

# ***WINDS OF CHANGE***

## **Conference and Debate on Canadian Military Law**

**University of Ottawa, Faculty of Law**

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### **Conference Proceedings**

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November 13, 2015

**Winds of Change**  
**Conference and Debate on**  
**Canadian Military Law**

November 13, 2015

**Organizing Committee**

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***Bottom Row:***

His Hon. M. Pelletier, His Hon. J. Blackett, BGen (ret'd) J-P. Spijk, Hon. G. Létourneau, Hon. G. Cournoyer, Mr. E. Fidell



## **Preface**

November 13, 2015 should be seen as a landmark in Canadian military justice. For the first time an international academic conference on military law was held in Canada at the University of Ottawa with the focus on reform and comparative law.

Experts and eminent jurists from the United States, Britain, Europe and Canada reported on completed, proposed or anticipated reforms in their respective jurisdictions.

While Austria, Belgium, Czechoslovakia, Denmark, Estonia, France, Germany, Japan, Norway, Sweden, The Netherlands and Switzerland , to name a few, have abolished military tribunals in peacetime, the United Kingdom as of 1995 proceeded to substantially reform its penal military justice system.

The objective was to civilianize it and ensure a judicial process free from the chain of command's interference as well as greater fairness to those prosecuted before military tribunals. In this regard summary trials held by the chain of command were a prime candidate for substantive reform.

Looking at the United Kingdom and Europe experiences, it is fair to say that reforms of the Canadian military justice system have been rather timid and conducted internally in a piecemeal fashion. Just like war is too important to leave to the generals, reform of the military justice system is too serious and important to leave to the military alone. The United Kingdom experience in this respect is quite telling.

This conference should trigger among all participants at the conference a profound reflection on the need to fundamentally review and devise ways of improving military justice systems for greater efficiency and fairness.

**Hon. Gilles Létourneau Q.C., retired judge of the Court Martial Appeal Court and the Federal Court of Canada.**





### **Message from the Chief Organizer**

As the chief organizer of the Inaugural Military Law Conference which took place at the Faculty of Law, University of Ottawa on Friday November 13, 2015 I wish to express my most sincere thanks to all participants for their individual contribution and attendance at this event.

The conference was attended by close to 100 persons. This included a significant number of justices from the Court Martial Appeal Court, the Federal Court of Appeal and the Federal Court of Canada. A rather large contingent of military lawyers from the Office of the Judge Advocate General, several members of the Faculty of Law and representatives of the CBA Military Law Section were also present. We also had civilian lawyers and members of the general public in attendance.

During the Conference we heard from several international speakers of renown and some twenty-additional speakers and panellists who willingly and enthusiastically shared their expertise, knowledge and experience for the overall benefit of the Canadian military justice system.

Finally, we had the privilege to hear from an experienced parliamentarian, the Hon. Jack Harris, who provided us with an unequalled candid view of the legislative process which led to the enactment of several key amendments to the *National Defence Act*.

The enthusiasm and interest generated during the conference was palpable and has already been the subject of significant positive and enthusiastic feedback both from members of the Canadian military bar, the bench and scholastic circles.

A sincere thank you to all who helped to make this Conference a tremendous success.

Nil Sine Labore.

Colonel-Maître™ Michel W. Drapeau

Lawyer, Michel Drapeau Law Office  
Professor, University of Ottawa





UNIVERSITY OF OTTAWA  
FACULTY OF LAW  
COMMON LAW SECTION

Dean Nathalie Des Rosiers

**Military Justice and Law Reform**  
**La justice militaire et la réforme du droit**

Des scandales ont secoué récemment l'armée canadienne: harcèlement sexuel toléré, agressions sexuelles passées sous silence et agissements à l'international (transfert de prisonniers afghans aux autorités afghanes dans un contexte où la torture pouvant être envisagée) dont la légalité était douteuse. La question posée dans le cadre de cette conférence est de déterminer si le cadre législatif actuel pour la discipline et la justice militaire est adéquat : respecte-t-il la Charte canadienne des droits et libertés? Correspond-il aux meilleures pratiques internationales? Assure-t-il un niveau d'imputabilité suffisant?

La question est importante pour deux raisons. Premièrement, l'armée canadienne joue un rôle de plus en plus important dans la société canadienne et au niveau international. Son rôle a grandement évolué au cours des dernières années : de gardiens de la paix, ou *casques bleus*, l'armée est devenue un acteur plus agressif dans les conflits internationaux. Cette transformation hausse le niveau de risque de comportements abusifs liés au stress, au manque de formation, à l'incertitude et au danger sur le terrain. Quelle réponse doit être donnée à ces comportements?

Deuxièmement, l'intérêt pour le droit militaire est à la une : quelques jours avant la suspension de la session parlementaire, le gouvernement a proposé un projet de loi pour amender de façon substantielle le traitement de certaines infractions militaires; la Cour suprême du Canada s'apprête à rendre une décision sur la question des protections procédurales nécessaires pour les employés des forces canadiennes accusés de crimes et finalement. Cependant, il y a un grand besoin de développement d'expertise académique sur le sujet : traditionnellement, les questions de droit militaire ont été sous-étudiées de façon chronique au Canada. Les experts dans le domaine sont peu nombreux. Il existe un réel besoin de relève dans ce domaine. Il est primordial que

la connaissance des meilleures pratiques internationales fasse partie de cet intérêt pour la réforme du droit canadien.

Comment approcher cette question? Je suggère que deux types de réflexions sont nécessaires. Premièrement, une approche comparatiste doit être utilisée. Deuxièmement, une approche pluridisciplinaire et empirique est également nécessaire.

a) A comparative law perspective

In his work<sup>1</sup>, Pierre LeGrand Jr., like many others, counselled against an adoption of rules and laws of other countries without a proper assessment of the context in which they operate. Not all “legal transplants” work well. Such a critical look at international experiments does not devalue the exercise. It is important to know what is going on in other countries for several reasons. First, because the military operates internationally, it is constantly interacting with different legal systems, national, international, military and otherwise. It is crucial that Canadian military law be cognizant of what is going on elsewhere and be responsive to new developments.

Second, many countries face issues of governance, accountability and trust that are at the centre of the current debates in Canada, as described in the next section. Much can be learned about other countries models, but also about the ways in which such models work in a dynamic and evolving environment. We could learn not only about the various mixtures of civilian/military law that exist around the world, but also about the historical contexts in which they were born and the process of change that they undertook. Such an in-depth analysis is crucial to determine whether the “model” can be exported or not.

b) An interdisciplinary approach

Law reform cannot be done without a sound assessment of what success looks like and how it can be measured. The subject of military justice ought to be studied through the prism of good democratic governance. What do we know are crucial ingredients to good governance? What does political science, psychology, law and public administration tell us about good governance?

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<sup>1</sup> Pierre LeGrand Jr., “The Same and the Different”, in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), pp. 240-311.

In their book, *Trust and Governance*, Valerie Braithwaite and Margaret Levi invite various writers to comment on the issue of trust<sup>2</sup>. John Braithwaite frames the issue in the following way : “How (...) do we maximize the benefits of trust while limiting the extent to which we fall victim to it?”<sup>3</sup> Braithwaite suggest that sound principles of institutional design are necessary so that trust is valued, but not abused.

In the context of military justice, how do we know whether we have the “right” institutional design”? Should we poll soldiers to see whether they trust that they would be treated fairly if they were to face disciplinary charges? Do we evaluate whether victims of crime feel heard and respected through the system as it exists? What about the Canadian public: does it have confidence in the system? If so, what are the key ingredients of such confidence? If not, why not? Are there principles of independence and accountability that should be maintained? How should they be designed?

All these questions point to further studies being conducted. My point is that academic studies of institutional behaviors may be useful to ensure that the choices made in the military justice system continue to meet the needs of our evolving society. If we live in a culture characterised by a Decline of Deference<sup>4</sup>, as Neil Nevitte suggests, how do we structure institutions such as the military who require obedience but cannot operate in silos from societies that they represent and support?

The subject is fascinating and requires much more studies. This conference should be the beginning of an increasingly rigorous research in the area of military law and justice. The course of research should draw from different disciplines and engage fully with empirical evidence, qualitative and quantitative. Universities have a role to play in ensuring that all national institutions work well and are the subject of thorough, demanding and accurate studies. Our military deserves no less.

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<sup>2</sup> Valerie Braithwaite and Margaret Levi, ed. *Trust and Governance* ( New York, Russell Sage, 1998)

<sup>3</sup> John Braithwaite, *Institutionalizing Distrust, Enculturating Trust*, in V. Braithwaite and M. Levi, *supra*, note 2, p. 343

<sup>4</sup> Neil Nevitte, *The Decline of Deference; Canadian Value Change in Cross National Perspective* Toronto, University of Toronto Press, 1996.





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CONFERENCE AND DEBATE  
on  
CANADIAN MILITARY LAW

***WINDS OF CHANGE***

November 13, 2015  
120 University Private, Ottawa, Ontario



This program qualifies  
for **7.0 hours of CPD**  
with the Law Society of  
Upper Canada

7:30	<b>NETWORKING</b> (Please be seated by 07:55 hrs)
<b>INTRODUCTION</b>	
8:00	<b>OFFICIAL WELCOME – Administration and Logistics</b> <i>Lieutenant-General (retired) Walter Semaniw</i>
08:10	<b>OPENING REMARKS</b>  <i>The Honourable Mr. Justice Guy Curnoyer, of the Quebec Superior Court and the Court Martial Appeal Court of Canada</i>
<b>PART I - CANADIAN MILITARY LAW</b>	
08:30	<b>MOVING FORWARD AND GAINING STRENGTH AND EXCELLENCE. A VIEW FROM ACADEMIA</b> [10 mins]  <i>Professor Nathalie Des Rosiers</i> Dean, Faculty of Law [Common Law Section], University of Ottawa
	<b>CANADIAN MILITARY JUSTICE AND JUDGE ADVOCATE GENERAL</b> [20 mins.]  <i>Major-General Blaise Cathcart, Judge Advocate General</i>
	<b>THE CANADIAN MILITARY JUDICIARY</b> [20 mins.]  <i>His Honour Colonel Mario Dutil, Chief Military Judge</i>



<b>PART II - INNOVATIONS, MODERNIZATION AND REFORMS</b>	
<b>09:20</b>	<p><b>SHOULD ONE NEED TO SURRENDER THEIR RIGHTS AND FREEDOMS UPON ENROLMENT IN THE ARMED FORCES?</b></p> <p><i>Emmanuel Jacob</i>, President of the European Organisation of Military Associations</p>
<b>9:50</b>	<b>DISCUSSION</b>
<b>10:10</b>	<p><b>CHAIR:</b> <i>The Honourable Justice (retired) Gilles Létourneau</i>, Federal Court of Canada and Court Martial Appeal Court of Canada</p> <p><b>A CANADIAN PERSPECTIVE: INTERNATIONAL HUMANITARIAN ACCOUNTABILITY, MILITARY JUSTICE AND INTERNATIONAL HUMAN RIGHTS STANDARDS</b> [10 mins.]</p> <p><i>Colonel Robin Holman</i>, Deputy Judge Advocate General</p> <p><b>EUROPEAN COURT OF HUMAN RIGHTS AND MILITARY JUSTICE</b> [20 mins.]</p> <p><i>Mr. Eugene Fidell</i>, Senior Research Scholar in Law and Florence Rogatz Visiting Lecturer in Law at Yale Law School</p> <p><b>THE EVOLUTION OF MILITARY JURISDICTIONS</b> [20 mins.]</p> <p><i>Brigadier General (ret'd) Jan Peter Spijk</i>, Ministry of Defence, The Netherlands. President of the International Society for Military Law and the Law of War</p> <p><b>THE ROLE AND FUNCTION OF THE UK JUDGE ADVOCATE GENERAL AND THE BARRIERS THAT WERE OVERCOME IN CIVILIANIZING PARTS OF THE SERVICE JUSTICE SYSTEM</b> [20 mins.]</p> <p><i>His Honour Justice Jeffrey Blackett</i>, Judge Advocate General for the United Kingdom, The Royal Courts of Justice, London, England</p>
<b>11:20</b>	<b>REFRESHMENT BREAK</b>
<b>11:30</b>	<b>DISCUSSION</b>
<b>12:15</b>	<b>LUNCH BREAK and NETWORKING</b>

<p><b>13:00</b></p>	<p><b>CHAIR:</b> <i>Professor Jean-Guy Perron</i>, Military Judge (retired), University of Ottawa</p> <p><b>SHOULD THE CANADIAN MILITARY JUSTICE SYSTEM HAVE JURISDICTION OVER ORDINARY CRIMINAL LAW OFFENCES?</b></p> <p><b>If so what is the rationale for having a separate military justice system and tribunals of exception dealing with ordinary criminal offences when an expert civilian justice system is already in place and discipline in the military can still be enforced through the disciplinary process in parallel with criminal proceedings before criminal courts.</b></p> <p><i>David McNairn</i>, Office of the DND/CF Legal Advisor [15 mins.]</p> <p><b>If not, why? What are the adverse consequences for an accused resulting from the fact that the prosecution is held before a military tribunal?</b> [15 mins.]</p> <p><i>Ms Anne London-Weinstein</i>, Criminal Lawyers' Association, Ottawa, Ontario</p>
<p><b>13:30</b></p>	<p><b>DISCUSSION</b></p>
<p><b>13:45</b></p>	<p><b>CHAIR:</b> <i>Professor Carissima Mathen</i>, Faculty of Law, University of Ottawa</p> <p><b>THE IMPACT OF THE SUPREME COURT OF CANADA DECISION IN <i>MORIARITY V. THE QUEEN</i></b> [30 mins.]</p> <ol style="list-style-type: none"> <li><b>1. If the Military Justice System is to retain jurisdiction over ordinary criminal law offences, what limits, if any, should be put on that jurisdiction?</b></li> <li><b>2. Should the law identify ordinary criminal law offences that should mandatorily fall under the civilian jurisdiction?</b></li> <li><b>3. For other ordinary criminal law offences, should military prosecution be subject to the consent of the Director of Public Prosecutions?</b></li> <li><b>4. Is the military nexus requirement a satisfactory limit?</b></li> <li><b>5. How should we define military nexus?</b></li> </ol> <p><i>Lieutenant-Colonel J. Bruno Cloutier</i>, Deputy Director Defence Counsel Services</p> <p><i>Mr. Matthew Estabrooks</i>, Gowlings Lafleur Henderson, Ottawa, Ontario</p>
<p><b>14:15</b></p>	<p><b>DISCUSSION</b></p>

<b>14:30</b>	<p><b>PANEL DISCUSSION. Chair:</b> Professor Craig Forcese, Faculty of Law, University of Ottawa</p> <p><b>Canadian Military Law in the Post-Charter Era. What has been done, and what is left to do?</b> [30 mins.]</p> <p><i>Lieutenant-Commander Mike Madden</i>, Acting Director of Law / Military Justice – Strategic, Office of the Judge Advocate General</p> <p><i>Ms. Carmen Cheung</i>, Director, Global Justice Lab, Munk School of Global Affairs, University of Toronto</p> <p><i>Professor (Colonel-Maitre™) Michel W. Drapeau</i>, University of Ottawa</p>
<b>15:15</b>	<b>REFRESHMENT BREAK</b>
<b>15:30</b>	<p><b>A VIEW FROM THE BATTLEFIELD – “A COMMANDER’S PERSPECTIVE”</b> [20 mins]</p> <p><i>Lieutenant-General (ret’d) Walter Semianiw</i> Former Commander of Canada Command, Commander of Military Personnel Command and Task Force Commander in Afghanistan</p>
<b>16:00</b>	<p><b>CHAIR:</b> <i>Mr. Paul Champ</i>, Counsel, International Civil Liberties Monitoring Group</p> <p><b>PANEL DISCUSSION. AN EXTERNAL VIEWPOINT: STRENGTHS and LACUNAS OF MILITARY ADMINISTRATIVE OVERSIGHT BODIES</b> [30 mins.]</p> <p><i>Mr. Bruno Hamel</i> Chair Person, Military Grievances External Review Committee [10 mins]</p> <p><i>Ms. Hillary McCormack</i> Chair Person, Military Police Complaints Commission [10 mins]</p> <p><i>Ms. Holly McManus</i> Office of the DND/CF Ombudsman [General Legal Counsel] [10 mins]</p>
<b>17:00</b>	<p><b>CLOSING REMARKS</b></p> <p><i>The Honorable Mr. Justice B. Richard Bell</i>, Chief Justice, Court Martial Appeal Court of Canada</p>





# CONFERENCE PAPERS



## **Canadian Military Justice and the Judge Advocate General**

Speech delivered by Major General Blaise Cathcart  
at the Winds of Change International Military Law Conference

**November 23, 2015 – University of Ottawa**

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Thank you very much ...

It's a fascinating agenda ahead of you. I'm sure there will be lively discussion about all of the good and the bad of the current military justice system. And that's fair enough. That's why we're here – to have a good, balanced and transparent debate.

Military justice is a subject that is extremely important to me as the Judge Advocate General, both because of my statutory responsibilities in relation to military justice and because of my experience in seeing how a fair and effective military justice system contributes to the operational effectiveness that is necessary for the success in our Canadian armed forces missions throughout Canada and the world.

En vertu de la *Loi de la défense nationale*, en tant que Juge Avocat Général, j'agit à titre de conseiller juridique du Gouverneur général, du Ministre, du Ministère de la défense nationale, et des Forces canadiennes, pour des questions de droit. Mais aujourd'hui mon allocution portera sur mon rôle par rapport au système de justice militaire. C'est à dire, mon autorité sur tout ce qui touche à l'administration de la justice militaire et mes responsabilités statutaires vis-à-vis certain acteurs comme le Directeur des poursuites militaires.

In any of these statutory duties and functions, I am responsible not to the Chief of Defence Staff or anyone in the military chain of command, but to the Minister of National Defence and through the Minister of National Defence, to Parliament. I will start with a brief overview of our system.



The Code of service discipline, which is a part of the *National Defence Act*, establishes a separate military justice system. The system operates in parallel with the civilian criminal justice system. Importantly, the military justice system has been recognized by the Supreme Court of Canada as both necessary and constitutionally valid.

Those who are subject to the Code of Service Discipline must adhere to an additional set of rules. These rules are intended to make certain that our forces maintain the highest standard of discipline, performance and conduct.

Discipline, however, is a means, and not an end. Ultimately, the military justice system strives to achieve two fundamental ends or purposes. The first one, like the civilian justice system, is to contribute to respect for the law, and the maintenance of a just, peaceful and safe society. The second and separate purpose is to promote the operational effectiveness of the Canadian Armed Forces by contributing to the maintenance of discipline, efficiency and morale.

Provisions of the Code of Service Discipline create service offences, including some that are unique to the military, such as desertion, or negligent performance of a military duty. The Code also captures offences created by the Criminal Code, or any other act of parliament.

The extent to which service tribunals may exercise jurisdiction over these offences is a matter that has recently been argued before the Supreme Court of Canada, in particularly the case of *Moriarity*, which I understand may be the subject of some discussion later today.

Service offences are tried by way of two types: By a summary trial or by a court martial. And the differences between the two are fairly straightforward. Summary trials are prompt and fair trials presided by officers within an accused person's chain of command and are reserved for less serious offences involving less serious punishments. One of my roles in relation to summary trials is to

certify that officers who preside over these trials are qualified to perform their duties.

It is also important to note that whenever true penal consequences may result from a summary trial, an accused has a right to elect to be tried by court martial that allows an individual to make an informed choice between having a matter heard at a summary trial or at a court martial.

Courts martial are trials before military judges, who possess all the constitutional hallmarks of judicial independence. These proceedings involve prosecutors representing the Director of Military Prosecutions. An accused has the right to be represented by a lawyer, either provided by the Director of Defence Counsel Services or by a civilian lawyer. I remind you that those provided by Director of Defence Counsel service are at no expense to the accused, or the accused can chose a civilian lawyer, often at his or her own expense.

Courts martial can try any service offence and can impose any punishment under the *National Defence Act* up to life imprisonment.

With this brief overview in mind, I will now describe how I, as the JAG, fit into this system; First, through the superintendence of the administration of military justice, and second through my statutory relationships with different actors in the court martial system.

### Superintendence

The National Defence Act provides that I have superintendence of the administration of the military justice system in the Canadian Armed Forces in much the same way as the Minister of Justice, by virtue of the *Department of Justice Act* is responsible for the civilian system, for superintendence of of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces.

Superintendence is not defined in statute. In older English common law, and now in the British prosecution of offences act, superintendence refers to the Attorney General's power to supervise the Director of Public Prosecutions. However, Canadian law has taken a different approach.

If we look at the federal *Department of Justice Act*, we see that it is the minister of justice, not the Attorney General who has superintendence of the administration of justice in Canada. Indeed, it is a different of the act that sets out the Attorney General's responsibilities for supervising and conducting litigation in the name of the Crown.

The *National Defence Act* mirrors this pattern of separately creating a superintendence responsibility under s.9(2)(1) of the *National Defence Act*, and responsibilities to supervise the Director of Military Prosecutions elsewhere in the *Act*. In other words, superintendence in Canada means something different than an authority to generally supervise a director of prosecutions.

To that end, my superintendence responsibilities obligate me to ensure that the military justice system is appropriately resourced, and that it operates efficiently, effectively, and in accordance with the rule of law.

Of course, in order to discharge my superintendence responsibility, I need to draw information and consult from a variety of sources. For instance, the office of the Judge Advocate General ensures that every record of disciplinary proceedings arising from a Summary Trial is legally reviewed and where necessary, review authority within the Chain of Command are given appropriate advice. I am sure that information from these trials is kept captured in a way that allows for reporting and tracking of trends.

I consult with the Director of Military Prosecutions and the Director of Defence Counsel services regularly, and they have the opportunity to inform me of any issues that may be of systemic importance or concern that both of them may have. They also both produce annual reports to me.

I am also required by statute to conduct regular reviews of the administration of justice and participate in the independent review that the minister of national defence is required to undertake every seven years. Ultimately, with all of this information, my military justice division and I continue to work toward the strategic goal of leading proactive military justice oversight, responsible development, and positive change. This to me is what superintendence means.

Un bon exemple de surveillance et de développement comme responsable du système de justice militaire est le projet de loi C-71: *Loi sur la droit des victimes* au sein du système de justice militaire déposé en juin dernier au Parlement et mort au feuillet au mois d'août lorsque que le Parlement fut dissout. Ce projet de loi transformatif visait à renforcer les droits des victimes dans le système de justice et a réviser le système de procès par voie sommaire.

I'll now turn to prosecutions.

With this concept or superintendence in mind, I'll now speak briefly about my relationship with the director of military prosecutions, or DMP.

The DMP is appointed by the Minister of National defence for a term of 4 years and is removable only for cause. He is assisted by a team of legal officers who serve as his trial and appellate team. The DMP is by statute responsible for preferring charges to courts martial, and for the conduct of all prosecutions at court martial.

The *National Defence Act* gives me a separate responsibility to generally supervise the DMP and associated authority to issue general instructions and guidelines to DMP in respect of prosecutions. I also have statutory authority to issue instructions and guidelines in respect of a particular prosecution, which the DMP would general be obliged to make public, just as the federal and provincial Attorney's General have express or implied powers to issue such instructions and guidelines to their respective Director of Public Prosecutions. In point of fact, the JAG has issued only two general instructions to DMP – one in relation to

prosecutions, and the second in relation to court martial delay. Both of these general instructions are publically available.

Although the DMP falls under my general supervision, this supervision is subject to certain constraints imposed by virtue of the Canadian Constitution. We have a rich history of jurisprudence and academic commentary in Canada essentially pointing to the same conclusion and that is: Prosecutorial decision making has a quasi-judicial dimension to it, and must therefore take place free from any improper political or other influences.

This principle is commonly known as the Shawcross Doctrine, after it was articulated in 1951 by Lord Shawcross, the Attorney General of England at the time. In the civilian criminal justice system this doctrine is respected through a recognition that Attorney's General, although they may also be partisan ministers of the crown responsible for departments of justice, must refrain from improperly influencing the day to day workings of the relevant prosecution services. In other words, it is accepted that a single individual can be appointed as Attorney General, and a minister of the crown so long as when he or she is acting in the constitutional Attorney's General role, and making prosecutorial decision, he or she does so free from inappropriate influence.

This constitutional doctrine governs my actions as JAG as well. In the military justice system, I am constitutionally obligated to refrain from improperly influencing the day to day decisions of the DMP. Both the law and the practice on this point was implicitly recognized by the Court Martial Appeal Court in its 2014 *Wehmeier* decision, wherein the DMP's entitlement to deference on questions of prosecutorial discretion was acknowledged and was equated by the court to the deference that the Attorney General receives on questions of prosecutorial discretion. The court in this case explicitly noted that both the DMP's decision to prefer charges and the decision to continue with the standing court martial "were his alone to make and come within the core of prosecutorial discretion."

It would be impermissible for me to attempt to interfere with this discretion for any political, personal or partisan reasons. A well accepted corollary of the Shawcross Doctrine is that there nonetheless be accountability of, and control over, the way in which a prosecution service operates, ultimately to Parliament or to the legislature, and through these bodies, to the public. In England, the Attorney General supervises the Director of Public Prosecutions is by convention a member of parliament. In the Canadian civilian system, although the federal Attorney General is part of cabinet when acting in his or her minister of J capacity, she is accountable as Attorney General to the House of Commons.

In the military justice system, the DMP is responsible to me a governor in council appointment, just like the federal Attorney General, and I in turn am accountable to the minister of national defence, who answers in parliament, for matters relating to the military prosecution service.

In other words, Canadian law recognizes that prosecutorial independence is not absolute. If there is to be accountability for prosecutions and control over prosecution services, then someone, whether an Attorney General, a JAG or a minister, must ultimately be able to supervise and then answer in parliament for prosecution service. Canadian law does not permit improper influences on prosecutions, but in both the civilian and military justice system, our law accepts that properly published and transparent, non-partisan instructions and guidelines to a director of prosecutions can be both necessary and lawful.

I'll now turn to the defence counsel services.

My relationship with the Director of Defence Counsel Services, or the DDCS, is somewhat different. Like the DMP, the DDCS is appointed by the minister for a fixed term of four years, and may only be removed for cause related to a number of factors set out in regulations by the governor in council.

The DDCS is also assisted by a team of legal officers who represent individual accused members. As with the DMP, the *National Defence Act* places the DDCS under my general supervision, and authorises me to issue

instructions and guidelines to the DDCCS which would be made public regarding the provision of defence counsel services. To date, I and my predecessors have only issued one publically available general instruction to DDCCS related to court martial delay.

I am fully aware, however, that the constitutional dimensions of the right to a fair trial preclude me from exercising my general supervisory authority in a way that could create a real or perceived conflict of interest on the part of defence counsel. Given this requirement, I must and do fully respect that defence counsel according to their own rules of professional conduct, owe a duty of undivided loyalty to their clients that I must not undermine through any general instructions or guidelines to the DDCCS. And of course, unlike with the DMP, the *National Defence Act* does not give me any authority to issue instructions or guidelines to the DDCCS in respect of a particular case since this would always create a real or perceived optical to defence counsel's duty of undivided loyalty to his or her clients.

Nonetheless, my responsibility to generally supervise the DDCCS and my authority to issue general instruction and guidelines are a necessary control and accountability mechanism that allow the public, through parliament, through the Minister of National Defence, through me, to have confidence that defence counsel services are being provided in a fair, efficient, and effective manner. Without these provisions in the *National Defence Act*, there would be no accountability for or control over the important public resources that are expended on defence counsel services in the military justice system.

En conclusion, mes responsabilités et mon autorité comme JAG font en sorte que le système de justice militaire canadien demeure un système efficace, équitable, et responsable.

The system has operated successfully through periods of intense operational activity, while elements of the Canadian armed forces were deployed in Afghanistan and throughout the world, and this operational crucible through which military justice systems must all ultimately be tested, provides a clear

example of the ways in which our military justice system continues to meet Canada's needs.

Simply put, an effective military justice system guided by the correct principles is a prerequisite for the effective functioning of an armed force of a modern democratic state governed by the rule of law.

With a better understanding of my responsibilities, we should also have confidence that I and the legal officers that support me in my statutory duties and functions remain vigilant in our efforts to achieve proactive oversight, responsible development and positive change within the military justice system so that the system can continue to fulfil the expectations of the Canadian public, and meet the needs of the government of Canada, the Canadian armed forces, and of course its members. 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 to protect.

And in some cases, and we witnessed that in Afghanistan, these same men and women are willing to die for those values as well.

Those conclude my remarks.

Transcribed by Joshua M. Juneau







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***"WINDS OF CHANGE"***  
**Inaugural Conference on Canadian Military Justice**  
**13 November 2015**  
**Ottawa**

Information provided by Emmanuel Jacob, President of EUROMIL

Founded in 1972, the European Organisation of Military Associations (EUROMIL) is an umbrella organisation composed of 41 military associations and trade unions from 25 countries. It is the main Europe-wide forum for cooperation among professional military associations on issues of common concern. EUROMIL strives to secure and advance the human rights, fundamental freedoms and socio-professional interests of military personnel of all ranks in Europe and promotes the concept of "Citizen in Uniform". As such, a soldier is entitled to the same rights and obligations as any other citizen. EUROMIL particularly calls for recognition of the right of servicemen and -women to form and join trade unions and independent associations and for their inclusion in a regular social dialogue by the authorities.

While the right to freedom of association and related rights are recognised for military personnel in international legislation, these rights are still restricted in a number of countries, which negatively affects the protection of military personnel, their moral and loyalty as well as progress towards democratic armed forces.

Among international standards, the Recommendation CM/Rec (2010)4 of the Council of Europe on Human Rights of the Members of the Armed Forces, the OSCE Code of Conduct on Politico-Military Aspects of Security or the jurisprudence of the European Court of Human Rights should be particularly highlighted, but the UN or ILO also adopted relevant documents.

Experience has shown that the right of association has not compromised combat efficiency or military discipline. On the contrary, involving democratic military associations in a well-structured dialogue with political and military authorities has de facto improved the moral and loyalty of troops. In several countries across Europe, military associations are recognised as valuable partners for defence administrations. In times of increased operational pace, military associations and unions can be a powerful ally to raise awareness and to articulate the professional interests and concerns of military professionals. Associations can also enhance the status of the military profession in society.



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Restrictions to the rights of military personnel, including the right of association, should therefore be prescribed by law, necessary, proportionate and non-discriminatory. A right balance should be respected between the requirements of service and the interests of the members of the armed forces. Additionally, establishing an enabling environment for military associations or unions to function and for creating the conditions for the rights and freedoms of military personnel to be respected, is needed both in legislation and in practice. Only then will military personnel be able to speak for themselves and raise their concerns.

For further information on international standards, concrete national case studies, or any other request, do not hesitate to contact the EUROMIL Office by email at [euromil@euromil.org](mailto:euromil@euromil.org).

Whenever requested and needed, EUROMIL is always willing and available to share its expertise with representatives of the authorities as well as to provide support to those in need of protection.

## THE EUROPEAN COURT OF HUMAN RIGHTS AND MILITARY JUSTICE

EUGENE R. FIDELL\*

The European Court of Human Rights has had a substantial impact on military justice systems. That impact has been felt keenly not only within the territory of the States Parties to the European Convention on Human Rights but extraterritorially for several of those countries. It has also had a substantial impact on non-European military justice systems because its jurisprudence interacts with that of other regional human rights bodies, the UN Human Rights Committee, and the jurisprudence developed at the national level by constitutional courts. In these remarks I will outline some of these impacts and identify current issues of interest.

### 1

In certain quarters, the work of the European Court has been a source of alarm. A scary headline in the *Daily Express*, for example, trumpets: “Human Rights Madness to End.” In fact, at least in the field of military affairs and military justice, the court’s jurisprudence has been rather cautious and moderate, affording a “margin of appreciation” that respects the exercise of considerable discretion by legislators in matters relating to national defense. The court’s military cases have typically arisen under Articles 2, 5 and 6 of the Convention.

Article 2 is central. It protects the right to life:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 5 establishes a right to liberty and security, and a number of its clauses readily apply to the administration of justice through military tribunals. It provides in pertinent part:

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1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Article 6, in turn, confers the right to a fair trial, and once again its relevance to military justice is readily apparent:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

2

Given broad rules such as these, it is hardly surprising that the European Court of Human Rights has been called on to address a surprising variety of issues relating to the application of the Convention to military affairs. Among the fundamental issues that have had to be explored are the very application of the Convention to military courts; its application to summary trials, which are ordinarily used for the adjudication of minor disciplinary offenses; investigatory independence; the Convention's territorial reach (*i.e.*, when does it apply beyond the State Party's territory); free speech; conscientious objection; and unionization of military personnel.

The sheer scope and variety of the court's military jurisprudence is apparent from the following sample of its decisions. As can be seen, much of it has emerged from cases involving the United Kingdom, but numerous other countries are also represented.

- *Engel v. The Netherlands* (1976) (Convention applies to military personnel and margin of appreciation applies to national policy judgments concerning military discipline, but provisional strict arrest by commander's order without procedural safeguards violated Art. 5(1))
- *Sutter v. Switzerland* (1984) (haircut case; no right to public hearing on cassation under Art. 6(1))
- *Findlay v. United Kingdom* (1997) (convening authority powers meant court-martial was not independent and impartial led to basic changes in the system, including abolition of convening authorities, creation of service prosecuting authorities with charging power, and enhancement of role of the judge advocate)
- *Incal v. Turkey* (2000) (Turkish national security court with one military judge and two civilian judges did not satisfy objective test for independence and impartiality; the military judges were serving officers in a military chain of command and subject to military discipline, with 4-year renewable terms); *see also Öcalan v. Turkey* (2005)

- *Morris v. United Kingdom* (2002) (insufficient guarantees of independence and impartiality of non-lawyer members), but seemingly accepted, following some changes, in *Cooper v. United Kingdom* (2003)
- *Grievies v. United Kingdom* (2003) (the presence of a uniformed naval judge advocate deprives naval courts-martial of a significant guarantee of independence)
- *A.D. v. Turkey* (2005) (21-day confinement ordered by commander violated Art. 5(1) because commander lacks independence and judicial guarantees)
- *Martin v. United Kingdom* (2007) (lack of independence in pre-reform court-martial; tightened rule on trial of civilians by court-martial)
- *DaCosta Silva v. Spain* (2006) (disciplinary house arrest imposed on *Guardia Civil* held to violate Art. 5(1) due to commander's lack of independence)
- *Bell v. United Kingdom* (2007) (summary dealing violated Art. 6 for lack of independence, impartiality, counsel, but these were later alleviated by creation of compliant Summary Appeal Court)
- *Boyle v. United Kingdom* (2008) (commander lacked impartiality needed to order detention because he had conflicting disciplinary responsibility; violation of Art. 5(3)); *see also Hood v. United Kingdom* (1999)
- *Ergin v. Turkey* (2008) (military trial of civilians permissible only in exceptional circumstances with compelling justification and clear and foreseeable legal basis; impartiality was in question because applicant was an editor who published an article critical of the army)
- *Al-Skeini v. United Kingdom* (2011) (Art. 2 right to life; duty to conduct independent investigation)
- *Bayatyan v. Armenia* (2011) (right to conscientious objection under Art. 9 (freedom of thought, conscience and religion))
- *Matelly v. France* (2014), *Adefdromil v. France* (2014) (overturning blanket ban on military trade unions under Art. 11)
- *Jaloud v. The Netherlands* (2014) (application of the Convention in Iraq; investigation must be independent)

### 3

*Jaloud* is especially worthy of study because it involves several fundamental issues: the extraterritorial application of the Convention to Dutch operations in Iraq, the importance of investigative independence, and whether the military member of the Dutch appellate court with authority to direct the prosecution of a military officer had sufficient sufficient guarantees of independence.

The facts of the case were essentially these. At 0230 one morning in 2004, a speeding Iraqi car struck and ran past a barrier at a checkpoint manned by Iraqi Civil Defense Corps personnel who were being supervised by a Dutch unit assigned to the Stabilization Force in Iraq (SFIR) whose operational commander, in turn, was a British officer. A fusillade ensued from the side of the road, killing a man in the passenger's seat. Lieutenant A of the Dutch unit fired 28 shots at the rear of the car after it sped past him. It is unclear whose bullets killed the decedent

The Dutch Royal Military Constabulary conducted the ensuing investigation, but the autopsy was performed by Iraqi officials without Dutch participation. The Public Prosecutor decided later in 2004 not to prosecute Lieutenant A. Three years later, the victim's father requested that the lieutenant be prosecuted. In 2008, the public prosecutor urged that the father's request be dismissed. The Advocate General to the Court of Appeal at Arnhem concurred in the decision to *nolle prosequi*. The Military Chamber of the Court of Appeal, one member of which was a serving senior officer, denied the father's request in 2008. That decision was not subject to review by the High Court of the Netherlands.

On these facts, the European Court had to reach examine these issues:

- Did the death occur within the jurisdiction of the Netherlands?
- Was the death attributable to the Netherlands, given the country's limited role?
- What were the governing Rules of Engagement?
- Was the Royal Military Constabulary's investigation sufficiently independent, effective and diligent?
- Was the Court of Appeal that refused to order a criminal prosecution of Lieutenant A sufficiently independent?

In 2014, the European Court's Grand Chamber decided the case, finding that the Convention applied in the circumstances. It further found the investigation insufficiently independent (as well as of poor quality substantively). As the court had previously held in *Al-Skeini v. United Kingdom*, ¶ 167:

"For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events." [Emphasis added.]

The *Al-Skeini* court also found that the Royal Military Police Special Investigation Branch was not "free to decide for itself when to start and cease an investigation" and did not first report to the Army Prosecution Authority rather than the military chain of command. But how did the facts there compare with those in *Jaloud*?

The Royal Military Constabulary is a branch of the Netherlands armed forces, on a par with Royal Army, Navy, Air Force. Its members have military status and rank and receive both military and police training. It also has a separate



chain of command, headed by a lieutenant general who reports directly to Minister of Defence. The RMC's duties include "carrying out police duties for Netherlands and other armed forces, as well as international military headquarters, and persons belonging to those armed forces and headquarters" (Police Act, 1993 § 6(1)(b)). Sergeants and above may be appointed as civil servants with investigative powers and certain commissioned officers may be appointed as assistant public prosecutors. As military police or military police investigators, RMC personnel are subordinate to the Arnhem Public Prosecutor.

The victim's father argued that the Royal Military Constabulary unit had been under day-to-day command of the Netherlands battalion commander and there was no public prosecution service presence. In addition, since the RMC personnel shared living quarters with regular troops, there was insufficient distance between them and the individuals they might be called upon to investigate. The father also contended that the public prosecutor's decision not to prosecute had been based entirely on RMC's reports, on which he placed excessive reliance. Finally, he argued that the Arnhem Military Chamber, which included a serving officer who did not belong to the judiciary, placed full reliance on the results of the very limited RMC investigation.

In response, the Grand Chamber ruled that sharing quarters with Royal Army personnel did not *per se* affect the RMC's independence "to the point of impairing the quality of its investigation." ¶ 189. The court further held that the distance between RMC Iraq and the Arnhem public prosecutor overseeing the investigation did not lead to "subordination of the [RMC] unit to the . . . Army battalion commander on a day-to-day basis." ¶ 190. In the court's view, the public prosecutors' reliance on police reports is inevitable and does not *per se* indicate they lack requisite independence. ¶ 192; *see also* ¶ 193 (was prosecutorial independence also at issue?).

With respect to the judicial independence issue, the Grand Chamber summarized the organizational issues in the following terms:

64. At the relevant time, Article 9 of the Code of Military Criminal Procedure provided that the benches of the Military Chamber of the Arnhem Court of Appeal should consist of two judges of the Court of Appeal, one of whom should preside, and one military member. The military member should be a serving officer holding the rank of captain (Royal Navy), colonel (Royal Army), group captain (Royal Air Force) or higher, who was also qualified for judicial office; he was promoted to the titular rank of commodore (Royal Navy), brigadier (Royal Army) or air commodore (Royal Air Force) if he did not already hold that substantive rank. He could not be a member of the Royal Military Constabulary. The military member was appointed for a term of four years, renewable once for a further such term; compulsory retirement was at the age of sixty (Article 6 § 4 of the Code of Military Criminal Procedure).

65. Section 68(2) of the Judiciary (Organisation) Act provides that the military members of the Military Chamber of the Arnhem Court of Appeal participate as judges on an equal footing with their civilian colleagues and are subject to the same duties of confidentiality (sections 7 and 13 of that Act) and functional independence and impartiality (section 12); and also that they shall be subject to the same scrutiny of their official behaviour as civilian judges (sections 13a–13g). The latter involves review of specific behaviour by the Supreme Court, initiated, at the request of an interested party or *proprio motu*, by the Procurator General to the Supreme Court.

On these facts, the Grand Chamber's rejected the father's judicial independence claim:

iii. The military member of the Military Chamber of the Arnhem Court of Appeal

195. The applicant argued that the independence of the Military Chamber of the Court of Appeal was tainted by the presence of a serving military officer in its midst. The Government argued that the independence of the Military Chamber of the Court of Appeal was guaranteed.

196. In the present case, the Court has had regard to the composition of the Military Chamber as a whole. It sits as a three-member chamber composed of two civilian members of the Arnhem Court of Appeal and one military member. The military member is a senior officer qualified for judicial office; he is promoted to titular flag, general or air rank if he does not already hold that substantive rank (see paragraph 64 above). In his judicial role he is not subject to military authority and discipline; his functional independence and impartiality are the same as those of civilian judges (see paragraph 65 above). That being so, the Court is prepared to accept that the Military Chamber offers guarantees sufficient for the purposes of Article 2 of the Convention.

The Grand Chamber's approach seems to be to consider the forum as a whole, not only the impugned official. A serving officer can be independent even if the judgeship in question comes with a term only four years long (renewable once). Would the European Court apply a different test if the court were composed of a majority, rather than a minority, of such officers? Looking beyond judicial tenure, what if the system doesn't provide for titular promotion to flag or general officer rank, or if a uniformed judge remained subject to normal military authority and discipline or is subject to judicial conduct discipline only by other military officers such as a uniformed Judge Advocate General, rather than by civilian judicial authorities?

In the end, the Grand Chamber found a procedural breach of Article 2 of the Convention and awarded €25,000 plus tax for non-pecuniary damage and another

€1372.06 plus tax for costs and expenses. The father's claim for just satisfaction was dismissed. Despite the modest damage award, there are certainly lessons to be gleaned from *Jaloud*:

- The Court will not delve too deeply into questions of structural independence of investigations when considering compliance with Article 2
- A “margin of appreciation” will be indulged in recognition of operational exigencies
- The Court will, however, examine the merits of a claim that an investigation is ineffectual under Article 2
- As for investigations, do it right the first time, or be ready to do it over again
- Charging (and exoneration) decisions are subsumed within the investigative duty imposed by Article 2 (Casadevall *et al.* concurring opinion ¶ 4) and must be predicated on the necessary information (*id.* ¶ 5) (here, evidence bearing on justifiability of conduct)
- Judicial structure is subject to scrutiny for independence in Article 2 cases, but standards against which it is tested may not be exacting

4

*Jaloud* is not alone in presenting human rights challenges to military leaders. *Al-Skeini v. United Kingdom* found a violation of the Convention-based duty to investigate the death of five Iraqis. National courts also have to confront such issues. For example, *Serdar Mohammed v. Ministry of Defence* [2014] UKHC 1369 (QB), involved the prolonged detention of an Afghan farmer. *Smith v. Ministry of Defence* [2013] UKSC 41, allowed a military next of kin's damage action for fatal battle space negligence as a violation of the Article 2 right to life. Cases such as these could have significant fallout. For example, they could lead to additional reservations to or derogations from national adherence to the Convention on Human Rights, withdrawal from the European Court, repeal of the UK Human Rights Act (so that final adjudicatory authority would rest with UK Supreme Court) or comparable legislation elsewhere, a chilling effect on overseas operations in general, and coalition operations in particular, overall risk aversion on the part of operational commanders, and increased cost to the fisc due to damage actions. Some of these concerns can be exaggerated, but it would be unwise to dismiss them as entirely fanciful. They can gain political traction given the competing demands of austerity and needed military operations.

Nor is *Jaloud* the last such case we can expect. Already a case has been filed with the Court as a result of the Srebrenica massacre. In *Nuhanovic v. The Netherlands*, the complaint contends that there was a violation of Article 2 in the Dutch Battalion's failure to assist the victims. The issues include whether the Dutch Ministry of Defence exerted pressure on prosecutors not to charge the

popular and charismatic Colonel Thom Karremans and two of his subordinates, and whether the investigation was independent. Apparently the independence of the Military Chamber of the Arnhem Court of Appeal is not being raised, presumably because of the *Jaloud* decision.

As can be seen from this brief survey, the military docket of the European Court of Human Rights offers a rich and changing bill of fare. Questions of structure and jurisdiction will continue to arise, but issues of a more operational character will play an increasing role. Since the court views the Convention as a “living instrument” (akin to the “living tree” referred to in *The Persons Case* (*Edwards v. Canada* (P.C. 1929))), this body of law will continue to grow, perhaps in ways that we cannot now even begin to predict with any confidence, just as Europe’s security situation itself seems unpredictable.





## The Evolution of Military Jurisdictions *Inter Arma Vigent Leges*<sup>1</sup>

### Presentation by

Jan Peter Spijk LL.M. MA

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President of the International Society for Military Law and the Law of War

### Introduction

I have the honor to represent the International Society for Military Law and the Law of War, a non-governmental Society, with worldwide membership and with the statutory aim to disperse knowledge of the laws of armed conflict and military legal issues, in the broadest perspective. Military Justice is one of our key interests and we are therefore highly interested in participating in this conference. I am most grateful to the organizing committee for inviting us.

In the context of today's interesting program I am asked to speak about the "evolution of military jurisdictions"; in the interest of time I will mainly address military courts and comparable institutions and disciplinary offences and summary punishments to a lesser extent.

It is interesting to note that ancient Greek literature mentions a military tribunal, already in 330 BC, which condemned to death the commander Filotas, because he did

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<sup>1</sup> "Among [times of] arms the laws rule", motto of the Netherlands' Army Military Legal Service; as contrary to Cicero's "Inter arma enim silent leges", in the Oratio pro Milone.

not timely suppress a conspiracy against King Alexander.<sup>2</sup> Much later, in the 15th century, with the arrival of standing armies in Italy, France and Spain, we see the first developments of a military judicial system, as a structure. Commanders of major units in those standing armies had the authority to judge and punish misdemeanors, in a rather arbitrary fashion. The King or prince had the formal power to intervene, but probably he rarely does so, in order not to diminish the authority of the military commanders.

In the following centuries military justice further develops and in continental Europe one sees the emergence of special organs, like the 'juge d'instruction', the military prosecutor and military 'courts martial'. Courts Martial also exist in England, they are to be found in the 'Mutiny Act', accepted by the English Parliament in 1689, based on the idea that a man should be judged by his peers.<sup>3</sup>

### **The twentieth century in Europa – political and legal drivers of change**

For our purpose of today, the developments in the twentieth century are the most important, so we move forward quickly. In the fifties of the previous century we can identify two major 'typologies' of military justice systems:

- the Anglo Saxon system, generally characterized by a system of ad-hoc courts martial, judge advocates and a crucial role for the commander as - what we would now call - 'convening authority';
- a Roman law-based system in continental Europe and South America, with military prosecutors and standing military tribunals with military officers and sometimes with one or more civilian members.

These military justice systems were very well established and seemed there to stay. But, primarily visible on the European Continent in the '60's and '70's, an increasingly critical appraisal of military justice systems emerges. This development coincides with an increasingly critical appraisal of "authority" and governmental institutions in the society

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<sup>2</sup> Sotyrios Kyrkos, Military justice in Greece; historical evolution, contemporary institutional developments and future prospects. P. 1. Paper for the Global Military Appellate Seminar 2011, Yale School of Law.

<sup>3</sup> John Gilissen, The Present Evolution of Military Justice; *Receuil de la Société Internationale de Droit Penal Militarire eb de Droit de la Guerre*, Bruxelles, 1981, p. 86.

at large. Contrary to what was considered appropriate earlier, ‘judgments by the peers’ now have become utterly suspect, often fueled by a real or perceived lack of transparency in those military legal procedures and the existence of ‘special’ rules, not in conformity with civilian standards.<sup>4</sup> Also relevant are perceptions of different standards for professional soldiers and enlisted personnel, for higher and lower ranks etc. Sometimes these critical attitudes were wholeheartedly adopted by the political leadership, as we will see in a moment.

On the European continent, this general spirit of discontent and suspicion translated itself into numerous procedures before the European Court of Human Rights in Strasbourg, based on the European Convention on Human Rights, which offers basic fundamental guarantees in Article 5, where deprivation of liberty is at stake, and in article 6, concerning the determination of criminal charges, with the entitlement to a “fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

The judgments of this Court are of compelling importance, since the nations-Parties to the Convention are obliged to implement the Court’s findings and to provide remedies to plaintiffs, in case of breaches of the Convention. An interesting example of the times is the first case ever against the Kingdom of the Netherlands before the European Court for Human Rights – we are talking 1971 - of the Dutch conscripted sergeant Cornelis Engel<sup>5</sup>, then aspiring vice-president of the Dutch Union for Conscript Soldiers, who submitted a list of complaints about the system of summary punishments and the procedures for the military courts to the ECHR. Although the Court found only two breaches of the European Convention<sup>6</sup>, the Engel ruling is important because it laid the groundwork for the later highly detailed scrutiny of military justice systems, with particular effects in the UK.

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<sup>4</sup> See for a comparable analysis: A.W. Dahl, International trends in Military Justice. Presentation at the Global Military Appellate Seminar at Yale Law School, April 1-2, 2011. (Not published.)

<sup>5</sup> Case of Engel and Others v. The Netherlands. (Application no. 5100/71; 5101/71; 5102/71; 5354/72; [5370/72](#)). ECHR, 8 June 1976.

<sup>6</sup> In particular with regard to the so-called ‘strict arrest’, which could be imposed by a company commander, and ‘hearing in camera’ in a procedure before the military court.



A quick chronological overview of the evolution of military jurisdictions in Europe shows the following picture:

- 1982: President Mitterand, elected on a platform of change and protest and highly critical of the role of military courts in the Algerian war, abolishes the military tribunals. The process of total 'civilianization' has recently been completed: as per 1 Jan 2012, the the *Tribunal aux armées* in Paris for troops serving abroad was abolished and per 1 Jan 2015 just 9 'centers of military knowledge' exist, collocated with civilian jurisdictions in France. It is interesting to quote Le Monde, which reported about this process in 2010: *"C'est l'aboutissement d'un processus. Il faut achever ce mouvement d'intégration de la justice militaire au sein du droit commun, pour lever toutes les suspensions, se défaire d'un regard qui tendrait à faire penser que les militaires jugent leurs affaires entre eux", explique-t-on à la défense.*"<sup>7</sup>

- 1991: the Netherlands abolish the Courts-Martial for the three services and the Supreme Military Court; military jurisdiction becomes integrated, by way of so-called 'military chambers' with two professional judges and one military lawyer, integrated in the Arnhem District Court and the Arnhem Court of Appeals. Nowadays the public prosecutor - a civil servant instead of a military officer - decides on the prosecution of a soldier.

- 1993 In the Czech Republic, by way of political decision the military courts were abolished, on the dissolution of the Republic of Czechoslovakia.. Civilian judicial organs assumed all tasks of the military courts.

- In the mid-nineties the courts martial system in the United Kingdom is subject of strict scrutiny by the ECHR and changes fundamentally over time., as we have seen in the earlier contribution.

- 2001: Finland reforms its military prosecution, by shifting the prosecutorial

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<sup>7</sup> [http://www.lemonde.fr/societe/article/2010/01/22/avec-la-suppression-du-tribunal-aux-armees-les-militaires-rentrent-dans-le-rang\\_1295279\\_3224.html#jgHldPR0fd5stHOJ.99](http://www.lemonde.fr/societe/article/2010/01/22/avec-la-suppression-du-tribunal-aux-armees-les-militaires-rentrent-dans-le-rang_1295279_3224.html#jgHldPR0fd5stHOJ.99)

responsibility from legal advisors to the public prosecutor in order to prevent any criticism with regard to possible influence of military authorities in court proceedings.

- 2004: By way of a political decision Belgium abolishes all military courts in times of peace.

- 2005: In Denmark, the military prosecution authority obtains a special status within the ministry of Defence, fully independent of the military chain of command. This situation also applies, *mutatis mutandis*, in Norway.

- 2006: Ireland adapted its system of military justice fully to the requirements as had been developed by the European Court of Human Rights. Military cases are now heard by standing courts with permanent judges.

- A European overview is not complete without mentioning Germany: After World War II Germany instituted a distinct separation between summary punishments and penal sanctions. All military courts were abolished and the legal advisors of the armed forces were to wear civilian dress, instead of uniform, in peacetime. All military criminal offences are now prosecuted in the civilian criminal justice system. In 2013, criminal cases from missions abroad have recently (2013) been centralized to one specific civilian court, making it possible to build up a certain expertise on military affairs at the court.

- It is interesting to note that – generally speaking – the North and Central European Countries have changed the most, whereas the Mediterranean European countries have generally stuck to their old system of specialized military courts, be it that they are also very much under ECHR scrutiny.

Until now I have focused on the European microcosm, but the developments in Europe have had effects in a global context, wholly or partially inspired by the jurisprudence of the ECHR. This was particularly true in countries with a legal connection to those under the European Convention, such as Australia, Canada and New Zealand.

## The UN and Military Justice

In the context of human rights we should mention here the United Nations Commission on Human Rights and the so-called “Draft principles governing the administration of justice through military tribunals”, as formulated by Mr. Emmanuel Decaux, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights.<sup>8</sup> The aim of those principles was to establish a minimum system of universally applicable rules to regulate military justice. The principles are based on the idea that military justice should be an integral part of the general judicial system.

These 20 principles partly overlap the principles as laid out by the ECHR and its counterpart, the Inter-American Court of Human Rights, e.g. where independence and impartiality of military judges and military tribunals and the rights to a just and fair trial are concerned, but are more explicit on issues like the jurisdiction of military courts to try civilians, a contentious issue in many countries. The Draft principles are of importance today, because the Special Rapporteur on Independence of Judges and Lawyers, currently Dr. Mónica Pinto, annually reports on developments and the way ahead.. (See e.g. the 2013 Report<sup>9</sup>.) It is worth mentioning that the UN High Commissioner for Human Rights held an Expert Consultation on the Administration of Justice through Military Tribunals in November 2014.

As the readers of the Global Military Justice Reform-blog know, military justice systems are evolving in many countries, in one way or the other. I mention the South American continent, mainland China and as an example of sudden political change – Taiwan, where mid 2013 courts martial were abolished from one day to the other, following the death of a conscript in suspicious circumstances, while serving a detention sentence at a mechanized brigade.

One should also of course mention the United States of America, with saw Congressional efforts in the past year to change the so-called “convening authority” and where the

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<sup>8</sup> UN Economic and Social Council, E/N.4/2006/58, 13 January 2006.

<sup>9</sup> UN Report A/68/285, 7 August 2013.

Military Justice Review Group is conducting a comprehensive review as we speak, focusing on the structure and operation of the Uniform Code of Military Justice and the Manual for Courts-Martial.

### **The Current Diverse Picture**

After several decades of evolution of military jurisdictions the picture is highly diverse and ranges from countries with ad-hoc military courts, countries with standing military courts, with specialized civilian courts only in times of peace, but military courts in times of war and countries where civilian courts apply in both times of peace and war. That said, over the past 50 years there seems to have been a general tendency to shift from military to civilian jurisdiction, restricting the competence of military courts and modifying or abolishing military prosecution,<sup>10</sup>

As an aside, it is interesting and important to note that although certain general principles apply – e.g. in the European context – and indeed have had a limited harmonizing effect, the results vary enormously in their detail and remain very much based on national interests, traditions and political considerations. Here the analogy between national military justice systems and national anthems springs to mind - they are all different. Let me add here that the Society has organized two major comparative law conferences on military justice, in 2001 and 2011, which fully support this observation.

This lack of harmonization is somewhat remarkable in a time where military cooperation is the standard, both in the organizational institutions of the major alliances and in military operations. Although one may argue that national considerations indeed always should warrant a fully national approach to the concept of a military jurisdiction – in the alliances this seems to be generally accepted - one should clearly recognize that on international missions the execution of military jurisdiction cannot be too diverse and cannot be too self-centered. This is certainly true in situations where interests and individuals of the host country are concerned. In most Status of Force Agreements the

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<sup>10</sup> See also A.W. Dahl, Presentation at expert consultation organized by the Office of the UN High Commissioner for Human Rights, 24 November 2015.

sending states claim exclusive criminal jurisdiction – understandably – but, as recent cases of misconduct by peacekeepers on the African continent have demonstrated, justice must not only be done, it must also be seen to be done and possibly in a rather harmonised way.

### **Change in a political environment**

Another important conclusion, to be drawn from our limited analysis, is that where military jurisdictions in the past have been abolished, this has not been caused by judicial scrutiny by international human rights courts, but by unequivocal political decisions, caused by certain perceptions or developments in a national political context.

In addressing this issue, I begin by saying that the ISMLLW of course respects all national decisions as to the configuration and even the existence of national military justice systems. Obviously, this is for national governments and parliaments to decide.

It is, however, the clear position of the Society that there are many important advantages attached to the existence of military justice systems, in general. To substantiate this position, a quote from the well-known Canadian Supreme Court decision, *R. v. G  n  reux*, from 1992, is appropriate.

“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. (...) 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. (...) (S)pecial 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 military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.”

This particular decision obviously lists arguments related to the Canadian system, but in a more general sense we can identify the need for specific rules and regulations, related to the specific military standards and military tasks and the circumstances under which these tasks are to be executed. In addition, the requirement for a judicial system which is geared to speedy, but nonetheless fair and high quality judgments, to ensure discipline and operational effectiveness within the Armed Forces.

The appropriate legal regimes and competences should be in place and commanders, as far as disciplinary offences are concerned, and prosecutors and judges, in case of criminal offences, should be fully qualified to correctly appreciate and judge behavior of military personnel in the broader context of the armed forces. This is of course particularly important in operational situations, where specific military conduct and different legal standards vis-à-vis the use of force will apply.

We know now that once a military justice system that meets all requirements has been developed, sooner or later critical questions about the validity and the quality of the system *will* occur.

Speaking from experience I note that the military leadership is not always particularly open to change where these topics are concerned. This resistance to change is often rooted in a deeply felt concern about the interests of the country in general and the important role of the military therein in particular. One can understand that Senior Commanders, in their unique responsibility as "standard-bearers" for the requirements of discipline and operational effectiveness, perceive a particular responsibility for maintaining a status quo. Often there seems to be a strong conviction that all change will be for the worse.

But although we of course should not change for the principle of change, the other reality is that nothing will remain constant – as the Greek philosopher Plato coined the thoughts of Heraclitus of Ephesus: *Panta Rhei* – everything flows. That was and is true for the role of military forces in armed conflict and will also be true for legal regimes, in the broadest sense of the word.

The best course of action is therefore a careful analysis, as an operational commander would do before embarking on an operation, identifying all factors of influence. The analysis will show which aspects of the system may be modified, without losing the key characteristics. Refusing change is generally not a good option, we have several examples where the military authorities ended up by losing the military justice system in its entirety.

Possibly the art is in adapting wisely and moving towards a larger sense of conformity with the civilian judicial systems, from the perspective that military justice should be an integral part of the general justice system. That has often meant in practice that additional guarantees for independence and impartiality of military courts and tribunals are introduced, in order to ensure that the principle of the separation of powers is reflected in the military judicial system, in particular with respect to the military hierarchy.

This development also means in practice that international standards and norms, based on international human rights treaties, are introduced in military judicial systems. I mention in particular the right to a fair trial and the right to an effective remedy. Perhaps further developments will move towards an increased right to elect trial instead of summary procedures and an increased right to legal representation, where not yet available.

The comparative analyses that we have made and that we as the Society continue to make - teach us that there are many ways leading to Rome; many options are available, but it seems compulsory to remain in step with the national developments and sentiments while – simultaneously – actively communicating the essential requirements of a justice system, suited to the requirements of the military.

These activities should be very much in sync: it is essential that the society at large perceives and – given its ever-changing nature - *continues* to perceive the military judicial system as truly fair, competent, independent and impartial. Simultaneously also our men and women in uniform should have that perception: they deserve to be assessed and judged in the most professional of ways, given the duties they perform and

the risks they are subjected to in the service to their country. Our political and military leadership carries the important responsibility to ensure that both these requirements continue to remain fulfilled.

In closing I submit to you that it is extremely important that we exchange views about developments like these in an international setting as we do today. In this respect I thank the organizers again and gladly take the opportunity to compliment my Canadian military legal colleagues. I am in a position to judge, from which I wish to say that the Canadian military legal advisors are second to none in their knowledge and professional conduct, particularly also in operational circumstances. I have met and continue to meet them in both operational and legal environments and - without exception - they show very high standards, contribute to a better understanding amongst partners and work towards solutions. I wish to compliment the Judge Advocate General, MGen Blaise Cathcart, for deploying his legal advisors in the broadest sense possible, thus showing a great example, enhancing international cooperation and – thus – contributing to a better application of the principles of military justice in all those other countries. This is the way ahead for all.

Thank you for your kind attention.





## **The Role and Function of the UK Judge Advocate General and the barriers that were overcome in civilianizing parts of the Service Justice System**

**His Honour Judge Jeff Blackett  
Judge Advocate General of Her Majesty's Armed Forces (UK)**

*La guerre! C'est une chose trop grave pour la confier à des militaires<sup>1</sup>.*

### **The tension between Military and Civilian**

Disagreements between politicians and generals about the conduct of operations are nothing new. The disastrous expedition in Gallipoli in 1915 was the brain child of Winston Churchill, as First Lord of the Admiralty, who overrode the concerns of senior officers – notably the First Sea Lord Admiral Fisher - when he planned the ill-fated expedition to Gallipoli. Notwithstanding his later exploits in leading Britain through WW2 he is still blamed for that disaster. He was convinced that if the Navy first and then the Army pressed ahead as planned, rather than approaching the campaign so cautiously, the campaign would have been a success and the war in Europe would have been over much more quickly. No doubt he agreed with Clemenceau who said that war was too important to be left to the generals.

I suspect that many who criticise the Court Martial system today would also pray Clemenceau in aid by suggesting that military justice in the modern age is too serious a matter to be entrusted to the military. On the other hand senior military officers have claimed that operational effectiveness is being hampered by too much interference from civilians: some argue that the civilianisation of military justice is part of the “lawfare” or “legal encirclement” which adversely affects their ability to do their job properly. These diametrically opposed positions highlight the tension that has existed for some time between the need to safeguard individual service persons’ fundamental human rights and the overriding requirement to ensure the operational effectiveness of the Armed Forces. And it is against this background in the UK that the Services have placed barriers in the way of civilianisation, often unnecessarily and often to the detriment of the Service Justice System.

Since 1995 when Lance Sergeant Findlay challenged the fairness of the UK Court Martial system before the European Court of Human Rights<sup>2</sup>, the Service Justice System has rarely been out of the limelight. A succession of challenges to various aspects of the system has led to significant changes throughout the Service Justice System. Human rights groups have argued that military justice is anachronistic in the modern age where national citizens who serve in a state’s armed forces are entitled to all of the rights and safeguards associated with an independent civilian justice system. They have attacked various aspects of the system: the Convening Authority, the lack of independence of the police and prosecution, the position of Board members

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<sup>1</sup> **War is too serious a matter to leave to soldiers.** As quoted in *Clemenceau and the Third Republic* (1946) by John Hampden Jackson, p. 228; this has also become commonly paraphrased as: **War is too important to be left to the generals.**

<sup>2</sup> Findlay v UK 91997) 24 EHRR 221

(military jury) and the status of the judge advocate. In response to each challenge, the UK has increasingly had to replace functions previously performed by service personnel with civilians to demonstrate “independence and impartiality.” But each change has been met with varying degrees of suspicion, often to the extent that civilians undertaking the roles have not had proper support from the Services.

There is, of course, always a tension where any element of military business is placed in the hands of civilians. Members of the Armed Forces can have a tendency to believe that civilians do not properly understand the ethos and culture of the Services and their personnel, the comradeship developed through training and operations, their acceptance that they have fewer freedoms and more restrictions than civilians<sup>3</sup>. So whilst to the outside world civilians generally provide the necessary independence and impartiality which might not otherwise be apparent, to the Services there is a perception that they bring a lack of empathy and different priorities.

### Comparison of pre 1995 and modern Court Martial system

So how much of the current system has been civilianised and how has that been received by the Armed Forces. Before answering that question it is important to examine briefly the system that it replaced.

Until 1995 nothing significant had changed in the Court Martial since the reforms which followed WW2. There were three systems of Service Justice: one for the Army, one for the RAF (which was identical to the Army's) and one for the Naval Service (including the Royal Marines). They grew up separately because the Army and RAF were both governed by statute whereas the Royal Navy was governed by Royal Prerogative. But in all the systems, they were controlled by the military with little civilian interference. In the Army and RAF – and occasionally in the RN - defence lawyers were civilians. In all three systems the Courts-Martial Appeal Court, the civilian Court of Appeal sitting to hear military cases, had a supervisory role in that they could quash a conviction, but they had no power to interfere with sentence.

Service police investigated allegations of offences and then reported to Commanding Officers. They reported through the chain of command to the Convening Authority (normally a military 2\*) which was responsible for prosecuting and administering each court-martial. The convening authority would nominate a military prosecutor (normally from his own staff), approve the charges the defendant would face, select the Board members and president and determine when and where the court-martial would take place. In the Royal Navy the judge advocate was a naval legal officer nominated by the chief naval judge advocate (who was supervised by the civilian Judge Advocate of the Fleet) while in the Army and Air Force he was a civilian nominated by the Judge Advocate General. Both JAF and JAG provided legal advice to their respective Service Boards. In all cases the convening authority was able to object to the appointment of the judge advocate. The trial itself was full of military pomp and ceremony. It was run by the president – the senior military officer on the board – and advised by the judge advocate. In the trial the judge advocate was effectively a legal clerk who advised the President and the Board on the law and

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<sup>3</sup> See comments of senior officers who gave evidence to the Defence Select Committee as the new Armed Forces Bill 2006 was making its way through parliament – Annex A below

sentence, but the sentence was determined entirely by the Board members. The president would often report back to the convening authority to discuss how the case went afterwards and to establish whether there were any general lessons to be learned. In the Army and RAF the Convening Authority confirmed the finding and sentence and had the ability to quash both or vary the sentence.

### The catalyst for change

In November 1991 Lance Sergeant Findlay pleaded guilty at a court-martial to a number of charges of common assault, prejudicial conduct and threats to kill. These charges arose out of an incident in 1990 when he held members of his unit at pistol point and threatened to kill himself and some of his colleagues. He was dismissed from the Army, reduced to the ranks and imprisoned for two years. He appealed and his case eventually reached the European Court of Human Rights where he complained that he was denied a fair hearing because his court-martial was not compliant with Article 6 of the European Convention on Human Rights (ECHR)<sup>4</sup>.

Findlay successfully argued that the court martial was neither independent nor impartial and he was denied a fair trial. As a result the UK Government set about a series of reforms. Further challenges to various parts of the old and new systems were considered by the ECtHR until finally in the case of *Cooper v UK* in 2003<sup>5</sup> the court determined that the British system had been put right. The court stated:

*“The prosecuting authority being answerable to the Attorney General was free of any chain of command or service connection to the higher authority, and it could not therefore be said that the former was likely to be influenced by the latter. It followed that there was a proper separation of the prosecuting, convening and adjudicating roles in the court martial. As regards the conduct of the court martial itself, the presence of the judge advocate constituted an important safeguard and significant guarantee of the independence of the court martial.”*

### The Modern System

Changes to the Service Justice System during the decade following Findlay were incorporated into the Armed Forces Act 2006. That created a single system of service justice (to replace the individual Service systems) and established the Court Martial as a standing court. It abolished the role of the Judge Advocate of the Fleet, removed the residual advisory duties of the Judge Advocate General (who also took over

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<sup>4</sup> “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society.....

<sup>5</sup> *Cooper v UK* [2003] ECHR 48843/99

responsibility for the Royal Navy and Marines as well as the Army and RAF) and established the judge advocates as full time judges (rather than judicial officers). The Judge Advocate General is the presiding judge of the Service Justice System who has a leadership role in relation to the judges and court officials, has a number of statutory responsibilities including specifying a judge advocate for each trial and maintaining the records of court proceedings. He issues sentencing guidance and practice memoranda and he is a member of the Board chaired by a minister for defence which oversees the SJS. He also sits as the trial judge in major trials in the Court Martial. He is no longer involved in providing general legal advice to the MOD or the Armed Forces.

Major changes were:

- Convening Authority – this role was completely abolished so that the chain of command could no longer interfere with a judicial process either by influencing it before hand or reviewing it afterwards.
- Court Administrative Officer and Military Court Service – a civilian (MOD civil servant) is appointed as the CAO and Director MCS. He is responsible for selecting military officers (and civilians) to sit as Board members in all trials, and, under the direction of a judge advocate, he lists the time and place of each hearing. His civilian staff provide all of the administrative support functions at each Court Martial centre.
- Service Prosecuting Authority – an independent prosecuting authority was established to prosecute all cases. It is staffed by military lawyers, but it is headed by a civilian. The chain of command has no influence in the SPA who makes independent prosecutorial decisions. The director may also employ civilian lawyers in permanent roles within his organisation, or brief counsel to prosecute in individual cases. He briefs civilian counsel to prosecute in most cases involving homicide and serious sexual offences.
- Civilian Judges – since 2003 service officers have been ineligible to sit as judges in the Court Martial. The ECtHR decided that a member of the Armed Forces sitting as a judge advocate could not guarantee a fair trial: that could only come from the presence of a civilian judge advocate<sup>6</sup>. The civilian judge advocate now presides at the hearing. He directs the board on the law, playing no part in the finding of guilt or innocence, but then leads the sentencing discussions and has the casting vote. Judge Advocates also preside over the Summary Appeal Court (which hears appeals from summary cases dealt with by Commanding Officers) and the Service Civilian Court (which deals with summary offences committed by civilians subject to service discipline).
- The Board – in cases involving service personnel the composition of the Board remains largely unchanged. Officers and Warrant Officers are selected at random. Technically a Board can deal with any service person even though not of the same Service but in practice the Boards generally deal with their

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<sup>6</sup> *Grievous v UK* [2003] ECHR 57067/00

own. Where the defendant is a civilian, the Board must comprise civilians (normally drawn from the ranks of the MOD civil servants).

- Court Martial Appeal Court – composed of civilian appeal judges from the civilian Court of Appeal – may quash a conviction and/or interfere with sentence (either increasing it on application by the Attorney General that it is unduly lenient or reducing it on application by the defendant that it is manifestly excessive or wrong in principle).
- Service Justice Board – this body oversees the Service Justice System and is ultimately responsible for policy development. It is chaired by a Government Minister from the MOD, and membership is a minister from the Ministry of Justice, the Solicitor General, JAG, Director Service Prosecutions, and four military 3\* officers.

### Barriers

Notwithstanding the legal challenges which need to be overcome, there were also strong challenges internally. The military did not wish to change – their perception was that their justice system was fair, albeit sometimes harsh, that it reflected the needs of discipline and service and that any outside interference would potentially damage operational effectiveness. The convening authority, far from being oppressive, actually safeguarded the rights of the individual through the power of review of finding and sentence. The trial process was also a tool by which the chain of command could ensure appropriate steps were taken against ill discipline. As a result, each legal challenge was met with a strong defence from the MOD arguing that there were sufficient safeguards in place to guarantee a fair trial. On most occasions the defence was broken down and the MOD were forced to retreat a little more.

At the same time personalities got in the way. Some who had been in certain positions within the SJS did not want to change, and when change was thrust upon them they were not minded to be particularly helpful to the civilian who now undertook the role. This was most marked in the prosecuting authority where the services provide military prosecutors to be under the command of the civilian director. The civilian director's control of his prosecutors was hampered by some of the Service officers responsible for manning not being sympathetic to his concerns. It soon became apparent that the turnover of prosecutors was too fast and the quality of those prosecuting diminished: that adversely effected the administration of justice and caused the Director to brief more civilian counsel to prosecute.

As the JAG I was faced with opposition as I attempted to shape the new justice system to reflect the needs of the services whilst ensuring compliance with ECHR Article 6. I thought that my 31 years service in the Royal Navy would have given those still in the Services some comfort but my confidence was soon shaken. I had to deal with:

- Natural reluctance of Service personnel to trust civilian judgement, the Services' view being that civilians do not understand service ethos, the pressure of service life and lack of experience of operational duty. In reality there is expertise and knowledge present in the Board members who determine

guilt or innocence and assist the judge advocate in determining the appropriate sentence. The test for bringing a prosecution is whether there is a realistic prospect of conviction and it is in the Service interest to prosecute (the public interest being part of the Service interest). Those who make the decision to prosecute are either military lawyers or civilians who have access to military advice, so this criticism is one of perception rather than reality.

- Lawfare and legal encirclement – the JAG was considered by many within the MOD to be an outsider and part of the “legal encirclement”. As a result judicial proposals for changes to the system have been met with suspicion and it has been a constant struggle even to adopt best practice from the civilian system. The overarching aim of the Office of the Judge Advocate General is to maintain a fair, robust and cost-effective Service Justice System in such a way as to support the operational effectiveness of the Armed Forces in times both of peace and armed conflict. Each and every time the service judiciary puts forward a proposal for change to the SJS it is tested against this aim. All too often the greatest challenge I face as JAG is not the decision I make in court, but in persuading those around me that the system is just and that further moves towards parity with the civilian justice system should be welcomed.
- Perceived lack of understanding of operational context – these criticisms gain traction both within and outside the Services following high profile cases, but they demonstrate a lack of understanding of the process and the composition of Boards. There is an element of random selection among the Boards, but in a case involving something which occurred during operational service, the CAO will always attempt to ensure that some of the Board have relevant operational experience. In the case of *R v Blackman*, for example, three of the seven Board members had served in Helmand Province on similar operations to the one in which the defendants were alleged to have murdered a wounded Taliban insurgent.

### Has civilianisation worked?

The short answer is yes, but not as well as I had hoped and there is still a way to go in educating the public and the Armed Forces that the SJS is fit for purpose.

There have been many teething problems as the SJS has moved from a totally military led and run system to an independent and impartial justice system. Time and experience has alleviated many of the fears expressed initially by the Services and there is much more confidence in the system than there was initially. It may have been painful for the Services to come to terms with the fact that they no longer control their own justice system, but those who come into contact with the system, perhaps as Board members, realise that it is professional and fair. But high profile cases can open up old cracks with retired senior military officers criticising the process publicly without really understanding the system or knowing the facts of the case. Equally, many civilian commentators still do not understand that the system is independent and suspect (without any evidence to support their suspicions) cover up or political interference in the process (see some of the press coverage of *R v Blackman*).



It is, of course, very important that those civilians who operate in the system do enjoy the confidence of both the military and the general public to ensure military justice is not perceived as a cover up on the one hand or oppression on the other. In the UK that confidence ultimately should come from the oversight provided by civilian judge advocates. Most are ex military but they are selected and trained in exactly the same way as civilian judges. Their primary role is to sit in the Service Courts, but they also sit in the Crown Court for about 1/3 of the year by virtue of the Armed Forces Act 2011 s 26. Additionally, the Court Martial was established as a standing court by the Armed Forces Act 2006, rather than the ad hoc courts-martial which existed before 2009, and this also ensured independent judge advocates are much more involved in listing and case management.

Despite these factors, many in the press and public seem unaware that the judiciary who operate in the SJS are independent and as competent as any other civilian judge.

Successive Ipsos Mori think-tank surveys have placed the judiciary more generally at the very apex of public trust. In 2015 the judiciary was the British public's fourth most trusted profession behind only doctors, teachers and scientists. Judges were some way ahead, I am always pleased to note, of politicians of whom just 16% of the public trusted to tell the truth, lower than estate agents, bankers and journalists!<sup>7</sup> But I am not confident that the judiciary who operate principally within the Court Martial would fare so well because of the misconceptions of their role and status. They are often described as "military judges" and perceived to be part of the military rather than independent office holders. Yet, the message needs to be heard. The judges who sit in both the military and civilian jurisdictions are one and the same and the independence which they bring extends to the courts themselves.

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<sup>7</sup> <https://www.ipsos-mori.com/Assets/Docs/Polls/Veracity%20Index%202014%20topline.pdf>



**Comments by former Chiefs of Defence Staff**

Admiral Lord Boyce said there was a feeling of legal encirclement:<sup>8</sup>

In recent years the range and scale of employment and social legislation that may be applied to the Army has changed radically. Individual rights are enshrined in legislation which seeks to eliminate discrimination. By placing more emphasis on individual rights than on collective responsibility, much domestic and European legislation may impact adversely on the operational effectiveness of the Army.

General Sir Michael Walker:

What you do need is people making judgments who do understand the context of those who are being accused of some crime, so 24/7 living, stress, pressures, finding yourself in a riot in some godforsaken part of the world produce pressures on people ..... when you are looking at making judgments about what they do, it requires you to have an understanding of that context.

Air Marshal Sir Jock Stirrup

What is crucial in terms of maintaining that bond of trust is that people understand and feel that their actions are going to be judged in the context in which they are operating, not as if they were walking down, dare I say, Watford High Street, but the fact they were in downtown Basra with everything that implies. So our concern is that the military justice system and the aspects of it which are covered in the Armed Forces Bill clearly recognise that difference from civilian life. That, it seems to me, is the fundamental point in maintaining that bond of trust.

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<sup>8</sup> House of Commons Select Committee on the Armed Forces Bill, Special Report of Session 2005-2006 – HC 828-1

# Should Canada's Military Justice System Have Jurisdiction Over Ordinary Criminal Offences?

*David McNairn*<sup>1</sup>

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## Introduction

I have been invited here today to speak about this question: Should Canada's military justice system have jurisdiction over ordinary criminal offences committed in Canada? My answer to this question is "yes" – with conditions. Canada's military justice system should, in appropriate circumstances, have jurisdiction over ordinary criminal offences committed in Canada by persons subject to the *Code of Service Discipline* – primarily members of the armed forces.<sup>2</sup> Indeed, this position will be entirely unsurprising, since I am the panel member who has been asked to speak in favour of military jurisdiction over ordinary criminal offences committed in Canada.

That being said, the far more interesting and challenging question to me is what conditions must be satisfied before the military justice system *should* exercise jurisdiction over ordinary criminal offences. This is a question that has confounded courts not only in Canada but in other jurisdictions as well. I hope to persuade you that if three conditions are met, then the exercise of military jurisdiction over ordinary criminal offences committed in Canada is well founded.

## Rationale for a Separate Military Justice System With Concurrent Jurisdiction Over Ordinary Criminal Offences

As part of this presentation, it is useful to consider the rationale for a separate military justice system and the rationale for such a system to exercise concurrent jurisdiction over ordinary criminal offences committed in Canada by persons subject to the Code of Service Discipline. This is a worthy topic of discussion in light of the fact Canada has a civilian criminal justice system in place where all ordinary criminal offences are otherwise dealt with. Indeed, it could be said that the subject-matter expertise over criminal law matters resides with the civilian justice system. As the Court Martial Appeal Court of Canada has observed, military tribunals

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<sup>1</sup> This paper is an expanded and edited version of a presentation made by the author on November 13, 2015, at the "Winds of Change" Military Law Conference at the University of Ottawa, Faculty of Law, Ottawa, Ontario, Canada. As part of a panel, the author was invited to speak in favour of the proposition that Canada's military justice system should have jurisdiction over ordinary criminal offences committed in Canada. The views expressed by the author should not be taken as necessarily representing the views of Government of Canada, Department of Justice, Department of National Defence, Canadian Armed Forces, or any other department or agency of the Government of Canada.

<sup>2</sup> Section 60 of Canada's *National Defence Act*, R.S.C. 1985, c. N-5, as amended, sets forth those persons who are subject to the *Code of Service Discipline* (i.e., those who are subject to the personal jurisdiction of the Canadian military justice system).

are courts of exception and therefore it could be argued that military jurisdiction over ordinary criminal offences committed in Canada should also be exceptional.<sup>3</sup>

The rationale for a separate military justice system with concurrent jurisdiction over ordinary criminal offences – in appropriate circumstances – appears to have been well settled by:

- Necessity, practicality and our legal history;
- The Parliament of Canada;
- Supreme Court of Canada jurisprudence; and
- The *Canadian Charter of Rights and Freedoms*.

As a practical matter and as a matter of necessity, I submit to you that a system of military tribunals has existed from the earliest of times to maintain and enforce military discipline. Justice McIntyre of the Supreme Court of Canada suggested as much in *R. v. MacKay* (1980) when he said, “Since very early times it has been recognized in England and in Western European countries which have passed their legal traditions and principles to North America that the special situation created by the presence in society of an armed military force, taken with the special need for the maintenance of efficiency and discipline in that force, has made it necessary to develop a separate body of law which has become known as military law.”<sup>4</sup>

Canada inherited its legal system from the United Kingdom which has long taken the view that a separate military justice system is necessary to maintain and enforce military discipline. With Confederation in 1867, Canada took its first step toward independence by becoming a self-governing Dominion. One of the earliest actions of the Parliament of Canada was to enact the *Militia Act* in 1868.<sup>5</sup> The *Militia Act* established the modest beginnings of an armed force for Canada and adopted, by reference, the British military justice system and British military law to govern the discipline of Canadian military forces.<sup>6</sup> Canadian military authorities were content to use this borrowed system of military justice for 83 years.

Military jurisdiction over ordinary criminal offences has its roots in 19<sup>th</sup> century legal developments in the United Kingdom. Up to this point, civilian jurisdiction over ordinary criminal offences had been jealously guarded. However, at some point U.K. authorities saw the merit in granting the military some jurisdiction over ordinary criminal offences. In 1860 the U.K. Parliament granted the Royal Navy jurisdiction over ordinary criminal offences. The U.K. Parliament was much more reluctant to grant the British Army such jurisdiction and did not do so until almost 20 years later – in 1879. These features of British military law were incorporated into Canadian law by the *Militia Act* and were carried on by the 1950 *National Defence Act*<sup>7</sup> which “Canadianized” the military justice system. Hence, military jurisdiction over ordinary

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<sup>3</sup> *R. v. Trepanier*, 2008 CMAC 3.

<sup>4</sup> *R. v. MacKay*, [1980] 2 S.C.R. 370 at 402.

<sup>5</sup> *Militia Act*, S.C. 1868, c. 40.

<sup>6</sup> *Ibid.*, ss. 64, 72 and 73.

<sup>7</sup> S.C. 1950, c. 43.

criminal offences, with the sanction of Canada's Parliament, has been a feature of Canadian military law for over 100 years.

The jurisprudence of the Supreme Court of Canada has recognized not only the legal validity a separate military justice system, but also its jurisdiction over ordinary criminal offences. In *R. v. Genereux* (1992)<sup>8</sup> the Supreme Court of Canada gave legal and constitutional sanction to a separate military justice system, forming part of the larger Canadian legal system, with the primary purpose of dealing with matters that pertain directly to the discipline and efficiency of the armed forces. Over 20 years earlier, a majority of the Court had upheld concurrent military jurisdiction over ordinary criminal offences committed in Canada, but at the same time acknowledged the primacy of civilian jurisdiction over such offences.<sup>9</sup>

The *Canadian Charter of Rights and Freedoms* gives implicit recognition to both a separate military justice system as well as military jurisdiction over ordinary criminal offences. It does so in s. 11 (f) by granting an exception to the right to a jury trial "in the case of an offence under military law tried before a military tribunal." The *Charter*, which was enacted in 1982, came into force at a time when a separate military justice system with concurrent jurisdiction over ordinary criminal offences was a longstanding feature of Canadian law.

While a separate military justice system to enforce discipline is not the only model, it is the policy choice made and generally preferred by nations with common law legal systems. The perceived need for a separate military justice system is really an article of faith in most common law jurisdictions, although it is clear that some nations have successfully integrated the enforcement of military discipline into their civilian justice systems. The concurrent military jurisdiction over ordinary criminal offences, such as exists in Canada, seems to be a practical recognition that a criminal offence committed by a person subject to the Code of Service Discipline may, in certain circumstances, also be a serious issue of military discipline. The case of the private who beats up his commanding officer on the parade square in front of other troops would be an obvious example.

## **Conditions for the Exercise of Military Jurisdiction Over Ordinary Criminal Law Offences**

Let's turn to the more interesting question of what conditions need to be satisfied before the military justice system should exercise jurisdiction over ordinary criminal offences committed in Canada by person subject to the Code of Service Discipline (primarily members of the armed forces). I have devised three pre-conditions to the exercise of military jurisdiction over ordinary criminal offences. In doing so, I have reviewed the jurisprudence and legal literature and done a good deal of thinking about this issue which, I suggest, has confounded courts in many countries.

The purpose of the three conditions is to draw the proper limits of military jurisdiction over criminal offences and to give guidance as to when the military's concurrent jurisdiction

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<sup>8</sup>[1992] 1 S.C.R. 259.

<sup>9</sup> *R. v. MacKay*, *supra* note 4.

over ordinary criminal law offences can be properly exercised. My pre-conditions for the exercise of military jurisdiction are based on three basic propositions:

1. **Primacy of Civilian Jurisdiction**: The civilian justice system has primacy of jurisdiction over ordinary criminal offences committed in Canada. This proposition is a practical function of the fundamental constitutional principle that the military is subordinate to civilian authority. There is ample legal and historical support for this proposition. While the civilian and military justice systems have concurrent jurisdiction over ordinary criminal offences, they do not have equal jurisdiction. Civilian jurisdiction over ordinary criminal offences is paramount and cannot be ousted by military proceedings. Stated another way, where the civilian justice system asserts jurisdiction over an ordinary criminal offence, the civilian courts can supplant the concurrent jurisdiction of the military justice system – even where there is a strong connection between the offence and the accused’s military service.
2. **Forum**: The proper forum for the trial of an ordinary criminal offence committed in Canada is presumed to be the civilian justice system.
3. **Presumptive Right of the Accused to a Civilian Trial**: The accused has a presumptive right to have an ordinary criminal charge tried in the civilian justice system, particularly where he would be entitled to a jury trial.

### **The Three Conditions for the Exercise of Military Jurisdiction Over Ordinary Criminal Offences: A Reformulation of the Military Nexus Doctrine**

What I am about to offer you is in effect a reformulation of the military nexus doctrine which developed rather haphazardly in Canadian jurisprudence. I suggest that the military justice system should only exercise its concurrent jurisdiction over an ordinary criminal offence allegedly committed in Canada by a person subject to the Code of Service Discipline if three conditions are satisfied:

1. Is there a real and substantial connection between the alleged offence and the accused’s military service?
2. Taking into account all relevant considerations, is there a compelling military interest in prosecuting the alleged offence?
3. Have civilian justice authorities been fully informed of the circumstances of the alleged offence, waived their authority to prosecute the offence, and consented to the prosecution in the military justice system?

### **Real and Substantial Connection**

Is there a real and substantial connection between the alleged offence and the accused’s military service? This is the first condition that must be satisfied before the military justice system should exercise its concurrent jurisdiction over ordinary criminal offences committed in

Canada. The mere fact that a person is a service member subject to the *Code of Service Discipline* is certainly not sufficient to satisfy this condition. Did the offence occur in civilian-like circumstances, or did it occur in a military context? The answer to this question is really a matter of degree. Without being exhaustive, some of the factors which may be relevant here include:

- Did the offence occur while the accused was in uniform, on duty or performing military duties?
- Did the offence occur on military premises or in a military vehicle, aircraft or vessel?
- Did the offence involve military equipment?
- Did the offence cause damage to military property or interests?
- Did the offence cause harm to military personnel?
- Did the offence occur in an operational setting?
- Did the offence involve other service members (e.g., as co-accused, or as victims)?

If there is no real and substantial connection between the alleged offence and the accused's military service, that is the end of the matter. There is no need to proceed to the second and third conditions. Military jurisdiction over an ordinary criminal offence committed in Canada should not be exercised. It is submitted that had this threshold question been asked and answered in cases such as *R. v. Ionson* (1987)<sup>10</sup> and *R. v. MacEachern* (1985)<sup>11</sup>, no real and substantial connection would have been found between the accused's offence and his military service. The failure of the court to ask and answer the threshold question allowed the analysis to leap forward to the military's disciplinary concern with drug use by service members. This flawed approach resulted in a near presumption of a military nexus where the alleged offence involved drug use, possession or trafficking by a service member.

## **A Compelling Military Interest in Prosecuting the Offence**

If the first condition is satisfied, then we should move on to the second condition for the exercise of military jurisdiction: Taking into account all relevant considerations, is there a compelling military interest in prosecuting the alleged offence?

The military's interests in discipline is a relevant consideration, but it should not overwhelm other relevant considerations such as:

- The interests of the accused;

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<sup>10</sup> (1987), 4 C.M.A.R. 433; aff'd [1989] 2 S.C.R. 1073.

<sup>11</sup> (1985), 4 C.M.A.R. 447.

- The interests of a victim;
- The interests of the community in which the offence occurred; and
- The larger public interest.

The analysis should proceed from the presumption that the proper forum for the trial of a criminal offence is the civilian justice system. All relevant considerations must be taken into account and a determination must be made as to whether there is a “**compelling**” military interest in prosecuting the alleged offence. When all relevant considerations have been weighed, the military’s interest in prosecuting the matter must not simply outweigh other considerations – it must be so compelling that it overcomes the presumption in favour of a civilian trial.

Again, without attempting to be exhaustive, some relevant considerations would include the following:

- Is the offence one that would entitle the accused to a jury trial and other procedural protections in the civilian justice system? We should be loath to deprive a person of these rights.
- What is the accused’s position regard the exercise of military jurisdiction? An objection to military jurisdiction by the accused would point toward a civilian trial.
- Is the civilian justice system better suited to deal with the particular offence in question? For example, it is already recognized that some types of cases (drinking and driving offences as well as domestic assault) are better left to the civilian justice system which often has better sentencing options and better support services.
- Does the matter involve multiple accused, some of whom are subject to military jurisdiction and others who are not? In general, it would be best to avoid a multiplicity of proceedings.
- What are the views, interests and wishes of the victim? The victim may prefer the civilian justice system because of better victim services, flexible sentencing options or the availability of criminal injuries compensation.
- What public interest has been infringed by the accused’s alleged criminal conduct? Is it a civilian or a military interest? If the general public interest is infringed, the civilian justice system is the appropriate forum for the trial of the matter.
- Is the accused’s status as a service member irrelevant to his alleged criminal conduct?
- Would a military prosecution contribute directly and substantially to the maintenance and enforcement of military discipline, efficiency and morale?



## **The Consent of Civilian Justice Authorities to a Military Prosecution**

If the first two conditions have been met, one more important condition must be satisfied before military jurisdiction over an ordinary criminal offence committed in Canada can be properly exercised. Have civilian justice authorities been fully informed of the circumstances of the alleged offence, waived their authority to prosecute the offence, and consented to the prosecution in the military justice system?

In my view, this condition must be satisfied in order to ensure respect for the principle that civilian jurisdiction over ordinary criminal offences is paramount. Of course, civilian prosecution authorities can hardly exercise their paramount jurisdiction over ordinary criminal offences if they do not even know that the military is conducting such a prosecution. Indeed, civilian prosecution authorities are often completely oblivious to prosecutions for ordinary criminal offences in the military justice system.

Canada has no formal procedure or protocol in place that requires military prosecutors to consult with their civilian prosecution colleagues with respect to whether a criminal charge involving a person subject to the *Code of Service Discipline* should be dealt with in the military or civilian justice system. The situation in Canada is in direct contrast to that which exists in the United Kingdom and Australia which both have protocols which recognize the supremacy of civilian jurisdiction over ordinary criminal offences and give civilian prosecutors the final say on whether a criminal case will be tried in the civilian or military justice system.<sup>12</sup> Canada needs a similar protocol to help ensure that the supremacy of civilian jurisdiction over ordinary criminal offences is respected and that military jurisdiction over ordinary criminal offences committed in Canada is only exercised where it is appropriate to do so.

## **Conclusion**

If the three-part test I have proposed is used, it would help to ensure that military jurisdiction over ordinary criminal offences is limited to those cases where there is a compelling military interest in a prosecution. In such cases, the accused may lose certain procedural advantages that are open to him in the civilian justice system (e.g., the benefit of the summary conviction procedure, preliminary inquiry, jury trial, more flexible sentencing options, etc.). Instead, the accused may face a trial before a General Court Martial consisting of a military judge and five-member panel of service members. It is submitted that the cases where there is a compelling military interest in prosecuting are the ones that will have the greatest effect, in a positive and salutary way, on military discipline. Indeed, the news is not all bad for an accused facing trial in the military justice system. There are significant advantages, such as free military defence counsel or the right to address the General Court Martial last regardless of whether the accused calls evidence or not.

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<sup>12</sup> *Protocol on the Exercise of Criminal Jurisdiction in England and Wales*, 2011 (United Kingdom); and *Memorandum of Understanding Between the Australian Directors of Public Prosecutions and Director of Military Prosecutions*, 2007 (Australia).





**Justice For All: Canadian Military Law and Charter Values**

By Anne London-Weinstein

**WINDS OF CHANGES. Inaugural Canadian Military Law Conference**

**November 13, 2015**

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It is an unfortunate irony of our military justice system that those who fight to defend our civil rights and liberties may not benefit from some of the most important of those rights and freedoms when they most are needed—when accused of committing an offence.

While civilian legal regimes are built on an independent and well trained prosecutorial team, and an independent and legally knowledgeable adjudicator, the military system of justice lacks these cornerstones of trial fairness. In fact, many of the other foundational principles of the civilian criminal justice system are notably absent in the military system of justice. The lack of these key trial fairness elements have lead to an international movement away from military forms of justice and toward systems which incorporate civilian trial fairness guarantees. This trend has not been followed in Canada, with the result that members of the Canadian Forces who are accused of offences are sometimes deprived of basic constitutional protections at trial. In times of peace in Canada, there is no justification for such constitutional deprivations. It should also be noted that the military justice model is particularly ill suited to deal with sexual offences which are endemic to the Canadian Forces.

The problems associated with successful prosecutions of sexual assault and harassment claims in the Canadian Forces lead former Supreme Court Justice Marie Deschamps to call for an independent centre for accountability for sexual assault and harassment claims, and the option of transferring complaints to civilian authorities.<sup>1</sup> The need for speedy resolution of offences and emphasis on discipline are necessary features of the military system of justice, however many of these particular features are only required during the exigencies of conflict. During peace time in Canada, there is no rationale justifying the denial of basic trial fairness guarantees to members of the Canadian Forces.

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<sup>1</sup> *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, March 27, 2015.

While other countries have reformed military justice systems to increase civilian oversight and reduce military jurisdiction in resolving offences, these reforms have not firmly taken root in Canada. This paper will argue that the civilian court model with its inherent independence, autonomy and trial fairness protective mechanisms is best equipped for dealing with any matter where a criminal conviction can follow a member outside of service, wherever detention is a potential sentence, and in all cases of sexual assault. The imposition of detention, or a criminal record, in the absence of basic constitutional guarantees of trial fairness is a violation of the principles of fundamental justice. Our service members deserve a better form of justice.

The *National Defence Act (NDA)* is the primary statute governing the conduct of Armed Forces members. The *Code of Service Discipline* found in Part III and related provisions in Part VII, promotes military discipline and applies to persons who are under service jurisdiction. The purpose of the *Code* is to promote discipline, however it also includes all criminal law civilian offences which, if committed in this country or abroad, would constitute an offence under Canadian criminal law.

The majority of charges laid under the *Code* can be tried either as a summary trial or court martial, with the overwhelming majority of charges being tried summarily.

Summary trials are disciplinary hearings conducted as necessary by the chain of command to adjudicate less serious offences which occur either inside or outside of Canada. Summary trial proceedings can result in the imposition of a true penal sentence and a criminal conviction, which can follow a military member even after they may have left service.

Despite the possibility of detention, or a criminal record, there is no right to counsel at a summary trial, even if an accused person is being tried in Canada and even if the trial is held during peace time.

There are no records of testimony or evidence kept of summary trial proceedings; hearsay evidence is generally admissible; there is no right to appeal and there are no formalized rules of

evidence. An accused person does not have protection against self-incrimination and may be compelled to testify, adverse inferences can be drawn from an accused's silence and spousal privilege is not upheld.

The Supreme Court has endorsed the constitutional validity of the penal military justice system as being necessary to maintain the discipline of the forces, holding however that the *Charter* also applies.. In *R v. Généreux*,<sup>2</sup> Chief Justice Antonio Lamer wrote that the purpose of a separate system of military tribunals is to permit the Armed Forces to deal with the discipline, efficiency and morale of the military. In order to ensure the safety and well-being of Canadians, it is necessary that there is a willing and able force of men and women to defend against threats to the nation's security, the Court noted. In addition, there may be instances where breaches of military discipline must be dealt with speedily and, frequently, and punished more harshly than would be the case in a civilian context.

The *Code of Service Discipline* allows the military 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 deal with routine military discipline requirements.<sup>3</sup> However, *Généreux* held that the structure and constitution of the General Court Martial were in breach of 11(d) of the *Charter* due to a perceived lack of judicial independence.<sup>4</sup>

The relationship, and the appearance of the relationship between the executive and the judiciary has been described as “embarrassingly close and giving rise to the perception of a lack of independence between the executive and the judiciary.”<sup>5</sup> While this may not be of concern in a

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<sup>2</sup> *R v Généreux* (1992) 1 S.C.R. 259

<sup>3</sup> *Ibid* at p. 293

<sup>4</sup> *Ibid*.

<sup>5</sup> *Lauzon v. The Queen*, (1998) CMAAC 415.

straight disciplinary context, in any case where meaningful punishment and stigma flow from an available sanction, it is a principle of fundamental justice that the matter be heard by a tribunal that not only is independent, but appears to be independent to an objective observer.

The Supreme Court has also held that there are limits to military jurisdiction and that the system does not provide trial fairness protections found in the civilian regime. In *Mackay v. The Queen*,<sup>6</sup> the Court noted that the servicemen charged with a criminal offence are deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code which differs in some particulars from the civil law, to differing rules of evidence, and to a different and more limited appellate procedure. His right to rely upon the special pleas of “autrefois convict” or “autrefois acquit” is altered for, while if convicted of an offence in a civil court he may not be tried again for the same offence in a military court, his conviction in a military court does not bar a second prosecution in a civil court. His right to apply for bail is virtually eliminated.<sup>7</sup> In *Mackay*, the Court specifically regarded the adjudication of criminal matters by military tribunals as an exception to the general rule that should only be carried out when the crimes had been committed in Canada. The military offence also had to be intrinsically connected to the service by both nature and consequence so that the offence itself would tend to impact the general standard of discipline and efficiency of the service<sup>8</sup>

Bill C-15<sup>9</sup> was introduced into the House of Commons at the same time as Bill C-16, the *Security of Tenure of Military Judges Act*, which provides security of tenure to military judges until a fixed age of 60 years in the absence of a removal for cause. When Bill C-15 passed, it was

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<sup>6</sup> *MacKay v. The Queen*, [1980] 2 S.C.R. 370

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* p. 410

<sup>9</sup> Bill C-15 was enacted on June 19, 2013. See *Statutes of Canada 2013*, c.24

to amend the *NDA*, however, no reforms were made to modernize the *NDA*, or to enhance the trial fairness protections available to more closely reflect those in the civilian context.<sup>10</sup>

In the military system, a commanding officer, or a delegated officer at a summary trial can examine facts and make decisions on issues of law, resulting in detention for up to 30 days. A conviction may also be entered. This conviction will follow an individual into private life when service is at an end. Despite the stigma of a criminal conviction and the reality of a sentence of imprisonment, an accused has no right to be represented by legal counsel. There are also no recognized rules of evidence which would protect the accused from a conviction based on unreasonable evidence. The admissibility of hearsay evidence compounds the danger of being convicted on unreliable evidence. The lack of a record of the testimony heard is problematic, as is the limited training available to decision makers.

While Bill C-41, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*,<sup>11</sup> increased both the military sentencing options and the independence of the military judiciary significant trial fairness issues remained. They included: the lack of a right to counsel, the lack of uniform laws of evidence, inadequate training of both prosecutors and the judiciary and a remaining perception that the process of adjudication was linked to the Executive.

While *Généreux* confirmed that the *Charter* applies to military tribunals and that s. 11 of the *Charter* provides criminal due process rights to individuals charged with an offence., the application of *Charter* principles to the summary trial procedure has never been addressed directly by the Supreme Court. However, it is arguable that *Charter* principles do apply based on the Court's commentary in *R v. Wigglesworth*,<sup>12</sup> where the Court stated that s 11 of the *Charter*

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<sup>10</sup> The author attended the Senate and made submissions on behalf of the Criminal Lawyers Association in relation to Bill C-15

<sup>11</sup> *Bill C-41, Third Session, Fortieth Parliament, 59 Elizabeth II, 2010*

<sup>12</sup> *R v Wigglesworth*, [1987] 2 S.C.R. 1

applies to an adjudicative process if that process is of a public nature or if that procedure has “true penal consequences.” In *Généreux*, the Court indicated that because military tribunals have a public purpose and have the power to imprison individuals they meet both *Wigglesworth* criteria. The summary trial process has the same ultimate purpose as the courts martial under the *NDA*, along with the risk of imprisonment. Where an individual can be subject to penal consequences such as imprisonment, procedural protections should be correspondingly robust.<sup>13</sup>

The other trial fairness issues relating to summary trials are the fact that an accused has no right to a lawyer and even if they can afford to hire one, they may be prevented from doing so.<sup>14</sup> The *NDA* allows for an assisting officer, but that officer is not required to have any legal training, or any prior experience with the summary trial process. The assisting officer is often an officer selected from the accused officer’s unit and is appointed by the presiding officer. This process poses problems with the accused’s right to meaningfully be defended and also poses problems with the independence of counsel. In 2003, Justice Antonio Lamer raised questions about the competence of assisting officers and their lack of both education and experience.<sup>15</sup> Where expediency is favoured over procedural fairness, it should only be permitted in circumstances where no penal consequences, nor criminal conviction can flow from the resultant sanction. An example of the fundamental unfairness which can arise in the summary trial process is encapsulated in the notion of reasonable doubt, a foundational cornerstone in any criminal proceeding. The summary trial regulations indicate “a reasonable doubt should not arise where based on a fair and impartial consideration of all the evidence, the presiding officer has a decided and firm conviction that the accused is guilty.”<sup>16</sup> However, this is not the definition articulated by

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<sup>13</sup> *Wigglesworth, supra, at para 24*

<sup>14</sup> *The Regulations Art. 108.14 (Note B)*

<sup>15</sup> The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., D.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35, at page 60

<sup>16</sup> Regs. Art. 108.20 Note (B)



the Supreme Court in *R v. Lifchus*<sup>17</sup>, where the standard was described as being inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence. The *Lifchus*<sup>18</sup> definition specifies that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused; a reasonable doubt is not a doubt based upon sympathy or prejudice; rather it is based upon reason and common sense; and it is logically connected to the evidence or absence of evidence. It does not involve proof of an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and more is required than proof that the accused is probably guilty—a jury which concluded only that the accused is probably guilty **must acquit**. This is a far different standard than the one relied on in military proceedings, which is a fundamental unfairness to an accused tried under the military system of justice.

In other jurisdictions, the trend has been a movement away from the military model of adjudication towards a more rights based approach of adjudication. The European Court of Human Rights, for example, has considered the question of the constitutionality of summary trials and determined that the system they were using contravened the rights of service members. That system is highly similar to the summary trial system currently relied on in Canada.<sup>19</sup>

France and Germany have removed summary trials of criminal offences from the military justice system. These matters are now tried before a civilian court. In the UK, the summary trial system has also been decriminalized, rights to counsel and rules of evidence formulated and appeal mechanisms instituted.<sup>20</sup>

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<sup>17</sup> *R v Lifchus*, [1997] 3 S.C.R. 320

<sup>18</sup> *Ibid.*

<sup>19</sup> *Canada Military Justice System: At A Crossroads*, Professor Michel William Drapeau, presented at Yale Law School, October 2013 at The Global Seminar on Military Justice Reform New Haven Connecticut USA

<sup>20</sup> *Ibid.*

The particular challenges to the administration of justice posed by sexual assault offences, which are a widespread problem in the military, are best adjudicated under a civilian regime.

Prior to 1998, the Canadian Forces did not have jurisdiction to try sexual assaults and these offences were all tried under the civilian regime. However, Bill C-25 modified section 70 of the *National Defence Act* which abolished the death penalty, militarized the JAG position and removed sexual assault offences from the list of exclusive jurisdiction of the civilian criminal justice system.<sup>21</sup>

Former Supreme Court Justice Marie Deschamps noted in her 2015 report that more than 70 per cent of survivors of sexual assault are not able to trust the chain of command as well as the military justice system in the prosecution of their assaults. She noted also the need for trained and experienced prosecutors independent of the military capacity to exercise discretion. A prosecutor who is serving under the JAG, who is in turn responsible to the Minister is unable to provide the expected level of neutrality and the appearance of impartiality. The victims of sexual assault cited a lack of confidentiality and a lack of trust in the chain of command.

In summation, while routine matters relating to discipline where expediency and convenience are paramount, for example during conflict, a less constitutionally rigorous method of adjudication, such as that found in summary trials is permissible. However, for offences for which imprisonment, or a criminal record can result on conviction, a civilian model of adjudication, with the appropriate constitutional protections of an impartial and independent prosecution and adjudicator, with established rules of evidence and the free exercise of the right to counsel is mandated. The civilian model of adjudication is also the only appropriate forum for sexual assault and harassment offences which occur in the military. Given the systemic problems relating to the reporting and prosecution of these charges within the military system, it is imperative that the complainants in these cases be given the benefit of an independent tribunal

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<sup>21</sup> NDA s. 70 amended S.C. 1998 c.35 “An Act to Amend the National Defence Act to make consequential amendments to other Acts” Bill C-25 section 22 amending section 70

free of the chain of command concerns which can bedevil these prosecutions. This format also ensures that the accused in these cases receive a high level of constitutional protection which is appropriate given the serious nature of the charges.

## **A View From The Battlefield: A Commander's Perspective**

Lieutenant General (ret'd) Walter Semianiw

*What follows is the oral presentation delivered to the Winds of Change  
Military Law Conference on November 13, 2015 at the University of Ottawa*

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1. Distinguished guests, ladies and gentlemen, bonjour. My name is Walter Semianiw, a 32 year Army Veteran of the Canadian Armed Forces. I have been asked today to provide you with a client's view of Canadian military justice system, in particular what I have observed over the years at home and abroad. As a friendly reminder, I am not a judge or a lawyer.
2. Let begin by reminding myself of the truths of the Canadian military legal system, as I witnessed it as one of its clients over a 32 year period at home and abroad:
  - first, military commanders need a military justice system and the powers and authorities that come with such a system to maintain good order and discipline of the military.
  - next, military lawyers have taken on an increasingly predominant role in the day to day operations and functioning of the military abroad and at home – warfare today has been coined by some as being called lawfare, given the increasingly critical role that lawyers are playing in planning and conducting the fight.
  - finally, the support that I received from the our military legal branch as a commander of a mission in Afghanistan or as a commander responsible for military operations across North America was nothing less than first rate. With that aside, let me begin.
3. Throughout my military journey at home and abroad over 32 years which just ended this past January, 2015, I have noticed a sea change beginning in the mid 1990s in the culture of the CAF driven by a number of internal and external social and technological factors. There was a time in the CAF where it was not uncommon to hear the comments: "march in the guilty B \_\_\_\_\_"; or that "we defend democracy, we do not practice it". But those views of the Canadian military justice system are evolving, transforming and changing dramatically within and outside of the CAF, why?
  - first, there is a more highly educated military at all rank levels , in particular more highly educated at the lowest rank levels with more and more enlisted

men and women with university degrees and master degrees – our men and women in uniform know better than ever the boundary of their rights and how the military legal system works, or should work and the interplay with the civilian justice system – I would submit to you that this is a good thing for all;

- next there is a more demanding soldier, sailor, airman airwomen – asking why, wanting information and understanding the military and the nature and use of military force, better than it ever has – the days have passed where one could find an approach of “blind obedience” in the military;
  - moreover, there is today a more diverse military force composed of immigrants and first generation Canadians who left countries where they had few rights and/or where militaries abused their obligations and responsibilities when it came to the use of military force, in particular at home. Indeed given this negative view of the military by some, shaped by previous experiences with military forces, some parents disappointingly even today do not encourage their children to join the Canadian military. Changing this view will be particularly vital for the CAF as it searches for new recruits from this demographic in order to maintain its roster into the future ;
  - next, there is a more demanding Canadian society. It demands and expects transparency, openness, and accountability not only of its new Government, but also of its military in all areas, particularly those that concern the welfare of our military personnel and their families. Canadians love their military
  - and finally, there is a more informed or misinformed military in what is called real time due to social media – the force is aware of what is going on across the force as it happens in all aspects of the military justice system and comments are made in the public domain on what is occurring in real time. There are few boundaries in place on what can be said about whom.
4. The confluence of these external and internal forces at play has led to a military that, in my opinion, is:
- on the one hand, demanding a greater voice in all aspects of the military - the idea of working at the pleasure of the Crown just does not cut it anymore for the younger generations. It means nothing for the younger generations because it provides nothing. The dynastic view of national service, what it means and should provide to men and women in uniform is changing;
  - second, demanding that they are afforded the same rights, if accused, as any Canadian is afforded so that they raise grievances that are heard expeditiously,

and/or can be defended in the best way possible by who they want. They want the right to raise a grievance, for it to be heard by an impartial authority quickly, expeditiously, and determined fairly, and a right to “scan the yellow pages” for a lawyer of their choice to defend them.

- with reference to the need for greater voice , the challenge will be to find an appropriate balance between providing greater voice that does not have a negative impact on the discipline of the forces - a military force cannot afford to have 100,000 public advocates in uniform. Nevertheless, our men and women in uniform need to be heard more than ever.
  - with reference to being afforded the same rights as all Canadians are afforded, if accused, would require a change to legislation, the National Defence Act. It has been amended in the past. With reference to having the ability to be defended by who our men and women in uniform want, would require a change in legislation and resources. Not insurmountable.
5. Nothing in what I have said would have impact on the conduct of operations. In today’s operations, minor service offences such as being late for duty, negligent discharge and fighting are dealt with in the theatre of operations, while serious offences such as assault, theft, or murder are dealt with at home. In the latter cases, the accused is immediately removed from the theatre of operations, and repatriated home to sort out the issue. Unlike in past wars as portrayed in movies such as “Paths of Glory”, serious offences of desertion are not dealt with in theatre, but at home.
6. So what can we make of these expectations and demands. How can we give greater voice to our men and women of the military that does not have a detrimental impact on operations and the discipline of the CAF – mission comes first? How can we ensure that they are afforded the same rights of any accused in a Canadian context? That I leave to you to determine the how but what I know today is that there is a need to change our military justice system to maintain the integrity and discipline of the force, if not, it could be that same system that our military commanders need to maintain good order and discipline that itself could be responsible for its undoing. Clearly, we need a military that not only defends democracy, but also practices it in an open and transparent manner when it comes to our men and women in uniform and their families.

LGen (Retired) Semianiw CMM, MSC, CD2.



## Epilogue

There is growing trend worldwide to make substantial changes to military justice systems in order to bring them more “*in line*” with contemporary human rights values and, as importantly, to bring them in sync with their national civilian criminal justice systems. United Kingdom, Germany, Belgium, Denmark and France are just a few examples of countries that have transformed their military justice systems over the past decade in order to make them more fair. On the other hand, the Canadian military justice system has not been subject to such transformation needed to achieve compliance with changes in Canadian society, and in particular, with the *Canadian Charter of Rights and Freedoms*.

The issue in Canada lies in the *Code of Service Discipline (CSD)* which is the basis of the Canadian Armed Forces (CAF) military justice system. It is found in Part III of the *National Defence Act (NDA)* and it does the following:

- It sets out who is subject to the military justice system;
- It establishes service offences for which a person can be charged;
- It establishes who has the authority to arrest and hold CF members in custody;
- It establishes service tribunals and their jurisdiction to conduct trials of persons charged with service offences; and
- It establishes processes for the review and appeal of findings and sentence after trial.

The CSD contains a wide range of ‘service offences’. It also includes all ordinary law offences contained in the *Criminal Code* and those in any other Act of Parliament. In the process, these criminal offences are transformed as ‘service offences’ becoming part of a mix of offences of a strictly disciplinary nature. All offences are tried by a disciplinary tribunal, either a summary trial<sup>1</sup> or a court martial.

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<sup>1</sup> The summary trial takes place before a member of the military chain of command. *Charter* arguments are not allowed; there are no rules of evidence; there is no right to counsel for the accused; there is no right of appeal. The constitutional validity of the summary trials system has still not undergone the test of judicial review.



The disciplinary jurisdiction of Canadian military tribunals has expanded to the point that only the offences of murder, manslaughter and abduction of children, when committed in Canada, cannot be tried by service tribunals. Since 1997, the military has been granted jurisdiction for the investigation and prosecution of sexual assaults, a situation which is the subject of increasing public criticism. Civilians including dependants, contractors and journalists, as well as members of their family, accompanying the Canadian Armed Forces abroad fall under the jurisdiction of military tribunals.

The expansion of the military justice system in Canada has resulted in a corresponding loss of a high number of rights, including the constitutional right to a jury trial, for those prosecuted before and tried by military tribunals.<sup>2</sup> On the other hand, victims of crimes investigated or prosecuted under military jurisdiction suffer the same fate since they have been patently excluded from the recently enacted *Victims Bill of Rights*.

Over the past decade or so, attempts to modernize *National Defence Act*<sup>3</sup> to bring it more in line with global trends or our own civilian penal system have been serially resisted by our own military. Several reforms made as a result of pressures were initiated from outside, including the judiciary, not within, the Department of National Defence. As a result, at present, the Canadian penal military justice system mitigates the right to equality before and under the law as well as the right to equal protection and benefit of the law guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*.

In the end, there remains an urgent need for the next Parliament to embark upon a review of the jurisdiction of Canadian service tribunals.

The Canadian military justice system is in need of a fundamental review on many fronts to achieve fairness, efficiency, justice and compliance with the *Canadian Charter of Rights and Freedoms*.

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<sup>2</sup> This is currently under review by the Supreme Court of Canada in *Second Lieutenant Moriarity, et al. vs. Her Majesty the Queen et al*, 2014 SCC51 whose decision is expected to come out in the near future.

<sup>3</sup> See *National Defence Act*, R.S.C. 1985, c. N-4

Despite the fact that military justice around the world is going through a period of formen by enacting major reforms - shrinking military jurisdictions in favor of increased civilian capacity - the Canadian military justice system has paid precious little attention to these developments.<sup>4</sup>

These changes are taking place in countries with whom we share a common legal heritage, and values system. Because a Canadian in uniform is a Canadian citizen first, decisions on questions of law and legal rights and responsibilities of our 'citizens in uniform' should be equal to those provided for in the civilian penal system and no longer be an attribute of the military mind and command. This is currently not the case.

As a prelude to such a review, and by happy coincidence, the Faculty of Law, University of Ottawa hosted an inaugural conference on possible reforms to the Canadian military justice system. The conference will brought judges, jurists, practitioners, scholars, students and persons interested in to a forum to debate and exchange ideas for the reform of the Canadian military law. The participants were be briefed on the changes to military justice which have occurred or are under active consideration in Europe and the Americas. The conference then focused on the need for reform to bring greater fairness into military justice and to make specific recommendation for improvement to Canada's current framework.

### *Conclusion*

Our military justice system is in need of a major overhaul.

The time has come to conduct a full-scale independent systemic review of our military justice system to ensure that it corresponds to strict functional

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<sup>4</sup> A case in point, the last Parliament enacted Bill C-15 to amend the *NDA*. This provided Canada with yet a new opportunity to bring our military justice on par with civilian society standards and to ensure that it more closely reflect the provisions of our own *Charter of Rights and Freedoms*. However, despite a considerable amount of debate in the House of Commons and, the Senate clamoring for reforms as well as significant number of witnesses appearing before various parliamentary committees<sup>4</sup> voicing their support for such reforms, at the end of the day no changes at all were made to either modernize the *NDA* or bring it in line with a global move to reduce, if not eliminate, the derogations between the military justice system and the civilian penal system.

necessity, without encroaching, as it currently does, on the jurisdiction that can and should belong to ordinary (civilian) courts.

The time has also come to recognize that the functioning of our military criminal justice system must also be untrammelled by the executive and the chain of command.

The November 13, 2015 *Winds of Change* military law conference provides an opportunity to review and debate such matters.

November 13, 2015

Prepared by: The Honourable Gilles Létourneau and Professor Michel W. Drapeau

**Annex A**  
**Participant Biographies**



## BIOGRAPHIES OF GUESTS SPEAKERS AND PANELLISTS



**His Honour Judge Jeff Blackett**

JUDGE-ADVOCATE-GENERAL (JAG)  
UNITED KINGDOM

His Honour Judge Jeff Blackett was born in 1955 in Portsmouth. He joined the Royal Navy as a Supply and Secretariat Officer in 1973 and subsequently read law at University College London. He was called to the bar in 1983 and became a Master of Studies (MSt) in Legal Research at St Anthony's College, Oxford in 2000.

During his early career he served at sea in guided missile destroyers HMS KENT and HMS LONDON and then frigates HMS AMBUSCADE and HMS ALACRITY. He prosecuted, defended and sat as judge advocate at Naval courts martial throughout his career, and latterly sat in part time civilian judicial appointments when Service commitments permitted. Later appointments in the Royal Navy included the Commander of HMS COLLINGWOOD, the Director of Navy Pay and Pensions and the Chief Naval Judge Advocate and Director of Naval Legal Services from which he retired in the rank of Commodore in October 2004.

His judicial appointments include Naval Judge Advocate 1989 - 2003, Acting Metropolitan Stipendiary Magistrate 1995 - 1999 and Recorder 2000 - 2004. He was appointed as a Circuit Judge on the South Eastern Circuit on 28 October 2004 and Judge Advocate General of the Armed Forces on 1 November 2004. He became a Senior Circuit Judge in 2005 and a Deputy High Court judge in 2013. He was elected Benchers of Gray's Inn in July 2008 and appointed Special Professor of law at Nottingham University in 2010.

He has written the definitive text on service law: "*Rant on the Court Martial and Service Law*" (published Nov 2009), a number of journal articles and contributed to *Halsbury's Laws*. He was also a contributor to the UK Manual of the Law of Armed Conflict and to Lewis and Taylor on Sports Law.



**Hon. Mr. Justice B. Richard Bell**  
CHIEF JUSTICE  
COURT MARTIAL APPEAL COURT  
OF CANADA

Appointed as a Justice of the Federal Court and Chief Justice of the Court Martial Appeal Court of Canada in February of this year, the Honorable Mr. Justice B. Richard Bell brings with him a wealth of experience. Beginning with his career as a Constable in the Royal Canadian Mounted Police – first in general duties policing and later as a member of the Criminal Investigation Branch in Halifax – Chief Justice Bell has dedicated his life to the law.

After graduating with an LL.B. from Dalhousie law School in 1979, Chief Justice Bell practiced law for over 25 years, during which he completed an LL.M. in 1998 and was appointed Queen's Counsel in 2004. Prior to his appointment to the Federal Court and the Court Martial Appeal Court of Canada, Chief Justice Bell served on the Court of Queen's Bench of New Brunswick from 2006 to 2007 and on the New Brunswick Court of Appeal from 2007 to 2015.



**Major-General Blaise Cathcart**  
JUDGE ADVOCATE GENERAL

Major-General Blaise Cathcart was born in Exeter, Ontario in 1961. He is a graduate of Saint Mary's University in Halifax, Nova Scotia (NS) (Bachelor of Arts (Honors)), University of Ottawa (Master of Arts) and Dalhousie Law School (Bachelor of Law). Major-General Cathcart articulated with the law firm of Huestis Holm, Dartmouth, NS in 1988. Major-General Cathcart was called to the Bar of Nova Scotia in August 1989. He worked in private practice with the law firm of Boyne Clarke in Dartmouth until he enrolled in the Canadian Armed Forces as a member of the Office of the Judge Advocate General (JAG) in 1990. He was promoted to the rank of Brigadier-General in April 2010, prior to his appointment to the position of Judge Advocate General on 14 April 2010. On October 29, 2012, he was promoted to the rank of Major-General.

Major-General Cathcart graduated with "Distinction" from the Masters of Law Programme (Public International Law) at the London School of Economics and Political Science in 2004 in the UK where he was awarded the following honours: the LSE Lawyers' Alumni Prize for the Best Overall Performance on the LLM Degree Programme; the Lauterpacht – Higgins Prize for the top student in Public International Law and the Blackstone Chambers Prize for the Best Public International Law Dissertation (the paper was entitled "International Law and Persons Detained as Unlawful Enemy Combatants During the War Against Terrorism").



**Mr. Paul Champ**  
Counsel at  
CHAMP & ASSOCIATES

Mr. Paul Champ is a human rights and labour lawyer in Ottawa, Canada. Mr. Champ regularly acts as legal counsel for Amnesty International, the B.C. Civil Liberties Association, and many other human rights organizations. Mr. Champ challenged the Canadian military's prisoner transfer policy in Afghanistan in the Courts and before the Military Police Complaints Commission. Mr. Champ has also represented several soldiers and veterans in precedent-setting cases, including Matt Stopford and Sean Bruyea.

Mr. Champ is active in international human rights, establishing corporate accountability for abuses in foreign countries, appearing before the Supreme Court of Canada in Khadr I, and representing Canadian Abousfian Abdelrazik in his successful efforts to be repatriated from Sudan and be removed from the UN1267 list.

Mr. Champ has consulted with UN Special Rapporteurs and bodies and taught the law of armed conflict at Carleton University and social justice and the law at University of Ottawa. In 2010, Paul was the recipient of the Reg Robson Civil Liberties Award and in 2013 he was honoured by the International Commission of Jurists with the Tarnopolsky Human Rights Award for outstanding contributions to domestic and international human rights.



**Professor Carmen Cheung**  
British Columbia Civil Liberties  
Association ( B.C.C.L.A)

Professor Carmen Cheung is the Director of the Global Justice Lab at the Munk School of Global Affairs at the University of Toronto. Prior to joining the Munk School, Carmen served as Senior Counsel at the B.C. Civil Liberties Association, where her work focused on issues relating to security and human rights. From 2013 to early 2014, she took a leave from the Association to serve as the acting Director of the International Human Rights Program at the University of Toronto Faculty of Law, where she taught international human rights advocacy and the law of armed conflict.

Professor Carmen Cheung has acted as counsel in a number of public interest cases in the United States and Canada, including litigation concerning the use of torture and extraordinary renditions by the United States, and the Afghanistan Public Interest Hearing, which looked into the transfer of Afghan detainees by Canadian Forces to risk of torture.

Professor Carmen Cheung has made submissions at all levels of federal court in the United States, including the U.S. Supreme Court, and has appeared before the Supreme Court of Canada.

She has testified before the House of Commons and the Inter-American Commission on Human Rights on matters relating to security, anti-terrorism, and human rights. Prior to joining the BCCLA, Professor Carmen Cheung was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York. She received her JD from Columbia University and graduated magna cum laude with an AB in Social Studies from Harvard University.



**LCol Jean-Bruno Cloutier**  
Deputy Director  
DEFENCE COUNSEL SERVICES  
OFFICE OF THE JAG

Lieutenant-Colonel Jean-Bruno Cloutier is a graduate of the University of Sherbrooke Law School. He was called to the Bar of Quebec in November 1986. He enrolled in the Canadian Armed Forces in April 1989 as a legal officer. He was employed as DJA for Eastern Region. In July 1992, he was posted to 17 Wing, Winnipeg, as DJA.

In September 1993, he was affected to former-Yugoslavia, for a six-month period, to the CCUNPROFOR. In August 1996, he was posted to CFB Valcartier as DJA. In September 1999, he was posted in Ottawa, at the Directorate of Law, Training. In September 2001, he was selected to complete his master degree in law at University of Ottawa. In November 2002, he was posted to the office of the RMP Central Region. In August 2006, he was posted as legal advisor to CANSOFCOM HQ. In May 2007, he was deployed to Afghanistan for a six month period. In June 2008, he was posted to 17 Wing, Winnipeg as AJAG.

In June 2009, he was posted at the Office of the Legal Advisor to the Department of National Defence and the Canadian Armed Forces. Since September 2011, he is the Deputy Director of Defence Counsel Services.

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**Hon. Mr. Justice Guy Curnoy**  
QUEBEC SUPERIOR COURT  
COURT MARTIAL APPEAL COURT  
OF CANADA

The Honorable Mr. Justice Guy Curnoy was a member of the Barreau du Québec from 1987 to 2007. He was a partner in the law firm of *Shadley Battista, s.e.n.c.* where he practiced in criminal, disciplinary and military law. As counsel, he appeared before criminal trial courts, military tribunals, the Quebec Court of Appeal, the Court Martial Appeal Court and the Supreme Court of Canada. He was Associate Commission Counsel for the *Commission of Inquiry into Certain Events at the Prison for Women* presided by Madam Justice Louise Arbour in 1995-1996.

He acted as counsel for a non-commission member of the Canadian Forces before the *Commission of Inquiry into the Deployment of Canadian Forces to Somalia* in 1996. In 1997-1998, he was Commission Counsel for the *Commission d'enquête chargée de faire enquête sur la Sûreté du Québec*. In 2004-2005, he was Associate Commission Counsel for the *Commission of Inquiry into the Sponsorship Program and Advertising Activities* presided by Justice John H. Gomery. He has taught criminal law McGill University, at the Université du Québec à Montréal and l'École du Barreau (Bar Admission Course). He was responsible for Ethics and Professional Responsibility at l'École du Barreau in 1999 and 2000.

He was a member of the Faculty of the Federation of Law Societies' National Criminal Law Program from 1995 to 2006. He was a member of the Judge Advocate General Advisory Panel on Military Justice during the tenure of Judge Advocate General Jerry S.T. Pitzul. He was appointed to the Superior Court of Quebec on May 10, 2007 and to the Martial Court Appeal Court on July 30, 2009. He sat as an *ad hoc* judge at the Québec Court of Appeal in 2010-2011. He is the author of the annotated Criminal Code: *Curnoy-Ouimet* and the *Code des professions annoté*.

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**Dean, Faculty of Law**



**Professor Nathalie Des Rosiers**  
Faculty of Law  
(Common Law)  
UNIVERSITY OF OTTAWA

Professor Nathalie Des Rosiers is a well-known professor of constitutional law. She served as the General Counsel for the Canadian Civil Liberties Association (CCLA), a national organization that acts as a watchdog for the protection of human rights and civil liberties in Canada. In that capacity, she has appeared in front of Parliament and various legislative bodies to defend the rule of law and constitutional protections. The CCLA is also an intervener in front all levels of courts in Canada.

Prior to her appointment to the CCLA, Professor Des Rosiers was Interim Vice-President - Governance for the University of Ottawa (2008-2009), Dean of the Civil Law Section, University of Ottawa (2004-2008), President of the Law Commission of Canada (2000-2004). She has been in private practice in Montreal and London, Ont. and was professor of law at Western Law School for many years. She was a member of the Environmental Appeal Board of Ontario, of the Pay Equity Board of Ontario, a Commissioner of the Ontario Law Reform Commission and a Board member of the Law Commission of Ontario. She also served as the President of the Federation of Social Sciences and Humanities, President of the Council of Law Deans, President of the Canadian Association of Law Teachers and of the *Association des juristes d'expression française de l'Ontario*.

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She has received many honours, including the Order of Canada in 2013, the Order of Ontario in 2012, an Honorary Doctorate from the UCL (Université catholique de Louvain) in Belgium in 2012, an Honorary Doctorate from the Law Society of Upper Canada, the Medal from the Law Society of Upper Canada, the NUPGE Award, the APEX Partnership Award and was named one of Canada's 25 most influential lawyers in both 2011 and 2012.

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**Professor Michel W. Drapeau**  
[Colonel-Maître™]  
Faculty of Law  
UNIVERSITY OF OTTAWA

Professor Michel William Drapeau holds a Baccalaureate degree in law and a Licentiate in Law. He is an adjunct Professor of Law at the University of Law where he teaches military and veterans law. He is also co-author of *Military Justice In Action*, published by Carswell in 2015.

A member in good standing of the Law Society of Upper Canada, he operates his own law practice which specializes in Canadian military and veterans law. He has regularly appeared before Canadian Parliamentary committees as an expert witness concerning the management of Canadian military affairs and proposed changes to the National Defence Act.

Prior to embarking on his legal career, Colonel-Maître™ Drapeau has served in the Canadian Forces (Reserve and Regular components) for a total of 34 years. During his military service, he twice served in a Commanding Officer position. During the last four years of his military service, he occupied the dual positions of Director, National Defence Headquarters reporting directly to the Vice Chief of the Defence Staff [VCDS] and, Secretary, Armed Forces Council reporting directly to the Chief of the Defence Staff [CDS].

He was named to the Canadian Order of Military Merit in 1990.

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**His Honour Colonel Mario Dutil**  
Chief Military Judge  
CANADIAN ARMED FORCES

Colonel Dutil, originally from Quebec City is a graduate of Université Laval Law School. He was called to the Quebec Bar in 1983. In 1995, Colonel Dutil obtained a Master of Law degree from the University of Ottawa.

Colonel Dutil joined the Canadian Forces as a legal officer in the Office of the Judge Advocate General in March 1984 and has been employed in various positions throughout his military career including as a Deputy Judge Advocate in both Europe and Valcartier, Quebec. He further held positions at the director level within the Office of the Judge Advocate General and the Office of the Department of National Defence/Canadian Forces Legal Advisor.

In 1997 Colonel Dutil was assigned as a senior counsel to the National Defence Act Amendment Team where he participated in the development, drafting and implementation of amendments to the National Defence Act and accompanying regulations. As a legal officer, Colonel Dutil has also acted as prosecutor and defence counsel before courts martial and appeared as counsel before the Court Martial Appeal Court. The Governor in Council appointed him a military judge in January 2001.

The Governor in Council has designated Colonel Mario Dutil the Chief Military Judge on 2 June 2006.

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**Mr. Matthew Estabrooks**  
Associate  
GOWLINGS - OTTAWA

Matthew is an associate in Gowlings' Ottawa office, practising in the areas of copyright law, appellate advocacy and administrative law.

As a member of the advocacy department and the Copyright Group, Matthew's copyright law practice includes extensive involvement in proceedings before the Copyright Board of Canada. He provides legal opinions on issues relating to the Canadian Copyright Act, and drafts copyright assignment and licensing agreements in connection with music and book publishing, software development and new media.

As a member of the Supreme Court Group, Matthew prepares applications for leave to appeal to the Supreme Court, represents clients on appeals and motions in the Supreme Court and advises clients on all aspects of Supreme Court practice and procedure.

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Matthew is also a member of the Drug Pricing and Reimbursement Group, where he advises clients on pricing issues and proceedings before the Patented Medicine Prices Review Board. He writes regularly on pricing matters impacting pharmaceutical clients. Matthew has appeared before the Copyright Board, the Ontario Superior Court, the Ontario Court of Appeal, the Federal Court of Appeal and the Supreme Court of Canada.

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**Mr. Eugene Fidel**  
Senior Research Scholar  
YALE LAW SCHOOL  
CONNECTICUT, USA

Mr. Fidel is Florence Rogatz Visiting Lecturer in Law and Senior Research Scholar in Law at Yale Law School, where he teaches courses on Military Justice, Guantánamo, The Original Jurisdiction of the United States Supreme Court, Federal Indian Law, Tribal Law, Law of the Sea, Admiralty, and Disasters. He has also taught at Harvard Law School and American University Washington College of Law, and is of counsel at the Washington, D.C. law firm Feldesman Tucker Leifer Fidell LLP. He graduated from Queens College of the City University of New York (B.A. 1965), where he was elected to Phi Beta Kappa, and Harvard Law School (LL.B. 1968).

He served in the U.S. Coast Guard from 1969 to 1972. Mr. Fidel is president emeritus of the National Institute of Military Justice and chairs the Committee on Military Justice of the International Society for Military Law and the Law of War. He has represented members of all branches of the U.S. armed forces, and has consulted on military justice matters for the UN Office of the High Commissioner for Human Rights. He is a co-author of *Military Justice Cases and Materials*, *Guide to the Rules of Practice and Procedure for the U.S. Court of Appeals for the Armed Forces*, and *Military Court Rules of the United States*.

Mr. Fidel is a life member of the American Law Institute and an adviser to the ALI's current project on the Restatement of the Law (Third), The Law of American Indians.

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**Professor Craig Forcese**  
Faculty of Law,  
UNIVERSITY OF OTTAWA

Mr. Craig Forcese is an associate professor at the Faculty of Law (Common Law Section), University of Ottawa. He teaches public international law, national security law, administrative law and public law/legislation. Much of his present research and writing relates to national security and democratic accountability.

He is co-author of *False Security: The Radicalization of Canada's Terror Laws* (Irwin Law, 2015), the author of *National Security Law: Canadian Practice in International Perspective* (Irwin Law, 2008) and co-editor of *Human Rights and Anti-terrorism* (Irwin Law, 2008). He is also co-author of *International Law: Doctrine, Theory and Practice* (Irwin Law, 2007, 2d Ed 2014) and *Laws of Government: The Legal Foundations of Canadian Democracy* (Irwin Law, 2005, 2d Ed 2011) and co-editor of *Public Law: Cases, Commentary and Materials* (Emond Montgomery, 1<sup>st</sup> Ed 2006; 2d Ed 2011; 3d Ed 2015).

Mr. Craig Forcese was vice dean in the Common Law Section 2011-2014. Prior to joining the law school faculty, Mr. Forcese practiced law with the Washington D.C. office of Hughes Hubbard & Reed LLP for two years, specializing in international trade and commercial law. He has a B.A. from McGill, an M.A. from the Norman Paterson School of International Affairs, Carleton University, an LL.B. (*summa cum laude*) from University of Ottawa and an LL.M. from Yale University. He is a member in good standing of the bars of Ontario, New York and the District of Columbia.

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**LCol (retired) Bruno Hamel**

Mr. Hamel enrolled in the Canadian Armed Forces (CAF) in 1983 and served mainly with Army field and training units from 1984 to 1997. This included a two-year exchange posting with the French 1st Corps reconnaissance regiment from 1986 to 1988. From November 1993 to May 1994, he was deployed in Visoko, Bosnia-Herzegovina, as the Adjutant, with his Regiment, *12ième Régiment blindé du Canada*. In November 1996, he was seconded until May 1997 to the Department of Foreign Affairs and International Trade to be deployed in Kinshasa, Zaire, as a Military Advisor and Liaison Officer during the country's civil war.

From 1997 to 1999, Mr. Hamel attended the *Université du Québec à Hull*, where he graduated with a Bachelor of Administration. He joined the office of the Director General Canadian Forces Grievance Authority (DGCFGA), as a grievance analyst, from 1999 to 2001. In 2001, he completed his Master of Defence Studies at the Kuwaiti/British Mubarak Al-Abdullah Joint

Chair,  
MILITARY GRIEVANCES EXTERNAL  
REVIEW COMMITTEE



**Colonel Robin Holman**  
OFFICE OF THE JAG



**Mr. Emmanuel Jacob**  
PRESIDENT OF THE EUROPEAN  
ORGANIZATION OF MILITARY  
ASSOCIATIONS  
BRUSSELS, BELGIUM

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Command and Staff College where he was the first CAF officer to be posted and to graduate. He returned in 2002 to DGCFGA as a senior analyst.

Promoted to Lieutenant Colonel in 2003, he held the position of Director Special Grievances Enquiries and Investigations for the most part until his retirement from the CAF in 2009. In this capacity, he was responsible for investigating the most complex, sensitive and difficult grievances at the Final Authority (FA) level. He was also asked twice to fulfil, on an interim basis, the duties of DGCFGA and acted as the FA of the grievance process pursuant to the CDS delegation. In 2008, Mr. Hamel received the Vice-Chief of the Defence Staff Commendation for informally resolving an unprecedented situation. Between 2006 and 2007, Mr. Hamel also worked as Director General of Operations in the Office of the Ombudsman for the Department of National Defence and the CF.

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Colonel Rob Holman enrolled in 1986 and attended the RMC where he earned a degree in Engineering Physics. He received his pilot wings. In 1995, he returned to the Royal Military College where he served as a squadron commander. He received his law degree from Queen's University and, after serving as a law clerk at the Federal Court of Appeal in Ottawa, was called to the bar of Upper Canada (Ontario) and joined the Office of the Judge Advocate General in February, 2002. From 2002 to 2007, Colonel Holman served as a military prosecutor, first as trial counsel before courts martial and later as appellate counsel, appearing in front of the Court Martial Appeal Court of Canada.

In 2010, he earned a Master's degree in international law from McGill University's Faculty of Law. He then served successively as the senior legal advisor to the Chief of Defence Intelligence, as an Assistant Legal Advisor at Supreme Headquarters Allied Powers Europe during part of NATO's operations in Libya, as the Assistant Deputy Judge Advocate General for Operational Law and as the Special Assistant to the Judge Advocate General.

Promoted to his present rank in 2013, he assumed the responsibilities of Deputy Judge Advocate General for Military Justice.

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Mr. Jacob enrolled in the Belgian armed forces (Field Artillery) in 1979 and was named as Chief Warrant Officer in 2006. In 1989, he served as the National Secretary of the Belgium NCO trade union. He is a founding member of the Belgian all-ranks trade union in 1991. Delegated by the Ministry of Defence, he served as Administrator of the Belgian Veteran Institute from 2003-2007, from 2009 to 2011 and 2012 to 2012. He served as Advisor on Human Resources and Education in the Office of the Minister of Defence between 2012-2013. He is currently a Policy Officer in the office of the Belgian Secretary of State for Foreign Trade.

Mr. Emmanuel Jacob was elected as a Board Member of the European Organisation of Military Associations (EUROMIL) in 2000 and again in 20014. He has been elected President of Euromil in 2006, 2008 and 2012. Euromil is an umbrella organisation composed of 40 military associations and trade unions. EUROMIL includes 25 countries. Funded exclusively by membership fees, EUROMIL keeps to strict non-denominational and politically independent policies. Euromil promotes the professional and social interests as well as the fundamental rights and freedoms of European soldiers to secure and advance the human rights, fundamental freedoms and socio-professional interests of military personnel by monitoring and advocating on the European level. It also represents the interests of the member associations vis-à-vis supranational institutions and authorities, and to support them in matters of their concern within their national sphere. It closely follows developments in NATO and the EU to provide its member associations with updated information about international developments in the field of security and defence as well as EU social and labour legislation.

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The Honourable Létourneau holds a B.A. and a law degree from Laval University (LL.L.), both with distinction, and he also has a master's degree in criminal law and criminology (LL.M.) from the London School of Economics and Political Science in London and a doctorate (Ph.D.) in criminal law and criminal procedure, also from that university.

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The Honourable Létourneau was appointed Queen's Counsel in 1991. He has been a member of Conference and Debate on Canadian Military Law **WINDS OF CHANGE**



**Hon. Gilles Létourneau**  
Justice (retired) of the FEDERAL  
COURT OF APPEAL AND  
THE COURT MARTIAL APPEAL  
COURT OF CANADA

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several boards of directors or bodies connected with the administration of justice and the diffusion of legal information, in particular the Department of Justice, the *Centre communautaire juridique de Québec*, the Law Faculty of Laval University and the *Société québécoise d'information juridique (SOQUIJ)*. He was active for eleven years in the professional training of young lawyers in Quebec, preparing and giving courses and acting as a member of the examiners' bureau for admission to the legal profession. He has also been Vice-Dean, Director of Undergraduate Studies and a professor in the Law Faculty of Laval University. He has practiced law in Quebec for five years.

He was appointed Judge of the Federal Court of Appeal and the Court Martial Appeal Court of Canada on May 13, 1992 and Chairman of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia on March 20, 1995. He had been appointed President of the Law Reform Commission of Canada on July 5, 1990 after having served as Vice-President for 5 years. He has knowledge of public administration, an over fifteen years' administrative experience as well as an excellent knowledge and experience in legislation and in the field of law reform. He has participated in several major legislative reforms in Quebec, where he was Associate Secretary General, Legislation, of the Executive Council and Secretary of the Legislation Committee before joining the Commission. He also served for seven years with the Quebec Departments of Justice and the Attorney General.

He is the author or co-author of over 125 texts, reports or articles connected with the law, legislation, the administration of justice and reform.

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**LCdr Mike Madden**  
OFFICE OF THE JAG

Lieutenant-Commander Mike Madden grew up in Ottawa, and studied English literature at Royal Military College, where, in 1999, he graduated with a Bachelor of Arts. After being commissioned as an artillery officer, he spent several years in Shilo as a troop commander with First Regiment, Royal Canadian Horse Artillery, during which time he also deployed, over the summer of 2000, to Bosnia with his battery. In October 2001, he re-mustered to the Maritime Surface and Subsurface Officer (MARS) occupation. LCdr Madden was selected for the Military Legal Training Plan (MLTP) in 2007, and graduated from Dalhousie Law School in 2010 with a Bachelor of Laws.

He was called to the Bar of Nova Scotia in 2011, and remains a member of the Nova Scotia Barristers' Society. LCdr Madden has served as Deputy Judge Advocate in Halifax. He currently works within the Directorate of Law/Military Justice Strategic, where he has been involved in the development and support of numerous criminal and military justice legislative initiatives.

LCdr Madden obtained his Master of Arts in English literature in 2007 from Dalhousie University, and his Master of Laws from Dalhousie University's Schulich School of Law in 2014. LCdr Madden and his wife Sandra (a physician in the Canadian Forces) live in Ottawa with their two children.

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**Ms. Holly McManus**  
General Counsel  
Office of the  
DND/CF OMBUDSMAN

Holly McManus is General counsel and Director of Legal Services for the Office of the Department of National Defence and Canadian Forces Ombudsman. She previously worked in private practice and as General Counsel at the Office of the Chief Electoral Officer of Canada.

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**Mr. David McNairn**  
Counsel, National Security Law

A member of the bar of Ontario for 27 years (1988 call), David McNairn worked the first 9 years of his legal career in private practice as a litigator and has spent the last 18 years working in the public sector, first as a military lawyer with the Office of the Judge Advocate General (JAG) for the Canadian Forces and then as civilian counsel with Canada's Department of Justice.

David has had a varied legal career, having worked as a criminal lawyer (defence counsel and part-time prosecutor), civil litigator, legal educator (law school professor and military-legal instructor), JAG lawyer, legal advisor to the Minister of Justice of Canada on wrongful

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Department of Justice Canada  
OFFICE OF THE LEGAL ADVISOR TO  
THE DEPARTMENT OF NATIONAL  
DEFENCE AND CANADIAN FORCES



**Professor Carissima Mathen**  
Faculty of Law  
UNIVERSITY OF OTTAWA



**Ms. Hillary McCormack**  
Chair,  
MILITARY POLICE COMPLAINT  
COMMISSION



**Professor Jean-Guy Perron**  
Retired Military Judge

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convictions, and now as legal counsel in the national security law field.

After 10 years working in the criminal law field with the Department of Justice, David joined the National Security Law Team with the Office of the National Defence and Canadian Forces Legal Advisor in 2013.

David served 19 years in the Canadian Forces (reserve and regular force), the last eight years as a JAG officer. He has published a number of articles on military law and justice issues and has recently completed a book entitled *Canadian Military Justice*. David is also a part-time professor at the University of Ottawa's Faculty of Law where he co-teaches a course on Canadian Military Law.

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Ms. Carissima Mathen is Associate Professor of Law at the University of Ottawa, and a founding member of the Faculty's Public Law Group. She is a member of the Bar of Ontario.

Professor Mathen holds degrees from McGill University, Osgoode Hall Law School and Columbia University Law School. Prior to entering the academy, she was Director of Litigation for the Women's Legal Education and Action Fund (LEAF), where she managed numerous cases and law reform projects in furtherance of women's equality rights.

An expert in Canadian constitutional and criminal law, Professor Mathen is a frequent media commentator. She appears on national radio and television programs, and is quoted in and writes opinion pieces for national newspapers. Her scholarship has been cited by the Supreme Court of Canada. Some of her more recent scholarly work deals with the role of intergovernmental relations in constitutional amendment, the Supreme Court appointment process, and the appropriate legal response to "revenge porn".

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Ms. Hilary McCormack was appointed Chairperson of the Military Police Complaints Commission of Canada (MPCC) effective October 5, 2015.

Prior to her appointment, Ms. McCormack was Director of Crown Operations (East Region) at the Ontario Ministry of the Attorney General, a position she held since 2009. As Regional Crown Attorney, she was responsible for 10 Crown Attorney offices. In addition to her management duties, Ms. McCormack continued to direct and supervise many complex trials.

Ms. Hilary McCormack graduated from the University of Western Ontario's law school. She was called to the Ontario Bar in 1980 and was in private practice for the first three years of her career. Ms. McCormack first joined the Ontario Ministry of the Attorney General as Assistant Crown Attorney in 1983. She was seconded to the federal Department of Justice in 1992. Her work as General Counsel, Criminal Law and Policy, resulted in amendments to the Criminal Code which enhanced the general protection of women and children from sexual and physical violence. She returned to the Ontario Ministry of the Attorney General in 1994. Six years later, she was the first woman to be appointed Crown Attorney for Ottawa, where she was responsible for all Criminal Code prosecutions and summary conviction appeals for the City of Ottawa.

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Lieutenant-Colonel (ret'd) Jean-Guy Perron, CD was granted a Bachelor of Arts (Military and Strategic Studies) degree by the Collège militaire royal de Saint-Jean in 1983. He served with every battalion of the Royal 22e Régiment in West Germany and Canada as well as with the 1er Commando, Canadian Airborne Regiment until 1990.

He was granted the degree of Bachelor of Common Law (LL.B.) by the University of Ottawa in 1993 and was called to the Law Society of Upper Canada in 1995. He completed a Masters program in law in 2008 specializing in national security law.

LCol (ret'd) Perron has served in numerous directorates of the Office of the Judge Advocate General and with the Director of Military Prosecutions as a Regional Military Prosecutor.

He has served a tour in Bosnia-Herzegovina in 1996 as a legal adviser and participated in OP ASSURANCE in Rwanda and Uganda in 1996. He was also deployed to Tampa, Florida in



**LGen (retired) Walter Semianiw**  
Strategic advisor,  
MICHEL DRAPEAU LAW OFFICE



**BGen (retired) Jan Peter Spijk**  
President,  
INTERNATIONAL SOCIETY FOR  
MILITARY LAW AND THE LAW OF  
WAR

BRUSSELS, BELGIEUM

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2001 as legal adviser for OP APOLLO (Roto 0). He commanded the Canadian Forces National Counter Intelligence Unit from 2004 to 2006.

The Governor-in-Council appointed LCol (ret'd) Perron to the position of military judge on 2 June 2006. He retired from the CF on 7 February 2014 and is presently teaching a course on National Security Law at the University of Ottawa

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During his long and prestigious military career (34years) as an infantry officer, Lieutenant-General (retired) Semianiw served in a number of combat units and formations in a variety of command and staff appointments at home and abroad including a tour of duty as the Canadian commander in Afghanistan. After serving a stint with the Privy Council Office, he was appointed Chief Military Personnel at National Defence Headquarters where he helped forge many of the current military human resources policies and programmes.

He went on to serve as the Commander, Canada Command responsible for the military defence and security of Canada. He was seconded to Veterans Affairs Canada as the Assistant Deputy Minister for Policy, Communications and Commemoration, where he became both intimately aware of and sensitive to the myriad of issues facing our veterans, particularly those who are wounded and psychologically injured.

Lieutenant-General Semianiw is a graduate of the Canadian Forces College, earning a Master of Arts in Military Studies, and a Master in Defence Studies. He has also completed the Joint Warfighter Component of the U.S. Military General/Flag Officer Capstone Programme and the NATO General Officers' Course. His several awards include Commander of the Order of Military Merit, the Meritorious Service Cross and the Order of St. John. He volunteers with Veterans Emergency Transition Services Canada, helping homeless Veterans.

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Following completion of the Netherlands' Royal Military Academy and several operational postings, Brigadier-General Spijk (1956) read constitutional and administrative law at Leiden University and graduated *cum laude* in 1990.

Having gained experience in the fields of operational law and personnel and organizational policy, he was promoted to Brigadier General in 2004 and appointed Director, Personnel Policy, at the Ministry of Defence in The Hague. In 2006 Brig Gen Spijk was appointed Netherlands' Contingent Commander in Kabul, Afghanistan. In 2007 he became Member of the Royal College for Defence Studies and read International Studies at King's College. (London, UK).

Subsequently, he was appointed Director Manpower and Personnel Policy at NATO's Allied Command Operations, SHAPE, and Belgium.

In 2011 Brig Gen Spijk was appointed Head of the Military Legal Services (TJAG) of the Netherlands' Armed Forces, Deputy Director of the Directorate of Legal Affairs (MoD) and senior Military Judge in the Military Chamber of the Court of Appeals.

Following his retirement from active duty, February 2013, he was awarded the Decoration of Merit (in Gold), for his contributions to the Legal and Personnel Policy domains of the Ministry of Defence. In May 2012, Brig Gen Spijk was elected President of the International Society for Military Law and the Law of War, at the Quebec City Congress, after previous terms as Vice President & Seminar Director. He was re-elected President of the Society, May 2015, at the Prague Congress. He is currently chairs Advisory Boards for the minister of Defence and the minister of the Interior of the Kingdom of the Netherlands. He is Chairman of the Netherlands' Military Law Review editorial board and a Visiting Fellow at the Netherlands' Defence Academy.

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**Ms. Anne London-Weinstein**  
Counsel  
CRIMINAL LAWYERS ASSOCIATION

Ms Anne London-Weinstein was called to the Bar of Ontario in 1998 after graduating from Osgoode Hall Law School with honours and winning the Osgoode Society Legal History Prize. She was actively involved in the Community Legal Aid Student Program in law school and conducted trials while still a law student. She completed her articles at a downtown Toronto law firm, where her interest in criminal law won out and she went on to practice criminal law as an associate for Pinkofsky Lockyer at the time the largest criminal law firm in Canada.

She spent summer attending the Inquiry into the Wrongful Conviction of Guy Paul Morin and worked for the Maple Leaf Gardens case for a prominent Toronto defence counsel. She later spent two years working as an assistant Crown Attorney in Scarborough, Ontario. Since 2002, Anne has been a criminal defence lawyer practicing in Ottawa, Ontario where she has handled numerous serious and complex cases. She received the degree of Masters of Law from Osgoode Hall Law School in 2011 and in 2015 she was certified by the Law Society of Upper Canada as a specialist in criminal litigation.

Aside from her involvement in the criminal law community, Anne has been an associate professor for many years at the University of Ottawa, teaching trial advocacy, evidence, criminal law, and advance criminal law. This year, she is focusing on the Conviction Review Project at the University of Ottawa, which looks into those who have been wrongfully convicted within the justice system.

Prior to attending law school, Anne was a print journalist and her work was published nationally. As a lawyer her work has been published in the Criminal Law Quarterly and For the Defence, the quarterly publication of the Criminal Law Association.



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