sup> *Ibid* at para 76.

<sup>15</sup> *R v KRJ*, 2016 SCC 31 (CanLII) at para 41[*KRJ*].

<sup>16</sup> Kenneth Watkin, *Canadian Military Justice: Summary Proceedings and the Charter* (LLM Thesis, Queen’s University Faculty of Law, 1990)[unpublished] at 123-30 [Watkin, “Summary Proceedings”].

<sup>17</sup> Patrick Cormier, “La Justice militaire canadienne: le procès sommaire est-il conforme à l’article 11(d) de la *Charte canadienne des droits et libertés* » (2000) 45 McGill LJ 209 at 224-28 (QL).

<sup>18</sup> *Wigglesworth*, *supra* note 4 at 555.

<sup>19</sup> *NDA*, s 2.

those proceedings begin when a ‘*charge is laid*’ in respect of a ‘*service offence*’<sup>20</sup> against a person, who then become an ‘*accused person*’.<sup>21</sup> Furthermore, summary jurisdiction depends on the ‘*powers of punishment*’ considering the ‘*gravity of the offence*’.<sup>22</sup> In the QR&O, although volume II is titled “Disciplinary”, its table of contents’ nomenclature resembles substantially to what would be seen in a system dealing with penal matters. Even if we exclude from our analysis chapters 109 to 112, 115 as they apply to court martial proceedings, other chapters refer to notions like “*offences*”, “*arrest*”, “*pre-trial custody*”, “*investigation*”, “*detention*”, “*findings*” or “*punishments*”. In the table of contents of Chapter 107 (*Preparation, Laying and Referral of Charges*) and Chapter 108 (*Summary Proceedings*), although the adjective ‘disciplinary’ is used several times to qualify ‘proceedings’, the nomenclature is mainly penal and closer to what we generally see in the *Criminal Code* or provincial penal legislation than to provincial legislation regulating professional bodies. For example, there is a ‘trial’ at the beginning of which “*the accused [...] shall be brought*” before the presiding officer.<sup>23</sup> The presiding officer will notably “*hear the evidence against the accused*.”<sup>24</sup> Ultimately, “*the accused may be found guilty on that charge*.”<sup>25</sup>

Second, summary trials are by default accessible to the public<sup>26</sup>; these are not ‘private’ proceedings.<sup>27</sup> The presiding officer can only order the hearing to be held *in camera* “*in the interests of justice and discipline, public safety, defence or public morals*”<sup>28</sup>

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<sup>20</sup> NDA, ss 161-161.1.

<sup>21</sup> NDA, ss 161.1, 163(1)(a),(c).

<sup>22</sup> NDA, s 163(1)(b).

<sup>23</sup> QR&O, art 108.20(1).

<sup>24</sup> QR&O, art 108.20(4).

<sup>25</sup> QR&O, art 108.20(7).

<sup>26</sup> QR&O, art 108.28(1).

<sup>27</sup> *R v Shubley*, [1990] 1 SCR 3 at 20, 1990 CanLII 149 (SCC).

<sup>28</sup> QR&O, art 108.28(2).

or during portions “*where classified information will be given in evidence.*”<sup>29</sup> Under conditions and with exceptions, any person may request copies of a record of disciplinary proceedings.<sup>30</sup>

Another aspect is that accused persons cannot be compelled to testify against themselves during summary trial<sup>31</sup>. Accused persons can testify if they want to, but there is no obligation. In the CAF training document for presiding officers, it is explained “that accused persons have the right to remain silent” – with a reference to the non-compellable right under section 11(c) of the *Charter* - and that it would be improper to infer anything negative if an accused person does not testify.<sup>32</sup>

Furthermore, the type of misconduct dealt with by summary trials is not purely disciplinary. As we saw in previous chapters, the summary proceedings system has jurisdiction over certain *Criminal Code* and *CDSA* offences, although the list of offences is limited in comparison with a court martial.<sup>33</sup> However, what Lamer C.J. wrote in *Généreux* – to the effect that the *Code of Service Discipline* serves a public function “*by punishing specific conduct which threatens public order and welfare*”<sup>34</sup> - has been toned down recently. In *Moriarity* Cromwell J. did “*not consider the language used by Lamer C.J. as an authoritative pronouncement on the object of the provisions which are*

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<sup>29</sup> QR&O, art 108.28(3).

<sup>30</sup> QR&O, art 107.16.

<sup>31</sup> QR&O, art 108.20(5).

<sup>32</sup> Canada, National Defence, B-GG-005-027/AF-011 *Military Justice at the Summary Trial Level*, v 2.2 (Ottawa: Canadian Defence Academy, 12 January 2011) ch 13 at para 62 [MJSTL].

<sup>33</sup> As per definition in the *NDA*, a ‘service offence’ encompasses both an offence contrary to the *Code of Service Discipline* and an “*offence pursuant to the Criminal Code or any other Act of Parliament.*” (*NDA*, s 2).

<sup>34</sup> *R v Généreux*, [1992] 1 SCR 259 at 281, 1992 CanLII 117 (SCC) [*Généreux*].

*challenged here.*<sup>35</sup> Nevertheless, he concluded that even in circumstances not related to military duties, any “*criminal or fraudulent conduct*” [emphasis added] committed by a service member may have an impact on military discipline.<sup>36</sup> Such a large range of conduct goes beyond the specific rules designed to regulate a particular sector or profession. Finally, a person cannot be tried again for having committed a substantially similar offence if the person was either found guilty or not guilty by a service tribunal, including a summary trial.<sup>37</sup> As put by Watkin, this rule preventing double jeopardy is an indication that service tribunals have an equal status with ordinary criminal courts.<sup>38</sup>

Even if summary proceedings were to be characterized as ‘disciplinary or administrative’ and ‘not criminal in nature’ they still trigger *Charter* legal rights protection. On the ‘true penal consequence’ part of the test, even when adding the *Martineau* criteria as the Supreme Court did in *Guindon*, summary trials are ‘criminal’. At summary trial each service offence can be punished by detention.<sup>39</sup> As we saw in Chapter II only commanding officers could impose up to 30 days detention. Although different from ‘imprisonment’ in some aspects<sup>40</sup>, it is still strict deprivation of liberty.<sup>41</sup>

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<sup>35</sup> *R v Moriarity*, [2015] 3 SCR 485, 2015 SCC 55 (CanLII) [*Moriarity*].

<sup>36</sup> *Ibid* at para 52.

<sup>37</sup> *NDA*, s 66.

<sup>38</sup> Watkin, “Summary Proceedings”, *supra* note 16 at 128.

<sup>39</sup> QR&O, art 108.07.

<sup>40</sup> Those punishments are different in terms of their respective general purpose, maximum length, what those who serve them are called and locations where they are served. See *R v Leading Seaman J.D. Dandrade*, 2008 CM 3014 (CanLII) at paras 16-17.

<sup>41</sup> *NDA*, ss 142, 203ff “Division 8 - Provisions Applicable to Imprisonment and Detention”; QR&O vol II ch 114, vol IV - Appendix 1.4 *Regulations for Service Prisons and Detention Barracks*, PC 1967-1703 (6 Sept 1967) arts 5.01-5.02, 5.05. See also *Trépanier v R*, CMAC-498, 2008 CMAC 3 (CanLII) at paras 40-53, leave to appeal to SCC refused 32672 (25 September 2008); Watkin, “Summary Proceedings”, *supra* note 16 at 131; Cormier, *supra* note 17 at 228; François, LeSieur, *A New Appeal to Canadian Military Justice: Unconstitutionality of Summary Trials Under Charter 11(d)*, (LLM Thesis, University of Ottawa, Faculty of Law, 2010) [unpublished] at 25.

Some would argue nuances should be made. First, most of the time presiding officers having summary jurisdiction decide before trial to not impose detention in ‘minor circumstances’. Second, most of offences are dealt with by delegated officers who have no power to impose detention. These are indeed realities. However in doing so, presiding officers consequently remove the right to elect court martial to the accused.<sup>42</sup> When the accused has no election, presiding officers do not have to inform the accused that he or she can consult legal counsel<sup>43</sup>. It seems rather unfair to exclude the application of *Charter* legal rights based on the exercise of discretionary power by a decision-maker who may be perceived as having an interest in the outcome of the proceedings. In addition, the accused is not in a position to oppose as he or she is not legally aware at that stage. Furthermore, the decision to keep it ‘minor’ is no guarantee of non-exposure to custodial punishment. A summary trial even for a ‘minor offence’ could change quickly. If circumstances are more serious than anticipated, presiding officers must offer election, assuming no finding has occurred yet.<sup>44</sup> For example during hearing for a “quarrel and disturbance” charge, the complainant could reveal he suffered injuries that were not apparent the time of the investigation. In most serious cases - if allegations reveal offences outside summary jurisdiction – the presiding officer must refer the matter up to higher authority for an eventual court martial.<sup>45</sup> For example, a drunkenness charge – where the initial allegations are that the accused made inappropriate comments while he was drunk – suddenly becomes way more serious if a witness testifies that the accused

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<sup>42</sup> QR&O, art 108.17(1).

<sup>43</sup> QR&O, art 108.17(2)(b) *a contrario*.

<sup>44</sup> QR&O, art 108.17(6).

<sup>45</sup> *MJSTL*, *supra* note 32 ch 11 at paras 82-86.

grabbed the breast of the complainant. In either situation, the accused is still exposed to incarceration.

Even if regulation do not provide for delegated officers to impose detention, they can impose confinement to barrack/ship up to 14 days.<sup>46</sup> Commanding officers can go up to 21 days.<sup>47</sup> Although labelled as a ‘minor punishment’<sup>48</sup>, it could arguably be considered a ‘true penal consequence’ as well. Not similar to ‘detention’, confinement to barrack/ship is nevertheless a deprivation of liberty as “*the movements of a person given such a punishment are controlled and restricted as much as possible.*”<sup>49</sup> In light of *KRJ*, it is undoubtedly a measure that “*has a significant impact on an offender’s liberty or security interests*”.<sup>50</sup> Arguably, it potentially gives rise to an application for *habeas corpus*.<sup>51</sup> A high level of discretion is given to commanders to set its conditions.<sup>52</sup> Those could be so stringent that in comparison with ordinary criminal sentencing regime, it may be akin to a conditional sentence of imprisonment to be served in the community, commonly known as ‘house arrest’.<sup>53</sup> An example of those conditions is given at Appendix A.<sup>54</sup> But as stringent as it may be, confinement to barrack/ship does not give a right to election.<sup>55</sup> Some might say that the conditions under which confinement to barrack/ship is served are similar to those during basic military training, in particular during the first four weeks

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<sup>46</sup> *NDA*, ss 139(1)(f) and 146; QR&O, arts 108.25, 108.37.

<sup>47</sup> QR&O, art 108.24.

<sup>48</sup> *NDA*, s 146; QR&O, art 104.13(2).

<sup>49</sup> *R v Private SJLS Bergeron*, 2008 CM 3011 (CanLII) at para 32 (LCol L.-V. D’Auteuil, m.j.).

<sup>50</sup> *KRJ*, *supra* note 15 at para 15.

<sup>51</sup> *Mission Institution v Khela*, [2014] 1 SCR 502; 2014 SCC 24 (CanLII); 455 NR 279; [2014] SCJ No 24 (QL) at para 30.

<sup>52</sup> QR&O, art 104.13(3) and Notes (A)(B)(C).

<sup>53</sup> *Criminal Code*, s 742.1.

<sup>54</sup> Canada, National Defence, “CFB Kingston - Rules and Regulations for Defaulters”, BSO 4.02 (Kingston: DND, September 2007) (Extract).

<sup>55</sup> QR&O, art 108.17(1) *a contrario*.

as known as the ‘indoctrination period’ where candidates have restricted free time.<sup>56</sup> That is partially true. During basic military training the confinement imposed by training staff: 1) is generally limited to base as opposed to quarters; 2) is part of everybody’s adaptation to military life as opposed to a punishment linked to the commission of an offence by one individual; 3) will not show up on the conduct sheet; 4) can be stopped by putting a voluntary release while the punishment of confinement has to be served; 5) is applicable to all candidates irrespective of their rank, while senior non-commission members and officers are not exposed to confinement to ship/barrack at summary trial.

More uncertain is the punishment of reduction in rank although it probably engages the *Charter*. It represents in military context serious financial impact and professional stigma.<sup>57</sup> But those aspects are not determinative of its penal nature. Even though offenders reduced in rank have lost prestige within the service, “*dignity and reputation are not self-standing rights. Neither is freedom from stigma.*”<sup>58</sup> Rather than being a condition shared with every other human beings such as freedom, rank is a functional privilege conferred by a particular organization required for specific purpose and which carries a certain level of responsibilities and authority. Yet it is considered sufficiently serious in the CAF to trigger the right to elect trial by a court martial.<sup>59</sup> Consequently in the current scheme, offenders who have been reduced in rank in a summary trial, have also been

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<sup>56</sup> See Canada, National Defence, “Joining Instructions - Basic Military Qualification and Basic Military Officer Qualification”, (Canadian Forces Leadership School, 2016), online: National Defence and Canadian Armed Forces <[www.forces.gc.ca/en/training-establishments/recruit-school-joining-instructions.page](http://www.forces.gc.ca/en/training-establishments/recruit-school-joining-instructions.page)> and “Get Ready for Basic Training”, *ibid*, online: <[www.forces.gc.ca/en/training-establishments/recruit-school-basic-training.page](http://www.forces.gc.ca/en/training-establishments/recruit-school-basic-training.page)>.

<sup>57</sup> *Reid v R*; *Sinclair v R*, CMAC-524, CMAC-526, 2010 CMAC 4 (CanLII) at paras 38-9; *Jackson v R*, CMAC-470, 2003 CMAC 8 at para 7; *R v Fitzpatrick*, [1995] CMAJ No 9 at para 31; *Thompson v R*, CMAC-515, 2009 CMAC 8 (CanLII) at para 48 [*Thompson*].

<sup>58</sup> *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44 (CanLII) at para 80.

<sup>59</sup> QR&O, art 108.17(1)(b).

exposed to detention prior sentence. Although reduction in rank is not a deprivation of liberty, its imposition by a commanding officer necessarily exposes offenders to such consequence and engages *Charter* legal rights.

Concerning the punishment of a fine, its magnitude is not in itself determinative.<sup>60</sup> Therefore, it cannot be argued that a fine of no more than 25% of the monthly basic pay is 'non-punitive' and anything above that up to 60% of the offender's monthly basic pay is 'punitive'. That 25% threshold was developed prior to *Guindon* and *Martineau*, based in part on a 1992 Federal Court decision which held that, amongst other sanctions, up to 10 days of forfeiture of pay under the *Royal Canadian Mounted Police Act*<sup>61</sup> was not a penal consequence.<sup>62</sup> However if we look beyond magnitude and apply the other *Guindon* criteria, fines are punitive in the military justice system. They have to be paid to the Receiver General for Canada to go into the Consolidated Revenue Fund, hence indicating to redress the harm done to the community as a whole.<sup>63</sup> In default of payment of a fine, the summary trial decision can be entered and enforced before any civilian court, hence again showing its public nature.<sup>64</sup> All other punishments that can be imposed at summary trials (severe reprimand, reprimand, extra work and drill, stoppage of leave, and caution) would not seem to meet the 'true penal consequences' threshold *per se*. However the criteria is what individuals have been exposed to and not what punishment they actually received.

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<sup>60</sup> *Guindon*, *supra* note 9 at para 76.

<sup>61</sup> RSC, 1985, c R-10.

<sup>62</sup> Canada, Office of the Judge Advocate General, *Summary Trial Working Group Report*, (Ottawa: OJAG, 1994) at 108 and 219 [*STWG Report*], referring to *Landry v Gaudet* (1992), 95 DLR (4th) 289 (FCTD).

<sup>63</sup> *Wigglesworth*, *supra* note 4 at 561; Watkin, "Summary Proceedings", *supra* note 16 at 133. For example, see *R v Gray*, 2010 CM 1013 (CanLII) at paras 14-15.

<sup>64</sup> *NDA*, s 145.1.

Other aspects of the summary proceedings indicate they impose true penal consequences. If we look at regulations and training doctrine manual, punishments are not “determined by regulatory considerations” but rather by application of “principles of criminal sentencing”.<sup>65</sup> Irrespective of the punishment, a conviction at the summary trial level is still considered as an offence for the purpose of the *CRA* although that risk is to be reduced when, as we saw in Chapter II, an amendment in Bill C-15 would come into force. Besides, even if not convicted of a criminal offence, any summary trial conviction will result in an entry in the service member’s conduct sheet.<sup>66</sup> Such an entry can be removed only when a record suspension (formerly a pardon) is granted under the *CRA* – hence indicating the public nature of the punishment - unless the offender was awarded a ‘minor punishment’ or a fine of no more than \$200.<sup>67</sup> In such a case, the commanding officer can authorise the suppression from the offender’s file.

Therefore it is most probable that a court, having to characterize the summary proceedings in a litigation over the *Charter* and applying *Guindon*, would conclude that they are criminal ‘in nature’ or at least they expose the accused to ‘true penal consequences’. However, a court more deferential to government’s position might conclude otherwise, in particular if it perceives that the accused has in fact never been exposed to ‘true penal consequence’. In doing so, that court might indicate or suggest it gives precedence to unique military context over individual rights. As we will see in the

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<sup>65</sup> QR&O, art 108.20 (10), Note (G), (H), (I), (J); see generally *MJSTL*, *supra* note 32 ch 14 “Sentencing and Punishment”.

<sup>66</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 7006-0, *Conduct Sheets*, (Ottawa: National Defence, 31 March 1998).

<sup>67</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 7006-1, *Preparation and Maintenance of Conduct Sheets*, (Ottawa: National Defence, 31 March 1998).

following part that approach has been abandoned since *Généreux* in 1992. The recent case of *Moriarity* has not altered that state of affairs.

## 2. Current Contextual Approach

Keeping in mind that a particular context would never justify negation of human rights, a *Charter* analysis of a legislation regulating a specific group should not be made *in abstracto*; it has to take into account the context, both from the group's and the broader society's standpoints. That contextual approach, adopted by the Supreme Court of Canada<sup>68</sup> follows a three-step analysis: 1) determine the value protected by the right allegedly infringed; 2) then, determine the objective of the legislation; 3) if objective cannot be met without infringing rights, determine if legislation is a reasonable limit "demonstrably justified in a free and democratic society".<sup>69</sup> Of note, the contextual approach was applied to determine whether essential elements of judicial independence were met for justices of the peace<sup>70</sup>, if processes pertaining to access to personal information<sup>71</sup> or security certificate<sup>72</sup> met "procedural fairness" requirements, or if pension legislation making a distinction based on retirement age of the deceased for the purpose of supplementary death benefits to the beneficiaries violated right to equality.<sup>73</sup> In a potential debate pertaining on the constitutionality of the summary proceedings in the Canadian Armed

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<sup>68</sup> *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 18 CCC (3d) 385; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 64 DLR (4th) 577, 1989 CanLII 20 (SCC) [*Edmonton Journal*].

<sup>69</sup> *Ibid* at 1352.

<sup>70</sup> *Ell v Alberta*, [2003] 1 SCR 857, 2003 SCC 35 (CanLII) at para 30 (Major J) [*Ell*]. This case will be further analysed when judicial independence will be discussed under s 11(d).

<sup>71</sup> *Ruby v Canada (Sollicitor General)*, [2002] 4 SCR 3, 2002 SCC 75 (CanLII), 219 DLR (4th) 385, 7 CR (6th) 88; 49 Admin LR (3d) 1 at para 39-40, 51 (Arbour J).

<sup>72</sup> *Charkaoui v Canada (Citizenship and Immigration)*, [2008] 2 SCR 326 at para 56, 2008 SCC 38 (CanLII), [2008] SCJ No 39 (QL), 294 DLR (4th) 478, 58 CR (6th) 45, 376 NR 154.

<sup>73</sup> *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 at para 43, 2011 SCC 12 (CanLII), 329 DLR (4th) 193, 412 NR 149, [2011] SCJ No 12 (QL) [*Withler*].

Forces, a court would almost invariably begin its analysis by giving some weight to military context. However recent evolution of case law shows that, although since the *Charter* individual rights were given precedence over that context, the opposite has not completely faded out and might be still present in the Canadian judiciary today.

In military justice, the contextual approach was applied even before the adoption of the *Charter*. In *MacKay* a member of the Canadian Armed Forces argued notably that being subject to military jurisdiction infringes his right to a fair trial and to equality before the law under the *Canadian Bill of Rights*<sup>74</sup> as the military judge could not act fairly as he was a service member.<sup>75</sup> For the majority of the Court, Justice Ritchie wrote that rather than being an impediment to a fair trial, the fact that the military judge had been exposed to military law and military life for years made him a “*more suitable candidate for president of a court martial than a barrister or a judge who has spent his working life in the practice of non-military law.*”<sup>76</sup> Later in his decision, he added “*that a separate code of discipline administered within the services is an essential ingredient of service life*” dealing with “*a particular class of individuals*”.<sup>77</sup> Without making direct reference to “contextual approach”, Justice Ritchie adopted it to ascertain the right to a fair trial to the military organization. Dissenting, Chief Justice Laskin (joined by Estey J.) gave precedence to protection of rights over any specific need, knowledge or particular context depending on the type of offence. For him, although such special skill may be justified in dealing with a “*strictly service or discipline offence, relating to military activity*” it becomes irrelevant

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<sup>74</sup> SC 1960, c 44 ss 1 (a), (b), 2(e), (f).

<sup>75</sup> *MacKay v The Queen*, [1980] 2 SCR 370 at 395, 1980 CanLII 217 (SCC) [*MacKay*].

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid* at 400.

where individuals are facing ordinary criminal law charges, which was precisely the case in *MacKay*.<sup>78</sup>

The influence of a contextual approach in Canadian military justice was subject of a paradigm shift ten years after the adoption of the *Charter* in the landmark decision of *Généreux*. Similarly to what was argued in *MacKay*, the service member objected to the jurisdiction of the General Court Martial, primarily because it was not an independent and impartial tribunal pursuant to section 11(d) of the *Charter*. However contrary to what occurred in *MacKay* the Court gave more importance to the enforcement of individual rights over the deference to the particular military context. For the majority of five judges, Lamer C.J. made first reference to the ‘flexible standard’ in *Valente v The Queen*<sup>79</sup> as stated by Le Dain J., who explained that section 11(d) cannot be construed as defining strict formal conditions as the section is designed to be applicable to different tribunals in different contexts.<sup>80</sup> Yet, after circumscribing the legitimate purpose of military justice<sup>81</sup>, he shared the concerns of Laskin C.J. and McIntyre J. in *MacKay* as to what a reasonable observer would think looking at the fact that military members serve on military tribunals.<sup>82</sup> For him however this deviation from the absolute independence would not tantamount in itself to a breach of section 11(d) as the existence of military justice system has strong historical roots, is justified by sound principles<sup>83</sup> and is even contemplated by section

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<sup>78</sup> *Ibid* at 380.

<sup>79</sup> [1985] 2 SCR 673, 1985 CanLII 25 (SCC) [*Valente*].

<sup>80</sup> *Généreux*, *supra* note 34 at 284-85.

<sup>81</sup> *Ibid* at 293.

<sup>82</sup> *Ibid* at 294.

<sup>83</sup> *Ibid* at 295.

11(f).<sup>84</sup> For him, difference justified by context does not equate to *Charter* breach as long as the structure does not violate the basic principles.

Dissenting, L'Heureux-Dubé J. believed the majority underestimated the particular context of a military tribunal. She qualified the contextual approach as being “*a tenet of constitutional interpretation which is of paramount importance.*”<sup>85</sup> She concluded from previous comments made by other Supreme Court judges, in particular those from Wilson J. in *Edmonton Journal*, that not only is the contextual approach relevant for the purpose of section 1 analysis but it “*is also important at the initial stage of deciding whether or not a breach of a given right or freedom has occurred.*”<sup>86</sup> For her, not only the contextual approach is helpful, “*it is clearly required where military tribunal are at issue.*”<sup>87</sup> Quoting McIntyre J. in *MacKay*<sup>88</sup> as well as authors Fay<sup>89</sup> and Heard<sup>90</sup> on their conceptions of what the role of military law is, she stated two ‘fundamental propositions’ pertaining to the military justice system. First, the military organization depends “*upon the strictest discipline in order to function effectively*” otherwise mission success is compromised.<sup>91</sup> Second, as this discipline needs to be maintained by senior CAF members, breaches need to be dealt with internally to ensure “*a sufficient degree of institutional knowledge on the part of those who judge.*”<sup>92</sup> For L'Heureux-Dubé J. the military is a society of its own within the larger one and is composed of “*traditions, rules and taboos which are not*

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<sup>84</sup> *Ibid* at 296.

<sup>85</sup> *Ibid* at 320.

<sup>86</sup> *Ibid* at 322.

<sup>87</sup> *Ibid* at 323.

<sup>88</sup> *MacKay*, *supra* note 75 at 402-4.

<sup>89</sup> JB Fay, “Canadian Military Criminal Law: An Examination of Military Justice” (1975) 23 Chitty's LJ 120 at 123 (QL).

<sup>90</sup> AD Heard, “Military Law and the Charter of Rights” (1988), 11 Dal LJ 514 at 514.

<sup>91</sup> *Généreux*, *supra* note 34 at 326.

<sup>92</sup> *Ibid*.

*within the normal ken of outsiders.*<sup>93</sup> With that in mind, she applied flexibility in assessing the three essential elements of independence as defined in *Valente* and concluded that none were breached in the context of the court martial system as it was then.<sup>94</sup>

It appears that the difference between majority and dissent in *Généreux* lies on the weigh to be given to context rather than on its relevance. L'Heureux-Dubé J. approaches *Charter* compliance in military justice with flexibility as this body of law is designed for a *unique society*. Lamer C.J. wants to ensure military tribunals are compliant with the basic principles of the *Charter* while taking into account the *unique needs* of military law in doing so. If we characterize their difference, we can say that both adopt a contextual approach. But while L'Heureux-Dubé's approach is more deferential to the military context, Lamer's one gives precedence to human rights.

Has the recent Supreme Court decision in *Moriarity* changed it? The short answer is 'no' as the Court applied a different analytical approach. As explained in Chapter I, the Court had to determine if provisions giving military justice jurisdiction over ordinary offences went too far to achieve their purpose. The Court had first to determine if the liberty interest – pursuant to section 7 of the *Charter* - was engaged. That did not create much of a debate as the provisions involved punishment of imprisonment.<sup>95</sup> There was no discussion suggesting *Charter* legal rights had to be softened due to military context.

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<sup>93</sup> *Ibid* at 327.

<sup>94</sup> *Ibid* at 330-37.

<sup>95</sup> *Moriarity*, *supra* note 35 at paras 17-19.

In the next step of the overbreadth analytical approach, the Court applied *Canada (Attorney General) v Bedford*<sup>96</sup> and identified the legislative objective of the sections of the *NDA* and their effects to determine any gap between the two.<sup>97</sup> In that regard not only the text but also the context of the legislation matter.<sup>98</sup> The Court reaffirmed the purpose of the military justice system – which is “assuring the discipline, efficiency and morale of the armed forces” - and wrote that the appellants defined the objective too restrictively, the Crown too broadly.<sup>99</sup> Cromwell J. concluded in particular that Parliament, except for few offences, subjected members of the regular forces to the military justice system in all circumstances<sup>100</sup> even outside military context.<sup>101</sup> Therefore the provisions were not overbroad.

To conclude that the outcome in *Moriarity* illustrates that Supreme Court gives now precedence to military context over individual legal rights would be erroneous. Context matters in that decision not to temper *Charter* legal protections but to capture the purpose of the legislation in the parameters of the overbreadth analysis. Indeed legal protections of service members still seem to be of primary importance for the Supreme Court. In *Moriarity* Cromwell J. underlined that neither the scope of Parliament’s power over defence nor the extent to which military law is exempted from the right to jury trial were raised. He further stated that “nothing in my reasons should be taken as addressing any of those other matters.”<sup>102</sup> Moreover during oral submissions, Cromwell J. inquired as to

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<sup>96</sup> [2013] 3 SCR 1101, 2013 SCC 72 (CanLII).

<sup>97</sup> *Moriarity*, *supra* note 35 at para 24.

<sup>98</sup> *Ibid* at para 26.

<sup>99</sup> *Ibid* at para 33.

<sup>100</sup> *Ibid* at para 37.

<sup>101</sup> *Ibid* at paras 52-53.

<sup>102</sup> *Ibid* at para 30.

the potential impact on individuals of being exposed to military justice rather than civilian justice.

Therefore the contextual approach as stated by the majority in *Généreux* still prevails. This seems to be the most appropriate approach. It has struck the right balance between the need to enforce human rights with the particular context where those rights have to be embodied. In Canadian military justice, context should not be given too much weight otherwise there is a risk that particular “*traditions, rules and taboos*” might serve as a justification to not comply with the *Charter*. To draw a parallel with how CAF deal with sexual misconduct, underlying organizational cultural norms can never justify to oppose, disregard or play down human rights.<sup>103</sup> Having already turned their mind to the military context, the drafters of the *Charter* created a particular regime as it regards to the right to trial by jury. They did not see the need to do the same for other legal rights. Therefore, those must be given maximum effects in the military justice system. As it was demonstrated by Cormier, there is no explicit or implicit renunciation by service members of their legal rights upon enrollment.<sup>104</sup> Yet the particular context of the CAF cannot be underestimated otherwise efforts to foster *Charter* rights might turn to be inapplicable to military life. In short, military context must give way to law, but law must take military context into account. This approach should govern any legal debate about the constitutionality of the summary proceedings.

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<sup>103</sup> Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, (Ottawa: National Defence, 2015) at 12-13.

<sup>104</sup> Cormier, *supra* note 17 at 232-35.

## ***B. Independence of Adjudicators***

Currently, the main potential challenge to the Canadian summary proceedings is that adjudicators are not sufficiently independent to act fairly. Officers presiding summary trials in particular are part of the very executive branch which has a real interest in the outcome of every case. To a lesser extent the concern could also reasonably be raised in respect of other actors of the summary proceedings system acting in judicial or quasi-judicial capacities such as commanding officers issuing arrest or search warrants, custody review officers of pre-trial custody and reviewing authorities.

Section 11(d) of the *Charter* reads as follows:

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

[...]

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

**11.** Tout inculpé a le droit :

[...]

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

Judicial independence is essential to judicial authority which in turn has among its objectives to ensure "*that governmental power is exercised in accordance with the law.*"<sup>105</sup>

The Supreme Court enunciated the three essential attributes of judicial independence in the landmark decision of *Valente*. First, judges must have security of tenure. They must hold office 'during good behaviour' and can only be removable for cause, after such cause

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<sup>105</sup> *Beauregard v Canada*, 1986 CanLII 24 (SCC), [1986] 2 SCR 56 at 70-73, 30 DLR (4th) 481, 26 CRR 5970 NR 1, [1986] SCJ No 50 (QL).

has been independently reviewed. Judges normally hold their office until retirement, or alternatively for a fixed term or a specific mandate, provided their tenure “*is secure, against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.*”<sup>106</sup> The second essential attribute is the financial security judges must enjoy. In essence, the salary and pension have to be statutorily established so that it is difficult for the Executive to arbitrarily alter judges’ remuneration.<sup>107</sup> In addition, their remuneration and benefits should be sufficient for them to not be subject from pressure by other groups. The third aspect is the institutional independence, which is the degree of freedom a court has in managing administrative matters relating to its judicial function such as determining who the judge would be for a given case, in which court room and in which order cases would be heard.<sup>108</sup> The responsibility for making and paying for travel arrangements for judges should be added to the list. That aspect is particularly relevant in military justice context as trials can be held anywhere in the world the forces are stationed or deployed.

## **1. Presiding Officers**

If they were a constitutional challenge to the current summary trial system, this is where the ‘frontal attack’ would likely come from and has the greater chances to succeed. Presiding officers have the most impact on service members’ rights and liberties. They make determination on the guilt of the accused persons and may impose, in certain circumstances, a sentence up to 30 day detention. In military context, they play a similar

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<sup>106</sup> *Valente, supra* note 79 at para 31.

<sup>107</sup> *Ibid* at para 40.

<sup>108</sup> *Ibid* at paras 47-49.

role to judges of provincial courts having penal/criminal summary jurisdiction. Consequently, they would require a similar level of independence from the executive branch.

CAF officers do not enjoy security of tenure as they are appointed during pleasure<sup>109</sup>, being potentially exposed to release at any time on Governor General's approval.<sup>110</sup> At the same time, they cannot 'resign' on their own motion as they are bound to serve until they are lawfully released by higher authorities.<sup>111</sup> Their career is subject to performance review<sup>112</sup>, and promotion<sup>113</sup> all of those decided ultimately by their superior officers. In the Regular force, they are subject to be posted without their consent.<sup>114</sup> Consequently they lack the necessary protections to decide without fear or expectation of having their career negatively or positively affected. In comparison military judges can resign at any time on notice<sup>115</sup>, can only be removed by the Governor in Council for cause on the recommendation of the Military Judges Inquiry Committee<sup>116</sup>, and do not have to care about their career if their decisions please or displease someone.

Presiding officers do not enjoy financial security as their pay is set by regulations of the Treasury Board<sup>117</sup> as opposed to military judges' pay which can only be modified

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<sup>109</sup> *NDA*, s 20(1).

<sup>110</sup> QR&O, art 15.01 (3)(a).

<sup>111</sup> *NDA*, s 23(1).

<sup>112</sup> QR&O, arts 26.08-26.12; Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 5059-0, *Performance Assessment of Canadian Forces Members*, (Ottawa: National Defence, 24 March 2005) which refers to the Canadian Forces Personnel Appraisal System (CFPAS).

<sup>113</sup> *NDA*, s 28; QR&O, art 12.01.

<sup>114</sup> *NDA*, s 33 (1) which refers to each Regular force member's liability to perform 'any lawful duty'.

<sup>115</sup> *NDA*, s 165.21(5).

<sup>116</sup> *NDA*, ss 165.21(3), 165.31, 165.32.

<sup>117</sup> *NDA*, s 12(3)(c). See Canada, Treasury Board, *Compensation and Benefits Instructions for the Canadian Forces*, ch 204 "Pay of Officers and Non-Commissioned Members" ss 204.20-204.22, online: National Defence and the Canadian Forces <[www.forces.gc.ca/en/about-policies-standards-benefits/toc-ch-204-pay-policy-officers-ncms.page](http://www.forces.gc.ca/en/about-policies-standards-benefits/toc-ch-204-pay-policy-officers-ncms.page)> [CBF].

after an inquiry by a Military Judges Compensation Committee.<sup>118</sup> Finally, presiding officers do not have institutional independence as they are by definition agents of the executive. An officer is essentially “a person who holds Her Majesty’s commission in the Canadian Forces”<sup>119</sup>. Not only are they insufficiently distant from the executive branch but they are part of that very executive branch. Officers become ‘presiding officers’ only in the very specific context of the summary proceeding. Once the trial is done, they are not presiding officers anymore. Military judges are appointed until retirement and belong administratively to the Office of the Chief Military Judge<sup>120</sup> - a distinct unit having its own administrative support managed by the Court Martial Administrator.<sup>121</sup> In contrast there is no specific unit regrouping all presiding officers; their administrative support generally comes from the very same unit they are a part of. From a well-informed and reasonable observer’s perspective presiding officers could not be perceived as independent.

Proponents of the status quo might raise a twofold argument to conclude that there is no breach of the judicial independence: first, presiding officers do not have to be as independent as judges and second, measures have been taken to increase their independence. On the first aspect, they might argue that presiding officers are not much different to provincial justices of the peace – like in the one in Ontario dealing with provincial offences<sup>122</sup> - who do not have all the aspects of judicial independence, are not necessary jurists, and can impose short term imprisonment, sometimes up to six

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<sup>118</sup> *NDA*, ss 165.33 to 165.37.

<sup>119</sup> *NDA*, s 2.

<sup>120</sup> *NDA*, ss 165.24 to 165.3;

<sup>121</sup> QR&O, art 101.17.

<sup>122</sup> See generally *Justices of the Peace Act*, RSO 1990, c J.4; *Provincial Offences Act*, RSO 1990, c P.33.

months.<sup>123</sup> They might rely on *R v Zelinski* where the Superior Court of Ontario was not convinced that “a trial before a non-lawyer JP is inherently unfair simply because a trial before a lawyer JP might be better.”<sup>124</sup>

They might further argue that in *Ell v Alberta* the Supreme Court actually only ruled over a policy choice made by Alberta. In other words, it has not set a constitutional standard for all provincial legal schemes pertaining to justices of the peace and by analogy to CAF summary proceedings’ authorities. They might add that conceptions change over years about what judicial independence minimally entails and “*opinions differ on what is necessary or desirable, or feasible*”<sup>125</sup> that it depends on “*the nature of the court or tribunal and the interests at stake*”<sup>126</sup> suggesting judicial independence similar to provincial judges is desirable but not constitutionally required in military context. On the second aspect, they might argue that rules have been developed over time to protect presiding officers’ role against interventions by superior authority in the proceedings<sup>127</sup>, against their own bias<sup>128</sup> or against legal actions and proceedings for what they do or omit in the execution provided they acted in good faith.<sup>129</sup>

On balance, the arguments raised by proponents of the status quo seem flawed. First, from an individual service member’s point-of-view presiding officers have an analogous impact in terms of exposure to true penal consequences and criminal conviction than a provincial judges having summary jurisdiction, except that the maximal

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<sup>123</sup> Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed (Toronto: Carswell, 2014) at 491-93.

<sup>124</sup> 2011 ONSC 619 (CanLII) at para 21, aff’d 2011 ONCA 593 (CanLII).

<sup>125</sup> *Valente*, supra note 79 at 692.

<sup>126</sup> *Ell*, supra note 70 at para 30.

<sup>127</sup> QR&O, art 108.04.

<sup>128</sup> QR&O, art 108.20(2); 108.27.

<sup>129</sup> *NDA*, s 270.

period of incarceration is only 30 days as opposed to 6 months for a provincial judge. Of course that exposure to potential maximum punishment does not occur in every case. But the non-exposure comes at the price of removing the option from the accused to elect court martial, not to mention that some 'minor' punishment may arguably be considered penal consequences anyway. Even if we were to characterize presiding officers as being conceptually closer to justices of the peace in Ontario, it does not assist the proponents of the status quo as in that system the accused is represented by counsel, trials are fully recorded and there is an appeal before a judge. On the second aspect, the rules in place to protect presiding officers' role in conducting summary trials are simply insufficient to counter-act the systemic problems that have been previously identified; they do not intrinsically change the very essence of presiding officers who remain part of the chain-of-command of the organization which has a real interest in the outcome of the cases. As an example, the Chief of the Defence Staff issued the operational order *Operation Honour* in reaction to the Deschamps Report on sexual misconduct in the CAF.<sup>130</sup> All presiding officers are subject to this order which would influence presiding officers in dealing with offences related to sexual misconduct.

A well-informed and reasonable observer, comparing a presiding officer with a judge would determine that the former does not enjoy sufficient freedom of action to decide a case either way. There is a reasonable perception that presiding officers might be concerned by the impact of their decisions on their own careers, despite the oath taken at the beginning of the trial and irrespective of whether they are in fact influenced or not.

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<sup>130</sup> Canada, National Defence, "CDS Op Order – Op HONOUR (August 2015), online: National Defence and Canadian Armed Forces <[www.forces.gc.ca/en/caf-community-support-services/cds-operation-order-op-honour.page](http://www.forces.gc.ca/en/caf-community-support-services/cds-operation-order-op-honour.page)>.

Therefore, a court looking at the statutory and regulatory scheme applicable to presiding officers would likely conclude that they fail to meet all of the standards identified in *Valente*, in breach of section 11(d) of the *Charter*.

## 2. Other judicial or quasi-judicial functions

As we saw, judicial independence applies primarily to presiding officers as they decide on the merits of each case. However it goes beyond that role depending on the individual interest at stake. In *Ell* Supreme Court decided that judicial independence applies to justices of the peace as their “*serve on the front line of the criminal justice process, and performed numerous judicial functions that significantly affected the rights and liberties of individuals.*”<sup>131</sup> In Canadian military penal law, in addition to presiding officers such functions are performed by commanding officers when they issue arrest and search warrants, by custody review officers and by reviewing authorities.

Proponents of the status quo might object that these functions constitutionally require a lower level of protection as they do not, like civilian justices of the peace issuing search warrants, decide on the merits of the case. However such contention was discarded in *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges’ Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Quebec (Attorney General)*; *Minc v. Quebec (Attorney General)* where the Supreme Court referring to *Ell* stated that “*Justices of the Peace in Alberta exercise an important judicial role. Their function has expanded over*

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<sup>131</sup> *Ell*, *supra* note 70 at 871.

*the years and requires constitutional protection.”*<sup>132</sup> That view was confirmed by the Quebec Court of Appeal in *R v Pomerleau* where searches authorized by non-judicially independent and non-legally trained justices of the peace were declared illegal.<sup>133</sup>

When commanding officers issue search warrants<sup>134</sup> they act judicially and consequently have to be independent. In the 1984 decision *Hunter v Southam Inc.* the Supreme Court established as one of the constitutional standards for search warrants that the person issuing it to assess the situations “*in an entirely neutral and impartial manner.*”<sup>135</sup> At that time, the Court ruled that the individual does not have necessarily to be a judge but must be at least “*capable of acting judicially.*”<sup>136</sup> Like justices of the peace in *Ell*, commanding officers acting in such capacity “*impact upon the right to be secure from unreasonable search and seizure under s 8 of the Charter.*”<sup>137</sup> They play an important role in military justice in being “*the very person who stands between the individual and the arbitrary exercise of power by the state or its officials.*”<sup>138</sup> Furthermore, in comparison with justices of the peace, commanding officers have a more delicate balanced to reach in that regard. The meaning of ‘private premises’ in military context might be often narrowly construed by military authorities. Some might perceive that individuals voluntarily entering on military establishments have somewhat relinquished their reasonable expectation of privacy. Yet service members’ privacy does not disappear. In comparison with the average citizen, their respective ‘private premise’ is relatively smaller

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<sup>132</sup> [2005] 2 SCR 286, 2005 SCC 44 (CanLII) at para 121 [*Bodner*].

<sup>133</sup> [2004] RJQ 83 (QCCA), 2003 CanLII 33471 (QC CA) at para 3, JE 2004-219 [*Pomerleau*].

<sup>134</sup> *NDA*, ss 273.3 to 273.5; QR&O, arts 106.04 to 106.09.

<sup>135</sup> [1984] 2 SCR 145, 1984 CanLII 33 at para 32, (1984) 41 CR (3d) 97 (SCC) [*Hunter*].

<sup>136</sup> *Ibid.* See Stuart, *supra* note 123 at 291-92.

<sup>137</sup> *Hunter*, *supra* note 135 at para 25 referring to *Baron v Canada*, [1993] 1 SCR 416 at 444-45, 1993 CanLII 154 (SCC).

<sup>138</sup> *Hunter*, *ibid* at para 26.

making it even more important for them, particularly where they live on base or are on operational deployments either on land or at sea.<sup>139</sup>

Professor Stuart explained that in *Hunter* the fact that the body issuing the search warrant also had an investigative role “*vitiating its ability to act in a judicial capacity and did not accord with the neutrality and detachment necessary to balance the interests involved.*”<sup>140</sup> The same can be said about commanding officers in military law; from a strict regulatory standpoint they can conduct the investigation and issue search warrants. In practice however, those officers usually refrain from investigating and issuing search warrants as they do not want to preclude themselves from hearing the case later, should it come to that point.<sup>141</sup> Yet even though they do not conduct investigations, the potential for lack of structural distance from the interests at stake makes the issuance of search warrants problematic. For example in the context of justices of the peace, the Saskatchewan Court of Appeal in *R v Baylis* determined that there was a reasonable apprehension of bias as there was a real danger that the decision maker - who was also a law enforcement agent – would act with partiality.<sup>142</sup> Commanding officers are by definition agents of the executive branch of the State. A reasonably informed person would conclude that even with the best intentions, irrespective of their training and even if they consult a legal advisor, commanding officers can hardly detach themselves from their official duties to solely act as an objective broker between interests’ of the State and those of the individual in determining if a search warrant should be issued or not. Applying

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<sup>139</sup> See for example *R v Adams*, 2012 CM 2002 (CanLII) at para 12.

<sup>140</sup> Stuart, *supra* note 123 at 322.

<sup>141</sup> *NDA*, s 163(2); QR&O, art 108.09.

<sup>142</sup> 1988 CanLII 5166 (SK CA), 65 CR (3d) 62 at paras 37-54.

that standard, a court would likely be of the opinion that commanding officers cannot act judicially or quasi-judicially at that stage and that any search warrant issued under those conditions would be ‘unreasonable’ generally speaking and evidence so gathered must be excluded under section 24(2) of the *Charter*. However, a court would likely give more leeway in situations where the CAF are located in settings where ordinary judicial resources are not readily available or simply without jurisdiction, such as during deployments overseas. Interestingly, it is telling that a similar line has been drawn in military justice training doctrine so that in Canada “*investigators will normally seek the search warrant from a civilian judicial authority*” using military search warrants “*outside Canada while deployed at sea or on operations.*”<sup>143</sup>

Similarly, commanding officers and delegated officers issuing arrest warrants act judicially and consequently require some degree of independence.<sup>144</sup> Although as explained in Chapter II it is uncommon in a summary proceedings context, putting under arrest has consequences on someone’s liberty and security. It involves some form of coercion from a State agent over an individual in carrying out arrest, including the use of force where reasonably necessary.<sup>145</sup> In some circumstances, it may result in the person being retained in custody although individuals arrested would normally be released as soon as practicable.<sup>146</sup> Service members can be put under arrest when they have committed, are charged with having committed or are believed ‘on reasonable grounds’ to have committed a service offence.<sup>147</sup> In addition, officers cannot issue an arrest warrant

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<sup>143</sup> *MJSTL*, *supra* note 32 ch 5 at para 36.

<sup>144</sup> *NDA*, s 157; QR&O, art 105.05.

<sup>145</sup> *NDA*, s 154(2); QR&O, art 105.09.

<sup>146</sup> *NDA*, s 158(1). See for example *R v Weldam-Lemire*, 2011 CM 4017 (CanLII) at paras 4-9.

<sup>147</sup> *NDA*, s 157(1).

for any officer of higher rank than theirs, unless ‘the exigencies of the service so require.’<sup>148</sup> Before issuing arrest warrants, commanding officers and delegated officers have to balance competing interests between the State and individuals, which requires them to act judicially and therefore with a certain degree of independence. In *R v Levi-Gould* the military judge, Commander Pelletier, ruled that although commanding officers and delegated officers do not require the same judicial independence as judges or justices of the peace as in *Ell*, they nevertheless require “the capacity to act as a truly neutral and detached arbiter”.<sup>149</sup>

Custody review officers (CRO) would also need to be independent to some extent. They determine, although rarely in summary trial context, if individuals would be released (with or without conditions) before trial or if they would be detained until a military judge conduct a review as soon as practicable after CRO’s decision. Individuals’ liberty interests are engaged. Reading the legislation strongly suggests CROs have to act judicially.<sup>150</sup>

This is indeed the conclusion Commander Martin Pelletier, military judge, came to in *R v Caicedo*.<sup>151</sup> But interestingly, he qualified those judicial functions as being “limited” in military context in comparison to justices of the peace – who can preside over bail hearings.<sup>152</sup> He determined that there was “fundamental difference between the roles of” the two institutions as the “fundamental role of justices of the peace is to assist courts in performing judicial duties” and “notably as it pertains to preservation of the constitutional

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<sup>148</sup> *NDA*, s 157(2). As an example, one of those ‘exigencies of the service’ would be if no other officer of higher rank could reasonably be made available in the area in time.

<sup>149</sup> *R v Levi-Gould*, 2016 CM 4002 (CanLII) at paras 23-26 [*Levi-Gould*].

<sup>150</sup> *NDA*, ss 158.2-158.6; QR&O, arts 105.18 to 105.23.

<sup>151</sup> 2015 CM 2018 (CanLII) at paras 42 and 46 [*Caicedo*].

<sup>152</sup> *Ibid* at paras 38-40.

order and the requirement to uphold the public's confidence in the administration of justice."<sup>153</sup> In Cdr Pelletier's eyes, CROs and authorities reviewing their decisions are different as they are under the *NDA*, "not in direct support of the courts or the judiciary", and their roles stand on their own.<sup>154</sup> For him, military officers exercising judicial roles that may involve deprivation of liberty – such as summary trial presiding officers - has been recognized by the Supreme Court in *MacKay*.<sup>155</sup>

At first glance, Cdr Pelletier's differentiation based on the specific military context is rather artificial. He might have been concerned that concluding CROs needed judicial independence would logically lead him to conclude that they require its three core characteristics: security of tenure, financial security and administrative independence. However, the conclusion he made in *Levi-Gould* on the requirement for officers "to act as a truly neutral and detached arbiter" should have been the same in *Caicedo*. Acting judicially and judicial independence or at least being a 'truly neutral and detached arbiter' are two sides of the same coin. From a reasonable observer's standpoint, an individual can be released under very stringent conditions pending trial by the CRO. If not released, it can take several days before a military judge could conduct a review hearing. Even though CROs do not exercise identical functions as judges or justices of the peace as in *Ell* or *Pomerleau*, they can "impact upon the right to security of the person under section 7 of the Charter and the right not to be denied reasonable bail without just cause under section 11(e)."<sup>156</sup> If we look at the grounds CROs may consider prior making their

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<sup>153</sup> *Ibid* at para 43 citing *Ell*, *supra* note 70 at para 26.

<sup>154</sup> *Ibid* at para 44.

<sup>155</sup> *Ibid* quoting McIntyre J. in *MacKay*, *supra* note 75 at 402.

<sup>156</sup> *Ell*, *supra* note 70 at para 24.

decision<sup>157</sup>, those are analog to those a justice of the peace may take into account.<sup>158</sup> They are both points of entry of their respective systems in controlling if police officers were right in detaining individuals. To that extent CROs and justices of the peace have a similar function which is to “stand between the individual and the arbitrary exercise of power by the state or its officials”.<sup>159</sup> They both must act as “truly neutral and detached arbiter”.<sup>160</sup> In all fairness to Cdr Pelletier, his conclusion in *Levi-Gould* came after *Caicedo* so his position might have evolved in between.

The fact that CROs decisions are reviewable either by the chain of command or by a military judge<sup>161</sup> is relevant under a section 1 of the *Charter* analysis. This is where

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<sup>157</sup> *NDA*, s 158.2(2) reads as follows:

(2) After reviewing the report of custody and the accompanying documents, the custody review officer shall direct that the person committed to custody be released immediately unless the officer believes on reasonable grounds that it is necessary that the person be retained in custody, having regard to all the circumstances, including those set out in subsection 158(1).

As for the factors to be considered, s 158(1) reads as follows:

A person arrested under this Act shall, as soon as is practicable, be released from custody by the person making the arrest, unless the person making the arrest believes on reasonable grounds that it is necessary that the person under arrest be retained in custody having regard to all the circumstances, including

- (a) the gravity of the offence alleged to have been committed;
- (b) the need to establish the identity of the person under arrest;
- (c) the need to secure or preserve evidence of or relating to the offence alleged to have been committed;
- (d) the need to ensure that the person under arrest will appear before a service tribunal or civil court to be dealt with according to law;
- (e) the need to prevent the continuation or repetition of the offence alleged to have been committed or the commission of any other offence; and
- (f) the necessity to ensure the safety of the person under arrest or any other person.

<sup>158</sup> *Criminal Code*, s 515(10).

<sup>159</sup> *Ell*, *supra* note 70 at para 26.

<sup>160</sup> *Levi-Gould*, *supra* note 149 at para 23.

<sup>161</sup> *NDA*, s 159. Bill C-15, see Chapter II, Part A.2, *above*, amends *NDA* by adding s 153.7 to also give to the military judge the power to review the release conditions.

military context should be more appropriately considered in assessing what the reasonable alternatives to the CRO scheme are. Even in concluding that CRO breaches judicial independence, a court might be more tolerant as to the attributes of such independence considering the CAF are often deployed in theatre of operations where Canadian ordinary judicial system has no jurisdiction or is not readily available. Indeed when the CAF are abroad, the alternative would be to rely on host nation's judicial resources which are unknown to Canadians and often of a substantially different legal tradition, if those resources are available.

In light of *Ell*, *Bodner*, *Pomerleau*, and *Levi-Gould* reviewing authorities also require some degree of independence as they act judicially. As we saw in Chapter II, although they do not conduct hearings, they can review summary trials either on offenders' request<sup>162</sup> or on their own initiative.<sup>163</sup> They may have to weigh State's and individuals' competing interests in considering reviews. They make determinations that expose offenders to potential deprivation of liberty and security of the person, for example by confirming detention initially awarded at summary trial hence terminating its suspension pending review and causing the offender to be taken into custody.<sup>164</sup> Even when findings are wholly quashed by review authorities, individuals are still exposed to such deprivation as "*the person who had been found guilty may be tried as if no previous trial had been held.*"<sup>165</sup> A court would likely conclude that review authorities exercise a 'judicial role'. Yet review authorities are still CAF officers.<sup>166</sup> From a judicial independence

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<sup>162</sup> *NDA*, s 249(1); QR&O, art 108.45.

<sup>163</sup> *NDA*, s 249(1); QR&O, art 116.02.

<sup>164</sup> QR&O, art 108.20(17.1).

<sup>165</sup> *NDA*, s 249.11(2). See for example, *Thompson v R*, CMAC 515, 2009 CMAC 8 (CanLII) at para 31.

<sup>166</sup> QR&O, art 116.02(2)(3).

perspective, they are in a similar position than summary trial presiding officers as they are integral part of the military chain-of-command except they are usually of higher rank. A reasonably informed person would conclude that reviewing authorities could not act as an independent guardian between individuals and the State.

On balance, the risk is high that court would conclude that all actors having an adjudicative role at various points of the summary proceedings, and more particularly in presiding trials, act judicially and either breach judicial independence or do not have the capacity to act as “truly neutral and detached arbiter” as their functions are too close to the organization.

### ***C. Absence of Transcript***

In penal matters, accurate transcript is essential to ensure a fair process. Of course as put by the Supreme Court, not every gap in the transcript would justify a new trial. The Court would only intervene if there is “*a serious possibility that there was an error in the missing portion of the transcript, or that the omission deprived the appellant of a ground of appeal*”.<sup>167</sup> Logically, in absence of such transcript, there cannot be any meaningful right of appeal.<sup>168</sup> This is all the more relevant where accused persons do not enjoy all the procedural safeguards of an ordinary criminal trial before a judge.<sup>169</sup>

In military justice context, the fact that there is no transcript of the proceedings, including written reasons from the decision-maker, diminishes offenders’ ability to fully

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<sup>167</sup> *R v Hayes*, [1989] 1 SCR 44, 1989 CanLII 108 (SCC).

<sup>168</sup> *R v Ovided*, 2008 ONCJ 317 (CanLII), at paras 3, 48.

<sup>169</sup> *Ibid* at para 2.

know the case they have to meet for review, impeding their right to make a full answer and defence pursuant to section 7 of the *Charter*. In other words, it “*makes a review of a guilty verdict random and difficult*”<sup>170</sup>. Some might reply that in putting a request for review, an offender would obtain from the presiding officer “his or her comments concerning the request to the review authority.”<sup>171</sup> However, concerns could be raised about those comments. First they do not constitute a verbatim of what occurred during the summary trial. In *The Queen v Wright* a captain was acquitted during a court martial of having submitted fabricated evidence, namely e-mails, during a prior summary trial – where he was acquitted - in response to a different charge. During the trial in court martial, those emails were excluded by the military judge because section 8 *Charter* was violated. Prosecution appealed arguing there was no breach and that if there was the evidence should not have been excluded. To assess prosecution’s claim, CMAC had to first look at what transpired during the summary trial including the initial e-mails. However, in absence of a written decision and a transcript of the proceedings, Justice Saunders stated for the majority of the Court that he was left with “*abbreviated notes presumably prepared*” by Col Irvine, the presiding officer.<sup>172</sup> He further stated that from those notes “*we get a good appreciation for his reasons in acquitting Capt Wright.*”<sup>173</sup> Yet, he made the following comment:

At this point I want to elaborate on my deliberate reference to the “evidence” before Col Irvine. I have intentionally put the word “evidence” in quotation marks. Without a verbatim transcript of the proceeding, or even a list of “witnesses” who appeared at the summary trial, it is impossible to say in fact, or with any confidence who appeared; whether

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<sup>170</sup> Gilles Létourneau, *Introduction to Military Justice: an Overview of Military Penal Justice System and Its Evolution in Canada* (Montréal: Wilson & Lafleur, 2012) at 36.

<sup>171</sup> QR&O, art 108.45(6).

<sup>172</sup> *The Queen v Wright*, CMAC-562, 2014 CMAC 4 (CanLII) at para 34.

<sup>173</sup> *Ibid* at para 36.

any “evidence” was actually proffered (and if so by whom); what exactly was declared by Col Irvine to be admissible; or whether any individuals actually gave evidence under oath.<sup>174</sup>

Another concern with presiding officers’ comments is that they are written after presiding officers know their decisions have been challenged, which “*enables the person who handed down the guilty verdict to justify his decision.*”<sup>175</sup> By analogy with the situation of a police officer reporting what happened when his professional conduct is under scrutiny, there is a risk that the presiding officer’s notes instead of being an “*accurate, detailed, and comprehensive*” recollection of what occurred during the summary trial will become a justification exercise to a superior officer as to why he or she made that decision.<sup>176</sup> A court would likely conclude that the absence in the regulations of any requirement to have transcript of what was actually said during summary trials makes it difficult even impossible to exercise genuine and precise legal oversight, which has a negative impact on the overall fairness of the process protected by section 7 of the *Charter*. With the technological means reasonably available today, it would be difficult to convince a court that requiring accurate recording of summary proceedings as a default rule – unless impracticable due to operational circumstances - would impose too much of a burden to the good administration of the military justice system.

#### ***D. Equality: Rank-Based Justice***

In the particular context of the case of *Généreux* it was determined that military status – in comparison with civilian one - does not in itself constitute discrimination within

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<sup>174</sup> *Ibid* at para 37.

<sup>175</sup> Létourneau, *supra* note 170 at 36.

<sup>176</sup> *Wood v Schaeffer*, [2013] 3 SCR 1053, 2013 SCC 71 (CanLII) at para 8.

the meaning of section 15 of the *Charter*.<sup>177</sup> In absence of evidence and unless a constitutional claim cannot be dealt with through other sections of *Charter* pertaining to legal rights, it is very unlikely that a court would embark on such an analysis. However discrimination can result from the differential treatment within a group. In military justice context, service members of lower ranks are dealt with differently than those of higher ranks. Is this differential treatment among service members against the equality before the law?

Supreme Court analytical framework of a section 15(1) challenge has varied over the past 30 years.<sup>178</sup> Arising from complex situations, discriminations issues usually generate divided and controversial decisions as to what the test to determine substantive equality should be. As a result, state of the law is uncertain. Having said that as it stands today, the current controlling test for section 15(1) is drawn from *Quebec (Attorney General) v A*<sup>179</sup> a case not related to criminal matters commonly referred to as 'Eric v Lola'. Writing for a majority of five judges, Abella J referred first to the test which has evolved from previous case law.<sup>180</sup> In summary, she wrote that ultimately the test lies in one question: "Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"<sup>181</sup> To help answer that question, prejudice and stereotyping against a group are relevant although not a requirement.<sup>182</sup> For Justice Abella, what matters after

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<sup>177</sup> *Généreux*, *supra* note 34 at 310-11.

<sup>178</sup> See generally Stuart, *supra* note 123 at 574-596.

<sup>179</sup> [2013] 1 SCR 61, 2013 SCC 5 (CanLII) [*Eric v Lola*].

<sup>180</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2 (SCC); *R v Kapp*, [2008] 2 SCR 483, 2008 SCC 41 (CanLII); *Withler*, *supra* note 73.

<sup>181</sup> *Eric v Lola*, *supra* note 179 at para 325.

<sup>182</sup> *Ibid* at paras 325-27.

all is the “discriminatory *conduct* that s. 15 seeks to prevent, not the underlying attitude or motive.”<sup>183</sup>

Applying that approach to summary proceedings, the differences in treatment between lower and higher ranks are substantial in the legislation. A comparative table is provided at Appendix B. For example, legal advice prior laying a charge is not required for alleged minor offences where accused persons are of the lowest ranks and there is no election or mandatory commitment to court martial otherwise.<sup>184</sup> Similarly, pre-trial legal advice is not mandatory where the accused has been charged with a minor offence which does not carry the right to elect court martial.<sup>185</sup>

Another main difference of treatment pertains to the exposure to potential punishments. While accused persons of lower ranks are potentially exposed to detention, reduction in rank and confinement to ship or barracks, those of higher ranks can only be awarded severe reprimand, reprimand and a fine up to 60% of their monthly pay, the first two having no other practical impact than being an entry on the conduct sheet which may or may not affect career progression.<sup>186</sup> Once in force, the amendment in Bill C-15 which would clarify that a conviction of any of a list of service offences is not a criminal offence for the purpose of the *Criminal Records Act* would not apply to detention and reduction in rank.<sup>187</sup> In other words, for the same offence, lower rank service members detained or

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<sup>183</sup> *Ibid* at para 328.

<sup>184</sup> QR&O, art 107.03 (1) (b) *a contrario*. Those ranks are Private/Ordinary and Able Seaman/Aviator, Corporal/Leading Seaman, Master Corporal/Master Seaman, Sergeant/Petty Officer 2nd Class.

<sup>185</sup> QR&O, art 107.11(1) (b) *a contrario*.

<sup>186</sup> Gilles Létourneau & Michel W Drapeau, *Military Justice in Action : Annotated Defence Legislation*, 2nd ed (Toronto : Carswell, 2015) at 390 [*Létourneau & Drapeau*].

<sup>187</sup> Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 41st Parl, 2013 (assented to 19 June 2013), SC 2013, c 24 [*Bill C-15*] cl 75 adding NDA s 249.27.

reduced in rank would have a criminal record while those of higher rank sentenced to severe reprimand, reprimand or a fine would not.

Some would say that such perception has to be nuanced as the vast majority of cases are dealt with by delegated officers, having no jurisdiction on ordinary criminal law offences and who cannot impose detention and reduction in rank as a punishment.<sup>188</sup> Yet in those situations delegated officers could impose confinement to ship or barracks up to 14 days, sometimes without any pre-charge or pre-trial legal advices, and without any obligation for review authorities to suspend the carrying into effect of the punishment of confinement pending the completion of the review should offenders disagree with the outcome.

Therefore, there is a differential treatment based on rank in Canadian military penal law at summary proceedings level. Obviously, rank is not among the enumerated grounds of discrimination of section 15(1) of the *Charter*. But could it be analogous to them? This is the crux of the matter here as it pertains to section 15. In *Corbiere v Canada (Minister of Indian & Northern Affairs)* Justices McLachlin (as she then was) and Bastarache circumscribe the concept of ‘analogous ground’:

“What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of

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<sup>188</sup> According to Canada, National Defence, *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 1 April 2009 to 31 March 2010*, (Ottawa: OJAG, 2010) [JAG Annual Report 2009-10] at 102, 81% of summary trials held where presided by delegated officers, 15% by commanding officers and 4% by superior commanders.

merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* [*Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497] analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.”[Reference added]<sup>189</sup>

In military context, differentiation by rank is a positive aspect generally speaking. It is an integral part of the service member’s identity.<sup>190</sup> It reflects the very hierarchical nature of the military organization for mission accomplishment. Rank “*visibly denote responsibility, authority and specialized expertise, and in such traditions as separate messing and marks of respect.*”<sup>191</sup>

Having said that, rank is a “*characteristic difficult to change, or changeable only at unacceptable personal cost*”.<sup>192</sup> Service members do not choose their rank; it is attributed to them providing they meet required standards. It could only be changed by operation of the law, with chain-of-command’s approval, depending on various factors and processes which service members have reduced influence over.<sup>193</sup> In military justice context,

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<sup>189</sup> [1999] 2 SCR 203, 1999 CanLII 687 (SCC) at para 13 [*Corbiere*].

<sup>190</sup> QR&O, art 3.01 “Ranks and Designations of Rank”; Canada, National Defence, *Duty with Honour*, 2009, A-PA-005-000/AP-001 (Kingston: Canadian Defence Academy, 2009) at 55 [*Duty with Honour*].

<sup>191</sup> *Ibid* at 21.

<sup>192</sup> *Corbiere*, *supra* note 189 at para 60.

<sup>193</sup> A service member can be promoted (QR&O, arts 11.01, 11.02, 12.01, 14.01) or reduced in rank (*NDA*, s 143; QR&O, art 104.10). A competent authority may revert a non-commissioned member to a lower rank for inefficiency (QR&O, art 11.10(2)(a)). In specific circumstances, service members could relinquish their ranks (QR&O, art 11.12).

accused persons cannot suddenly get promoted or relinquish a rank to make vary the rules applicable to them. Quite the contrary, the fact of being charged almost invariably puts career on hold.

A service member of a lower rank anticipating a summary trial, might request release to become a civilian, in expectation that military authorities would then lose interest in prosecuting him or her, as summary trials does not have jurisdiction over civilians. However it is a faint hope. Release might not be approved as it cannot serve to avoid the consequences of misconduct.<sup>194</sup> Even if released, the service member would be still under the jurisdiction of a potential court martial. Even if military authorities lose interest in prosecuting after release, removing the negative consequences of holding a lower rank would have been at the price of a military career. Furthermore, not having challenged charges may translate in having a negative item of release that impedes the individual's chances in seeking future employment. Therefore, rank in summary trial context is constructively immutable.

This distinction in summary military justice disadvantaging lower ranks perpetuates a conduct against a group that has been historically discriminated in comparison with another one within the same organization: service members who on average are younger, have lower income and are less educated than those of higher ranks.<sup>195</sup> Some may justify the distinction by drawing a parallel with *Kahkewistahaw First Nation v Taypotat*, where education was not recognized as an 'analogous ground'. In that case, the chief of a First

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<sup>194</sup> See for example QR&O, art 15.18(3).

<sup>195</sup> On age and education differences between officers and non-commissioned members, see generally Statistics Canada, *A Profile of the Canadian Forces*, by Jungwee Park, Catalogue No 75-001-X (Ottawa: Statistics Canada, July 2008) at 18. On income differences, see generally *CBI*, *supra* note 117, ch 204.

Nation band, claimed that a new Grade 12 education requirement for candidate to be elected chief violated his equality rights under section 15(1) of the *Charter* as he had only Grade 10 education. The Supreme Court acknowledged that “*education requirements may well be a proxy for, or mask, a discriminatory impact*” but it concluded that, in that case, there was no “*evidence linking the requirement to a disparate impact on members of an enumerated or analogous group.*”<sup>196</sup>

The situation of Mr. Taypotat cannot be compared with the one of a service member of lower rank facing summary trial. First of all, what is at stake in each case is not of the same degree. In *Taypotat*, it is the ineligibility to be elected as a chief of a First Nation band. In the summary trial system, it is a lower degree of procedural safeguards while facing greater penal consequences. Although the first is important for the democratic life, the second is directly linked to fundamental legal rights protecting individuals against State action. In addition, there is a legitimate link between the level of responsibilities of an elected office and the necessary level of education to exercise them. In contrast, there is no apparent rationale to vary penal law due to the sole fact that an individual holds a particular rank within an organization.

In order to better illustrate, we could compare with the academic world. Of course there are differences of treatment (income, benefits, and privileges) between a full professor, an assistant professor and a lecturer. Those distinctions are legitimately based on seniority, education, and level of responsibility. But if a student were to put a sexual harassment complaint, it would be inappropriate to expose the lecturer to a different

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<sup>196</sup> *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548, 2015 SCC 30 (CanLII) at para 13 [*Taypotat*].

process with more serious disciplinary sanctions and less procedural safeguards than for the assistant professor or the full professor on the sole basis of academic rank.

Again, the differentiation between ranks in summary military justice has a concrete negative impact. From lower rank service members' perspective, it is a disadvantage as the absence of requirement for pre-charge legal advice in some instances potentially puts those individuals more exposed to vexatious complaints and unsubstantiated charge. In those cases where no legal advice has been obtained, presiding officers might be objectively less sure about their duties than those who have such an advice. In addition, the absence of pre-trial legal advice potentially reduces presiding officer's accountability; presiding officers who disagree with the unit legal adviser must state their reasons in writing and provide their reasons to both their legal officer and to their superior officer in matters of discipline.<sup>197</sup> If no legal advice is sought, there is no need to justify going against it. In case where there are errors resulting for the absence of pre-charge and pre-trial legal advice, only post-trial monthly review by commanding officer on legal officer's advice could fix them, assuming they are apparent on the face of the record. The fact that in practice many CAF units have a policy that prior laying charges legal advice must be sought irrespective of the rank may be indicative that the distinction is obsolete.<sup>198</sup>

If we add to that that, since recent amendment to *National Defence Act*, detention and reduction in rank would create a record while all punishments for higher ranks would not, accused members of lower ranks are more exposed to true penal consequences. Some might oppose that for the same type of offences, services members of higher ranks

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<sup>197</sup> QR&O, art 107.11(2).

<sup>198</sup> See Chapter II, Part B.3, *above*, for more on this topic.

are facing higher consequences as their cases are ‘elevated’ to ‘superior commander’ level and even often to court-martial. As explained in Chapter II, superior commanders have fewer powers to impose true penal consequences. Moreover for a similar electable offence allegedly committed by a service member of higher rank, court-martial is not automatic. On the disparity, training doctrine manual explains that: “*Since detention cannot be imposed on commissioned officers, any offence committed by an officer that warrants a loss of liberty should be dealt with by a court martial*” [emphasis added].<sup>199</sup>

For example, in a case where it is alleged that a service member had a conduct to the prejudice of good order and discipline for having used cannabis contrary to regulations, lower rank service members would likely be charged. In particular, the ‘reasonable prospect of conviction’ criteria is assessed as if they were tried by summary trial, where evidence rules are less stringent in comparison with those applicable in a court martial.<sup>200</sup> When charged, they would be given a choice between summary trial and court martial. If they chose summary trial, the risk of being convicted and sentenced to detention is high.

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<sup>199</sup> See for example *MJSTL*, *supra* note 32 ch 14 at para 29, n 24.

<sup>200</sup> Canada, National Defence, Judge Advocate General, Policy Directive # 010/00 “Charge Screening Policy”, (Ottawa: OJAG, 2000, updated 2009) at paras 14-16. Paras 15 and 16 read as follows:

15. If the pre-charge review of the evidence reveals that the potential offence or offences would be ones that could be tried by summary trial, with or without an election, the review shall be conducted with a view of establishing the reasonable prospect of conviction on the basis of the evidentiary standard applicable at summary trial only.

16. If the pre-charge review of the evidence reveals that the potential charge or charges can only be tried by Court Martial (CM)), the legal officer shall at the first instance refrain from giving legal advice and refer the case to a Regional Military Prosecutor (RMP) for that region. The RMP will be responsible to conduct the pre-charge review using the evidentiary standard applicable at court martial. Once completed, the RMP review will be forwarded to the legal officer for use in giving pre-charge advice to the charge laying authority.

Where higher rank service members are charged with the same offence, they will also be given option between summary trial and court martial, unless the presiding officer is of the view that in the circumstances – which may include the higher rank of the accused – his or her punishment powers are insufficient. If they go before a superior commander, detention is simply not available. If the case is sent to court martial either by accused's choice or directly, a regional military prosecutor will review the file and will consider if there is a reasonable prospect of conviction for the matter to proceed to trial by court martial<sup>201</sup> and if it is in the public interest to proceed.<sup>202</sup> At that point, “Reasonable prospect of conviction” is assessed as if the case would go to court martial, where evidence rules are more rigorous. Then the matters can stop there if the prosecutor is of the view that for example a bodily sample or an incriminatory statement were not taken correctly. If charges are preferred, trial held and individuals found guilty of drug use, offenders have been usually fined by courts martial.<sup>203</sup> In some cases prosecution and defence have recommended suspended custodial sentences.<sup>204</sup> Only in the notable case of *R v St-Onge* was an ex-private awarded 30 days of a custodial punishment – namely imprisonment - after having admitted to the military police that he used drugs throughout a period of 28 months.<sup>205</sup>

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<sup>201</sup> Canada, National Defence, Director of Military Prosecutions, Policy Directive # 003/00 “Post-Charge Review”, (Ottawa: OJAG, 2000, updated 2016) at paras 4, 19-23 online: National Defence and Canadian Armed Forces <[www.forces.gc.ca/en/about-policies-standards-legal/post-charge-review.page](http://www.forces.gc.ca/en/about-policies-standards-legal/post-charge-review.page)>.

<sup>202</sup> *Ibid* at paras 4, 24-30.

<sup>203</sup> *R v Captain Racine*, 2014 CM 1011 (CanLII); *R v Petty Officer 1st Class Canning*, 2012 CM 4018 (CanLII); *R v Officer Cadet Maheu*, 2008 CM 1014 (CanLII); *R v Private Johnstone*, 2007 CM 4007 (CanLII); *R v Private Fletcher*, 2007 CM 4001 (CanLII); *R v Corporal Benedetti*, 2013 CM 2009 (CanLII).

<sup>204</sup> *R v Ex-Ordinary Seaman Labrie*, 2008 CM 1013 (CanLII); *R v Private Desrosiers*, 2009 CM 3006 (CanLII).

<sup>205</sup> [2011] 1 SCR 625, 2011 SCC 16 (CanLII), rev'g 2010 CMAJ 7 (CanLII), [2010] CMAJ No 7 (QL), 2010 CarswellNat 4985, aff'g 2008 CM 3012 (CanLII), 2008 CarswellNat 3475 at para 12 b. *iv*.

Even when officers of higher rank are directly sent to court martial because of absence of summary jurisdiction, they might end up having more leverage in diminishing the potential negative consequences than if they had been tried by summary trial. Consider for example the case of *R v Miller* where a Lieutenant-Colonel found guilty of having improperly worn medals, ribbons and decorations was sentenced to a severe reprimand and a fine of \$5,000 following a joint submission by counsel. Although the military judge indicated he would have considered awarding reduction in rank<sup>206</sup>, he was bound by the rule that unless the joint submission “is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest”, a court should not depart from it.<sup>207</sup> Service members facing summary trial do not have that bargaining power.

Such distinction seems to perpetuate an historical prejudice against a ‘lower’ social class. It is difficult to see any modern rationale to such a differentiation in the administration of justice. In his 2003 report on the *NDA*, Lamer CJ had also no clue as to why legal advice were mandatory prior to charging service members of higher rank only.<sup>208</sup> It can be reasonably inferred that it is a reminiscence of the historical classification of society that was mirrored in the military organization. At that time it may well be that rank-based justice – either in military or civilian society - was more socially acceptable. But in 2016 Canada where social mobility is higher than during the British Empire era that

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<sup>206</sup> *R v Miller*, 2014 CM 2018 (CanLII) at para 18.

<sup>207</sup> *Ibid* at para 15 referring to *R v Private Chadwick Taylor*, 2008 CMAC 1 (CanLII).

<sup>208</sup> First Independent Review by the Right Honorable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, *An Act to amend the National Defense Act and to make consequential amendments to other Acts*, as required under section 96 of the Statutes of Canada 1998, c 35, (September 2003) at 72 [*Lamer Report*].

is hard to sell. From a purely economic standpoint, some might also say that there is still a legitimate need for an organization to take additional measure to preserve the arguably more educated, experienced, and high-costs human resources, especially if a large-scale conflict were to occur. However as put by Abella J the discriminatory conduct matters, not necessarily its motive. In a military organization where all CAF members of all ranks are considered members of the 'profession of arms'<sup>209</sup> it is legally doubtful to advance that the different degree of responsibility between ranks command such a differentiation in the application of penal law. Besides in the regulations, two notes affirm that equal treatment irrespective of the rank is essential "particularly in the administration of the *Code of Service Discipline*" for example "when deciding whether or not to lay a charge."<sup>210</sup> If we add to that the fact that service members of lower ranks are those who are the more exposed to the risks of military operations in carrying superior orders, the differentiation is, from a policy standpoint, simply untenable.<sup>211</sup>

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<sup>209</sup> *Duty With Honour*, *supra* note 190 at 21.

<sup>210</sup> QR&O, art 107.015 Note (B) reads as follows:

Responsibilities and entitlements in the Canadian Forces are often assigned based on a member's rank and position in the service. For example, a warrant officer serving in a unit will have certain responsibilities for the well-being of his subordinates which those who hold lesser rank may not have. Similarly, pay and other entitlements reflect the increased responsibilities which ordinarily accompany promotion to higher rank. These necessary distinctions are reflected in a number of provisions of the *National Defence Act* and regulations made thereunder. However, in other matters, it is essential that members be treated equally, regardless of their rank, particularly in the administration of the *Code of Service Discipline*. For instance, it is the evidence surrounding the alleged commission of the offence and not the accused's rank, which will be determinative when deciding whether or not to lay a charge.

QR&O art 108.20 Note (A) is identical but has the following additional sentence at the end:

[...] It would be improper to give any preferential treatment to a particular accused simply because of his rank.

<sup>211</sup> National Defence, "Fallen Canadians", online: National Defence and Canadian Armed Forces <[www.forces.gc.ca/en/honours-history-fallen-canadians/index.page](http://www.forces.gc.ca/en/honours-history-fallen-canadians/index.page)>.

### ***E. Right to Counsel***

The right to counsel is usually raised under section 10(b) following arrest or detention. This research will focus on the right to counsel at trial. That legal right is usually raised under section 7 as a principle of fundamental justice in proceedings potentially depriving of the right to “life, liberty and security of the person”. It is also linked to a right to a fair trial under section 11(d). Section 10(b) of the *Charter* is less of an issue in Canadian military justice in comparison to the absence of legal representation at summary trial. As explained in Chapter II, the vast majority of matter investigated and prosecuted by the military justice system does not result in individuals being put under arrest or in pre-trial custody. When they face bail hearing, they are provided with legal representation.<sup>212</sup> Therefore, up to the point charges are laid, service members’ situation is relatively similar to any other citizen facing ordinary criminal justice system in terms of legal representation. Pass that point though, in particular when the right to be tried by court martial is offered, the right to counsel substantially differs from what occurs in Canadian civilian jurisdiction.

For the hearing to be ‘fair’ not only the decision maker must be independent and impartial but the accused person must be in a situation to have a reasonable opportunity to present his or her case in a cogent fashion, pursuant to the right to make full answer and defence under section 7 of the *Charter*. In a debate where the question is whether the accused person has broken the law, legal knowledge is relevant to the process. In that regards, legally trained persons such as lawyers are better suited to present legal

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<sup>212</sup> QR&O, art 105.26.

arguments. It could also be inferred from section 11 (d) that to ensure a fair trial to accused persons, it necessarily entails the right of those persons to be legally represented.<sup>213</sup>

There is no right of counsel for accused persons at summary trial<sup>214</sup>. However, an individual could request it to the presiding officer who has then the discretion to permit, deny or refer the case for court martial. In making their decision, presiding officers could consider several criteria, such as the nature of the offence, its complexity and the 'exigencies of the services' – for example if we are on a ship in the middle of the Atlantic Ocean.<sup>215</sup> Although there is no formal obligation to consult the unit's legal advisor, experience and anecdotal evidence suggest that such a request is in general treated seriously by presiding officers who would normally seek legal guidance before responding to such a request. If allowed, legal representation will be through a civilian lawyer, at accused person's own expense.<sup>216</sup> However, legal representation is rarely sought in

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<sup>213</sup> See generally *R v McGibbon*, 1988 CanLII 149; 45 CCC (3d) 334 (ON CA); *R v Rowbotham* (1988), 41 CCC (3d) 1 at 70, 63 CR 3d 113, (ON CA).

<sup>214</sup> QR&O, art 108.14 Note B reads as follows:

(B) An accused person does not have a right to be represented by legal counsel at a summary trial. However, if an accused requests such representation, the officer having summary trial jurisdiction has the discretion to:

- i. permit representation by legal counsel;
- ii. proceed without representation by legal counsel; or
- iii. apply for disposal of the charges against the accused by a court martial.

<sup>215</sup> QR&O, art 108.14 Note (C) reads as follows:

(C) In the exercise of the discretion referred to in Note (B) of this article, the officer having summary trial jurisdiction should consider at least the following:

- i. the nature of the offence;
- ii. the complexity of the offence;
- iii. the interests of justice;
- iv. the interests of the accused; and
- v. the exigencies of the service.

An officer having summary trial jurisdiction who is considering the exercise of the discretion to permit representation by legal counsel should consult with a representative of the Judge Advocate General.

<sup>216</sup> *MJSTL*, *supra* note 32 ch 13 at paras 17-21.

practice. Since the reform in 1999, there are no official statistics on how many times legal representation have been sought, denied and/or allowed at summary trial level.

As explained in Chapter II, instead of a legal counsel, an “Assisting Officer” is appointed to help the accused person in making a choice as to the mode of trial, in preparing the case, and during the trial.<sup>217</sup> Their duties and responsibilities are described in further detail in *Military Justice at Summary Trial Level*<sup>218</sup> and in a guide specifically designed to them.<sup>219</sup> However, no formal training is required by regulations prior being appointed as an assisting officer. For some, the imbalance between the high level of responsibilities of assisting officers in comparison with the absence of formal training creates an impression “*of witnessing the wanderings of the blind leading the lame down a dark corridor*”.<sup>220</sup> Furthermore, as summary trials are ‘tribunals’ by operation of the *NDA*, assisting officers are currently exposed to provincial legislation that prohibits performing any of the acts which are of the exclusive prerogative of the lawyer.<sup>221</sup> Section 270 of the *National Defence Act* which bars actions against any service member doing his or her duty under the *Code of Service Discipline* might be insufficient to protect them.

For the past 20 years, many recommendations have been made to increase training of assisting officers. Training documentation has been developed for those

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<sup>217</sup> QR&O, art 108.14; *MJSTL*, *supra* note 32 ch 9 at paras 8-9.

<sup>218</sup> *Ibid* at ch 9 “Assisting Officer”.

<sup>219</sup> Canada, National Defence, *Guide for Accused and Assisting Officers – Pre-Trial Proceedings at the Summary Trial Level*, A-LG-050-000/AF-001 (Ottawa: Chief of the Defence Staff, 2009), online: National Defence and the Canadian Armed Forces <[www.forces.gc.ca/en/about-reports-pubs-military-law/guide-for-accused-and-assisting-officers.page](http://www.forces.gc.ca/en/about-reports-pubs-military-law/guide-for-accused-and-assisting-officers.page)>.

<sup>220</sup> Létourneau, *supra* note 170 at 35.

<sup>221</sup> See for example, *An Act Respecting the Barreau du Québec*, CQLR c B-1, ss 128, 132.

officers to have ‘*sufficient legal training*’ in order to perform their role.<sup>222</sup> During the first independent review of the *NDA* in 2003, it was recommended to increase training and require assisting officers to pass a test before performing their role.<sup>223</sup> The second independent review authority went further and was more specific in 2011 by recommending that assisting officers be certified in similar way than for presiding officers.<sup>224</sup>

Although favourable in principle to training enhancement, the military organization has never officially imposed formal training. Anecdotal evidence suggests that some units would require assisting officers to have taken the Presiding Officer Certification Training course although no empirical data has been collected to determine the extent of such practice. Furthermore, Module 3 of the recent Canadian Armed Forces Junior Officer Development (CAFJOD) Programme has been designed and developed to specifically train all CAF junior officers in respect of their duties as assisting officers.<sup>225</sup> In addition,

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<sup>222</sup> *STWG Report, supra* note 62, Recommendation 25 at 148; Canada. Special Advisory Group on Military Justice and Military Police Investigation Services. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*. (Ottawa: Department of National Defence, 14 March 1997) (Chair: Rt. Hon. Brian Dickson) Recommendation 24 at 63 [*Dickson Report I*].

<sup>223</sup> *Lamer Report, supra* note 208, Recommendation 44 at 59-61.

<sup>224</sup> The Honourable Patrick J. LeSage, *Report of the Second Independent Review Authority to the Honourable Peter G. MacKay*, (Minister of National Defence, December 2011) Recommendation 11 at 24.

<sup>225</sup> According to National Defence, Canadian Forces Leadership and Recruit School website, online National Defence and the Canadian Armed Forces <[www.forces.gc.ca/en/training-establishments/recruit-school-officers.page](http://www.forces.gc.ca/en/training-establishments/recruit-school-officers.page)>:

The Canadian Armed Forces Junior Officer Development (CAFJOD) Programme exposes Junior Officers to a general and standardized body of foundational knowledge through seven Distance Learning modules:

1. Staff Duties
2. Enable the Fighting Force
3. Law and Military Justice
4. Leadership and Ethics
5. Joint Operations
6. Canadian Military History
7. Support the Institution

presiding officers have the responsibility to inquire at the beginning of the trial if the assisting officer has made the accused person aware of the gravity of the offence and the differences between a summary trial and a court martial.<sup>226</sup> It can be reasonably inferred that assisting officers would minimally read the regulations and guide to fulfill that 'awareness' requirement to avoid any embarrassment in front of the presiding officer.

In practice, the last qualitative survey in 2009-10 reported that "*most assisting officers took a limited role in assisting the accused during the summary trial process.*"<sup>227</sup> Still according to the report, "*responses suggested that in many instances, however, assisting officers felt ill-prepared to fulfill their duties. This was often attributed to insufficient training.*"<sup>228</sup> Since the reporting year 2009-10 no data has been reported in respect of the training assisting officers do effectively receive.<sup>229</sup>

Yet assisting officers are not legal counsel, irrespective of the quality of their training. The duties, responsibilities and protection applicable to lawyers do not apply to assisting officers.<sup>230</sup> Even when legal counsel is allowed, opinions vary as to his or her role during the proceedings as there is currently no precise regulation or policy on the issue. Some would limit it to representation on facts and not on law, as the presiding officer is not a legally-trained expert. Indeed, opening a legal debate indicates that the matter should probably be sent to court martial. Some others would limit the legal counsel

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<sup>226</sup> QR&O, art 108.20(3)(a) which refers to QR&O, art 108.14(5)(a)(b).

<sup>227</sup> JAG Annual Report 2009-10, *supra* note 188 at 25.

<sup>228</sup> *Ibid.* It was recognized by the Office of the JAG "*that further training is warranted to ensure that this important function is carried out effectively as possible.*"

<sup>229</sup> Starting from reporting year 2010-11, the content of JAG annual report has significantly been reduced. To illustrate, in comparison with the 2009-10 report which has 116 pages, the 2010-11 report has 30 pages.

<sup>230</sup> MJSTL, *supra* note 32 ch 9 at para 2.

to a more passive role of providing advice to the accused person only, either by being present with him or her in front of the presiding officer or from outside the room where the summary trial is held. In practice a resourceful assisting officer requests a recess to the presiding officer in order to contact a DCS counsel to seek legal guidance. Therefore, the characterization that there is currently no right to legal assistance at summary trial should be nuanced. Yet from a court's standpoint reviewing the constitutionality of the scheme an aspect might still raise concerns. Is it constitutionally valid to not allow right to counsel at summary trial as a general rule?

Military law has long recognized the right to counsel at court martial. However, as we saw in Chapter II, it has not been recognized for hearings before commanding officers acting in summary disciplinary jurisdiction.<sup>231</sup> This traditional view was illustrated in *Fraser v Mudge*<sup>232</sup> pertaining to prison law. Charged with a disciplinary offence, the individual wanted to be represented by counsel before a board. He sought an injunction which was denied. That decision was unanimously upheld by the Court of Appeal. In his decision, Lord Denning M.R. said:

We all know that, when a man is brought up before his commanding officer for a breach of discipline, whether in the armed forces or in ships at sea, it never has been the practice to allow legal representation. It is of the first importance that the cases should be decided quickly. If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter

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<sup>231</sup> Watkin, "Summary Proceedings", *supra* note 16 at 170.

<sup>232</sup> [1975] 1 WLR 1132, [1975] 3 All ER 78 [*Fraser*].

being held up for legal representation. I do not think we ought to alter the existing practice.<sup>233</sup>

Watkin referred to this position as the “disciplinary exception” which was traditionally also applied to police or firemen.<sup>234</sup> In his thesis, he provides us with the evolution of that concept in Canadian law as it pertains to prison law. He explained that even before the *Charter*, Canadian courts had begun eroding it. They recognized that legal representation was permitted although not as of right; it was an exercise of discretionary power by the decision-maker depending on the interests at stake.<sup>235</sup>

This trend was confirmed after the adoption of the *Charter* in the case of *Howard v Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution*<sup>236</sup> where an inmate faced five disciplinary offences and a potential loss of earned remission as a consequence. The Federal Court of Appeal found that in that case the prisoner’s liberty was at stake, triggering section 7 protection.<sup>237</sup> The Court concluded that there was no reason to refused legal representation in those particular circumstances.<sup>238</sup> Having said that, the majority of the Court stated that section 7 of *Charter* did not create a new absolute right to counsel for inmates.<sup>239</sup> Actually that right “will depend on the circumstances of the particular case, its nature, its gravity, its complexity and the capacity of the inmate himself to understand the case and present his defence.”<sup>240</sup> This was

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<sup>233</sup> *Ibid* at 1133-1134 quoted in *Martineau v Matsqui Disciplinary Bd.*, [1980] 1 SCR 602 at 636, 1979 CanLII 184 (SCC) [*Martineau*].

<sup>234</sup> *Ibid* at 624.

<sup>235</sup> Watkin, “Summary Proceedings”, *supra* note 16 at 171-72.

<sup>236</sup> [1984] 2 FC 642, 1985 CarswellNat 2, 1985 CarswellNat 610, 19 DLR (4th) 502, 11 Admin LR 63, (1985) 45 CR (3d) 242 (Fed CA), appeal quashed [1987] 2 SCR 687, 1987 CarswellNat 4, 1987 CarswellNat 910, 102 NR 79 (Note), 41 CCC (3d) 287 [*Howard*].

<sup>237</sup> *Ibid* at paras 25; 84.

<sup>238</sup> *Ibid* at paras 39; 99.

<sup>239</sup> *Ibid* at para 34.

<sup>240</sup> *Ibid* at para 35.

confirmed in *Gochanour v Alberta (Solicitor General)* where, acknowledging there was no absolute right to counsel, Justice Andrekson concluded nevertheless that when an individual is exposed to a loss of liberty, a tribunal may have to appoint a counsel to ensure a fair hearing.<sup>241</sup>

Applying *Howard* to the summary proceedings as they were in 1990, Watkin concluded that a “strong argument can be made that the nature of military disciplinary proceedings are such that one of the criteria which mandates a right to counsel will always be present in respect of summary proceedings under the National Defence Act.”<sup>242</sup> Under his section 1 analysis, he recommended incorporating the guidance on the issue from a note to the regulations proper – which enhances its mandatory force on presiding officers – or modifying regulations to expressly set out *Howard* criteria.<sup>243</sup> However his recommendation was not followed and guidance on legal representation at summary proceedings still remains in a note.

In the meantime, right to counsel in a disciplinary inmate proceedings context has further evolved. In *Winters v Legal Service Society* Justice Binnie for the majority of the Supreme Court concluded that as the individual was exposed to solitary confinement the “‘services ordinarily provided by a lawyer’ would include a preliminary investigation of the facts giving rise to the disciplinary charges, and advice about the range of potential outcomes, and the chances of success”<sup>244</sup> adding that in some other instances however,

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<sup>241</sup> 1990 CanLII 5517 (AB QB) at paras 17-19, [1990] 5 WWR 178; 105 AR 289; 74 Alta LR (2d) 12; [1990] CarswellAlta 66; [1990] AJ No 348 (QL).

<sup>242</sup> Watkin, “Summary Proceedings”, *supra* note 16 at 178.

<sup>243</sup> *Ibid* at 166, 286 at para f.

<sup>244</sup> *Winters v Legal Service Society*, [1999] 3 SCR 160, 1999 CanLII 656 (SCC) at para 30.

the presence of a legal counsel at the hearing might not be necessary.<sup>245</sup> Although this decision pertains more on publicly-funded legal assistance in disciplinary inmate proceedings context, there are interesting comparisons and useful parallels to make with the current level of legal services available to service members facing summary proceedings.

In *Smith v Fort Saskatchewan Correctional Centre* a prisoner was charged by a provincial institution of having in his blood an active ingredient in the narcotic marijuana facing to be declared not eligible for temporary absences. Appearing before a disciplinary board, he requested to be represented by a lawyer but was denied. Seeking intervention by the Court of Queen's Bench of Alberta he argued that the denial infringes the principles of natural justice or section 7 of the *Charter*.<sup>246</sup> After providing a comprehensive review of the relevant case law in respect of the right to legal representation in administrative proceedings<sup>247</sup>, Justice Clarkson compared the right to counsel as protected by the principle of natural justice with the protection offered by section 7 of the *Charter*, acknowledging that the principles of natural justice apply to a broader scope of activities than the *Charter*.<sup>248</sup> Although he solved the case at bar through the lens of natural justice, Justice Clarkson nevertheless proposed that the right to counsel under section 7 of the *Charter* is triggered where "the Charter applies to the proceeding and the proceeding has the potential to infringe upon the life, liberty or security of the person" irrespective of the

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<sup>245</sup> *Ibid* at para 31.

<sup>246</sup> *Smith v Fort Saskatchewan Correctional Centre*, 2002 ABQB 1044 (CanLII) at paras 7-12, 325 AR 90; [2003] 3 WWR 681; 10 CR (6th) 168; 48 Admin LR (3d) 153; 10 Alta LR (4th) 97 [*Fort Saskatchewan*].

<sup>247</sup> *Ibid* at paras 24-29 referring to *R v Secretary of State for Home Department, Ex p Tarrant*, [1985] QB 251 [1984] WLR 613 (QBD) [*Ex p Tarrant*]; *Fraser*, *supra* note 232; *Irvine v Canada (Restrictive Trade Practice Commission)* 1987 CanLII 81 (SCC), [1987] 1 SCR 181; *Howard*, *supra* note 236.

<sup>248</sup> *Fort Saskatchewan*, *supra* note 246 at 29.

factors set out by the case law in respect of the right to counsel in administrative context.<sup>249</sup> His views were confirmed by the Supreme Court stating that section 7 implies a “right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected” although “this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or a tribunal.”<sup>250</sup>

In the current scheme, accused persons have a limited access to legal assistance during summary proceedings, even in situations where they are exposed to deprivation of liberty. On the other hand presiding officers have a direct access to their legal advisors at any time during the summary trial. In the CAF training document in the chapter titled “Conduct of Summary Trial”, presiding officers are recommended in many situations to consult with their legal advisors during the conduct of summary trials.<sup>251</sup> That presiding officer’s relatively easy access to unit’s legal advisor during the conduct of summary trial while the accused does not have the right to be represented except with permission creates an improper imbalance depriving the accused of a fair hearing. In a challenge to the summary trial, considering that the right to a fair trial entails the right of counsel, it is doubtful that a court would conclude that by giving the right to *request* counsel the system has met the constitutional standard.

Some might argue in response that accused persons are not totally alone during summary trial as they can request an adjournment and call a lawyer, such as a defence counsel from Defence Counsel Services, to seek legal advice. It is true that accused

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<sup>249</sup> *Ex p Tarrant*, *supra* note 247; *Howard*, *supra* note 236; *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 1999 CanLII 653 (SCC).

<sup>250</sup> *British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873, 2007 SCC 21 (CanLII) at para 25.

<sup>251</sup> *MJSTL* *supra* note 32 ch 13 at paras 17-21.

persons can ask to adjourn proceedings to contact a lawyer. However, it does not put them in a similar situation in comparison with the presiding officer in terms of access to meaningful legal advice during summary trials. First, accused persons have to request adjournment to presiding officers while those could order it on their own as they may see fit. After a certain point, an accused person might refrain from seeking adjournment to avoid antagonising the presiding officer. Second, unit legal advisors are already familiar with the file as they provided pre-charge and pre-trial/post-charge legal advices, while a defence counsel usually does not know the case yet or if so, not entirely. Without having the file before them, defence counsel might refrain from providing legal advice and would limit their intervention to provision of legal information. Third, unit legal advisors by their position have often established a trust relationship with presiding officers already, while the contact with the accused person and the defence counsel is usually the first or second one, as no defence counsel has been ‘retained’ yet. If we add to that that a presiding officer could more easily meet together with his or her legal advisor face-to-face as both are generally collocated while defence counsel is generally away, it can hardly be said that accused persons and presiding officers have similar access to legal advice in the current state of affairs.

On balance, a court’s conclusion as to the right of counsel at summary trial would likely depend on the circumstances of each case. In situations where service members are exposed to detention or confinement to ship or barracks, a court would apply the criteria set out in *R v White* and likely come to the conclusion that the accused faces a “real or imminent” deprivation of liberty, security of the person or a combination thereof.<sup>252</sup>

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<sup>252</sup> [1999] 2 SCR 417, 1999 CanLII 689 (SCC) at para 38.

To the extent that summary trials convictions are still considered ‘criminal offence’ for the purpose of the *Criminal Record Act*, a court could even determine that that exposure to official stigmatization engages legal representation. If a request for counsel is denied and review authority does not provide effective remedy, the court might conclude that the right to counsel had been infringed, irrespective of the reasons provided by the presiding officer in denying the request. One probable argument to convince the court to the contrary would be – where the right to elect the mode of trial was offered – to argue that accused person’s election to summary trial is a valid waiver of the right to counsel. That aspect will further analyzed in Chapter V.

In situations where it is clear from the circumstances that individuals were not imposed or exposed to such deprivations or stigmatization the court would likely adopt the principle of natural justice approach. The court would review the decisions made by the presiding officer - and the reviewing authority, as the case may be - through the correctness standard, as the issue pertains to a fundamental right. However, the file might be too thin to conduct any meaningful review. As we previously saw, it is currently not mandatory for presiding officer’s decision to be reduced in writing or to record the proceedings. Left potentially with only the presiding officer’s comments in the context of a review<sup>253</sup> or even nothing if such a review did not occur, a court might conclude the record is insufficient to determine whether the decision to deny the right to counsel was correct in the circumstances. Such a context would likely play against the organization, not the individual. In light of the factors set out in *Howard*<sup>254</sup> it seems that to convince a

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<sup>253</sup> QR&O art 108.45(7).

<sup>254</sup> *Howard*, *supra* note 236 at para 35.

court that the decision to not allow legal representation was the right one, circumstances and reasons must clearly show that the nature of the case, its gravity, its complexity were low and the capacity of the inmate himself to understand the case and present his defence were unaffected.

In sum, the primary Charter challenges under sections 7, 11(d), and 15 of the *Charter* are that even though accused persons are exposed to custodial punishments presiding officers are not independent, proceedings are not recorded, and individuals are not represented by counsel, not to mention they are dealt with differently depending on their rank with no reasonable justification.

#### ***F. Other potential breaches***

Other Charter arguments could be developed under the more general duty to ensure procedural fairness of the proceedings under section 7 of the *Charter*.<sup>255</sup> However it will be suggested they are weaker than those already identified. In *Charkaoui* the Supreme Court stated that laws interfering with life, liberty and security of the person must conform to the principles of fundamental justice which “*include a guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security.* [Reference omitted]”<sup>256</sup> Although it does not require a particular process, it nevertheless requires “*a fair process having regard to the nature of the*

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<sup>255</sup> See generally Stuart, *supra* note 123 at 239-77.

<sup>256</sup> *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, 2007 SCC 9 (CanLII), at para 19 [*Charkaoui* 2007].

*proceedings and the interests at stake.*<sup>257</sup> In short, “*the issue is whether the process is fundamentally unfair to the affected person.*”<sup>258</sup>

In the past years Mr. Drapeau – with whom former Justice Létourneau substantially concurs with - has claimed there are several potential breaches of the principle of due process in the Canadian summary trials system. Aside from the lack of judicial independence of presiding officers, the right to counsel and the lack of transcript – already analyzed here – the concerns of these authors lie in the insufficiency of the pre-trial disclosure, the ‘impossibility’ for the accused person to raise an argument based on the *Charter*, the absence of rules of evidence “*including non-compellability of the accused to be a witness against himself, self-incrimination, adverse inference from the accused’s silence, or, spousal privilege*” and the potential to fully rely on hearsay evidence, the absence of the ‘right’ of appeal.<sup>259</sup> Each of their claims will be briefly discussed here.

## **1. Pre-Trial Disclosure**

As seen in Chapter II, once the individual is charged he or she and the assisting officer are provided with a copy of, or given access to, any information 1) that is to be relied on as evidence at the summary trial or 2) tends to show that the accused did not commit the offence charged.<sup>260</sup> Létourneau and Drapeau claim that “*the level of disclosure provided to the accused at a summary trial is not as thorough as the level of*

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<sup>257</sup> *Ibid* at para 20.

<sup>258</sup> *Ibid* at para 22.

<sup>259</sup> Létourneau, *supra* note 170 at 35-36; Létourneau & Drapeau, *supra* note 186 at 58-59.

<sup>260</sup> QR&O, art 108.15(1) which is a reaffirmation of the principle in *R v Stinchcombe* [1991] 3 SCR 326, 1991 CanLII 45 (SCC) where it was recognized a general constitutional obligation for the prosecution to disclose all relevant information either inculpatory or exculpatory in relation to the charges.

*disclosure provided at a court martial.*<sup>261</sup> They did not say to which extent or in what regard the level of disclosure at summary trial was of inferior quality in comparison with the court martial one. In trying to assess the validity of their claim we could have a look at the reported data by the OJAG. In the last qualitative survey, accused persons interviewed reported they were provided with a copy of the investigation reports or at least access to it sufficiently in time to prepare for 'their elections (where applicable) and their summary trials'.<sup>262</sup> However the size of the sample in comparison with the population to be interviewed raises concerns in terms of data reliability.<sup>263</sup> Even taking into account that many of those individuals would play the role more than once within a year, the number of accused persons interviewed seems relatively small in comparison to the whole population of those involved in military penal proceedings. Careful consideration should be taken before arguing that that sample is reflective of any trend. Since the 2009-2010 reporting period, subsequent JAG annual reports do not show any data in respect of that issue. Without a more precise picture of the actual compliance by units, it is difficult to either confirm or infirm Létourneau-Drapeau's claim about the relative lack of 'thoroughness' of disclosure at unit level.

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<sup>261</sup> Létourneau & Drapeau, *supra* note 186 at 58.

<sup>262</sup> *JAG Annual Report 2009-10*, *supra* note 188 at 27.

<sup>263</sup> *Ibid* at 21. In 2009-2010 134 individuals were interviewed combining main participants in the military justice systems to which accused persons were a portion of although not specified. In comparison the potential population to be interviewed that year represents the number of summary trials held that year (1942) multiplied by the main 'roles' of the summary proceedings: 1) presiding officer; 2) charges layer; 3) investigator; 4) assisting officer; and 5) accused person.

## 2. Rules of Evidence

The claim by Drapeau and Létourneau that summary trials are “*not governed by any rules of evidence*”<sup>264</sup> is legally and factually erroneous. True the *Military Rules of Evidence* (MRE) do not apply at summary trials.<sup>265</sup> As summary trials are designed to be less formal, it was decided not to apply MRE at that level. Yet, reception of evidence is governed by regulations<sup>266</sup>, by guidelines in the training doctrine manual<sup>267</sup> and by pre-trial advice provided by the unit legal advisor in the particular circumstances of each case.

There is absolutely no obligation for accused persons to testify<sup>268</sup> although they could if they wish to do so.<sup>269</sup> In addition, presiding officers are told that it is improper for them to draw any inference from the fact that the accused has not testified.<sup>270</sup> Unless accused persons choose to testify, presiding officers are forbidden to question them.<sup>271</sup> The only exception occurs at the beginning of the trial prior receiving any evidence where the presiding officer asks if the accused would like to admit any particular of the charges.<sup>272</sup> This is not out of the ordinary in comparison with the ordinary criminal justice system.<sup>273</sup>

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<sup>264</sup> Létourneau & Drapeau, *supra* note 186 at 58.

<sup>265</sup> QR&O, art 108.21(1).

<sup>266</sup> Primarily by QR&O, art 108.21(2)-(5) and its Notes.

<sup>267</sup> MJSTL, *supra* note 32 ch 13 “Hearing the Evidence” at paras 53-63.

<sup>268</sup> *Ibid* at para 62, n 75 which makes reference to *Charter* s 11(c).

<sup>269</sup> QR&O, art 108.20(5).

<sup>270</sup> MJSTL, *supra* note 32 ch 13 at para 62, n 76 which makes reference to *Regina v Symonds* (1983) 9 CCC (3d) 225 at 227 where that principle is affirmed.

<sup>271</sup> MJSTL, *ibid*, at para 63.

<sup>272</sup> QR&O, art 108.20(3)(c).

<sup>273</sup> See for example the role of the case management judge acting as a trial judge encouraging the parties to make admissions, *Criminal Code* s 551.3(1)(b).

Drapeau-Letourneau's concern that a conviction would be solely based on hearsay is relatively improbable. The *Military Justice at Summary Trial Level* manual explains that while hearsay evidence would not be automatically excluded, presiding officers can accept it if relevant but must exercise caution. They must pay particular attention to its reliability and its potential weight in doing so.<sup>274</sup> The training manual is generally reflective of Canadian law. In addition, in their advice prior summary trials, legal advisors would normally warn presiding officers against using hearsay evidence to prove or disprove the essential elements of the offences. It should be reminded that there is no absolute prohibition in ordinary criminal law on hearsay. The traditional rule excluding it has many exceptions. In essence, they lie on two requirements: the necessity to rely on hearsay evidence and its reliability. Over the past recent years, rules have evolved giving more discretion to triers of facts to receive such evidence. Yet the Supreme Court has reaffirmed the rule that hearsay is *presumptively* inadmissible unless it falls under an exception or meets requirements of necessity and reliability.<sup>275</sup>

On that point, presiding officers are arguably less capable than judges in identifying and weighing hearsay evidence. Regulations may not be sufficient to palliate for the lack of legal training as they provide only general guidelines on relevance, reliability and weight of the evidence.<sup>276</sup> On hearsay, presiding officers are simply reminded that “*direct evidence is to be preferred and in this regard, witnesses who have first-hand knowledge should be called to testify before the presiding officer.*”<sup>277</sup> The risk of errors during

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<sup>274</sup> MJSTL, *supra* note 32 ch 12 at paras 104-109.

<sup>275</sup> *R v Khelawon*, [2006] 2 SCR 787, 2006 SCC 57 (CanLII) at para 59 [*Khelawon*].

<sup>276</sup> QR&O, art 108.21 (2)(3).

<sup>277</sup> QR&O, art 108.21 Note (A).

summary trials is reduced by pre-trial legal advice when hearsay issues are apparent from the file. That risk may be greater for those cases where legal advice is not sought or hearsay issues arise suddenly at hearings. However the risk does not make the process unfair *per se*.

Overall, a court would likely conclude that although the regulations titled “*Military Rules of Evidence*” do not apply to summary proceedings, admissibility of evidence is governed by rules. While those do not mirror the ordinary criminal proceedings, they substantially follow the principled approach to hearsay evidence proposed by the Supreme Court.<sup>278</sup> Judicial intervention might occur only where the factual basis clearly shows that a presiding officer has wrongly applied the admissibility of evidence in a particular case to a point where the outcome would have reasonably been different.

### **3. The so-called ‘Impossibility’ of Raising a Charter Issue**

Létourneau and Drapeau claim that it is impossible for the accused person to raise a *Charter* issue at the hearing. In light of the factors identified in *Charkaoui* this seems to be a false dilemma. Arguably, such impediment could impact the right to answer the case as it removes from the argumentative toolbox a line of constitutional issues. Some might also say that it reduces accountability for presiding officers to base their decisions on facts and law as the potential of raising a *Charter* argument keep them on their toes. However that concern seems to misunderstand the nature of summary proceedings. First, *Charter* does apply but legal debate is not the primary focuses of these proceedings.

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<sup>278</sup> *Khelawon*, *supra* note 275 at para 42.

Usually *Charter* issues are identified prior the hearing by unit legal advisors. If such an issue has been spotted, unit legal advisors would recommend in pre-trial advice to presiding officers an appropriate course of action, including potential exclusion from the evidence. Most common examples pertain to statements made by the accused in persons of authority during the investigation and chain of custody of real evidence. Alternatively, if a *Charter* issue cannot be dealt with appropriately at this stage, unit legal advisor would likely recommend sending the matter to court martial. Sometimes potential breach to *Charter* is such that unit legal advisor would recommend to not proceed with the charges. In cases where defence counsel was consulted during election process, he or she might recommend to the accused and the assisting officer a certain course of action, which includes electing to be tried by court martial.

Second, it is not 'impossible' for accused persons or their assisting officers to raise a *Charter* issue at the hearing. True that not having the legal training makes them probably less efficient to identify and argue it in a legal fashion. But there is no prohibition preventing them raising the *Charter*, in particular in respect of evidentiary issues. If there is 'impossibility', it lies in the incapacity for presiding officers to deal with and eventually provide remedies concerning complex or broader systemic *Charter* issues. In response to such a claim, presiding officers would consult with their legal advisors. Those, if unable to suggest an appropriate course of action at this level, would likely recommend sending the case to court martial as the summary trial is unlikely a 'court of competent jurisdiction' to give a remedy under section 24(1) of the *Charter*.<sup>279</sup> In that context and aside from other potential breaches, a court would likely conclude that the relatively incapacity for

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<sup>279</sup> *Mills v The Queen*, [1986] 1 SCR 863, 1986 CanLII 17 (SCC) at paras 264-66.

presiding officers to deal with complex *Charter* matters does not *per se* substantially impact their capacity to decide the case based on facts and law.

#### 4. 'Right' to Appeal

The expression 'right to appeal' may have created some confusion in the Canadian legal public discourse. Criminal law entails the right to appeal from a conviction. But this right has not – on a stand-alone basis - reached constitutional status yet; for the moment, it is a statutory right. Having said that, it could be attached to the overall rule of law principle. In *Charkaoui*, it was argued that the unavailability of an appeal of the judge's decision on the reasonableness of the certificate was contrary to the rule of law. Referring to a previous case<sup>280</sup> the Supreme Court stated that "there is no constitutional right to an appeal."<sup>281</sup> The Court implicitly recognized the right to appeal might be a component of the overall constitutional standard to have a fair trial according to law. Yet the Court added that such right could not be inferred from the particular context of that case.<sup>282</sup>

Looking at summary trial system from a strict semantic perspective, a 'review' is different from an 'appeal.' Having to go beyond terminology to assess fairness, it is useful to compare the court martial appeal process with the summary trial review. The primary focus here will be on review requested by offenders<sup>283</sup> and not the one conducted by

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<sup>280</sup> *Kourtessis v MNR*, 1993 CanLII 137 (SCC), [1993] 2 SCR 53.

<sup>281</sup> *Charkaoui 2007*, *supra* note 256 at para 136.

<sup>282</sup> *Ibid.*

<sup>283</sup> QR&O, art 108.45

commanding officers on their own initiative on a monthly basis on the face of the record of disciplinary proceedings.<sup>284</sup> There is a comparison table at Appendix C.

As described in Chapter II, review is less formal than appeal and requested by a simple memorandum. Its outcome occurs sooner as timings to initiate the process and to obtain a decision are tighter. Should an offender requires help in preparing the request, an assisting officer would be appointed. In theory, review cannot produce a negative impact from the offender's perspective; in the 'worst' case scenario the findings and sentence are confirmed. As it was explained earlier, reviewing authorities are not judicially independent and non-jurists.<sup>285</sup> Having said that, the absence of legal training does not render the process unfair *per se*; the requirement for review authorities to seek legal advice is designed to palliate that lack of training. However, legal advice is based on facts; it is as good as factual basis is accurate. In absence of any summary trial transcript or recording, the facts which legal advice is based upon might be incomplete, inaccurate, even misrepresented. This is the most problematic difference between appeal and review in terms of fairness.

## 5. Judicial Review

Some might argue that such secondary concerns in respect of due process of the summary proceedings are alleviated by the fact that review authorities' decisions are ultimately under the scrutiny of the Federal Court<sup>286</sup> or the Superior Court in the province

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<sup>284</sup> QR&O, art 116.02

<sup>285</sup> See Chapter III, Part B.2, *above*. In rare exceptions, for example in a reserve unit, an officer might be trained as a lawyer but acts in a different occupation in the CAF, such as a logistic officer.

<sup>286</sup> *Federal Courts Act*, RSC 1985, c F-7, ss 18 and 18.1.

where the summary trial was held.<sup>287</sup> “Should offenders disagree with the final outcome, they would ask these courts to intervene”, they say. However, the exposure to judicial review might be insufficient to ensure procedural fairness of the system. First, the scope of judicial review is limited to determine if the ‘tribunal’ (“summary trial” or “reviewing authority”) exceeded its jurisdictional limit or breached a constitutional right. Contrary to an appeal or a review process, it does not pertain to the legality of the verdict or the legality/severity of sentence.

Another aspect is that there is no obligation for review authorities to inform service members of that option. In comparison with what occurs at the end the grievance process, CAF regulations and directives do not impose to tell service members that should they are unsatisfied with review authority’s decision they can make an application for judicial review under the *Federal Courts Act*. Consequently, while presiding officers are obliged to verbally inform offenders about what they could do next, review authorities are silent in their final decisions. Therefore in practice service members do not know that they can seek the intervention of a court of superior jurisdiction at that stage. Not to mention that they are usually not legally represented.

Lastly, individuals facing any penal system should not wait until a judicial review to have their legal rights enforced. In *US v Ferras; US v Latty* a decision in extradition context, Chief Justice McLachlin for the Supreme Court stated that although a case does not have to be presented in a particular form, a *prima facie* case “*must be established through a meaningful judicial process*”.<sup>288</sup> Considering the potential deprivation of liberty

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<sup>287</sup> *MJSTL*, *supra* note 32 ch 15 at paras 50-52.

<sup>288</sup> [2006] 2 SCR 77, 2006 SCC 33 (CanLII) at para 19.

for the individual, a court might conclude that in comparison, summary trial and its review have not reached yet the “meaningful judicial process” standard. In absence of transcript and written decisions, a court would likely conclude that it is illusory to expect that exposure to judicial review would make the process more ‘judicially meaningful’.

Overall, the compliance of summary proceedings with due process on the above secondary aspects is not as negative and stark as put by Létourneau and Drapeau. Having said that, a court would likely look at the summary trial system by comparing it with its civilian counterpart, taking ordinary criminal proceedings statutory scheme as a starting point. The court might be deferential to military context but only to a certain extent, for example on policy matters not incompatible with ordinary statute law. Again as put by late Chief Justice Blanchard of CMAC “*the military justice system should therefore resemble the civilian justice system insofar as there is no military rationale for adopting a different approach.*”<sup>289</sup>

Looking at the system through the lens of *Charter*, a court would apply a two-step analysis in light of the jurisprudence on constitutional review as recently reaffirmed by the Supreme Court although in a different context.<sup>290</sup> The first question would be to determine if the legislation breaches any of the above-identified rights of the individual before the court. If the answer is no, then the court would determine if the legislation’s reasonable foreseeable applications will breach the *Charter* for any of those rights. This is where it seems a court would at least conclude to violations to: 1) section 11(*d*) as it pertains to judicial independence; 2) section 7 as there is no transcript of the proceedings; 3) section

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<sup>289</sup> *R v O’Toole*, 2012 CMAC 5 (CanLII) at para 32.

<sup>290</sup> *R v Nur*, 2015 SCC 15 (CanLII) at para 77.

7 as legal representation at the hearing is absent, and; 3) section 15 as there is an unjustifiable treatment between senior and junior ranks amongst accused persons. For governmental authorities to convince courts of the absence of any breach is to focus on the need to adopt a unique contextual approach to a point where civilian case law is less or not applicable, together with a strong factual basis showing that no breach effectively occurred or that 'reasonable foreseeable applications' are actually 'remote or far-fetched examples'.<sup>291</sup> However, that would presuppose considerable efforts in terms of time and resources in developing novel arguments with low chances of success. Another and probably more efficient course of action would be acknowledging potential breaches but arguing that they are justified in a free and democratic society.

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<sup>291</sup> *Ibid* at para 76.

## Chapter IV: Reasonably Available Alternatives

But before entering into a section 1 analysis, it will be instructive to consider reasonably available alternatives. That review will first look at other legal processes internal to the CAF where individuals are exposed to substantial negative consequences. Then the review will expand to foreign military jurisdictions. Comparing “*approaches adopted in other democracies*” is relevant to see potential “*solutions that can be devised*” to pursue the objective and “*at the same time are less intrusive on the person’s rights.*”<sup>1</sup> Such review is important as those ‘other democracies’ have, like Canada, committed to international obligations as it pertains to administration of justice, which includes military justice.<sup>2</sup> The Supreme Court reaffirmed recently “*the Charter should be interpreted consistently with [those] obligations.*”<sup>3</sup>

It is tempting in comparing to change the purpose of a system to fit the comparison. A caveat is needed to maintain the relevance of the review of reasonably available alternatives. First, essential aspects of the summary proceedings should be kept in mind. In the preparation of a major military justice reform in New Zealand in 2007, ‘vital elements’ have been identified mainly due to Commander (*Retired*) Christopher Griggs’ preparatory work. Those are: 1) Maintenance of Discipline; 2) Consistency (in all strategic environments); 3) Portability; 4) Expedition (or Promptness); 5) Fairness; 6) Efficiency and; 7) Simplicity.<sup>4</sup> The first one is the purpose while the six others are the necessary

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<sup>1</sup> *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, 2009 SCC 37 (CanLII) at para 139.

<sup>2</sup> *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 14.

<sup>3</sup> *Henry v British Columbia (Attorney General)*, [2015] 2 SCR 214, 2015 SCC 24 (CanLII) at para 136.

<sup>4</sup> NZ, *Hansard*, Armed Forces Law Reform Bill, 1st reading, 48th Parl, 1st Sess, 15 March 2007 at 8064-65, 8076; NZ, *Hansard*, Armed Forces Law Reform Bill, in Committee, 48th Parl, 1st Sess, 10 October

characteristics to fulfill it. Therefore, summary proceedings will be compared with processes that share those attributes.

In addition, the focus of the review is put on features within those processes that are designed to ensure compliance with legal rights as it pertains to potential breaches identified in Chapter III that put the summary trial at greater risk: judicial independence, right to counsel, requirement for a transcript of the proceedings, and equality of treatment of accused persons. Therefore, although it would be interesting to do the same exercise as it pertains to the power of arrest or search of the commanding officers, the custody review officers or the reviewing authority, the primary focus is put here on the role of the presiding officer at the hearing.

## ***A. Other Canadian Military Law Processes***

### **1. CAF Board of Inquiry**

In the Canadian Armed Forces, two processes expose individuals to serious consequences with a substantial interest in proceeding in a prompt, simple, efficient, portable, consistent yet fair fashion. The first process which is administrative in nature is the Board of Inquiry (BOI)<sup>5</sup> a body convened on an *ad hoc* basis to investigate “any matter connected with the government, discipline, administration or functions of the Canadian Armed Forces or affecting any officer or non-commissioned member.”<sup>6</sup> Although not

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2007 at 12242-43, 12253-54; NZ, *Hansard*, Armed Forces Law Reform Bill, 3rd reading, 48th Parl, 1st Sess, 24 October 2007 at 12713, 12716-17. Those seven vital elements are identified and explained in Christopher Griggs, *Discussion Paper: Fundamental Basis for the Military Justice Review* (publisher unknown) at 3-7.

<sup>5</sup> *NDA*, s 45; QR&O, art 21; Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 7002-1, *Boards of Inquiry*, (Ottawa: National Defence, 8 February 2002) [DAOD 7002-1].

<sup>6</sup> *NDA*, ss 45(1). Subjects of investigation are listed at QR&O, arts 21.21 to 21.75 and Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 7002-3, *Subjects of Investigation and*

designed to determine guilt, a BOI may result in adverse findings from an individual's perspective.<sup>7</sup> A witness before a BOI can be assisted by counsel who can be present only during his or her testimony.<sup>8</sup> If the witness has been provided with a notice of adverse evidence (NOAE)<sup>9</sup> his or her counsel may also be present if the witness chooses to be present for the testimony of other witnesses.<sup>10</sup> As all available evidence to be received before a BOI is recorded<sup>11</sup>, the BOI must plan for "obtaining the necessary recording capability and a reliable back-up system to ensure the accurate recording of the testimony."<sup>12</sup> However, meetings are not open to the public.<sup>13</sup> A BOI shares with the summary proceedings an objective of portability, as it could be convened to assemble anywhere, including overseas.<sup>14</sup> BOIs are composed of service members, usually officers.<sup>15</sup> At the end of a BOI a report is produced.<sup>16</sup>

In comparison with summary proceedings, the BOI process offers additional protections to an individual facing adverse consequences: evidence is recorded, a final report in writing is produced, and witnesses could be assisted by a counsel during the proceedings. A BOI can be presided over by a military judge, although it seems that is

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*References*, (Ottawa: National Defence, 8 February 2002). A BOI is also normally convened if a matter is of unusual significance or complexity, where a service member is suspected to have wilfully caused their own death or serious injury or detailed medical information is required to report on any matter (DAOD 7002-1, *ibid*, ch "Board of Inquiry (BOI) Subjects of Investigation").

<sup>7</sup> DAOD 7002-1, *ibid*, ch "Findings".

<sup>8</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 7002-4, *Examination of Witnesses*, (Ottawa: National Defence, 8 February 2002), ch "Counsel at a BOI" [DAOD 7002-4].

<sup>9</sup> QR&O, art 21.10 (4)(5).

<sup>10</sup> *Ibid*.

<sup>11</sup> QR&O, art 21.10(1)(a).

<sup>12</sup> DAOD 7002-4, *supra* note 8, ch "Planning".

<sup>13</sup> QR&O, art 21.12.

<sup>14</sup> QR&O, art 21.11.

<sup>15</sup> QR&O, art 21.08.

<sup>16</sup> QR&O, art 21.15.

has never occurred in practice.<sup>17</sup> It is rather surprising to see that even though no true penal consequences could come as a result of a BOI, individuals benefit from more procedural safeguards in comparison with summary trials, notwithstanding that those are public and findings are based on a proof beyond reasonable doubt.

## 2. Prisoners of War Disciplinary Regime

This second process is disciplinary in nature and shares with the summary proceedings the requirements of promptness, portability, efficiency, consistency, simplicity and fairness. Like summary proceedings it is designed to operate during armed conflicts, although not in combat zones. The *Geneva Convention III* provided for disciplinary sanctions pertaining to prisoners of war (POW). Those are subject to the “laws, regulations and orders in force in the armed forces of the Detaining Power” which would include in a Canadian military context, the *Code of Service Discipline*.<sup>18</sup> Like CAF service members, offences can be dealt with either at court martial or at unit level, although the latter is given preference over the former.<sup>19</sup> If the disciplinary route is taken to deal with an alleged offence, POWs are exposed to the following punishments: fine, discontinuance of privileges granted over and above the treatment provided for by *Geneva Convention III*, ‘fatigue duties’ (similar to Canadian ‘extra work and drill’) not exceeding two hours daily, and confinement.<sup>20</sup> Any of those punishments cannot exceed thirty days.<sup>21</sup> Even when POW are sentenced to confinement, they continue to enjoy the

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<sup>17</sup> QR&O, art 21.081.

<sup>18</sup> *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, 12 August 1949, 75 UNTS 135, s 82 [*Geneva Convention III*].

<sup>19</sup> *Ibid*, s 83.

<sup>20</sup> *Ibid*, s 89.

<sup>21</sup> *Ibid*, s 90.

benefits as POWs except in so far as these are necessarily rendered inapplicable by the confinement.<sup>22</sup> Those punishments can be imposed “only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers.”<sup>23</sup>

From an individual soldier’s point-of-view, the POW disciplinary regime has the benefit of being clearly a non-criminal system. Contrary to Canadian military justice, where summary proceedings combine both disciplinary and criminal law aspects, the *Geneva Convention III* regime makes a clear delineation between disciplinary and judicial proceedings where more procedural safeguards are involved.<sup>24</sup> From a policy perspective, it might be rather difficult to justify to the Canadian public that POWs benefit from a better characterization of the proceedings while their guards, Canadian service members, are exposed to convictions to ordinary criminal law offences and the punishment of detention without the necessary procedural safeguards associated with such an exposure.

### ***B. Alternatives in Foreign Jurisdictions***

Some Canada’s allies have adopted alternative approaches to maintain military discipline at the unit level. Although for different national contexts, the essential need for promptness, fairness, portability, efficiency, consistency and simplicity is similar. The scope of this comparative review is limited to those countries with comparable economy, military traditions and legal infrastructure. Although having military organizations of

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<sup>22</sup> *Ibid*, s 98.

<sup>23</sup> *Ibid*, s 96.

<sup>24</sup> *Ibid*, ss 84 (judicial independence), 105 (right to counsel).

different sizes and military involved at various degrees, these countries share a common commitment for the Rule of Law including a duty – pursuant to International Humanitarian Law - to maintain discipline wherever and whenever their respective military forces are deployed. It was considered important to include countries representing the two major legal traditions, namely common law and civil law, which are represented in Canada. The purpose is not to analyze each national scheme of summary proceedings in detail but to give an overview of their main features to show that they constitute reasonably available alternatives to be considered in comparison with the current Canadian analog scheme. They can be divided in three groups: those that have ‘judicialized’ some aspects of their systems, those that have ‘depenalized’ their system and those that represent a combination of those approaches.

## **1. Judicialization Approach: United Kingdom and New Zealand**

The first approach is to increase procedural safeguards by integrating some features of the ordinary judicial criminal system. Facing a trilogy of challenges before the European Court of Human Rights<sup>25</sup> and in anticipation of unfavourable decisions, the United Kingdom modified its military law in 2000.<sup>26</sup> The main concerns related to the lack of judicial independence of commanding officers presiding ‘summary hearings’ and lack

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<sup>25</sup> *Thompson v The United Kingdom* - 36256/97 [2004] ECHR 267; (2005) 40 EHRR 11 (15 June 2004); *Bell v The United Kingdom* - 41534/98 [2007] ECHR 47 (16 January 2007); *Boyle v The United Kingdom* - 55434/00 [2008] ECHR 15 (8 January 2008).

<sup>26</sup> With the *Armed Forces Discipline Act 2000* (UK), c 4 which was replaced by the *Armed Forces Act 2006* (UK), c 52 which in turn was continued by the *Armed Forces Act 2011* (UK), c 18.

of legal representation for the accused persons contrary to Article 6 of the *European Convention of Human Rights* (ECHR).<sup>27</sup>

To address those points, United Kingdom instituted prior hearing a systemic right to elect court martial in every cases. It also created a universal right to appeal in the form of a re-hearing to the ‘Summary Appeal Court’ (SAC). The SAC is composed of a judge and two service members and accused persons are entitled to legal representation and legal aid.<sup>28</sup> However the summary proceedings kept their penal nature as commanding officers retained the power to impose, with higher authority’s approval, up to 28 days of detention.

That system was validated by the Committee of Ministers of the European Union in 2011<sup>29</sup> and by the England and Wales High Court in *Baines v Army Prosecuting Authority & Anor*.<sup>30</sup> In that case, the individual was initially charged with assault causing bodily harm, an offence that could only be tried at court martial. Consequently he was appointed a defence counsel through legal aid. As the victim did in fact not suffer bodily harm, the defence counsel requested by letter to the chain-of-command to modify charge to battery, an offence objectively less serious that can be dealt with by the commanding officer. The case was sent down to summary dealing, where the individual pleaded guilty

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<sup>27</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 art 6 [ECHR]. The ECHR had been introduced in the United Kingdom although not with a full constitutional status by the *Human Rights Act 1998* (UK), c 42.

<sup>28</sup> See generally UK, Ministry of Defence, *Manual of Service Law: JSP 830*, vol 2 updated ed (London, UK: MOD, 2015), ch 27 “The Summary Appeal Court”, online: GOV.UK <[www.gov.uk/government/publications/court-guide-manual-of-service-law-jsp-830-volume-2](http://www.gov.uk/government/publications/court-guide-manual-of-service-law-jsp-830-volume-2)>.

<sup>29</sup> *Boyle, Thompson and Bell against the United Kingdom* - 55434/00 [2011] ECHR 2269 (2 December 2011) (Resolution CM/ResDH(2011)287).

<sup>30</sup> [2005] EWHC 1399 (Admin) (12 July 2005)[*Baines*]. See generally Peter Rowe, “A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court” (2003) 8:1 J Confl & Sec L 201.

but was sentenced to reduction in rank. Dissatisfied with that result, the individual went on appeal against both his conviction and his sentence, arguing that the summary dealing process was in breach of the right to a fair and public hearing and to defend himself through legal assistance.<sup>31</sup> After reviewing the summary process in details, the High Court – Queen’s Bench Division determined that considering all the safeguards, the system considered as a whole was compliant with Article 6 of the *ECHR*.<sup>32</sup> It is not expected that the recent referendum on the leave of UK from EU (also known as ‘Brexit’) would change that state of affairs in the near future.

Seeing those legal debates from a distance while acknowledging the potential transfer in its legislation, New Zealand proactively made changes to their summary trial systems. Although not bound by the *ECHR*, New Zealand had since 1990 the *New Zealand Bill of Rights Act*<sup>33</sup>(*NZBORA*) which provides for similar protections, in particular the right to a counsel during the proceedings<sup>34</sup> and the right to a fair trial<sup>35</sup>. Interestingly, the *NZBORA* also expressly provides for the right to appeal for anyone convicted of an offence.<sup>36</sup> Having come into force in 2009, the current system also provides for an appeal before the Summary Appeal Court of New Zealand (SACNZ) but composed of a judge alone<sup>37</sup>, also in the form of a rehearing<sup>38</sup> and where the appellant could also be

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<sup>31</sup> *ECHR*, arts 6(1),(3)(c).

<sup>32</sup> *Baines*, *supra* note 30 at paras 56-59.

<sup>33</sup> *New Zealand Bill of Rights Act 1990* (NZ), 1990/109 [*NZBORA*].

<sup>34</sup> *NZBORA*, s 24(c).

<sup>35</sup> *NZBORA*, s 25(a).

<sup>36</sup> *NZBORA*, s 25(h).

<sup>37</sup> *Armed Forces Discipline Act 1971* (NZ), 1971/53, ss 118-120 [*AFDA*]. See generally, New Zealand, Ministry of Defence, *Manual of Armed Forces Law – DM69*, 2nd ed, vol 1 (Wellington, NZ: MOD, 2010), ch 10 “Summary Appeals”, online: New Zealand Defence Force <[www.nzdf.mil.nz/downloads/pdf/public-docs/dm-69-2ed-vol-1-al3-complete-bk-online.pdf](http://www.nzdf.mil.nz/downloads/pdf/public-docs/dm-69-2ed-vol-1-al3-complete-bk-online.pdf)> [*Manual of Armed Forces Law*].

<sup>38</sup> *AFDA*, s 131(1).

represented by counsel.<sup>39</sup> SACNZ's decisions are "final and conclusive".<sup>40</sup> Other modifications were designed to increase fairness, in particular the requirement for the disciplinary officer to ensure audio recording or a written summary of the proceedings.<sup>41</sup> It also imposed a duty in disciplinary officer to explain to the accused the implications of choosing summary proceedings – i.e. waiving his or her rights to legal representation and to be tried by an independent court.<sup>42</sup>

Having the Canadian system in mind, the main benefit of that approach is that at hearing level the system is essentially kept as it is, subject to a few changes. Only the review process would significantly change, increasing the role of judicial actors in either a new or a subsequent procedural step. The transparency would be also better as SAC decisions would more closely represent what happens in the field, not to mention that it would develop a body of case law that would assist presiding officers and their legal advisers with regards to their responsibilities.

There are however two risks with the judicialization approach. First, it might be followed by a surge in challenging summary trials decisions that might clog military justice resources, in particular if the summary appeal court is constituted with military judges. Before the establishment of the UK SAC, the British Army estimated that 20% of the 'summary disposals' would be sent to appeal. It turned out that the proportion was in fact

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<sup>39</sup> AFDA, s 141(2).

<sup>40</sup> AFDA, s 136(1).

<sup>41</sup> AFDA, s 117ZE; *Armed Forces Discipline Rules of Procedure 2008* (NZ), 2008/237, ss 18 and 19; *Manual of Armed Forces Law*, *supra* note 37, ch 7 at para 7.3.24.

<sup>42</sup> AFDA, ss 117ZC-117ZD. See generally Chris Griggs, "A new military justice system for New Zealand" (2006) 6 NZ Arm For L Rev 62, (2006) 45 Mil L & L War Rev 287; Chris Griggs, Memorandum "Seminar on Military Jurisdiction: Report of New Zealand" sent to President of the International Society for Military Law and the Law of War (26 April 2011).

closer to 10%.<sup>43</sup> Therefore the risk might be exaggerated. Another risk is for a SAC where judges and lawyers play the major roles to 'overlegalise' the issues, particularly if those jurists have no military background. It could lead to what Professor Gerry Rubin calls juridification: the imposition of external legal and values norms on the military organization in situations which have been traditionally solely governed by military ethos and exigencies.<sup>44</sup>

## 2. Depenalization Approach: France and Germany

A second approach consists in making a clear delineation between offences of a minor disciplinary nature and those of a more criminal nature, giving complete procedural safeguards associated with criminal trials in the latter while simply applying due process standards associated with administrative law in the former. Two countries of civil law tradition also under the *ECHR* illustrate such an approach where the penal aspect of summary proceedings are reduced, even removed.

France abolished its separate military courts system in 2011 by enacting that all criminal offences allegedly committed by service members in peacetime are to be dealt with by ordinary criminal courts.<sup>45</sup> Nevertheless, French military law provides for a sophisticated internal system dealing with disciplinary infractions.<sup>46</sup> The sanctions can be of two types: professional (if the service member belongs to a trade)<sup>47</sup> or disciplinary

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<sup>43</sup> Rowe, *supra* note 30 at 205.

<sup>44</sup> Gerry R Rubin, "United Kingdom Military Law: Autonomy, Civilianisation, Juridification" (2002) 65 Mod L Rev 36, at 37-38 (HL).

<sup>45</sup> *Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles*, JO, 14 December 2011, (France) having modified the *Code de justice militaire (nouveau)* (France) (2014 Oct 1), art L111-1 [CJM].

<sup>46</sup> *Code de la défense* (France) (2015 June 22), arts L4137-1-L4137-5 [CDD].

<sup>47</sup> CDD, art L4137-1 par 2, R4137-114 to R4137-133.

proper.<sup>48</sup> The latter are divided in three groups. First group are sanctions that blame you or restrict your movement. The most severe are the ministerial severe reprimand (*blâme du ministre*) or confinement (*arrêts*) up to 60 days but reduced by regulations to 40 days.<sup>49</sup> The second group consists of sanctions that momentarily stop or slow down your career, including removal from the promotion list (*radiation du tableau d'avancement*). Disciplinary sanctions of the third group either suspend your career, such as employment suspension up to 12 months (*retrait d'emploi*) or ends it by termination of contract (*résiliation du contrat*).<sup>50</sup> As a general rule, the more serious the sanction, the more formalized the disciplinary body.<sup>51</sup> In the first group, the higher the authority to decide (*premier niveau, deuxième niveau, troisième niveau*), the greater the punishment powers.<sup>52</sup> The entry point is the first level authority irrespective of the rank. If individuals disagree they can go to the second level who has greater punishments powers, and then to a third level who has even greater punishment powers. Interestingly for officers and warrant officers, that third level authority is vested in the Minister of Defence, including for general officers.<sup>53</sup>

In terms of procedural safeguards, service members can make oral or written representation before summary disciplinary authority, with the assistance of a service member of their choice and after having at least one day to prepare their defence, having

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<sup>48</sup> CDD, art L4137-1 par 1.

<sup>49</sup> CJM, art L311-13; CDD, art R4137-38.

<sup>50</sup> CDD, arts L4137-2, L4138-15. In the first group the sanction of '*arrêts*' is analogous to CAF confinement to quarters/ship under stringent conditions while the sanction of '*consigne*' is akin to CAF confinement under more lenient conditions.

<sup>51</sup> CDD, art L4137-3. Before imposing sanctions of the second group a disciplinary board (*conseil de discipline*) must be consulted. In case of sanction of the third group it is a board of inquiry (*conseil d'enquête*).

<sup>52</sup> CDD, art R4137-25.

<sup>53</sup> CDD, art R4137-19.

being provided with the file for that purpose.<sup>54</sup> French military law also provides for an administrative review of those professional and disciplinary sanctions.<sup>55</sup>

As service members are exposed to confinement - which could involve further solitary confinement - some might say that ‘depenalization’ in French military justice is not total. Besides, the validity of such restriction to liberty has been confirmed by the *Conseil constitutionnel* playing an analogous role to the Supreme Court of Canada in terms of constitutionality of legislation. The court determined that confinement is a legitimate restriction to service members’ rights, those having particular obligations as service members which involves necessary restrictions to their freedom of movement. However the issue of solitary confinement was not raised.<sup>56</sup>

Germany has chosen a somewhat similar route, although it has formalized and structure the disciplinary proceedings in a parallel administrative tribunals system. As early as after the World War II, a clear distinction was instituted between disciplinary sanctions and criminal offences in military law.<sup>57</sup> While the latter are dealt with by the civilian criminal ordinary jurisdiction, disciplinary misconducts are dealt with by military authorities, primarily at company or battalion levels by commanding officers.<sup>58</sup> The disciplinary measures – described as ‘simple disciplinary measures’ – those officers can take are: 1) Reprimand; 2) Severe Reprimand; 3) Disciplinary Fine (up to a salary of one

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<sup>54</sup> *CDD*, art R4137-15.

<sup>55</sup> *CDD*, arts R4137-134-R4137-141.

<sup>56</sup> Cons const, 25 February 2015, *Droits et Libertés – Question Prioritaire de Constitutionnalité*, 2014-450 QPC.

<sup>57</sup> Stanislas Horvat, Ilja Van Hespén & Veerle Van Gijsegem, eds, “International Conference on Military Jurisdiction – National Reports – Germany”, (2013) 19 *Recueils de la Société internationale de Droit pénal militaire et de Droit de la guerre* 270 (HL) [*National Report - Germany*].

<sup>58</sup> *Ibid* at 271. The Disciplinary and Complaints Courts are composed of one legally trained judge assisted by two service members acting as lay assessors, see *ibid* at 273.

month); 4) Confinement to Quarters (up to 21 days); 5) Disciplinary Arrest (which is a simple deprivation of liberty for up to 21 days).<sup>59</sup> Their decisions are subject to complaints by unsatisfied service members<sup>60</sup> and legally reviewed by superior officers, who are assisted by legal advisors.<sup>61</sup> When legal advisers' assessment differ from what was awarded by subordinated commanders, those lawyers become Disciplinary Attorneys and on superior commanders' order they conduct a disciplinary investigation. Eventually they might bring disciplinary charges before the Disciplinary and Complaints Courts, an administrative tribunal within the Ministry of Defence which deals with imposing sanctions on service members charged with serious disciplinary offences and decide on appeals concerning minor disciplinary measures taken at lower levels.<sup>62</sup> The Military Disciplinary and Complaints Courts have greater administrative punishments powers – called 'judicial disciplinary measures' - such as imposing reduction in pay grade, demotion (akin to CAF reduction in rank) or disciplinary 'discharge' (in CAF terms 'release').<sup>63</sup> If needed, there might be a further appeal before the Military Affairs Divisions of the Federal Administrative Court. For the German Federal Constitutional Court, service members having been sanctioned administratively and facing subsequent criminal proceedings over the same circumstances do not face double jeopardy, as sanctions imposed by military disciplinary courts are not considered *penal* sanction.<sup>64</sup> In short Germany, while deferring to civilian

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<sup>59</sup> *Military Disciplinary Code*, 16 August 2001, (2001), Federal Law Gazette 2093 (Germany), ss 22-26. [*Military Disciplinary Code*].

<sup>60</sup> *Military Disciplinary Code*, s 42.

<sup>61</sup> National Report – Germany, *supra* note 57 at 272.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Military Disciplinary Code*, s 58. National Report – Germany, *supra* note 57 at 274.

<sup>64</sup> *Ibid* at 277.

authorities prosecution of criminal offences allegedly committed by service members, has instituted an entire administrative tribunal system to deal with disciplinary misconduct.<sup>65</sup>

The greatest benefit of that approach is that it clarifies that service members are not convicted of criminal offences. As opposed to the UK system – where some summary trial convictions had adverse consequences for individuals even after their military careers<sup>66</sup> – the disciplinary sanctions of the French and German systems do not impose a criminal stigma. However that would mean a summary trial would lost some of its ‘teeth’ by removing penal punishments in particular detention. In addition from a Canadian perspective, it would represent a greater paradigm shift from the current state of affairs. Consequently, it would require more resources to implement at training level in comparison with the ‘judicialization’ option.

### **3. Hybrid Approaches: United States, Australia and Ireland**

Lastly, some countries apply hybrid approaches where penal nature of the proceedings is either removed or reduced, disciplinary aspect emphasized or judicial oversight increased. While varying in content and amplitude, those approaches have the common denominator of considering the military summary proceedings system as a mixture of administrative disciplinary law and penal law. Those approaches also focus on the non-judicial aspect of the process at its initial stage.

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<sup>65</sup> *Ibid* at 279-81.

<sup>66</sup> “Military justice left me unaware I had criminal conviction”, *Channel 4 News* (4 January 2013), online: <[www.channel4.com/news/military-justice-criminal-conviction-raf-tom-deacon](http://www.channel4.com/news/military-justice-criminal-conviction-raf-tom-deacon)>.

United States has a dual-system enabling commanders to deal with minor offences in a prompt manner.<sup>67</sup> In order to punish using a simplified procedure commanders can go either through ‘Summary Courts-Martial’ (SCM)<sup>68</sup> or ‘Non-judicial punishments’ (NJP).<sup>69</sup> Both types of proceedings have similarities, including the absence of right to be represented by counsel, the non-adversarial hearing, and the right for service members to refuse the proceedings in favour of a more formalized judicial process.<sup>70</sup> They both can impose relatively short periods of deprivation of liberty.

However they differ in many aspects. While a NJP can be served to a service member of any rank in a particular unit, a SCM has no jurisdiction over officers and warrant officers. The maximum punishment a SCM can impose is 30 days of “confinement” which is comparable to detention in the Canadian system. In contrast, amongst the maximum punishments that can be imposed through NJP is 30 days of “restriction to specified limits” (akin to low-level confinement to barracks) for officers and warrant officers or 30 days of “correctional custody” (akin to highly-stringent confinement to barracks) for lower ranks.<sup>71</sup> While NJP is under commander’s control, SCM is under the control of an SCM officer who acts as a magistrate although is not a lawyer. Consequently, service members have a greater chance to be found not guilty in a SCM as the presiding officer has to apply more stringent rules in managing evidence<sup>72</sup> and is

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<sup>67</sup> “Minor Offences” are defined in the US, Department of Defence, *Manual For Courts-Martial (2012 Edition)*, (Fort Belvoir, VA: US Army Publishing Directorate, 2012), part V, p V-1 at para 1.e. [MCM].

<sup>68</sup> *Uniform Code of Military Justice*, art 20, 47 USC tit 10 § 820 [UCMJ]; MCM, part II, *Rules for Court Martial* c XIII, “Summary Courts-Martial” [RCM].

<sup>69</sup> UCMJ, art 15.

<sup>70</sup> Takashi Kagawa, “Soldier’s First Offense: Article 15 or Summary Court-Martial?” (2014) 1 *Army Law* 33 at 34.

<sup>71</sup> Compare MCM, part V, p V-4 to V-7 at para 5 with RCM, art 1301(d).

<sup>72</sup> See generally US, Department of the Army, Pamphlet 27-7 *Legal Services – Guide for Summary Court-Martial Procedure*, (Washington DC, 2014).

more independent from the commander. More formalized, SCM requires more resources, personnel and time. In a SCM the collateral consequences and stigma on someone's career are more serious.<sup>73</sup> By design a NJP is precisely designed to preserve a service member from a court's conviction<sup>74</sup> although in certain circumstances it may still be reported to the Federal Bureau of Investigation as "nonjudicial disciplinary action".<sup>75</sup> Where both NJP and SCM are available that choice it is up to commanders and not to service members to make.

Except in limited circumstances, service members can refuse a NJP or object to a SCM and demand to be tried by a general or special court martial where they will be entitled to more procedural safeguards.<sup>76</sup> Prior making their decision, they are usually allowed 48 hours to consult with a counsel free of charge but each service has its particularities.<sup>77</sup> Air Force personnel have an absolute right to consult. The Army offers the same right unless the individual is offered a 'Summarized Article 15', 'Summarized NJP' or 'Summarized Proceedings' (as opposed to 'Formal Article 15') exposing service members to lesser punishments.<sup>78</sup> In the Navy, Marine Corps and Coast Guard there is no right to consult prior NJP but individuals are strongly encouraged to consult with a lawyer if circumstances permit. Each branch of the forces has its own defense counsel service not centrally located - as in Canada - but spread in regional offices covering military bases and installations in United States and abroad. For example in the US Army,

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<sup>73</sup> Kagawa, *supra* note 70 at 35-36.

<sup>74</sup> US, Department of the Army, Army Regulations 27-10 *Legal Services – Military Justice*, (Washington DC, 2011) at para 3-2b [AR 27-10].

<sup>75</sup> Kagawa, *supra* note 70 at 36.

<sup>76</sup> RCM, art 1303; MCM, part V, p V-2 at para 3.

<sup>77</sup> Stephen P Karns, "Right to Counsel for Non-Judicial Punishment and Court-Martial Action", online : The Law Office of Stephen P. Karns <[www.usmilitarylawyer.com/military-right-to-counsel.asp](http://www.usmilitarylawyer.com/military-right-to-counsel.asp)>.

<sup>78</sup> AR 27-10, *supra* note 74 at para 3-16.a(1).

a soldier being offered a NJP could set a meeting with a lawyer of the regional office of the US Army Trial Defense Service (USATDS or TDS).<sup>79</sup> While the primary task of the TDS is to represent service members before courts martial, providing legal advice with regards to NJPs is considered a 'Priority II duty' mainly performed by TDS counsel unless resources are insufficient.<sup>80</sup>

Interestingly, US Army NJP and SCM forms show differences as it pertains to service members' right to court martial. In a 'Summarized Article 15', service members are simply informed of their right to demand court martial.<sup>81</sup> In a 'Formal Article 15' service members further acknowledge they have been afforded the opportunity to consult with counsel and select the type of proceedings.<sup>82</sup> A blank waiver form is provided at Appendix D. To be tried by SCM, service members must further indicate whether they have consulted with a counsel, that they understand their rights and that they "voluntarily decided to trial by SCM".<sup>83</sup> Such terminology indicates that from a US Army's standpoint, a waiver is needed due to SCM's penal nature. That seems at odd with *Middendorf v Henry*<sup>84</sup> where the US Supreme Court decided that an SCM was not a 'criminal prosecution' for the purpose of the Sixth Amendment.

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<sup>79</sup> See generally *ibid* ch 6.

<sup>80</sup> Peter Masterton, "The Defence Function: The Role of the U.S. Army Trial Defense Service", (2001) *The Army Lawyer* 1 at 4 (HL).

<sup>81</sup> US, Department of the Army, DA Form 2627-1 "Summarized Record of Proceedings under Article 15, UCMJ" (2011) part 2.

<sup>82</sup> US, Department of the Army, DA Form 2627 "Record of Proceedings under Article 15, UCMJ" (2011) parts 2 and 3.

<sup>83</sup> US, Department of the Army, DA Form 5111 "Record of Proceedings under Article 15, UCMJ" (2009) parts 1 and 2.

<sup>84</sup> 425 US 25 at 42 (1976).

In comparison with Canadian military law, the main feature of the US system seems that it offers a broader panoply of tools to commanders in maintaining discipline. It seems also that service members when facing NJPs and SCMs have a better sense of awareness of the implications of their choice – where available - due to the availability of defence counsel services. In addition, the greatest benefit of accepting a NJP is that in the worst case scenario it would not be a criminal conviction. On the other hand, service members who believe they might have a valid legal argument to raise in a court martial might be reluctant to ‘turn down’ a NJP or oppose a SCM as they can be exposed to higher maximum punishment, not to mention the formal conviction. This ‘chilling effect’ can discourage service members from legitimately vindicating their rights. It also makes look the US summary proceedings system sometimes as a ‘game of the chicken’ between the individual soldier and the chain-of-command.

Having a system reflecting its British origin, Australia seems to have been recently influenced by the US experience. Depending on the rank of the accused, there are three levels of summary authorities.<sup>85</sup> The punishments that can be imposed vary between levels and can be up to 28 days of detention. Interestingly within ‘minor punishments’, confinement to ship or barracks is replaced by ‘restriction of privileges’ which sets the basic parameters and gives flexibility to summary authorities to modulate the conditions under which it would be served.<sup>86</sup> Summary authorities’ decisions can be reviewed by a

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<sup>85</sup> Stanislas Horvat, Ilja Van Hespren & Veerle Van Gijsegem, eds, “International Conference on Military Jurisdiction – National Reports – Australia”, (2013) 19 *The Recueils of the International Society for Military Law & the Law of War* 145 (HL) [*National Report – Australia*].

<sup>86</sup> *Defence Force Discipline Act 1982* (Cth), s 68 (1)(k) (AustLII); *Defence Force Discipline (Consequences of Punishment) Rules 1986* (Cth), r 6 (AustLII). See also Australia, Department of Defence, *Discipline Law Manual ADFP 06.1.1 – Volume 3 Summary Authority and Discipline Officer Proceedings*, (Canberra: Defence Publishing Service, 2009) at paras 5.73-5.79.

reviewing authority.<sup>87</sup> At first glance that scheme is somewhat similar to the Canadian summary proceedings system or the American 'Summary Courts-Martial'. But in addition to the 'more traditional form' of summary proceedings, Australia has instituted a lesser one for minor offences against specified sections allegedly committed by service members of junior ranks. Such an approach pursues the same objective as provincial diversion programs do. 'Discipline officers' can deal with those 'disciplinary infringements' for those service members who have elected that mode of disposition.<sup>88</sup> Accordingly, sanctions available to discipline officers are less severe. However service members electing discipline officer scheme must admit the infringements, otherwise discipline officers cannot have jurisdiction over the matter.<sup>89</sup>

In essence, Australia and United States have tried to reduce the penal nature of the summary proceedings by creating a dual-system in dealing with minor offences: one more disciplinary in nature and the other more formalized. Another hybrid approach – that could qualified as 'hybrid plus' – consists in removing penal nature during trial and increasing judicial control after.

As part of the European Union, Ireland foresaw that it might face the same legal challenges as the United Kingdom did, in particular as both countries' military justice systems have the same origins and share similitudes.<sup>90</sup> Like United Kingdom and New Zealand, there is an appeal to a judicial body - the Summary Court Martial - presided by

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<sup>87</sup> *National Report – Australia supra* note 85 at 162.

<sup>88</sup> *Ibid* at 148-49.

<sup>89</sup> *Ibid*.

<sup>90</sup> Tony McCourt, " Ireland's Military Justice System Updated : Defence (Amendment) Act 2007", (2007) 46 *Mil L & L War Rev* 429 at 430-33.

a judge sitting alone, in the form of rehearing of the matter and where the individual could be represented by counsel.<sup>91</sup> In a sense, Irish military summary proceedings system could have been characterized as being amongst the ‘Judicialization Approach’ group. But Ireland also reduced the penal nature of the summary proceedings by removing the punishment of detention at that level and by making clear it was no more a ‘service tribunal’ hence indicating the now purely disciplinary nature of the summary process.<sup>92</sup> In addition, ordinary criminal law offences are left to court martial unless the Director of Military Prosecutions directs otherwise.<sup>93</sup> To that extent the Irish system could also have been characterized as being a member of the ‘Depenalization Approach’ group. Of all the foreign systems studied for this research, the Irish system seems to be at the forefront in terms of protecting individual soldier’s rights.

#### **4. General Overview**

In short, there are reasonably available alternatives to the current legal scheme of Canadian military summary trial. There are two other processes internal to the CAF, namely the BOI and the POWs’ Disciplinary Regime, which have struck a better balance in protecting individual rights with military exigencies. The BOI shows that although facing lower adverse consequences in an administrative process an individual can be provided with greater procedural safeguards. The POWs’ Disciplinary Regime, very similar to

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<sup>91</sup> *Defence (Amendment) Act 2007* (IR), 2007 [DAA 2007], n 24 s 26 adding sections 178E to 178G to *Defence Act 1954* (IR), 1954, n 18 [*Defence Act*].

<sup>92</sup> McCourt, *supra* note 90 at 433-34. The summary trial is called ‘investigation and summary disposal’.

<sup>93</sup> *DAA 2007*, ss 23, 25 adding sections 177D and 178D to the *Defence Act*. See also, Stanislas Horvat, Ilija Van Hespen & Veerle Van Gijsegem, eds, “International Conference on Military Jurisdiction – National Reports – Ireland”, (2013) 19 *The Recueils of the International Society for Military Law & the Law of War* 302 at 310 (HL).

summary trial in its intent to maintain discipline in military context, has the benefit for individuals to clearly be a non-criminal process.

The other group of alternatives comes from foreign military summary proceedings. They can be divided along a paradigm line. In general, processes considered to be disciplinary provide for less procedural safeguards although they involve less adverse consequences for individuals. Conversely, processes characterized as penal have more procedural steps to ensure compliance with legal rights, in particular by enhancing judicial oversight after initial hearing. Some countries have chosen one of either routes, some have integrated both in their system. Interestingly, among the foreign jurisdictions studied, the one having the largest forces (United States) has the most commander-centric system. In comparison, those having small forces (Ireland, New Zealand) seems the most focused on individual legal rights. It is difficult to identify the multiple factors (culture, geography, politics, economy, history, civilian-military relationship) that could explain the differences. But it does not seem to be simply a matter of size. Countries having forces more numerous than Canada have moved to either a more judicialized system (UK) or a depenalized one (Germany, France). One having forces comparable to the size of the Canadian Armed Forces have chosen a hybrid system (Australia). There is a common trend though: those systems either set a better delineation between disciplinary and criminal proceedings or offer a greater protection to individual rights where there is no such delineation.

## Chapter V: Can Breaches be Demonstrably Justified under Section 1?

The summary trial system breaches the *Charter* mainly in four respects: section 7 (right to counsel; absence of transcript), section 11(d) (judicial independence), and section 15 (inequality of treatment between ranks). Can these breaches nevertheless be justified? Section 1 of the *Charter* reads as follows:

1. 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.

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Since the adoption of the *Charter* the debate on the constitutionality of summary trials have almost always turned to whether it was justified under section 1. In the first two decades of the *Charter* era, when summary proceedings were analysed either in scholarly work<sup>1</sup> or in reviews<sup>2</sup> the trend was that although summary trial breaches the *Charter* those infringements could be justified under section 1. Before the major overhaul of mid-late 1990s, section 1 was used as a guideline to identify potential options of modification on various aspects of the summary proceedings to better sustain a potential constitutional

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<sup>1</sup> Kenneth Watkin, *Canadian Military Justice: Summary Proceedings and the Charter* (LLM Thesis, Queen's University Faculty of Law, 1990) [unpublished] [Watkin, *Summary Proceedings*] at 241-75; Patrick Cormier, "La Justice militaire canadienne: le procès sommaire est-il conforme à l'article 11(d) de la *Charte canadienne des droits et libertés*" (2000) 45 McGill LJ 209 at 243-57 (QL); David J Corry, "Military Law Under the Charter" (1986) 24: 1 Osgoode Hall LJ 67 at 104-17.

<sup>2</sup> Canada. Special Advisory Group on Military Justice and Military Police Investigation Services. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*. (Ottawa: Department of National Defence, 14 March 1997) (Chair: Rt. Hon. Brian Dickson) [*Dickson Report I*] at 54 and Annex F, legal opinion from Guy J. Pratte (Special Legal Counsel) and Lise Maisonneuve (Special Legal Adviser), 13 March 1997 [Pratte & Maisonneuve].

challenge.<sup>3</sup> More recently however, commentators such as Michel Drapeau have suggested that summary trial breaches of the *Charter* cannot be saved under section 1.<sup>4</sup> Francois LeSieur substantiated this conclusion after a thorough section 1 analysis.<sup>5</sup>

The analytical method to determine if a Charter breach can nevertheless be justified in a 'free and democratic society' is provided by the landmark decision of *R v Oakes*.<sup>6</sup> Once a breach is established, the party seeking to uphold the limitation – namely the State - brings the evidence to establish justification on a balance of probabilities through several steps. In the context of *Charter* attacks on summary trials no evidence has ever been brought by the State. However as “justification does not always have to be supported by evidence, it may be demonstrated by the application of common sense and inferential reasoning.”<sup>7</sup> Looking at legislation, case law, policy, doctrine, and data reported in *JAG Annual Reports* such evidence might be reasonably inferred.

The first step is to determine the objective to be served by the measure limiting a *Charter* right; it must relate to societal concerns which are pressing and substantial. Then, the limiting measure has to be proportionate. It involves answering three questions: 1) Is

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<sup>3</sup> Canada, Office of the Judge Advocate General, *Summary Trial Working Group Report*, (Ottawa: OJAG, 1994) at 54-57, 131-39, 142-46, 150-54, 160-65; 174-75; 179-81; 191-202; 205-08, [STWG Report].

<sup>4</sup> Michel Drapeau, “Canadian Military Justice System: At A Crossroads” (Testimony delivered at the US Congress Response Systems Panel on Military Justice and Sexual Assault, 24 Sept 2013) [unpublished] (Lecture delivered at the Global Seminar on Military Justice Reform, Yale Law School, 18 & 19 October 2013) [unpublished] at 23-5; Michel Drapeau, “Military summary trials : A Victorian system of justice”, *Sword and Scale* (March 2010); Michel Drapeau, “A balancing act: more military judges or constitutionalizing summary trials”, *The Hill Times* (14 March 2011) 13; Michel Drapeau & Joshua Juneau, “Canada’s military summary trials are frozen in time”, *The Hill Times* (15 February 2016) 10 *contra* Kenneth Watkin, “Military summary trials: A response”, *Sword and Scale* (March 2010); Michael Gibson, “Canada's Military Justice System” (2012) 12: 2 Can Mil J 61.

<sup>5</sup> François, LeSieur, *A New Appeal to Canadian Military Justice: Unconstitutionality of Summary Trials Under Charter 11(d)*, (LLM Thesis, University of Ottawa, Faculty of Law, 2010)[unpublished] at 32-7.

<sup>6</sup> [1986] 1 SCR 103, 1986 CanLII 46 (SCC) [Oakes].

<sup>7</sup> *R v Levi-Gould*, 2016 CM 4002 at para 33 [Levi-Gould].

there a rational connection between the limiting measure and the objective (*rational connection*)? 2) Does that measure impair the right in question as little as possible (*minimal impairment*)? 3) Are the salutary effects of the limiting measure outweighed by the deleterious effects (*proportionate effects*)? In presence of an objective relating to societal concern which are pressing and substantial and where all questions on the proportionality are answered by the affirmative, the limiting measure is 'justified in a free and democratic society'. As it pertains to summary trials in military justice, the crux of the matter lies in the proportionality test, in particular on the minimal impairment aspect.

### ***A. Societal concern pressing and substantial***

Maintenance of “high level of discipline in the special conditions of military life” is of the essence of any modern military organization<sup>8</sup> which in turn can be said to be part of the broader protection of national security.<sup>9</sup> As it pertains to summary proceedings, literature is consistent in determining that the first part of the *Oakes* test is met.<sup>10</sup> From that point, the objectives are first presented here from a broader organizational point-of-view and then as applicable to summary trials proper. Irrespective of the potential breach to the *Charter*, those objectives remain the same.

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<sup>8</sup> *Généreux*, [1992] 1 SCR 259, 1992 CanLII 117 (SCC) at 313 [*Généreux*]. See also *R v Moriarity*, [2015] 3 SCR 485, 2015 SCC 55 (CanLII) at para 33 [*Moriarity*].

<sup>9</sup> *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, 2007 SCC 9 (CanLII), at para 68 [*Charkaoui 2007*].

<sup>10</sup> Pratte & Maisonneuve, *supra* note 2 at 12; Cormier, *supra* note 1 at 244-45; Watkin, *Summary Proceedings*, *supra* note 1 at 254-59; LeSieur, *supra* note 5 at 32.

## 1. Existence and purpose of military justice

The objectives pursued by the military justice system are drawn from legislation itself. The applicability of the *Charter* to military trials is contemplated in that the drafters thought it necessary to provide for an exception to the right to a jury trial “...in the case of an offence under military law tried before a military tribunal.”<sup>11</sup> The *Criminal Code* provides that nothing in the Code “affects any law relating to the government of the Canadian Forces.”<sup>12</sup> As to the purpose of military justice, regulations prescribe that both officers and non-commission members must “promote the welfare, efficiency and good discipline” of the subordinates<sup>13</sup> and “be acquainted with, observe and enforce the National Defence Act [...] the QR&O and all others regulations, rules, orders and instructions that pertain to the performance of [their] duties.”<sup>14</sup> Recent amendments enunciating the fundamental purposes of sentencing by service tribunals illustrate the dual nature of military justice: to “contribute to respect for the law and the maintenance of a just, peaceful and safe society” - like its civilian counterpart - and to “promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale” which is a unique role.<sup>15</sup> The dual nature is also reflected in the list of sentencing objectives of service tribunals, some being analog to the civilian justice system, some being specific to the military context.<sup>16</sup> Legislation reflects

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<sup>11</sup> Section 11(f); *Généreux*, *supra* note 8 at 296.

<sup>12</sup> *Criminal Code*, s 5.

<sup>13</sup> QR&O, arts 4.02(1)(c), 5.01(1)(c).

<sup>14</sup> QR&O, arts 4.02(1)(a), 5.01(1)(a).

<sup>15</sup> Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 41st Parl, 2013 (assented to 19 June 2013), SC 2013, c 24, cl 62 [Bill C-15] amends the *NDA* by adding sections 203.1 to 203.4 which are not in force yet. These provisions mirror *Criminal Code*, ss 718 to 718.2 but with adaptations. Fundamental purposes of sentencing are set out at *NDA*, s 203.1(1)(a) and (b).

<sup>16</sup> *Ibid* adding subsection 203.1(2) *NDA* which would read as follows:

recognition by higher courts of the necessity of a specialized body of law<sup>17</sup>, illustrated by the notorious quote from Lamer CJ in *Généreux*,<sup>18</sup> yet of a dual nature as confirmed by Cromwell J in *Moriarity*.<sup>19</sup>

That view was present in the military justice review of 1997. It made reference to the necessity to have “a military justice which deals expeditiously, decisively and yet fairly with breaches of Code of Service Discipline.”<sup>20</sup> Unsurprisingly, that view also found in the first independent review of 2003 where former Chief Justice Lamer explained that his recommendations have to strike a balance between Canadian norms and values “with the unique needs of the military for discipline, efficiency and portability.”<sup>21</sup> That view is reflected in military justice training doctrine which further defines the threefold purpose of discipline in military context as follows: “a) ensuring members carry out assigned orders

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(2) The fundamental purposes shall be achieved by imposing just sanctions that have one or more of the following objectives:

- (a) to promote a habit of obedience to lawful commands and orders;
- (b) to maintain public trust in the Canadian Forces as a disciplined armed force;
- (c) to denounce unlawful conduct;
- (d) to deter offenders and other persons from committing offences;
- (e) to assist in rehabilitating offenders;
- (f) to assist in reintegrating offenders into military service;
- (g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
- (h) to provide reparations for harm done to victims or to the community; and
- (i) to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

<sup>17</sup> *MacKay v The Queen*, [1980] 2 SCR 370 at 402, 1980 CanLII 217 (SCC) (McIntyre J) [*MacKay*]; *Rutherford v R* (1983), 4 CMAR 262 (CMAC) at 268 (Mahoney CJ).

<sup>18</sup> *Généreux*, *supra* note 8 at 293 (see above Chapter 1, C.2).

<sup>19</sup> *Moriarity*, *supra* note 8 at paras 42-43 quoting Lamer CJ in *Généreux*, *supra* note 8 at 281.

<sup>20</sup> *Dickson Report I*, *supra* note 2 at 9.

<sup>21</sup> First Independent Review by the Right Honorable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, *An Act to amend the National Defense Act and to make consequential amendments to other Acts*, as required under section 96 of the Statutes of Canada 1998, c 35, (September 2003) at 48 [*Lamer Report*].

*in the face of danger; b) controlling the armed forces so that it does not abuse its power; and c) assisting in assimilating a recruit to the institutional values of the military.”*<sup>22</sup>

As military forces are designed to protect national interests not only over national territory but also abroad, the purpose of military justice can be also viewed from an international standpoint. In *United States v Burns*, quoting Dickson CJ in a previous decision, the Supreme Court stated that it is relevant to consider Canada’s international human rights obligations to interpret “*what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.*”<sup>23</sup> In international humanitarian law - which pertains to the conditions under which the use of military forces could be lawful in particular to minimize harm to non-combatants – there is a positive obligation imposed on States parties to subject their forces “*to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.*”<sup>24</sup> Observance to military discipline is fundamental to prisoner of war (POW) status, not only for national armed forces but also for militias, volunteer corps and organized resistance movement, providing they meet four essential conditions including “*being commanded by a person responsible for his subordinates*” and “*conducting their operations in accordance with the laws and customs of war.*”<sup>25</sup> Therefore not only is military justice necessary to maintain discipline so that Canadian Armed Forces remain

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<sup>22</sup> Canada, National Defence, B-GG-005-027/AF-011 *Military Justice at the Summary Trial Level*, v 2.2 (Ottawa: Canadian Defence Academy, 12 January 2011), ch 1 at para 33 [MJSTL].

<sup>23</sup> [2001] 1 SCR 283, 2001 SCC 7 (CanLII) at para 80.

<sup>24</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1)*, 8 June 1977, 1125 UNTS 3, art 43(1).

<sup>25</sup> *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, 12 August 1949, 75 UNTS 135, art 4(2).

an effective fighting force under civilian control domestically it is also required to meet Canada's international obligations to protect together combatants and non-combatants.<sup>26</sup>

## 2. The purpose of summary trial

The *National Defence Act* is silent as it pertains to the purpose of summary proceedings in Canadian military law. We have to rely on regulations which prescribe that:

The purpose of summary proceedings is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.<sup>27</sup>

This rather succinct yet precise legal articulation illustrates that summary proceedings fulfill not only organizational but also individual needs. In *R v Grant*, Justice Létourneau explained that accused service members may prefer a summary trial over a court martial as the latter has greater punishment powers and attracts more publicity than the former.<sup>28</sup> In addition, as summary trials occur almost invariably before courts martial do, it is an opportunity for the individual soldier to swiftly “fall on the sword, turn the page and carry on”.

In short, summary proceedings have been developed to fulfill the purpose of the armed forces in maintaining discipline by meeting six characteristics: 1) Promptness; 2) Fairness; 3) Portability; 4) Simplicity; 5) Consistency, and; 6) Efficiency. From the

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<sup>26</sup> See generally Michael R Gibson, “International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity” (2008) 4 J Int'l L & Int'l Rel 1 (HL).

<sup>27</sup> QR&O, art 108.02 was referred to in *R v Able Seaman SA Fenwick-Wilson* 2007 CM 4021 (CanLII) at para 41.

<sup>28</sup> 2007 CMAC 2 (CanLII) at para 39.

organizational point of view, none has precedence over others and must be met all at once. There are also benefits for accused service members in choosing summary proceedings: 1) it is faster; 2) it attracts less publicity, and; 3) the punishments that can be imposed are usually less severe. As summarized by military training doctrine “a common thread throughout the long history of the military justice system has been the requirement for a trial system that is more expeditious and less complicated than the courts found in the civilian system.”<sup>29</sup> It is also designed to be nevertheless fair, in particular as it pertains to punishments imposed.<sup>30</sup>

On balance, any court would likely agree that the expeditious maintenance of discipline in the Canadian Armed Forces through summary proceedings relates to societal concerns which are pressing and substantial. To conclude the opposite would eventually lead to lesser efficient control over Canadian Armed forces, which creates a risk to the constitutional order of the State.

## ***B. The proportionality test***

### **1. The rational link**

Is there a “non-arbitrary and non-capricious, connection between the legislative objective and the law being challenged”?<sup>31</sup> The question is raised for each of the main four potential breaches to the *Charter*. In order for the CAF to be swift in maintaining discipline, is it logical: 1) to rely on non-independent officers to preside over the

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<sup>29</sup> *MJSTL*, *supra* note 22 ch 2 at para 50.

<sup>30</sup> *Ibid* at para 51.

<sup>31</sup> *Levi-Gould*, *supra* note 7 at para 36.

proceedings; 2) to virtually deny legal representation by counsel at hearing; 3) to not take the transcript of the proceedings, and; 4) to deal with service members unequally according to their ranks?

In the context of judicial independence of the general court martial as it stood in early 1990s, Chief Justice Lamer *Généreux* expressed the view that he could admit that there may well be a rational connection between the challenged structure of military penal law at the time and the maintenance of discipline in the forces.<sup>32</sup> More specifically on summary proceedings, literature has generally established a similar connection explaining in essence that summary trial allows for a speedy disposition in disciplinary matters, irrespective of where Canadian Armed Forces are stationed or deployed.<sup>33</sup> For these authors, it would evidently defeat that purpose if we were to convene a court martial presided by a judge with complete representation by lawyers each time an offence – including a minor one - is allegedly committed. In addition, the necessary judicial resources might not be readily available in certain operational contexts.

However in an essay written in 2010, LeSieur argues that summary proceedings are not justified under section 1 as the *Oakes* analysis stops at the rational connection part of the proportionality test. The author is of the view that, considering the evolution of military ethos and the needs of modern warfare, there is no rational connection between the punishment of soldiers by infringement of their rights and the maintenance of discipline.<sup>34</sup> For him such infringement is not in line with modern conception of military

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<sup>32</sup> *Généreux*, *supra* note 8 at 313.

<sup>33</sup> Pratte & Maisonneuve, *supra* note 2 at 12; Watkin, *Summary Proceedings*, *supra* note 1 at 259-62; Cormier, *supra* note 1 at 246-47; *STWG Report*, *supra* note 3 at 133.

<sup>34</sup> LeSieur, *supra* note 5 at 32.

discipline which is more focused on “*positive informal values such as trust, confidence, esprit de corps, and morale.*”<sup>35</sup> Actually, he asserts that quite to the contrary fostering fairness is compatible with modern military disciplinary needs to a point where “*Charter s. 11(d) is squarely fitted with the special conditions of 21<sup>st</sup> century military life*”.<sup>36</sup> In other words, opposing fairness and maintenance of discipline would be counter-productive; negative perception of unfairness by the troops would decrease their trust towards their chain of command and ultimately unit’s cohesion.

Nevertheless, a court might find that “this test is not particularly onerous” to meet, similarly to what Cdr Pelletier concluded in *Levi-Gould*.<sup>37</sup> On balance, the court would likely conclude that there is a rational connection where limitations are necessary to ensure the essence of summary proceedings. The need to maintain discipline promptly and simply entails that some of the procedural features of courts martial should be absent at summary trial level otherwise it would unduly delay final disposition.

However, where procedural fairness can be reasonably reached through means that would not impede promptness, portability, efficiency, and simplicity of the proceedings, a court might be reluctant to find a rational connection between the limit on the right to a fair trial and the maintenance of discipline. This is especially so if the court adheres to the model as presented in CAF doctrine documentation where all service members are considered professionals<sup>38</sup> governed by a blend of collective and self-

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<sup>35</sup> *Ibid* at 33.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Levi-Gould, supra* note 7 at para 36.

<sup>38</sup> Canada, National Defence, *Duty with Honour, 2009*, A-PA-005-000/AP-001 (Kingston: Canadian Defence Academy, 2009) at 62 [*Duty with Honour*].

discipline based on positive values such as: “*pride in a great service, a belief in essential justice, and the willing obedience that is given to superior character, skill, education and knowledge*” (emphasis added).<sup>39</sup> The term ‘essential justice’ is presented in the military training doctrine as being ‘*closely related to legal concepts such as natural justice or fundamental justice*’.<sup>40</sup> In that context, a court may well find that discipline and justice are interdependent and not opposing concepts, and that reducing the latter would in fact weaken the former.

## 2. The minimal impairment

Are there other reasonable ways to meet legislative objective with less impact on rights? This is where the matter lies in almost all cases involving the *Oakes* test.<sup>41</sup> Professor Stuart’s review of jurisprudence suggests that after some inconsistency, case law from the Supreme Court seems to “*have settled on the minimum on whether the measure restricts as little as reasonably possible*”.<sup>42</sup> In *Alberta v Hutterian Brethren of Wilson Colony* the Supreme Court concluded that compelling a religious group against their beliefs to have their photo taken infringes freedom of religion. However, the infringement was justified under section 1, as there was no evidence pertaining to an alternative measures which would substantially satisfy the government’s objective while allowing the claimants to avoid being photographed. The Court determined that the

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<sup>39</sup> *MJSTL*, *supra* note 22 ch 1 at paras 34-36 quoting the definition of discipline in the Canada, National Defence, *Report on Certain “Incidents” Which Occurred on Board HMC Ships Athabaskan, Crescent and Magnificent and on Other Matters Concerning the Royal Canadian Navy*, (Ottawa: 1949) at 32.

<sup>40</sup> *Ibid* at para 36.

<sup>41</sup> Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed (Toronto: Carswell, 2014) at 24, 31-32. However, in the recent case of *R v KRJ*, 2016 SCC 31 (CanLII) [*KRJ*], Karakatsanis J for the majority of the court wrote that the proportionality of effects “*permits courts to address the essence of the proportionality enquiry at the heart of s. 1.*” (at para 79).

<sup>42</sup> *Ibid* at 31-32. *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 772, 1986 CanLII 12 (SCC).

alternative proposed by the claimant compromised the government's objective and was therefore not appropriate for consideration at that stage. Summarizing the minimum impairment test, Chief Justice McLachlin stated:

While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner.<sup>43</sup>

This approach was confirmed in *Canada (Attorney General) v Bedford* where the Supreme Court stated that “*Minimal impairment’ asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature’s reasonable alternatives.*”<sup>44</sup> More specifically as it pertains to fairness of proceedings exposing to serious impact on someone’s liberty, the Supreme Court in *Charkaoui 2007* stated that although “*Parliament is not required to use the perfect, or least restrictive alternative to achieve its objective*”<sup>45</sup>, it could nevertheless fail to meet the ‘minimum impairment’ test if other less intrusive “*mechanisms developed in Canada and abroad illustrate that the government can do more to protect the individual.*”<sup>46</sup> However the Supreme Court gives the state a certain level of deference, “*particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.*”<sup>47</sup>

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<sup>43</sup> [2009] 2 SCR 567, 2009 SCC 37 (CanLII) at para 55 [*Hutterian Brethen*].

<sup>44</sup> [2013] 3 SCR 1101, 2013 SCC 72 (CanLII) at para 126 [*Bedford*].

<sup>45</sup> *Charkaoui 2007*, *supra* note 9 at para 85.

<sup>46</sup> *Ibid* at para 87.

<sup>47</sup> *Hutterian Brethen*, *supra* note 43 at para 53.

As it pertains to Canadian Armed Forces summary trials the issue might be put in the following terms:

Could the Parliament have designed a less drastic mean to the current structure of summary trials in Canadian military justice to achieve the objective of maintaining discipline at unit level in a real and substantial manner, considering the reasonable alternatives in Canada and abroad?

This question will be answered for each of the four main potential *Charter* breaches identified in Chapter III, using alternatives described in Chapter IV. Alternatives can be divided according to the following trends: an increase of the procedural safeguards, a reduction of the penal consequences or a combination thereof.

There are less drastic options to non-independent officers having jurisdiction over offences - some against ordinary criminal law - and imposing 'true penal consequences.' Military summary jurisdiction can be reduced to disciplinary offences only. Ordinary criminal offences can be left to courts martial like in United States or Ireland. Those offences could also be left to civilian justice like in France or Germany. In either case, ordinary criminal offences are under the jurisdiction of judges whose independence is less of a debate.

At the same time, penal nature and consequences of the summary proceedings could be reduced by replacing detention by less restrictive deprivation of liberty. It has occurred in completely disciplinary systems such as the French system where the maximum punishment is 'arrest' (*arrêts*) up to 60 days (40 by regulations), the German one which can impose 'disciplinary confinement' up to 21 days or the POWs disciplinary regime where an individual can also be confined up to 30 days. Replacing detention has also been done in some systems by making a clearer delineation between penal and

extra-judicial processes at summary level. The US system of NJP can impose 'restriction' or 'correctional custody'. The Australian 'disciplinary officers' system that can impose even lesser punishments. However those extra-judicial processes have limited jurisdiction in terms of offences and rank of the accused.

In systems where jurisdiction over some ordinary criminal offences and the punishment of detention are kept at summary level, judicial oversight after hearing have been increased. In United Kingdom and New Zealand it has taken the form a universal right of appeal before a 'Summary Appeal Court', a judicial body. The composition and the process of that judicial body could vary. It could consist of three persons conducting the appeal by the way of re-hearing the case like in UK. It could also like in New Zealand be an appeal before a court consisting of a judge sitting alone reviewing the initial hearing and "who could order a re-trial if the Court finds that such a re-trial is required for the maintenance of discipline".<sup>48</sup> In either format, judicial independence is not provided at hearing level but in the system as a whole.

As in Ireland, the two approaches can be combined. Even where there is no distinction between criminal and disciplinary offences at the summary level, the most stringent punishments in terms of deprivation of liberty ('detention', 'confinement') can be removed from a non-judicial process. At the same time, oversight can be increased by having, after initial review by a superior officer, the possibility of an appeal to a judicial body, called in Ireland the 'Summary Court Martial'.

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<sup>48</sup> Chris Griggs, "A new military justice system for New Zealand" (2006) 6 NZ Arm For L Rev 62, (2006) 45 Mil L & L War Rev 287 at 300.

To keep the relatively informal nature of the summary proceedings, there are less drastic options than virtually denying legal representation during hearing. For example, legal assistance can be increased so that accused persons can have access to meaningful advice relatively easily prior and after the hearing. Akin to what the US Army Trial Defence Service does in counseling service members on NJPs, lawyers may assist in reviewing the investigation report, identifying issues, raising potential questions for witnesses and preparing submissions.<sup>49</sup> Legal assistance can also be made more readily available after hearing in providing preparation support to service members challenging its outcome through a review – like in the United States Army<sup>50</sup> - or by providing complete legal representation during an appeal – like in Ireland, New Zealand and United Kingdom.<sup>51</sup>

A formal reporting system at summary level would be against its essence. Such a system requires time and human resources that are difficult to gather in operational theatre. Yet there are less drastic options than having no transcript of the summary trial. In New Zealand the rule is for the disciplinary officer to ensure the audio recording of the proceedings unless it is not reasonably practicable, in which case a detailed written summary must be made.<sup>52</sup> In the Canadian Armed Forces, witnesses giving evidence before a Board of Inquiry are recorded.<sup>53</sup> With the technology currently available, audio

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<sup>49</sup> Peter Masterton, “The Defence Function: The Role of the U.S. Army Trial Defense Service”, (2001) *The Army Lawyer* 1 at 10.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Defence (Amendment) Act 2007* (IR), 2007, n 24 s 26 adding in particular s 178F(3) to *Defence Act 1954* (IR), 1954, n 18; *Armed Forces Discipline Act 1971* (NZ), 1971/53, s 141(2); *Armed Forces (Summary Appeal Court) Rules 2009* (UK), SI 2009/1211, rule 41.

<sup>52</sup> *Armed Forces Discipline Rules of Procedure 2008* (NZ), SR 2008/237, rules 18, 19.

<sup>53</sup> QR&O, art 21.10(1)(a); Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 7002-4, *Examination of Witnesses*, (Ottawa: National Defence, 8 February 2002) at paras 2.3d, 2.4, 2.5, 2.6.

recording of the proceedings as a standard operating procedure does not seem to create an administrative burden. Quite the contrary, having the audio recording of the proceedings avoid endless debates about what was said. Combined with electronic means of communication it also facilitates the review process by overcoming geographical distances.

Finally, there are less drastic options than having a system where higher ranks benefit from more procedural safeguards and are less exposed to penal consequences than lower ranks. Although military organizations are by nature hierarchical, distinctions must be based only on operational requirements; irrational or unjustifiable privileges are detrimental to mutual respect among service members of all ranks.<sup>54</sup> Like Canada, other jurisdictions make distinctions between ranks at military justice summary level. However there are important differences.

In the common law systems studied, summary jurisdiction does not go beyond a certain point in the military hierarchy. But in comparison with Canada, jurisdiction over higher ranks is generally broader. For example officers cannot be tried by US Summary Court Martial but only through NJPs, providing a commander's authority to deal with "military personnel of any rank within the unit" has not been otherwise limited by superior authority.<sup>55</sup> In United Kingdom, a commanding officer has jurisdiction over "an officer of or below the rank of commander, lieutenant-colonel or wing commander" and "a person of or below the rank or rate of warrant officer".<sup>56</sup> In Australia, a superior summary authority

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<sup>54</sup> *R v Boyd*, [2002] UKHL 31, [2003] 1 AC 734 (BAILII) at para 4 [*Boyd*].

<sup>55</sup> Takashi Kagawa, "Soldier's First Offense: Article 15 or Summary Court-Martial?" (2014) 1 Army Law 33 at 35.

<sup>56</sup> *Armed Forces Act 2006* (UK), c 52, s 52(3)(a) and (b) [*AFA 2006*].

can deal with ‘an officer who is 2 or more ranks junior to him or her, being an officer of or below the rank of rear admiral, major-general or air vice-marshal’<sup>57</sup> which means a captain (Navy) or a colonel (Army/Air Force). New Zealand has similar rules.<sup>58</sup> Only in Ireland – similarly to Canada - does summary jurisdiction stop at the rank of commandant (major) or lieutenant-commander.<sup>59</sup>

In terms of punishments common law systems also make distinctions based on rank. However they involved less disparities. For example in the United States NJP system, officers and warrant officers can be awarded ‘arrest in quarters’ (comparable to confinement to barracks) up to 30 days.<sup>60</sup> In United Kingdom, only officers could be imposed ‘forfeiture of seniority’<sup>61</sup> and only warrant officers and non-commissioned officers can be awarded reduction in rank or ‘disrating’.<sup>62</sup> Detention can be imposed only on “leading rate (Navy), lance corporal or lance bombardier (British Army) or corporal (RAF)”.<sup>63</sup> That is similar to New Zealand where officers and warrants officers can be awarded stay of seniority up to 12 months but are not exposed to reduction in rank nor detention.<sup>64</sup> In Ireland, there are also less disparities between ranks, officers and warrants officers being exposed in addition to fine, reprimand and severe reprimand to reduction

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<sup>57</sup> *Defence Force Discipline Act 1982* (Cth), s 106 [DFDA].

<sup>58</sup> *Armed Forces Discipline Act 1971* (NZ), 1971/53, ss 2(1), 108(1) [AFDA]; New Zealand, Defence Force, *Manual of Armed Forces Law*, DM69, 2nd ed, vol 1 ‘Commander’s Handbook on Military Law’ (2010), ch 7 ‘Summary Proceedings’, at paras 7.1.3 to 7.1.5; 7.1.13.

<sup>59</sup> *Defence Act 1954* (IR), 1954, n 18, s 177.

<sup>60</sup> US, Department of Defence, *Manual For Courts-Martial (2012 Edition)*, (Fort Belvoir, VA: US Army Publishing Directorate, 2012), part V, p V-4 at para 5.a(1)(B)(i).

<sup>61</sup> *AFA 2006*, s 132, Table row 2; UK, Ministry of Defence, *Manual of service law: JSP 830*, vol 1 (London, UK: MOD, 2013), ch 13 “Summary hearing sentencing and punishments” at paras 85-92.

<sup>62</sup> *AFA 2006*, s 132, Table row 3.

<sup>63</sup> *AFA 2006*, s 132, Table row 1.

<sup>64</sup> *AFDA*, Schedule 4 and Schedule 5.

of pay for one year or deferral for one year of the next pay increment.<sup>65</sup> Only Australia is very similar to Canada as warrant officers and officers can only be sentenced to fine, reprimand or severe reprimand.<sup>66</sup>

The French system goes further in reducing the gap. It does not distinguish between ranks in terms of summary jurisdiction over offences; all ranks are subject to disciplinary sanctions.<sup>67</sup> What differs is the level of authority required in imposing those sanctions. After the two first levels of authority, while non-commissioned members can be dealt with by third level of authority, warrants officers and officer – including generals - must be dealt with by the Minister of Defence.<sup>68</sup> At that last level, sanctions are similar. They are exposed to the same length of potential confinement and they both can be awarded a ministerial severe reprimand (*blâme du ministre*).<sup>69</sup>

In sum, there are less drastic options than having a system presided by non-independent officers, with no legal representation during hearing, no transcript of the proceedings and which deals with higher ranks more leniently for no apparent reason. There are alternatives reasonably available to minimally reduce the impairment on rights. In short, the criminal nature of summary trials could be removed, review could become an appeal before a court, or both. In Canadian military law, other processes exposing

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<sup>65</sup> Stanislas Horvat, Ilja Van Hespén & Veerle Van Gijsegem, eds, “International Conference on Military Jurisdiction – Conference Proceedings - National Reports – Responses to Questionnaire - Ireland” (2013) 19 : 1 Recueils of the International Society for Military Law and the Law of War 302, ch IV “Summary Punishments” pp 310-312 at paras 1-3 (HL).

<sup>66</sup> *DFDA*, Schedule 3 Table A “Punishments that may be imposed by a superior summary authority on certain officers” and Table B “Punishments that may be imposed by a superior summary authority on other persons”.

<sup>67</sup> *Code de la défense* (France) (2015 June 22), Articles L4137-1 to L4137-5 [*CDD*].

<sup>68</sup> *CDD*, art R4137-41.

<sup>69</sup> *CDD*, art R4137-25.

individuals to serious negative impact do better in providing procedural safeguards without compromising promptness, portability, and simplicity of the proceedings.

Moreover, on a comparative law analysis with foreign jurisdictions, even more alternatives are reasonably available and adapted. It is significant that those alternatives are drawn from military jurisdictions of similar legal traditions with which Canada shares common roots and where basic legal rights, in particular the right to a fair trial have generally the same meaning. As those other societies have found ways to better protect service members' rights as it pertains to military summary proceedings, it is difficult to believe that Canadian society and its military forces are so unique that none of the alternatives are applicable and the current scheme is the very least minimal reasonably available mean to achieve the objective in a real and substantial manner.

### **3. The proportionate effect**

Assuming a court is convinced that there is a rational connection between reducing service members' rights and maintenance of discipline and that the current scheme constitutes the least minimum impairment on such rights, last step of the proportionality test is to "*weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good.*"<sup>70</sup> In the recent case of *R v KRJ*, the Supreme Court stated that the proportionality of effects "*permits courts to address the essence of the proportionality enquiry at the heart of s. 1.*"<sup>71</sup> It has been previously said that in military justice context, if a trial does not meet the right to a

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<sup>70</sup> *Bedford*, *supra* note 44 at para 126.

<sup>71</sup> *KRJ*, *supra* note 41 at paras 77-79.

fair trial, it “will only pass the second arm of the proportionality test in *Oakes* in the most extraordinary of circumstances” such as war or insurrection.<sup>72</sup> But since, the Supreme Court has recognized that “depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the Charter cannot be discounted.”<sup>73</sup>

Actually, some might say that such a system has to be designed precisely to be ready to operate fairly and promptly in extraordinary times, such as war, outbreak of war or insurrection. In *Généreux*, Chief Justice Lamer referred to a “state of readiness”<sup>74</sup> In the United Kingdom decision of *Boyd*, Lord Bingham stated that maintenance of discipline is important both during peace and wartime.<sup>75</sup> Waiting times of war or national emergency to amend such a system may be counter-effective and unfair. It could be counter-effective because changing substantially and suddenly legal conditions under which troops have trained might impair their military effectiveness. It could be unfair because actors unfamiliar with new rules might apply them improperly. For examples, during the two World Wars, millions of individuals joined Allied forces eventually through conscription. On a short period of time, citizens who are not acquainted with military rule and ethos had to comply with the exigencies of military life. In addition, jurists not necessary acquainted with military law had to operate the system. Although methodical researches revealed that military authorities were more lenient and humane than what is it generally

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<sup>72</sup> In *Généreux*, *supra* note 8 at 313 (Lamer CJ). See also Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006) at 59.

<sup>73</sup> *Bedford*, *supra* note 44 at para 129.

<sup>74</sup> *Généreux*, *supra* note 8 at 293.

<sup>75</sup> *Boyd* *supra* note 54 at para 4.

perceived<sup>76</sup> war stories of veterans having been abused triggered – rightly or wrongly – major reform movements after conflicts.<sup>77</sup> In addition, sometimes the difference between ‘wartime’ and ‘a period of normality’ is unclear, which adds to the complexity of developing a two-tiered system.

At the moment however, current limitations on legal rights by the summary proceedings seem disproportionate in comparison with objective of maintaining military discipline. This is the result of adhering to a traditional dichotomy where efficient maintenance of discipline and justice are considered opposed concepts; one cannot be promote without being necessarily detrimental to the other. Arguably, it may well have been true in the past where social groups were more differentiated, more impermeable to social transfer, and more characterized by hierarchy and rank both in civilian and military contexts. At that time, a more traditional meaning of discipline – a punitive sense – may have been necessary for one group to exercise effective control over the others. In modern times however this seems disproportionate as all citizens serving in the CAF are committed to the rule of law, a characteristic considered essential to ensure that Canadian Armed Forces “*remain an effective and efficient armed force that reflects Canadian values and makes Canadians proud of its military force's achievements around the world.*”<sup>78</sup>

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<sup>76</sup> See generally Teresa Iacobelli, *Death or Deliverance: Canadian Courts Martial in the Great War* (Vancouver: UBC Press, 2013). After reviewing the files of nearly 200 individuals sentenced to death by courts martial, the author found that the vast majority of them saw their punishment commuted by disciplinary authorities being able to show wisdom and compassion in reviewing those files.

<sup>77</sup> Edward F Sherman, “The Civilianization of Military Law”, (1970) 22 *Maine Law Review* 3 at 15, 28.

<sup>78</sup> *R v Semrau*, 2010 CM 4010 (CanLII) at para 45 (Perron, mj).

### ***C. The Waiver of Rights during summary trial process***

Even if summary trial breaches certain legal rights of the *Charter*, can it be said that by electing it accused service members have waived those constitutional rights? As suggested before parliamentary committee during the study of recent Bill C-15, are service members fully informed in doing so?<sup>79</sup>

#### **1. Conditions of waiver**

For a waiver of rights to be considered legally valid, it was decided in *Korponay v Attorney General of Canada* that it must be “*clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.*”<sup>80</sup> In *Clarkson v The Queen* a case pertaining on the right to counsel by a detained person under section 10(b) of the *Charter*, the Court stated that before waiving such right, an accused “*must pass some form of ‘awareness of the consequences’ test.*”<sup>81</sup> In the context of the right to a fair trial under section 11(d) in a provincial regulatory context, the Supreme Court concluded in *R v Richard* that it could be waived providing some conditions are met: 1) individuals cannot be imprisoned; 2) offences are of regulatory nature; 3) under the procedural scheme, they are “*fully informed of the consequences of failing to act*” in particular by a note to that effect on the ticket, and 4) there are other safeguards to prevent potential injustices (such as the requirement for

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<sup>79</sup> Bill C-15, House of Commons, Committee, *Standing Committee on National Defence*, 41st Parl, 1st Sess, No 66 (13 February 2013) at 1700.

<sup>80</sup> [1982] 1 SCR 41 at 49, 1982 CanLII 12 (SCC) [*Korponay*].

<sup>81</sup> [1986] 1 SCR 383, 1986 CanLII 61 (SCC) at para 20 [*Clarkson*].

conviction to be entered only when an independent judge is satisfied conditions are met or the possibility to set aside the decision afterwards).<sup>82</sup> According to Professor Stuart, “when the Supreme Court has characterized the issue as one of waiver, it has repeatedly demonstrated its reluctance to find that there has been a waiver of a Charter right.”<sup>83</sup>

## 2. Validity of waiver in the summary trial process

When a charge has been laid, an election is offered and the accused person is given at least 24 hours and could consult, at no expense, a military defence counsel.<sup>84</sup> In practice, the assisting officer would ideally make the accused aware of that option. Under Director of Defence Counsel Services’ (DDCS) supervision<sup>85</sup> legal advice could be provided with respect to the making of an election<sup>86</sup> and more generally on matters relating to summary trials:<sup>87</sup> According to CAF training doctrine the fact that 1) the accused was offered an opportunity to consult with defence counsel; 2) has his/her election recorded on the Record of Disciplinary Proceedings (RDP), and; 3) the requirement to indicate (on the RDP) that an opportunity to consult legal counsel has been provided to an accused is designed to ensure the presiding officer has confirmed the accused is making an informed choice before opting to proceed by way of summary trial.<sup>88</sup>

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<sup>82</sup> [1996] 3 SCR 525, 1996 CanLII 185 (SCC) at paras 31-34 [*Richard*].

<sup>83</sup> Stuart, *supra* note 41 at 37.

<sup>84</sup> QR&O, art 108.18.

<sup>85</sup> NDA, s 249.19.

<sup>86</sup> QR&O, art 101.11 (c).

<sup>87</sup> QR&O, art 101.11 (d).

<sup>88</sup> MJSTL, *supra* note 22 ch 4 at paras 38-39. See also Watkin, “Summary Proceedings”, *supra* note 1 at 277-84 which these measures originated from; STWG Report, *supra* note 3 vol I at 209-26; Pratte & Maisonneuve, *supra* note 2 at 15-16.

Military authorities and OJAG in particular have always publicly equated the election to summary trial in the described above circumstances as a valid waiver. In the *JAG Annual Report of 2012-2013*, the relatively low number of elections for trial by court martial (39 times out of the 415 cases where an election was offered (9.4 %)) was presented “*to be indicative of the perceived fairness of the summary trial process.*”<sup>89</sup> The following reporting year however, the proportion of accused members who elected court martial increases to 16.34% (66 times out of the 404 cases). Interestingly, report simply indicates that “*further analysis will be required.*”<sup>90</sup> In the *JAG Annual Report of 2014-2015*, based on revised statistics for the three precedent reports, the trend was confirmed.<sup>91</sup> Over the last four annual reports, the proportion of those accused service members who elected court martial when offered has gone from about 9% to close to 18%. The report vaguely indicated that “*consideration will be given as to what mechanisms should be used during the upcoming reporting period to obtain clarity on this continued increase.*”<sup>92</sup>

The current election process does not equate to a valid waiver as per *Korponay* or *Clarkson*.<sup>93</sup> The conditions of *Richard* for a waiver of the right to a fair trial to be valid are not met. On the contrary, when election is offered, service members are clearly exposed to ‘true penal consequences’ including detention putting summary proceedings

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<sup>89</sup> Canada, National Defence, *Annual Report of the Judge Advocate General – A Report to the Minister of National Defence on the administration of military justice from 1 April 2012 to 31 March 2013*, (Ottawa: OJAG, 2013) at 10.

<sup>90</sup> Canada, National Defence, *Annual Report of the Judge Advocate General – A Report to the Minister of National Defence on the administration of military justice from 1 April 2013 to 31 March 2014*, (Ottawa: OJAG, 2014) at 16.

<sup>91</sup> Canada, National Defence, *Annual Report of the Judge Advocate General – A Report to the Minister of National Defence on the administration of military justice from 1 April 2014 to 31 March 2015*, (Ottawa: OJAG, 2015) at 13.

<sup>92</sup> *Ibid.*

<sup>93</sup> See also Cormier, *supra* note 1 at 236-43.

closer to those ‘criminal in nature’. In addition in military context, the imbalance between subordinates and their chain-of-command increases the risk that a choice might be influenced – rightly or wrongly - by fear of a negative impact on the career.<sup>94</sup> The record of disciplinary proceedings does not expressly indicate to service members that by electing summary trial they effectively waive their right to a fair and public hearing by an independent and impartial tribunal.<sup>95</sup> Assisting officers are not lawyers more knowledgeable of the potential legal implications of an election. Summary trials are not presided over by independent judges who can effectively prevent potential injustices. That is not to say that that presiding officers cannot prevent it, should they see one. But by regulations their duty in terms of election is simply to “*confirm with the assisting officer that he or she has ensured that the accused was made aware*”<sup>96</sup> of the “*nature and gravity of any offence with which the accused has been charged*”<sup>97</sup> and “*differences between trial by court martial and trial by summary trial*”.<sup>98</sup> Relying on the accused service member’s writing confirmation in the Record of Disciplinary Proceedings<sup>99</sup>, presiding officers would ensure that he or she had *an opportunity* to consult legal counsel but not necessarily if the accused *effectively consulted*. Indeed in 2006-2007, only 25% of those who were offered the election to court martial contacted DDCS to seek legal advice with regard to election.<sup>100</sup> Following reports do not provide sufficient data to confirm that proportion.

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<sup>94</sup> LeSieur, *supra* note 5 at 31.

<sup>95</sup> QR&O, art 107.07, part 3.

<sup>96</sup> QR&O, art 108.20(3)(a).

<sup>97</sup> QR&O, art 108.14(5)(a).

<sup>98</sup> QR&O, art 108.14(5)(b).

<sup>99</sup> QR&O, art 108.17(3)(2.).

<sup>100</sup> Canada, National Defence, *A review from 1 April 2006 to 31 March 2007 - Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces*, (Ottawa: OJAG, 2007) which included at Annex D “Annual Report 2006-2007 of the Director of Defence Counsel Services” and Annex E on summary trials statistics. At para 33, DDCS

In addition even when such a legal advice is sought, its extent is in practice limited. Based on author's experience, such legal advice is invariably provided by telephone as the accused and the legal counsel are most of the time not in the same location, most of DCS counsels being located in the National Capital Region. It is an advisory service "*typically of a general nature only*".<sup>101</sup> In comparison with services offered as it pertains to courts martial or to show cause hearings, counsel is not 'assigned' to the individual requesting the advice. Also, those who contact a defence counsel do not often have the copy of the investigation report with them at the time of the call, despite the fact that regulations provide that such information must be made available in sufficient time to permit the accused to consider it.<sup>102</sup> When they do have the report of investigation, they usually cannot communicate a copy of it to the defence counsel due to its level of classification. Therefore, the defence counsel has only an indirect view at the disclosure materials.

To provide a complete legal advice in making election, defence counsels would have to open a file, request all information made available to the accused, review it and provide a written legal opinion including recommendations as to the mode of trial. However the current level of resources allocated to DCS, not to mention logistic and geographical challenges, do not allow such level of services at the moment. Moreover, the particular nature of military justice system makes the legal advice difficult from a

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reported that in 2006, 121 calls related to court martial election. During the same period, there were 493 cases where member was offered the right to be tried by court martial.

<sup>101</sup> Canada, National Defence, *Defense Counsel Services Manual* (Ottawa: DND, np), ch 4 at p 7, n 43, online: National Defence and Canadian Armed Forces <[www.forces.gc.ca/en/about-reports-pubs-military-law-defence-counsel-manual/index.page](http://www.forces.gc.ca/en/about-reports-pubs-military-law-defence-counsel-manual/index.page)>.

<sup>102</sup> QR&O, art 108.15(2).

professional standpoint. To the question ‘what if I chose court martial?’, defence counsel informs accused persons that once the military prosecutor has the file on his or her desk one of the options is to add or modify charges, with or without additional investigation. When asked ‘what kind of charge could be added?’ a defence counsel would likely reply ‘I do not know’ as he or she is not in prosecution’s position. Any attempt to identify potential charges is speculative. Besides, such uncertainty indirectly puts pressure on the accused to choose to be tried by summary trial. For example someone charged with conduct to the prejudice to good order and discipline<sup>103</sup> – with a maximum punishment of dismissal - could end up after election charged with disobedience of a lawful command<sup>104</sup> with a maximum punishment of life imprisonment, as essential elements of both offences could often be drawn from the same set of facts. However offences punishable by imprisonment to life could only be tried by a general court martial (GCM) before a judge and a panel of five officers unless the prosecutor consents the accused be tried by standing court martial.<sup>105</sup> Therefore, by electing court martial in those circumstances, not only would the accused be exposed to greater peril, this would also directly elevate the proceedings to a GCM. That is why, as a matter of practice, legal advice by DCS is limited to information of a general nature on the differences between summary trial and court martial. In the current scheme, the more particularized the legal advice is - notably on recommending a specific course of action as to what the individual should do next - the more the defence counsel runs the risk of providing a legal advice not based on an accurate set of facts or on a correct appreciation of what is really at stake.

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<sup>103</sup> *NDA*, s 129.

<sup>104</sup> *NDA*, s 83.

<sup>105</sup> *NDA*, s 165.191(1)(a).

The current Director of Defence Counsel Services (DDCS) has recently identified areas of concerns which further diminish the probability that election process be considered as a valid waiver of the right to a fair trial. In a recent report to JAG, the DDCS first acknowledges the importance of the right to elect court martial, describing it as a “*safety valve within the system.*”<sup>106</sup> Nevertheless, he described “*barriers to its practical exercise*”. Accused persons frequently received directly or indirectly pressure to not elect court martial.<sup>107</sup> This was echoed in the LeSage Report describing that “a member on deployment who elects court martial will frequently be immediately ‘repatted’ back to Canada.”<sup>108</sup> Where charges are preferred by Director of Military Prosecutions (DMP), it occurs months or even years after initial election, and sometimes with different charges, making it difficult for both the accused and counsel to know exactly the case to be met.<sup>109</sup> And lastly many accused persons seem to have not been provided with an election where, according to DDCS, it would have been required.<sup>110</sup>

In sum, having an opportunity or even having contacted a defence counsel in the current summary proceedings scheme does not amount to a clear and unequivocal waiver by an accused service member fully aware of the consequences of the election. The only way it could be concluded that the accused has validly waived the right to a fair trial is where facts clearly establish that the accused had been provided complete legal

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<sup>106</sup> Canada, National Defence, *Annual Report of the Director of Defence Counsel Services 2012-2013*, (Ottawa: National Defence, np) p 4 at para 18 [*DDCS Report 2012-13*] online: National Defence and Canadian Armed Forces <[www.forces.gc.ca/en/about-reports-pubs-military-law-ddcs-2012-13/index.page?>](http://www.forces.gc.ca/en/about-reports-pubs-military-law-ddcs-2012-13/index.page?>).

<sup>107</sup> *Ibid* at para 19(1.).

<sup>108</sup> The Honourable Patrick J. LeSage, *Report of the Second Independent Review Authority to the Honourable Peter G. MacKay*, (Minister of National Defence, December 2011) at 31.

<sup>109</sup> *DDCS Report 2012-13 supra* note 106 at para 19(2.).

<sup>110</sup> *Ibid* at para 19(3.).

advice based on full disclosure after charges were laid with total absence of any indicia suggesting pressure from the chain-of-command in electing summary trial.

## Chapter VI: Reform Proposals

This last chapter recommends what to do not only to successfully sustain a constitutional challenge but moreover to improve the administration of military justice at summary level. Irrespective of the constitutionality of the system, there are indeed good policy reasons “to strive to offer a better system than merely that which cannot be constitutionally denied”.<sup>1</sup> As recently put by the current JAG himself:

Moreover, the military justice system must always fiercely promote and protect the very democratic values and the rule of law that our men and women in uniform willingly put themselves in harm’s way and are willing to die for.<sup>2</sup>

By joining the CAF, Canadian citizens have voluntarily decided to accept additional obligations and risks associated with military life. Through training and with optimal resources, they overcome their natural fears to carry on with the mission, often in dire circumstances. In doing so, service members obey lawful orders from superior officers who they trust. They also adhere to the profession of arms’ code of conduct which is a reflection of Canadian values and legal norms, in particular the Rule of Law. Besides, they are not entitled to be represented by an association.<sup>3</sup> The least we can do for those men and women who serve and protect their country is to foster the protection of their

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<sup>1</sup> First Independent Review by the Right Honorable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, *An Act to amend the National Defense Act and to make consequential amendments to other Acts*, as required under section 96 of the Statutes of Canada 1998, c 35, (September 2003), “Foreword”, at (1) [*Lamer Report*].

<sup>2</sup> Major-General Blaise B Cathcart, “Remarks of the Judge Advocate General” (Remarks delivered at the University of Ottawa Military Law Conference, 13 November 2015) [unpublished], online: [www.forces.gc.ca <http://www.forces.gc.ca/en/about-reports-pubs-military-law/jag-remarks-military-law-conference-2015.page>](http://www.forces.gc.ca/en/about-reports-pubs-military-law/jag-remarks-military-law-conference-2015.page).

<sup>3</sup> QR&O, art 19.10.

rights when facing allegations of misconduct. Not only it would make them more effective in defending Canadian democratic values but “the public is also likely to have increased confidence in the military justice system. Such increased confidence could, in turn, have a positive effect on military recruitment.”<sup>4</sup>

But before making recommendations, a word on Bill C-71 entitled “*An Act to amend the National Defence Act and the Criminal Code*”<sup>5</sup> the most recent legislative attempt initiated by the Canadian government to reform the summary trial system. Although it died on the Order Paper when the last federal election was called, a new iteration of such legislation might be introduced before Parliament in the near future.

## **A. Bill C-71**

### **1. Description**

The primary focus of Bill C-71 was to mirror the effects of the *Canadian Victims Bill of Rights*<sup>6</sup> in military justice. Although pursuing a legitimate purpose, that aspect will not be studied in this research. A large portion of Bill C-71 however substantially reforms the summary trial system. It abandons some of the penal aspects of the current system by creating the new concept of ‘disciplinary infractions’ over which summary trial would

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<sup>4</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Equal Justice: Reforming Canada’s System of Courts Martial, Final Report: A Special Study on the Provisions and Operation of An Act to amend the National Defence Act and to Make a Consequential Amendment to Another Act*, SC 2008, c 29 (May 2009) at 4.

<sup>5</sup> Bill C-71, *An Act to amend the National Defence Act and the Criminal Code*, 2nd Sess, 41st Parl, 2015 (first reading 15 June 2015) [*Bill C-71*].

<sup>6</sup> SC 2015, c 13, s 2.

have jurisdiction.<sup>7</sup> It clarifies that a 'disciplinary infraction' is not an offence.<sup>8</sup> It also removes detention from punishment powers that can be imposed at summary level, reduction in rank becoming the new maximum 'sanction'.<sup>9</sup> It reduces rank-based disparity by exposing both officers and non-commission members to similar sanctions, providing the person is at least one rank below the rank of the presiding officer.<sup>10</sup> Bill C-71 varies sanction powers following the authority presiding the summary trial, superior commanders having the full panoply, commanding officers having reduced powers and delegated officers having only the power to impose 'deprivation of pay' for 7 days or less or 'minor sanctions'.<sup>11</sup> Bill C-71 also reduces the force of *res judicata* of summary trials. Indeed it provides that if a person is tried in respect of a disciplinary infraction, the person may be tried before a court martial, civil court or court of a foreign state in respect of an 'offence' arising from the same facts, whether the person was found guilty or not guilty of the disciplinary infraction.<sup>12</sup> However, if a person is tried in respect of an 'offence' by a court, that person may not be tried in respect of a disciplinary infraction arising from the same facts.<sup>13</sup>

## 2. Criticism

Bill C-71 raises concerns as it pertains to the summary trial system. First and foremost, it removes detention from the commanders' tool box in dealing with service

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<sup>7</sup> Bill C-71, cl 3(2) adding the new definition 'disciplinary infraction' to *NDA*, subs 2(1) and cl 12 replacing *NDA*, s 162.4.

<sup>8</sup> Bill C-71, cl 12 adding *NDA*, s 162.5.

<sup>9</sup> Bill C-71, cl 12 adding *NDA*, s 162.7.

<sup>10</sup> Bill C-71, cl 12 adding *NDA*, s 162.8 and replacing *NDA*, s 163(1)(a).

<sup>11</sup> Bill C-71, cl 12 adding *NDA*, s 163.2.

<sup>12</sup> Bill C-71, cl 12 adding *NDA*, s 162.6(2).

<sup>13</sup> Bill C-71, cl 12 adding *NDA*, s 162.6(1).

members' misconduct. We have to keep in mind that a military justice system must be designed to respond to, perish the thought, large-scale conflicts often in distant theatres of operations where legal resources are not readily available, even though this probability is currently remote. In such situations, individuals unacquainted with military discipline are enrolled in large numbers, usually by reducing the recruitment standards and even through conscription. Detention would then be an even more useful tool, at least as a general deterrent to potential offenders, particularly those who might be tempted to commit a serious offence in hope of leaving the theatre of operations to face military justice. Therefore, avoiding constitutional challenge at the price of throwing away detention is not advisable on a longer-term perspective. Once gone, detention would not easily be given back by Parliament. If detention is suddenly back, there is a risk it would be improperly used, at least in the beginning of its reintroduction.

As a matter of fact, Bill C-71 represents too much of a paradigm shift from the current state of affairs. Going towards such a 'depenalization' puts the system too much away from its historical roots. The gap might create unease among actors - in particular commanders - in fulfilling their obligations. In comparison, the reform of the 1995-1998 era - which represented at that time less of a shift from the previous state of affairs - took years to integrate through training. A larger-scale reform runs the risk of taking even longer to be fully and efficiently implemented.

In addition too many aspects are left unanswered or left to regulations where important elements are buried. 'Disciplinary infractions' would be defined by regulations which raises concerns in terms of publicity and *Charter* scrutiny of penal law, particularly

in a National Defence context. Regulations under the *National Defence Act* – such as the QR&Os – are indeed exempted from registration.<sup>14</sup> A proposed regulation is then not subject to the most formal examination process, in particular as it pertains to its compliance with the *Charter*.<sup>15</sup> Furthermore, such a regulation is not pre-published in the *Canada Gazette*, Part I<sup>16</sup>, a step “intended to promote transparency and effectiveness”<sup>17</sup> and that “gives all Canadians a chance to submit their comments about a proposed regulation before it is made”.<sup>18</sup> Such exemptions are legitimate for regulations of a technical nature, affecting few individuals or when constant changes make examination and pre-publication not reasonably practicable. But when such regulations set the norms of conduct for thousands of service members who would be exposed to serious disciplinary sanctions in case of allegations of misconduct, such exemptions appear unjustifiable.

Same concern can be said about the onus of proof required for decision-making. The system being characterized as ‘disciplinary’, would the onus be lowered to balance of probabilities standard? If so, it would represent a loss of procedural safeguards from an individual perspective. The ‘minor sanctions’ are also left to be defined by regulations.<sup>19</sup> What are they? Similar to ‘minor punishments’ of the current scheme?<sup>20</sup> At

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<sup>14</sup> *Statutory Instruments Act*, RSC, 1985, c S-22, ss 5(1), 20(b) [SIA]; *Statutory Instruments Regulations*, CRC, c 1509, s 7(a) [SIR].

<sup>15</sup> SIA, s 3(2) *a contrario*.

<sup>16</sup> SIR, s 15(1).

<sup>17</sup> Canada, Treasury Board Secretariat, *Guide to the Federal Regulatory Development Process*, (Ottawa: 2014), “Part 2: Overview of the Federal Regulatory Development Process”, online: Treasury Board Secretariat <[www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/guides/gfrpg-gperf/gfrpg-gperftb-eng.asp](http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/guides/gfrpg-gperf/gfrpg-gperftb-eng.asp)>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Bill C-71, cl 12 adding NDA, s 162.7(e).

<sup>20</sup> NDA, s 139(1)(l); QR&O, art 104.13(2).

least of them is far from being 'minor'; confinement to ship/barracks is a deprivation of liberty that can be very stringent indeed.

Also, Bill C-71 does not provide for the recording of summary trials. Even if the proceedings do not expose to 'true penal consequences', fundamental procedural fairness requires hearings to be recorded. Otherwise the prospect of a meaningful, accurate and efficient review process is illusory. Bill C-71 is also silent as to if and how the review process would take place. Would it be like the current system where decision could be only quashed, modified or – in the 'worst case scenario' from an offender's perspective - confirmed? Or would it involve that the higher individuals go in seeking review, the greater their exposure to sanctions? If so, that would discourage service members from requesting review. The process being more administrative in nature, would sanctions be subject to the grievance process?

Besides, that system may not provide sufficient independence for officers to act as impartial decision-makers. Even if Bill C-71 goes away from the penal model, hence lowering the threshold for independence, the system may still lack sufficient safeguards for presiding officers to act like disciplinary bodies of a self-regulated profession. In particular where summary authorities could still impose sanctions that have long-lasting impact on a service member's career. As a comparison, Germany has developed an entire administrative tribunal system to deal with disciplinary misconduct.<sup>21</sup>

Furthermore, Bill C-71 is silent as it pertains to legal representation or legal advice to individuals involved in that process, and yet the disciplinary sanctions are no trivial

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<sup>21</sup> See Chapter IV, part B, section 2, above.

matter. Would assisting officers play analogous role then? Would service members have the option of electing court martial or a more formalized decision-making body? If so in which circumstances and how?

In short, Bill C-71 is a legitimate attempt to avoid constitutional challenge by adopting the ‘depenalization’ approach at the summary trial level. However, such reform would be at the price of creating confusion among operators. Despite its benefits in terms of removing some of the penal consequences from an individual’s perspective, there is uncertainty as it pertains to service members’ rights. In particular the silence on transcript and judicial oversight raises concerns in terms of transparency, accountability and procedural fairness. Another course of action is recommended.

### ***B. Recommendations***

Generally speaking, the ‘judicialization’ approach<sup>22</sup> should be adopted together with some elements of other jurisdictions. The judicialization approach is more aligned with Canada’s historical legal military background. It is also less of a shift from the current state of affairs, which would ease implementation among operators, including legal officers. It enhances judicial oversight while keeping penal punishments at summary level, including detention where necessary.

With this approach in mind, recommendations will be divided in two groups. The first group consist of measures considered essential to address the main potential *Charter* breaches. It will be recalled that the analysis in Chapter III concluded that there were four

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<sup>22</sup> See Chapter IV, part B, section 1, above.

main Charter challenges. In Chapter V it was demonstrated that – in particular due to the availability of reasonable alternatives described in Chapter IV - those breaches were strong and highly unlikely to be demonstrably justified under section 1. Here are those breaches in summary:

- a) Presiding officers are not independent. Even in their military justice capacity, they remain agents of the executive branch of the State. Their pay, career progression, postings depend on the very same chain of command that, from a reasonable observer point of view, has an interest in the outcome of each case. Such lack of independence infringes the right to a fair trial pursuant to section 11(d) of the *Charter*;
- b) Proceedings - including reasons of presiding officers - are not recorded. It makes any review speculative as offenders' cannot fully know the case they must meet to have the decision modified. Comments made by presiding officers during review process cannot save that defect as they are incomplete and may be self-interested. The absence of transcript violates the right to make full answer and defence pursuant to section 7 of the *Charter*;
- c) Individuals are not legally represented during proceedings. Conditions are insufficient in practice for them to obtain meaningful legal advice in choosing the mode of trial. Assisting officers are not lawyers. Any request to be legally represented would in practice generally become a transfer to court martial. If request is granted, legal counsel is limited to a passive role. If denied, in absence of transcript, it is difficult to determine if the decision was right. Service

members cannot be legally represented during review. That situation violates the right to counsel pursuant section 7 of the *Charter*, and;

- d) There is a disparity of treatment between ranks at summary level. Legal advice prior laying charge is mandatory for higher ranks while for lower ranks it is only required when court martial could be involved. If charged, higher ranks cannot be detained, reduced in rank or confined to ship/barracks. Most senior ranks (lieutenant-colonels, colonels and generals) are simply not subject to summary trial. Such lack of jurisdiction does not automatically translate into a court martial: the 'reasonable prospect of conviction' necessary to prosecute is assessed more stringently by military prosecutors than by unit legal advisors. Even when charges are preferred before court martial, higher ranks would benefit from all its procedural safeguards, including the leverage that being legally represented offers in terms of plea bargaining. This disparity violates the principle of equality before the law enshrined in section 15 of the *Charter*.

In the second group of recommendations are facilitative measures that although not imperatively required to sustain a constitutional challenge would nevertheless improve military justice system at summary level. Each recommendation will identify what statutory or regulatory rules need to be changed.

## 1. Necessary Changes

### a) *Remove Ordinary Offences from Summary Jurisdiction*

The current summary jurisdiction over offences of the *Criminal Code* and the *Controlled Drugs and Substances Act* must be abandoned. Due to the seriousness and public stigma associated with them, such ordinary criminal offences (aka ‘civil offences’) relating to any other act of Parliament except the *National Defence Act* must be left to court martial only, akin to what Ireland does.<sup>23</sup> This change would apply only to commanding officers and superior commanders; delegated officers cannot currently try such offences. It would not create much of an impact on the system as very few of those offences are currently dealt with by summary trial. Besides, the more stringent test used by the Canadian Military Prosecutions Service to prefer charges would likely mean that not all of those cases would necessarily be transferred into the court martial system caseload.

Article 108.07 of the Queen’s Regulations and Orders (QR&O) should be modified, in particular to remove section 130 of the *National Defence Act* (NDA) from subsection (2). Consequential amendments should be made to QR&Os 108.10(2)(c) and 108.125.

### **Recommendation 1**

**Remove ordinary criminal or civil offences from the list of offences that can be tried by commanding officers and superior commanders.**

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<sup>23</sup> See Chapter IV, part B, section 3, above.

*b) State that Summary Trials do not create Criminal Offences*

It must be made statutorily clear that any conviction at summary trial does not create a criminal offence for the purpose of the *Criminal Records Act*. Instead of linking the absence of criminal conviction to a combination of certain offences and punishments like in Bill C-15, it must be solely forum-driven. This reflects the very summary nature of the proceedings and gives an additional incentive for all service members to select that mode of trial. It also reduces the negative impact of summary convictions on service members' opportunity to seek future employment after their military career. The proposal would apply to both past and present convictions by summary trials. Should it is believed that the circumstances of the case are serious enough that a formal criminal conviction before a court martial is needed, the matter would then be directly sent up to the Canadian Military Prosecution Service for consideration.

As for the mechanics, Bill C-15 clauses on that issue could be used as a starting point and modified accordingly. *National Defence Act* should be amended by adding section 249.27 which would read as follows:

249.27 A person who is convicted by a summary trial pursuant to sections 163 and 164, or who has been convicted by it before the coming into force of this section, has not been convicted of a criminal offence.

Consequential amendment should be made to section 307 to *National Defence Act* added by clause 105 of Bill C-15 prohibiting questions on such convictions during employment processes.

## **Recommendation 2**

**Confirm in the *National Defence Act* that summary trial convictions are not criminal offences.**

### *c) Record Summary Proceedings*

As in New Zealand<sup>24</sup> or CAF Board of Inquiry<sup>25</sup>, hearings must be audio recorded, unless this is not reasonably practicable. Digital electronic recording should be preferred as it could be burned on a CD-ROM, a memory stick or uploaded on a Defence Wide Area Network (DWAN) terminal to ease further transmission in the context of a review. When recording is not practicable, the presiding officer should be required to make a detailed written summary of proceedings, for example by a Resources Management Support (RMS) clerk.

Such recording or written summary would be considered as a 'record' as defined by Treasury Board *Policy on Information Management* and would be managed therefore as per CAF administrative directives.<sup>26</sup> The physical support of the audio recording or the detailed written summary would also be attached to its related Record of Disciplinary Proceedings and placed on the Unit Registry Disciplinary Registry.<sup>27</sup>

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<sup>24</sup> See Chapter IV, part B, section 1, above.

<sup>25</sup> See Chapter IV, part A, section 1, above.

<sup>26</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 6001-0, *Information Management*, (Ottawa: National Defence, 28 February 2012); Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 6001-1, *Recordkeeping*, (Ottawa: National Defence, 13 March 2013).

<sup>27</sup> QR&O, art 107.14.

As to the wording, in addition to New Zealand and CAF BOI provisions, there is another example in CAF regulations pertaining to living accommodations of court martial actors.<sup>28</sup> These responsibilities would be provided for in the NDA with consequential amendments in the QR&O, in particular chapter 108 and article 107.14 as it pertains to the recording or the detailed written summary be placed on the Unit Registry of Disciplinary Proceedings.

### **Recommendation 3**

**Require that presiding officers ensure that summary proceedings be audio recorded, unless it is not reasonably practicable to do so having regard to the location of the summary trial and the constraints of military operations. Require that if this is not reasonably practicable or if the audio recording fails, a detailed written summary of the proceedings be made. Require that support of the audio recording or the written summary be placed on the Unit Registry of Disciplinary Proceedings.**

#### *d) Eliminate Rank-Based Distinction*

Rank distinctions in summary justice must be eliminated. Similarly to the French system<sup>29</sup>, all ranks – including the Chief of the Defence Staff – would be subject to summary proceedings and exposed at least to equal consequences in the case of conviction. In the alternative, superior commanders should be given the most severe punishments powers, following the principle that the higher the rank and responsibilities, the heavier the consequences in case of misconduct.

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<sup>28</sup> QR&O, art 111.16 (1).

<sup>29</sup> See Chapter IV, part B, section 2, above.

In terms of procedural safeguards, all service members must benefit from pre and post-charge legal advice. What would differ is the authority who can decide the matter and impose punishments, at least one rank above the accused person. That rule would go up the entire chain-of-command. Where the CDS would be the accused person, jurisdiction would then be exercised by the Deputy Minister of National Defence. Should it come to that point, the Minister of National Defence would then act as the reviewing authority. Based on a recent Supreme Court decision, it can be inferred that generally speaking the Minister could still validly play a role in military justice.<sup>30</sup>

Having leaders equally exposed to summary proceedings would efficiently build trust within the Defence Team as a perfect illustration of fundamental leadership principles such as ‘leading by example, sharing risks and hardships, and refusing to accept or take special privileges; walking the talk’.<sup>31</sup> However it might be rationally substantiated from a reasonable observer’s perspective that some punishments are simply not appropriate for some higher ranks, such as extra work and drill. In that case, those punishments must be replaced by others having longer-term and meaningful consequences on their career, such as forfeiture of seniority as in United Kingdom, stay of seniority up to 12 months as in New Zealand, removal from the promotion list or ministerial reprimand as in France, or reduction of pay for one year or deferral for one year of the next pay increment as in Ireland.<sup>32</sup> Another option is to determine that if lower ranks are the only ones exposed to detention, higher ranks are the only ones exposed to

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<sup>30</sup> *R v Cawthorne*, 2016 SCC 32 (CanLII).

<sup>31</sup> Canada, National Defence, *Leadership in The Canadian Forces : Leading People* (Kingston: Canadian Defence Academy, 2007) ch 6 “Building Effective Teams” at 71.

<sup>32</sup> See Chapter V, part B, section 2, above.

reduction in rank. It may be advisable however to exclude military judges from summary trial jurisdiction to protect their judicial independence.

In terms of legislative amendments, the definition of 'superior commander' at section 162.3 of the *National Defence Act* would be modified to include all commissioned officers of the rank of colonels and above, providing the accused person is at least one rank below the rank of the superior commander. Where the accused person is the CDS, the Deputy Minister of National Defence is the 'superior commander'. Paragraph 164 (1)(a) of the *National Defence Act* would be modified to expand summary jurisdiction to, in addition to non-commissioned members above the rank of sergeant, any officer above the rank of officer-cadet, with the exception of military judges. Subsection 164(3) should be deleted. Subsection 164(4) should be modified to include at least the same list of punishments than those available to a commanding officer at subsection 163(3).

Articles 107.03 and 107.11 of the QR&O must be modified to remove any requirement to provide legal advice based on rank. Consequential amendments should be also made to Chapter 108, in particular Table to Article 108.26 on the powers of punishments of a superior commander.

#### **Recommendation 4**

**All ranks must be subject to summary proceedings, benefit from same procedural safeguards, in particular pre and post charge legal advice, and be exposed at least to similar consequences in case of conviction. Only the level of authority having jurisdiction would vary. Should any rational disparity in punishments between lower and higher ranks remain, it must be translated by having the latter being exposed to punishment having longer-term consequences on their career.**

*e) Create a Right of Appeal to Summary Appeal Court Martial*

Similarly to United Kingdom, New Zealand and Ireland, there must be a right to appeal summary trial findings, sentence or both before a Summary Appeal Court Martial (SACM) consisting of a military judge.<sup>33</sup> That right of appeal would take place after initial review, which according to statistics is currently generally favorable to offenders.<sup>34</sup> The prosecution and offenders would be represented by counsel. As in Ireland, the maximum punishment that can be awarded on appeal would be limited to what could have been awarded by the presiding officer.<sup>35</sup> However, contrary to New Zealand, SACM decisions would be subject to appeal before the Court Martial Appeal Court, an additional safeguard to ensure that military justice at summary level remains within Canadian legal norms.

To contribute to a better administration of military justice, appeals from summary trials would by default be disposed of upon the record or by agreed statements of facts. Documents and exhibits already on file from the summary trial would be transferred as evidence. As in appeals on summary convictions in ordinary criminal justice<sup>36</sup>, only when the military judge is of the view that the interests of military justice would be better served by a trial *de novo* could he or she order re-hearing of the case, entirely or partially.<sup>37</sup> For example, it could be justified where audio recording is absent or in bad condition. In addition, the military judge would have the discretion to work directly from the audio recording or order a written transcript to be made, on its own motion or on application by

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<sup>33</sup> See Chapter IV, part B, sections 1 and 3, above.

<sup>34</sup> See Chapter II, part B, section 7, above.

<sup>35</sup> Tony McCourt, "Ireland's Military Justice System Updated : Defence (Amendment) Act 2007", (2007) 46 Mil L & L War Rev 429 at 434.

<sup>36</sup> *Criminal Code*, ss 812-838.

<sup>37</sup> *Criminal Code*, s 822(4)(5).

either of the parties. For reasons of efficiency, it would be possible to hear an appeal by way of videoconference.

As presiding officers are not jurists, they would sometimes make wrong decisions on a question of law. Some procedural irregularities might also occur. In either case, there would be circumstances where offenders, despite those mistakes, would not have suffered substantial wrong or miscarriage of justice. Similarly to ordinary criminal law, it would be provided for SACM to have the ability to dismiss appeals in those cases where appellants would have suffered no prejudice.<sup>38</sup>

As for the mechanics, numerous amendments to the *National Defence Act* and the QR&Os would be required. In the context of the present research, it would be too complex and onerous to enumerate and pinpoint in current legislation where those potential changes could be made.

### **Recommendation 5**

**Create a right of appeal to a Summary Appeal Court Martial (SACM) consisting of a military judge that would take place after initial review. By default, appeals would be disposed of upon the record or by agreed statements of facts, unless the SACM directs otherwise. There would be the possibility of hearing appeals by way of videoconference. Parties would be represented by counsel. SACM would have the ability to dismiss appeals where they would be ‘harmless’ mistakes made at the summary trial. In addition SACM would be capped at what would have been the maximum punishment by the presiding officer. SACM decisions would be, in turn, subject to appeals before the Court Martial Appeal Court.**

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<sup>38</sup> *Criminal Code*, s 686(1)(b)(iii) and (iv).

*f) Make Election an Unequivocal Waiver of Rights*

It must be made crystal clear that when a service member elects to be tried by summary trial, he or she waives certain rights guaranteed by the *Charter*. As in New Zealand<sup>39</sup> the *National Defence Act* must provide that an accused person would be 'deemed to have irrevocably waived' the right to legal representation during hearing and the right to an independent tribunal.<sup>40</sup> When there is an election, to ensure that service members are fully aware of the consequences of their choice, a presiding officer would not be able to proceed with the charge unless the accused person confirms he or she has *effectively* consulted with a counsel. This would be added to the list of conditions to be satisfied for presiding officers to try an accused person.<sup>41</sup>

Along similar lines to the US Army waiver form prior to summary court martial<sup>42</sup> Part 3 of the Record of Disciplinary Proceedings pertaining to the choice of mode of trial needs to be modified. It must in particular state in plain language that, after having consulted with a counsel, an accused person understands his or her rights and that he or she voluntarily consents to be tried by summary trial. Articles 107.07, 107.075 and 108.17(3) of the QR&Os require to be modified accordingly.

**Recommendation 6**

**Make election to summary trial an unequivocal waiver of the rights: 1) to be represented by counsel at hearing, and; 2) to be tried by an independent tribunal.**

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<sup>39</sup> See Chapter IV, part B, section 1, above.

<sup>40</sup> *Armed Forces Discipline Act 1971* (NZ), 1971/53, s 117ZB.

<sup>41</sup> *NDA*, subs 163(1) and 164(1).

<sup>42</sup> See Chapter IV, part B, section 3, above. See Appendix D, below.

**National Defence Act needs modification to include a deemed provision to that effect. The Record of Disciplinary Proceedings needs a waiver statement written in plain language.**

*g) Give Meaningful Access to Legal Advice*

Each time services members have to make important decisions during the summary proceedings, they must have meaningful access to complete legal advice. Defence Counsel Services must be expanded so that for the purpose of election each defence counsel is in a position to effectively provide complete legal advice to the accused rather than legal information.<sup>43</sup> Copy of any information to be relied on as evidence at the summary trial or tending to show that the accused did not commit the offence charged, such as any unit or military police investigation report, must also be communicated to defence counsel in sufficient time prior to election. Regulations must be amended as they impose that obligation only as it pertains to the accused and the assisting officer.<sup>44</sup>

At the hearing, should the presiding officer feel it necessary to adjourn to consult with the unit legal advisor, the accused and the assisting officer must be given similar access to consult with legal counsel, ideally those who have provided the legal advice for the election. In addition to the general power to request or order an adjournment, regulations must specifically provide for such a situation.<sup>45</sup> As for the appeal, a similar

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<sup>43</sup> See Chapter III, part E.

<sup>44</sup> QR&O, art 108.15(1)(2) and Notes (A)(B)(C).

<sup>45</sup> QR&O, art. 108.33.

process to what occurs when someone elects to be tried by court martial should be established.<sup>46</sup>

Such expansion of services would likely represent adding human resources to Defence Counsel Services. To enhance face-to-face meetings with service members, it may also worth considering regionalization similarly to the US Army Trial Defense Service<sup>47</sup> and sending defence counsel on short-term deployments (aka Technical Assistance Visit or TAV) to significant CAF contingents located in theatre of operations, even on longer term deployments (3 or 6 months) for larger CAF contributions.

### **Recommendation 7**

**Give meaningful access to complete legal advice to service members during summary proceedings, in particular during election and appeal processes. Consider regionalization and deployment of Defence Counsel Services resources.**

#### **2. Desirable Changes**

##### *a) Give Election beyond Minor Punishments only*

The threshold for the right to elect should be determine based on the punishment to which the accused person is exposed, irrespective of the offence. Therefore all service offences would have the potential of being a minor offence. This would remove the uncertainty caused by the expression "...but only where the offence relates to military

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<sup>46</sup> QR&O, art. 109.04.

<sup>47</sup> See Chapter IV, part B, section 3, above.

training...” as one of the circumstances for not offering election when someone is charged with conduct to the prejudice of good order and discipline.<sup>48</sup>

In terms of punishments, the limit should be set lower than the current level. Anything above the punishment of caution, suppression of leave, extra work and drill or fine of more than 25% of the monthly basic pay would require election. As for the punishments of confinement to barracks/ship, as it a deprivation of liberty, an election should be given.

### **Recommendation 8**

**Set the threshold for election to exposure to low level punishments, irrespective of the service offence. Any punishment above caution, suppression of leave, extra work and drill and a fine of 25% of the monthly basic pay would require election.**

#### *b) Minimize undue Pressure to Elect Summary Trial*

When election is offered, undue pressure<sup>49</sup> on the accused to elect summary trial should be minimized in three ways.

First, to reduce the risk that charges be unduly transformed into more serious ones after election, Director of Military Prosecutions’ ability to add another charge or substitute charges referred to him or her<sup>50</sup> should only be exercised when additional investigation<sup>51</sup> has disclosed new facts justifying such a change. Absent those additional facts,

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<sup>48</sup> QR&O, art 108.17(1)(a).

<sup>49</sup> See Chapter V, part C, section 2, above.

<sup>50</sup> QR&O, art 110.04(1)a.

<sup>51</sup> QR&O, art 110.04(2).

modification to the charge should be done only on request to a military judge, should a court martial is convened. In the alternative, any modification after election without any new fact should at least give rise to another election, even if it means that a summary trial would occur beyond the time limitation. Article 110.04 of the QR&O should be modified accordingly.

Secondly during operational deployments, the decision to 'repat' (aka Return To Unit or RTU) an individual based on the alleged commission of an offence should be decided independently from the election process. Although the nature of allegations and charges against the individual is relevant, his or her choice as to the mode of trial is not. The officer who refers a charge to a referral authority due to an election to be tried by court martial should not be the same officer who decides the repatriation of the individual. Due to the important consequences of a repatriation on a service member, the procedure should be analogous to the relief from performance of military duty when someone is alleged to have committed, charged with or convicted of an offence.<sup>52</sup> An article 110.095 should be added to the QR&O to that effect.

Thirdly, a court martial should be capped at what would have been the maximum punishment imposed by the presiding officer. The only exception is if a further investigation or the trial itself reveals new facts justifying aggravating factors beyond summary powers. The *National Defence Act* should be amended to add such a

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<sup>52</sup> QR&O, art 101.09.

punishment limitation to General Courts Martial and Standing Courts Martial powers respectively.<sup>53</sup>

### **Recommendation 9**

#### **Minimize undue pressure on accused persons to elect summary trial:**

- a) Additional or substitution of charge after election should be made only when an additional investigation reveals new facts to justify it. Otherwise, amendment should be authorized by a military judge or, alternatively, give rise to another election;**
- b) During disciplinary proceedings, decision to repatriate should be made independently and by a different authority than officer referring the charge to a referral authority. Election is not alone a factor. The process should be analogous to that for relief from performance of military duty, and;**
- c) Unless additional investigation or evidence reveals new aggravating facts, a court martial should be capped at what could have been imposed by the presiding officer.**

#### *c) Create New Offences Currently under Section 129*

New specific offences should be created in the *National Defence Act* so that the current use of 'act, conduct, disorder or neglect to the prejudice of good order and discipline' as main legal basis for charges at summary trial is minimized. Creation of specific offences would increase predictability of the law which would be beneficial to service members as to what is expected from them. It would also assist in determining with more precision the objective seriousness of various misconducts and set maximum

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<sup>53</sup> *NDA*, ss 166.1, 175.

punishments accordingly. This might in turn help in determining which offences should remain within summary jurisdiction from those that should be left to court martial. Finally, it would reduce uncertainty as to how to establish those misconducts, respond to them, and decide, from an individual's perspective, the mode of trial when election is offered.

This would also clarify legislation following a recent court martial decision where the presumption that any act or omission constituting a contravention to CAF regulations, orders or instructions is to the prejudice of good order and discipline was declared unconstitutional as being against the presumption of innocence.<sup>54</sup>

The following non-exhaustive list of new potential offences should be considered:

- a) Sexual Misconduct or Inappropriate Sexual Behaviour : based on former Justice Marie Deschamps recent report<sup>55</sup>, any prohibited sexual conduct not otherwise covered by a sexual offence, including:
  - i. fraternization;<sup>56</sup>
  - ii. adverse personal relationships;<sup>57</sup>
  - iii. sexual harassment<sup>58</sup>, and;

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<sup>54</sup> *R v Korolyk*, 2016 CM 1002 (CanLII) at paras 20-28.

<sup>55</sup> Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, (Ottawa: National Defence, 2015) at 46.

<sup>56</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 5019-1, *Personal Relationships and Fraternization*, (Ottawa: National Defence, 22 December 2004).

<sup>57</sup> *Ibid.*

<sup>58</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 5012-1, *Harassment Prevention and Resolution*, (Ottawa: National Defence, 20 December 2000).

- iv. use of DND electronic networks or computers to communicate or access material of a sexual nature;<sup>59</sup>
- b) Information Technology Security Breach;<sup>60</sup>
- c) Drug Use;<sup>61</sup>
- d) Negligent or Unauthorized Discharge of a Weapon: where ‘negligent’ would be a true criminal offence established by ‘a marked departure from the norm’ whereas ‘unauthorized’ would be a strict or absolute liability offence, exposing contraveners to non-custodial sentences;<sup>62</sup>
- e) Failure to Properly Maintain:
  - i. Personal Equipment;
  - ii. Quarters, or;
  - iii. Work Space;<sup>63</sup>
- f) Inappropriate Dress or Deportment<sup>64</sup>: the first being a failure to be properly dressed according to CAF instructions<sup>65</sup>, irrespective of the behaviour, while the second is a failure to maintain proper behaviour, while wearing a uniform.<sup>66</sup>

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<sup>59</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 6002-2, *Acceptable Use of the Internet, Defence Intranet and Other Electronic Networks, and Computers*, (Ottawa: National Defence, 12 February 1999).

<sup>60</sup> Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 6003-1, *Information Technology Security Programme*, (Ottawa: National Defence, 18 April 2012).

<sup>61</sup> QR&O, art 20.04.

<sup>62</sup> See generally *R v Brideau*, 2014 CM 1005 (CanLII).

<sup>63</sup> QR&O, art 108.17(1)a.

<sup>64</sup> *Ibid.*

<sup>65</sup> Canada, National Defence, *A-DH-265-000/AG-001 Canadian Forces Dress Instructions*, (np: CDS, 2010), ch 2 “Policy and Appearance”, sec 1 “Dress Policy” at paras 1-58.

<sup>66</sup> *Ibid* sec 2 “Appearance” at paras 1-3; QR&O, art 17.02.

Finally for all prohibitions contained in a regulation, directive, order, or instruction, not otherwise specified in a service offence, a strict liability offence (Contravention to regulation, directive, order, or instruction) should be created in the *National Defence Act* exposing service members only to minor punishments and fine of no more than 25% of the monthly basic pay.

### **Recommendation 10**

**Create new specific service offences in the *National Defence Act* for various misconducts that are currently captured under section 129.**

#### *d) Require Presiding Officers to Provide Written Reasons*

Presiding officers should be required to provide written reasons of their decisions on findings and sentence. This is highly advisable in terms of procedural fairness, irrespective of the potential punishment. It facilitates acceptance of decisions, not only from an individual's perspective, but also for members of the military community, even those who were not present at the hearing. It also lays out in a more narrative form how the sentence is to be carried out. That would be convenient where presiding officers would have power to impose any reasonable condition associated with the suspension of detention.<sup>67</sup> It provides factors to determine whether the principle of similarity in sentencing should be applied or not, relevant where co-offenders are not tried by the same presiding officer.<sup>68</sup> Last but not least, providing written reasons eases understanding of each presiding officer's thought process, particularly useful for review

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<sup>67</sup> Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 41st Parl, 2013 (assented to 19 June 2013), SC 2013, c 64 replacing *NDA*, s 215.

<sup>68</sup> *Criminal Code*, s 718.2(b).

authorities and military judges should the matter be elevated at those levels. Besides, it should not represent an insurmountable challenge; the presiding must already provide written reasons when they disagree with a unit legal advisor or a CFNIS military police officer on whether they should go with a summary trial or not.<sup>69</sup> Article 108.20 of the QR&O should be modified accordingly to impose similar requirement towards the accused person.

The format of the written reasons does not have to equate to a judicial decision. For example, it can be presented in a bullet point format. As long as certain fundamental elements are present, a certain degree of flexibility should be left to presiding officers in writing their decision. Presiding officers would have access to a unit legal advisor for guidance. It might also worth considering adding a page to the Record of Disciplinary Proceedings providing a blank form template as guidance to presiding officers. Articles 107.07 and 107.075 of the QR&O should be modified accordingly.

### **Recommendation 11**

**Presiding officers should be required to provide written reasons for their findings and sentences. An additional page should be added to the Record of Disciplinary Proceedings accordingly.**

#### *e) Set Confinement as a Distinct and Higher Punishment*

The punishment of confinement to ship or barracks should be removed from the list of 'minor punishments' and become a distinct punishment. It is a restriction on liberty,

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<sup>69</sup> QR&O, arts 107.11(2), 107.12.

analogous to confinement of the POW Camp disciplinary scheme<sup>70</sup> and *arrêts* of the French system.<sup>71</sup> It should be therefore separately identified in the scale of punishments, lower than detention, but at least more severe than a fine. Section 139 of the *National Defence Act* should be modified accordingly and a specific provision added.<sup>72</sup> Exposure to potential confinement should give rise to election to be tried by court martial.

In terms of predictability of the law, it should be considered to provide for general rules applicable to all confinements in the QR&O, as the Australians do with 'restriction of privileges'.<sup>73</sup> In terms of accountability in the administration of military justice, there should be a requirement for specific rules applicable to confinement on a particular base, unit or element to be produced each time a presiding officer considers imposing it. Article 104.13 of the QR&O should be modified accordingly.

Although a restriction on liberty, confinement should not be suspended pending initial review by reviewing authority. Otherwise confinement to ship awarded just before going to a port could be circumvented by putting a request for review but abandoning it just after the ship is back at sea. Nevertheless, to remedy wrongly awarded confinement, reviewing authority should be given the ability to give days off (or 'leaves' in military terminology) to compensate for time served, akin to what happened recently in the case of *Private Nicholas Detre v Attorney General of Canada*.<sup>74</sup>

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<sup>70</sup> See Chapter IV, part A, section 2, above.

<sup>71</sup> See Chapter IV, part B, section 2, above.

<sup>72</sup> *NDA*, ss 140-146.

<sup>73</sup> See Chapter IV, part B, section 3, above.

<sup>74</sup> See Chapter III, introduction, above. *Private Nicholas Detre v Attorney General of Canada* (18 June 2015), Montreal T-2145-14 (Prothonotary Richard Morneau) aff'd (14 August 2015), Ottawa T-2145-14 (FCTD).

## **Recommendation 12**

**Confinement to ship or barracks should be a distinct punishment, higher in terms of severity than fine. It should give a right to elect to be tried by court martial. General rules applicable to all confinements should be provided for in the QR&O. Specific rules applicable to a base, unit or element should be introduced in evidence each time a presiding officer considers imposing confinement. Confinement should not be suspended pending review. The reviewing authority should have ability to authorize leave in case of a wrongful confinement.**

### *f) Update Punishments Panoply*

Presiding officers should be given more flexibility and impact in sentencing individuals. The consequences of some available punishments should be specified, notably reprimand and severe reprimand. Those punishments should have precise consequences on someone's career by having a direct impact on offenders' personal reevaluation reports (PER) for a shorter term for a reprimand and a longer term for a severe reprimand. Additional punishments should also be made available for presiding officers. It could be done by giving power to presiding officers to impose forfeiture of seniority providing the consequences that flow from it would have a significant effect on someone's career like in United Kingdom.<sup>75</sup> It could be also done by creating new punishments such as restrictions of privileges as in Australia<sup>76</sup>, removal from the promotion list as in France<sup>77</sup>, or reduction of pay for one year or deferral for one year of the next pay increment as in Ireland.<sup>78</sup>

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<sup>75</sup> NDA, ss 139(1)(h), 144; QR&O, art 104.11. See Chapter V, part B, section 2, above.

<sup>76</sup> See Chapter IV, part B, section 3, above.

<sup>77</sup> See Chapter IV, part B, section 2, above.

<sup>78</sup> See Chapter IV, part B, section 3, above.

### **Recommendation 13**

**The punishments scheme at summary trial should be revamped. Consequences that flow from reprimand and severe reprimand should be specified. Forfeiture of seniority should be considered to be within summary jurisdiction. The creation of additional punishments should be considered such as: restrictions of privileges, removal from the promotion list, or reduction of pay for one year or deferral for one year of the next pay increment.**

#### *g) Require Formal Training for Three Roles*

Custody review officers, summary unit investigators, and assisting officers should be formally qualified before performing their duties. Due to the importance of their respective roles they should, similarly to that provided for presiding officers, be trained and certified in the administration of the *Code of Service Discipline* according to a curriculum established by the Judge Advocate General. Article 101.07 of the QR&O should be modified accordingly. Training should be particularized to each role and standardize respective format and procedure, such as summary unit investigation reports. Once an individual is qualified in a particular training, it should appear on the Member's Personnel Record Résumé (MPRR).

### **Recommendation 14**

**Custody reviews officers, summary unit investigators and assisting officers should be qualified and trained in their respective role in the administration of the *Code of Service Discipline* before assuming their duties.**

### *h) Create a Summary Proceedings Electronic System*

A Summary Proceedings Electronic System (SPES) should be established. For each case an electronic file should be created with a specific filing number. Relevant documentation, beginning with investigation reports but also various forms as per regulations, would be particularized, digitalized and associated with the file accordingly. SPES would help actors, often in different locations, in performing their respective role. To that extent, each actor would be given appropriate access to their role – and no more - and ability to digitally sign each of their actions.

For example SPES would facilitate defence counsel to have, in timely fashion, access to complete disclosure to provide legal advice for the election. It would also expedite review by simply accessing the electronic file and listening to the audio recording of the summary trial decision. SPES would help the Military Justice Division – which would have full access – to assist the Judge Advocate General his or her role as superintendent of the administration of military justice in the Canadian Armed Forces.<sup>79</sup> Not only would it ease the production of statistical data, notably for the purpose of the annual report<sup>80</sup>, but it would become a useful tool to exercise real-time oversight.

#### **Recommendation 15**

**A Summary Proceedings Electronic System (SPES) should be created. Individual case would be electronically filed; relevant documentation and forms would be attached accordingly. Depending on the role, from investigation until review, each actor would be given appropriate access rights and ability to digitally sign each**

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<sup>79</sup> NDA, s 9.2(1).

<sup>80</sup> NDA, s 9.3(2).

**transaction. Full access would be given to JAG as superintendent of military justice.**

*i) Conduct 3-Year Qualitative Surveys by ADM(RS)*

Qualitative surveys on military justice should be conducted on a periodic basis by Assistant Deputy Minister (Chief Review Services) and integrated in JAG annual reports. Since the 1998 legislative reform, three qualitative surveys with military justice stakeholders were conducted by Office of the JAG (OJAG): in 2001-02, in 2006-07, and in 2009-10 where, for the first time, accused persons were also interviewed.<sup>81</sup> Those qualitative surveys should be conducted at a more sustained pace although not annually. As unit commanding officers and their chief warrant officers/chief petty officers 1<sup>st</sup> class are replaced usually on a 2 or 3 year cycle, qualitative surveys should be conducted every three years. Then, each time an independent review authority is mandated to conduct an external review of the military justice system every seven years<sup>82</sup>, in addition to seven years of statistics, he or she would benefit from at least two even three qualitative surveys.

In addition, qualitative surveys should be conducted in a more systematic fashion to provide meaningful data useful for comparative purpose and identification of any trend that might require change. Even with the best of intention, OJAG alone might not have the professional candor and detachment required for such a task. Indeed, some aspects of those surveys might – rightly or wrongly - raise concerns about legal officers' efficiency in providing legal advice and training to operators. Unconsciously, it might influence

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<sup>81</sup> See Chapter III, part E and part F, section 1, above.

<sup>82</sup> NDA, s 273.601.

OJAG personnel in conducting surveys in the way they select their sample of service personnel, which questions they choose to ask, how they ask those questions and how they interpret the answers.

To maintain a certain distance between the operating and reporting functions in the administration of military justice, those qualitative surveys with stakeholders and accused persons should be conducted by Assistant Deputy Minister (Review Services) or ADM(RS). That organization plays, within DND/CAF, an analogous role to the Auditor General. It carries out its mandate by delivering internal audit and evaluation programs, independently from other DND/CAF organizations.<sup>83</sup> In the context of military justice however, such surveys should be always done in collaboration with the JAG, as he or she has ultimately the statutory reporting duty to the Minister of National Defence.

### **Recommendation 16**

**Qualitative surveys with stakeholders and accused persons on the administration of military justice at summary level should be conducted every three years by Assistant Deputy Minister (Review Services) in collaboration with OJAG.**

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<sup>83</sup> Canada, National Defence, *Assistant Deputy Minister (Review Services)* (8 July 2015), online: National Defence and the Canadian Armed Forces <[www.forces.gc.ca/en/about-org-structure/chief-review-services.page](http://www.forces.gc.ca/en/about-org-structure/chief-review-services.page)>.

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# **Appendices**

## ***A. Conditions Of Confinement To Ship or Barracks – Extract***

**BSO 4.02 (Last Modified Sept 07)**

### **CFB KINGSTON** **RULES AND REGULATIONS FOR DEFAULTERS**

#### **GENERAL**

1. This is an order that applies to all Canadian Forces personnel employed within Base Kingston.
2. This order is issued under the authority of the Base Commander, CFB Kingston.
3. The OPI for this order is the BCWO, CFB Kingston.

#### **PROCEDURES**

4. These Rules and Regulations shall be adhered to by all personnel sentenced to a punishment of Confined to Barracks, Extra Work and Drill, or Stoppage of Leave. The preceding personnel will be known as defaulters. The rules and routine for those personnel Released from Custody with Conditions also appear within this order.
5. The following general rules shall apply to all personnel on defaulters:
  - a. once sentenced, defaulters will immediately report to the BCWO office accompanied by their SM for a briefing and sign the defaulters Declaration of Understanding attached as Annex A, as having read and understood these orders;
  - b. the defaulter's SM is responsible for the administration, control, and employment of the defaulter. The SM is also responsible for providing an NCO to act as Duty NCO to supervise and inspect the defaulter throughout his or her punishment. The Duty NCO must be at least one full rank above the personnel on defaulters. The Duty NCO's responsibilities and report form are attached as Annex B;
  - c. the Base Duty Officer will conduct the 1800hr defaulter inspection on the first day of punishment and again every second day until the punishment is complete. The Duty NCO will accompany the BDO during these inspections and conduct all other inspections until the punishment is complete;
  - d. defaulters will be dressed as instructed when reporting to the Duty NCO on defaulters parade;

- e. all defaulters extra drill will be conducted on McNaughton Parade Square or during inclement weather Thompson Drill Hall, or any other suitable area; and
- f. defaulters will not be excused drill or work at their own request. Excusal of defaulters from any portion of their punishment will be authorized only by the BCWO, or as a recommendation from a Medical Officer.

**RULES FOR CONFINEMENT TO BARRACKS, STOPPAGE OF LEAVE, OR EXTRA WORK AND DRILL PERSONNEL**

6. Personnel serving a punishment of Confinement to Barracks will move into a Defaulters Room in B37 (Sherman Hall) and will remain in the Barracks except on the following occasions:

- a. when carrying out the normal daily tasks and or training on normal working days;
- b. when attending meals at the Base All Ranks Kitchen;
- c. when reporting to Sick Parade once cleared through the Duty NCO or Base Duty Officer (BDO);
- d. when employed on defaulters Extra Work and Drill;
- e. when authorized to attend church services; and
- f. when authorized to use the CANEX to purchase toiletries by the Duty NCO or BDO.

7. Personnel serving a punishment of Confinement to Barracks will:

- a. not enter any Mess or Institute;
- b. not consume alcoholic beverages, or illicit/illegal drugs;
- c. not wear civilian clothing other than PT gear during normal working hours;
- d. not be allowed visitors unless otherwise authorized by the Duty NCO or BDO;
- e. not appear at any place of entertainment; and
- f. not be allowed any personal items (radios, walkmans, MP3 players, cell phones, game like items...etc) or food items in their room.

[...]

**DRESS**

10. The following orders of dress will be worn during defaulters:

- a. Parade Order dress will consist of:
  - (1) Ceremonial Dress No 1A Medals only, with Ankle boots;
  - (2) weapons will not be carried; and
  - (3) in inclement weather, raincoats may be worn but will be removed for inspection.

- b. Dress of the Day will consist of:
  - (1) CADPAT with beret and Combat boots; and
  - (2) in inclement weather the appropriate wet weather gear may be worn but will be removed for inspection.
  
- c. Marching Order will consist of:
  - (1) CADPAT with helmet and Combat boots;
  - (2) Tactical vest, or personal webbing packed as per kit list;
  - (3) rucksack packed as per kit list; and
  - (4) in inclement weather the appropriate wet weather gear may be worn but will be removed for inspection.
  
- d. Fighting Order will consist of:
  - (1) CADPAT with helmet and Combat boots;
  - (2) Tactical vest, or personal webbing packed as per kit list; and
  - (3) in inclement weather the appropriate wet weather gear may be worn but will be removed for inspection.

## **ROUTINE**

11. Following the initial reporting period at the BCWO's office, all personnel Confined to Barracks will report dressed in the appropriate order of dress at the following times:

- a. normal work days:
  - (1) 0645hrs – Dress of the Day for inspection;
  - (2) 1800hrs – Marching Order for room inspection;
  - (3) 1900hrs – Fighting Order with gloves for 2 x 20min periods of drill and extra work;
  - (4) 2100hrs – Parade Order Dress for inspection; and
  - (5) 2200hrs – Dress of the Day for inspection.
  
- b. Saturdays:
  - (1) 0800hrs – Parade Order Dress for inspection;
  - (2) 0900hrs – Fighting Order with gloves for 2 x 20min periods of drill and extra work;
  - (3) 1100hrs – Dress of the Day for inspection;
  - (4) 1300hrs – Fighting Order with gloves for 2 x 20 min periods of drill and extra work;
  - (5) 1600hrs – Dress of the Day for inspection;
  - (6) 1800hrs – Marching Order for room inspection;
  - (7) 1900hrs – Dress of the Day with gloves for extra work;

- (8) 2100hrs – Dress of the Day for inspection; and
- (9) 2200hrs – Parade Order Dress for inspection.

c. Sundays and holidays:

- (1) 0900hrs – Dress of the Day for inspection;
- (2) 1300hrs – Dress of the Day for inspection; and
- (3) 2100hrs – Dress of the Day for inspection.

12. Reveille will be at 0600hrs during the workweek and 0700hrs on Saturdays and Sundays. Lights out will be 2300hrs nightly. During the period of lights out to reveille no work will be carried out.

[...]

**SIGNATURE**

25. All defaulters will sign the declaration below as having read and fully understood these orders. Defaulters SM will sign as witnessed the defaulter reading and understanding his or her duties.

## ***B. Differences in Treatment between Ranks in Summary Proceedings***

<b><u>Procedural aspects</u></b>	<b><u>Lower ranks</u><sup>1</sup></b>		<b><u>Higher ranks</u><sup>2</sup></b>
<b><i>Pre-charge legal advice</i></b>	Required only if it would give rise to election or offence can only be dealt with by court martial		Always
<b><i>Pre-trial/post-charge legal advice</i></b>	Required only if it would give rise to election or offence can only be dealt with by court martial		Always
<b><i>Presiding Officer</i></b>	Delegated Officer	Commanding Officer	Superior Commander
<b><i>Proportion</i><sup>3</sup></b>	81% of summary trials	15% of summary trials	4% of summary trials
<b><i>Jurisdiction</i></b>	Disciplinary offences only	Disciplinary and some criminal offences	
<b><i>Potential punishment</i><sup>4</sup></b>	<ul style="list-style-type: none"> <li>-Reprimand</li> <li>-Fine (max 25%)</li> <li>-Confinement to ship or barracks (14days)</li> <li>-Extra work &amp; drill (7days)</li> <li>-Stoppage of leave (14days)</li> <li>-Caution</li> </ul>	<ul style="list-style-type: none"> <li>-Detention(30 days)</li> <li>-Reduction in Rank</li> <li>-Reprimand</li> <li>-Fine (max 60%)</li> <li>-Confinement to ship or barracks (21days)</li> <li>-Extra work &amp; drill (14days)</li> <li>-Stoppage of leave (30days)</li> <li>-Caution</li> </ul>	<ul style="list-style-type: none"> <li>-Severe Reprimand</li> <li>-Reprimand</li> <li>-Fine (max 60%)</li> </ul>
<b><i>Criminal Offence</i></b>	Least exposed	Most exposed	Less exposed

<sup>1</sup> Private/Ordinary Seaman and Able Seaman/Airman, Corporal/Leading Seaman, Master Corporal/Master Seaman, Sergeant/Petty Officer 2nd class,.

<sup>2</sup> Warrant Officer/Petty Officer 1st class, Master Warrant Officer/Chief Petty Officer 2nd class, Chief Warrant Officer/Chief Petty Officer 1st class and all officers from Officer cadet/Naval Cadet and above.

<sup>3</sup> JAG Annual Report 2009-10. Following reports do not provide such data.

<sup>4</sup> Officer Cadets are considered of lower rank for that purpose.

***C. Comparing Review in Summary Proceedings with Court Martial Appeal***

<b><u>Features</u></b>	<b><u>Appeal before CMAC</u></b>	<b><u>Summary Trial Review</u></b>	
		<b><u>QR&amp;O, art 108.45</u></b>	<b><u>QR&amp;O, art 116.02</u></b>
<b>a) Process</b>			
<b>Initiated by</b>	Prosecution or defence	Offender	Commanding officer on legal advisor's review
<b>Timings</b>	30 days from decision	14 days from decision	Anytime
<b>Time extension</b>	Yes	Yes	N/A
<b>Grounds</b>	<p>Legality of any finding of guilty</p> <p>Legality of whole or part of the sentence</p> <p>With leave, the severity of the sentence</p> <p>Other</p>	<p>Unjust findings</p> <p>Sentence unjust or too severe</p>	<p><u>Initial step</u>: errors on the face of the record and non-compliance with procedural requirements, then:</p> <p>Unjust findings</p> <p>Sentence unjust or too severe</p>
<b>Leave</b>	Only for the severity of the sentence	No	
<b>File</b>	Written decisions + Trial transcript	Presiding Officer's note + RDP	RDP
<b>Submission of arguments</b>	Factums of both parties + Hearing	-Request in writing (memorandum or letter); -Comments from presiding officer	None
<b>Governed by</b>	Rules of Appeal Procedure	QR&O, art 108.45	No particular rules

<b><u>Features</u></b>	<b><u>Appeal before CMAC</u></b>	<b><u>Summary Trial Review</u></b>	
		<b><u>QR&amp;O, art 108.45</u></b>	<b><u>QR&amp;O, art 116.02</u></b>
<b>b) Decision-maker</b>			
<b>Nature</b>	Judges	High-rank officers	
<b>Training</b>	Legally trained	Not legally-trained (unless rare exceptions)	
<b>Numbers</b>	Three	One	
<b>Relationship with the individual</b>	Outside their chain-of-command	Part of their chain-of-command	
<b>Representation</b>	Legal Counsel	Assisting Officer	None
<b>c) Outcome</b>			
<b>Dispositions</b>	If appeal allowed, set aside finding (not guilty, guilty or direct new trial) or substitute finding  Alter sentence	Quash/Substitute/Confirms findings <u>but no conviction where acquittals</u>  Alter (Substitution/Mitigation/Remit/Commit) sentence <u>but never increases.</u>	
<b>Timings</b>	Variable. Usually within a year following the notice of appeal	Prescribed by regulations. Within 21 days after request, 35 days if additional information was sought	Variable. Shortly after commanding officer's review occurs (as the case may be)
<b>Force of <i>res judicata</i></b>	High	Relatively high (however if quashed, offender may be tried as if <u>no previous trial had been held.</u> )	
<b>Potential following steps</b>	Appeal to SCC	Judicial Review	CDS acting as review authority

## D. US Army Summary Court Martial Rights Notification/Waiver Statement

<b>SUMMARY COURT-MARTIAL RIGHTS NOTIFICATION/WAIVER STATEMENT</b> For use of this form, see AR 27-10; the proponent agency is OTJAG		
<b>1. STATEMENT CONCERNING REFUSAL TO ACCEPT QUALIFIED COUNSELING, ARTICLE 20, UCMJ AND UNDERSTANDING OF RIGHTS</b>		
a. On _____, I was afforded an opportunity to consult with legal counsel before making my decision to consent to Summary Court-Martial proceedings under Article 20, UCMJ. <i>(Date)</i>		
b. I have decided not to see counsel in connection with this action.		
c. I understand my rights under Article 20, UCMJ, including my right to object trial by Summary Court-Martial, punishment limitations, potential use of the record of Summary Court-Martial in any subsequent courts-martial, and other consequences of my decision.		
d. I voluntarily decide to consent to trial by Summary Court-Martial.		
TYPED OR PRINTED NAME OF SERVICE MEMBER	RANK	SIGNATURE
TYPED OR PRINTED NAME OF SUMMARY COURT-MARTIAL OFFICER	RANK	SIGNATURE
<b>2. STATEMENT ACKNOWLEDGING QUALIFIED LEGAL COUNSEL FOR ARTICLE 20, UCMJ, AND STATEMENT OF UNDERSTANDING OF RIGHTS</b>		
a. On _____, I consulted with _____ who <i>(Date)</i> <span style="float: right;"><i>(Name and Rank of Defense Counsel)</i></span>		
explained my rights to me under the provisions of Article 20, UCMJ, to include my right to object to trial by Summary Court-Martial, punishment limitations, potential use of the record of Summary Court-Martial proceedings in any subsequent courts-martial, and other consequences of my decision.		
b. I understand my rights and voluntarily decided to consent to trial by Summary Court-Martial.		
TYPED OR PRINTED NAME OF SERVICE MEMBER	RANK	SIGNATURE
c. I have advised _____ of his or her statutory and regulatory rights with regard to this <i>(Name and Rank of Service Member)</i> Summary Court-Martial and the possible consequences of his or her consent or objection to trial by Summary Court-Martial.		
TYPED OR PRINTED NAME OF DEFENSE COUNSEL BRANCH	RANK	SIGNATURE
<b>3. REFUSAL TO ACKNOWLEDGE RECEIPT OF ADVICE - ARTICLE 20, UCMJ</b>		
After I advised _____ of his <i>(Name (First, MI, Last))</i> <span style="float: right;"><i>(Rank)</i></span>		
or her rights to consult with legal counsel before making a decision to consent or object to Summary Court-Martial proceedings under Article 20, UCMJ, he or she refused to complete and sign an acknowledgment of receipt of the advice.		
TYPED OR PRINTED NAME OF SUMMARY COURT-MARTIAL OFFICER	RANK	SIGNATURE
REMARKS		