

AN OVERVIEW OF CANADA'S MILITARY JUSTICE SYSTEM

I. WHY CANADA HAS A SEPARATE MILITARY JUSTICE SYSTEM

1. Canada's military justice system is a unique, self-contained system that is an integral part of the Canadian legal mosaic. This separate, constitutionally valid, military justice system operates in parallel with its civilian criminal justice counterpart. The system is created within the *Code of Service Discipline* (CSD), which is Part III of the *National Defence Act* (NDA). The purpose of the military justice system is to maintain discipline, efficiency, and morale in the military.

2. The operational realities of military life mean that service members are often held to a higher standard of conduct than what would be expected of a civilian. Because military personnel are often required to risk injury or death in the performance of their duties, both inside and outside of Canada, the military justice system puts a premium on the necessity for discipline and for cohesion of military units.

3. These realities of military life were acknowledged by the Supreme Court of Canada (SCC) in the Court's 1992 decision, *R v Généreux*:

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

As the SCC implicitly recognized in this passage, and as former Chief Justice of Canada, Brian Dickson, recognized in the separate context of an independent report on the military justice system that he completed for the Canadian Forces in 1997, the chain of command is at the heart of this system.

4. Even though members of the Canadian Armed Forces (CAF) are held to the highest standards of conduct, they do not give up the rights that are afforded to them under Canadian law, including under the Constitution. Nonetheless, an individual's rights can be limited where they are inconsistent with the basic obligations of military service. The *Charter of Rights and Freedoms* (*Charter*) – as part of Canada's Constitution – has primacy over the NDA and all other laws of Canada. However, section 1 of the *Charter* explicitly permits other *Charter* rights to be limited under certain circumstances:

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

5. This balancing of rights against other pressing and substantial government objectives, such as the government’s need to maintain a disciplined and effective armed force, is important to understand when considering different aspects of the current Canadian military justice system.

II. CONSTITUTIONAL AND LEGAL BASIS FOR A SEPARATE MILITARY JUSTICE SYSTEM

6. The validity of a parallel military justice system is well-founded in the Constitution and laws of Canada, and in the jurisprudence of the SCC. Section 91(7) of the *Constitution Act, 1867*, bestows upon the Parliament of Canada the ability to make laws pertaining to “the Militia, Military and Naval Service, and Defence.” Using this constitutional authority, Parliament has enacted the NDA, which, among its provisions, sets out the organization of the DND, the CAF, and all the various aspects of the Canadian military justice system (including the establishment of courts martial and the Court Martial Appeal Court). The NDA is also the statutory authority that authorizes the creation of regulations, such as the QR&Os, which often set standards that may be relevant in a disciplinary context.

7. The *Charter* also expressly recognizes the existence of a separate system of military justice within the Canadian legal system. Section 11 of the *Charter* states that:

“Any person charged with an offence has the right [...]

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

8. The SCC has directly addressed the validity of a separate, distinct military justice system in three decisions, most recently in its 2015 decision, *R v Moriarity*. On each occasion, the Court has upheld the requirement for a separate justice system for the CAF.

9. In *Généreux*, the SCC found that “the existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by [...] compelling principles.” In *MacKay v R*, the SCC similarly noted:

When the National Defence Act is considered as a whole it will be seen that it encompasses the rules of discipline necessary to the maintenance of morale and efficiency among troops in training and at the same time envisages conditions under which service offences may be committed outside of Canada by service personnel stationed abroad. [...] In my view these are some of the factors which make it apparent that a separate code of discipline administered within the services is an essential ingredient of service life.

In *Moriarity*, the SCC upheld the constitutionality of s 130(1)(a) of the NDA (which incorporates offences under the *Criminal Code* and other Acts of Parliament into the military justice system) because the Court acknowledged that “the behaviour of members of the military relates to

discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base.”

A. THE CODE OF SERVICE DISCIPLINE (CSD)

10. The CSD, which is found at Part III of the NDA, is the statutory foundation of the Canadian military justice system. It sets out disciplinary jurisdiction and describes service offences, punishments, powers of arrest, and the organization and procedures for service tribunals, appeals, and post-trial review.

11. A “service offence” is an offence under the NDA, the *Criminal Code* or any other act of Parliament committed by a person while subject to the CSD. The CSD includes several service offences that are unique to the profession of arms, such as: misconduct in the presence of the enemy; mutiny; disobedience of a lawful command; desertion; absence without leave; negligent performance of duty; and conduct to the prejudice of good order and discipline. However, under s. 130 of the NDA, any other civilian offence under the *Criminal Code* or other federal law can also be charged as a service offence.

12. **The CSD applies to Regular Force members at all times and to Reserve Force members in specified circumstances**, such as when on duty, in uniform, in a CAF vehicle, etc. The CSD can also apply to civilians in limited circumstances, such as while accompanying a CAF unit that is on service or active service.

13. When a person subject to the CSD commits an offence under the *Criminal Code* or any other federal law, the NDA provides jurisdiction to deal with the matter in the military justice system. Similarly, the NDA also provides for military jurisdiction over acts that would constitute offences under the relevant foreign law applicable in the place where the acts are committed. However, not all offences can be charged and tried within the military justice system. **The CAF has no jurisdiction to try** any person charged with having committed within Canada the offences of **murder, manslaughter, or** any offence under the sections of the *Criminal Code* relating to **the abduction of children**. There are also many cases where both the civilian and military systems could have jurisdiction over a matter, and where a decision must be taken as to who will exercise jurisdiction. For example, if a service member strikes a superior in a bar outside of a base in Canada, the civilian authorities could pursue charges under section 266 of the *Criminal Code* for a simple assault. Alternatively, the military authorities could pursue a charge of striking a superior officer contrary to section 84 of the NDA.

III. MILITARY TRIBUNAL STRUCTURE

14. The military justice system employs a two-tiered tribunal structure. The term “service tribunal” means either an officer presiding at a summary trial, or a court martial. Both tribunals can be held wherever the CAF is deployed.

A. **Summary trials** are designed to deal with relatively minor service offences that are important for the maintenance of military discipline and efficiency at the unit level.

These trials allow military commanders to effectively and swiftly administer discipline, enabling members to return to duty as soon as possible.

B. **Courts martial** are formal military courts presided over by independent military judges. These tribunals are similar in nature to civilian criminal courts, and are designed to deal predominantly with offences that are more serious in nature.

A. SUMMARY TRIALS

15. A summary trial may be held wherever a unit is located, whether it is in garrison, in an exercise area or deployed abroad. Historically, summary trials have made up approximately 95% of all service tribunals. This is consistent with the central role of the chain of command in the disciplinary process and also with the purpose stated in QR&O 108.02:

“The purpose of summary proceedings is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.”

Regulations require that all presiding officers be trained in accordance with a curriculum established by the JAG, and that they be certified by the JAG as being competent to perform their duties. The training that presiding officers currently receive consists of a pre-instruction package and a threshold knowledge test, followed by a two-day course taught by legal officers.

16. Not all service offences can be dealt with at summary trial. QR&O 108.07 lists the offences that can be dealt with by a commanding officer at summary trial. Some offences, including most *Criminal Code* offences charged under section 130 of the NDA, cannot be tried by summary trial. Currently, only nine enumerated civil offences can be tried by summary trial, including assault (contrary to s. 266 of the *Criminal Code*), and possession of a controlled substance (contrary to s. 4(1) of the *Controlled Drugs and Substances Act*).

17. QR&O 108.17 specifies when an accused person has the right to elect to be tried by court martial. An accused person will generally be offered an election to be tried by court martial, unless two criteria are met: first, all the offences with which the individual has been charged must be for insubordination, drunkenness, AWOL, quarrels and disturbances, or (under limited circumstances) conduct to the prejudice of good order and discipline; and, second, the circumstances surrounding the commission of the offence must be so minor in nature that the presiding officer concludes that a punishment of detention, reduction in rank or a fine in excess of 25 per cent of monthly basic pay would not be warranted if the accused were found guilty of the offence. In general, only 5-10% of accused persons who are offered an election in a given year actually elect to be tried by court martial. In other words, an election to be tried by court martial is only offered in a minority of cases, and the accused only elects to be tried by court martial in an even smaller number of the cases where the election is offered to the accused person.

18. These trials are generally presided over by officers from within the accused person's chain of command, from within one of the following classes of officer: Commanding Officers (CO), Delegated Officers (officers to whom a CO has delegated his powers to try matters), and

Superior Commanders. The maximum punishments that can be imposed by these presiding officers is as follows: CO – 30 days detention; Delegated Officer – a reprimand (although a fine of 25% of basic monthly pay can also be imposed); and, Superior Commander – a severe reprimand (although a fine of 60% of basic monthly pay can also be imposed).

19. A presiding officer generally has the discretion to try an accused charged with any offence detailed in QR&O 108.07, provided the following conditions are satisfied:

- A. the presiding officer has jurisdiction to try people of the accused person's rank (for instance, a Commanding Officer cannot try a commissioned officer, and a Superior Commander cannot try a junior NCM).
- B. the presiding officer considers that her powers of punishment are adequate;
- C. the accused has not elected to be tried by court martial; and
- D. the presiding officer does not have reasonable grounds to believe the accused is unfit to stand trial or was suffering from a mental disorder when the alleged offence was committed.

20. During a summary trial, the accused is provided with an assisting officer, but she does not have a right to be represented by counsel. The primary functions of an assisting officer are to assist the accused in the preparation of his or her case and to assist the accused during the trial to the extent desired by the accused. In addition, before the accused makes an election, the assisting officer shall ensure that the accused is aware of the nature and gravity of the offence(s) with which the accused has been charged and the differences between trial by court martial and trial by summary trial.

21. All offenders found guilty at summary trial have the **right to request a review** in accordance with QR&O 108.45 of the finding and/or punishment imposed at summary trial. The military review authorities acting under this article must obtain legal advice before making any determination on requests for review. As well, the findings and punishment imposed at summary trial may also be reviewed on the independent initiative of a review authority.

B. COURTS MARTIAL

22. Courts martial formal military courts presided over by a military judge. They are designed to deal with more serious offences, and are conducted in accordance with rules and procedures similar to those followed in civilian criminal courts while maintaining the military character of the proceedings. Like summary trials, courts martial may be held anywhere in the world. Statutorily, courts martial have the same rights, powers and privileges as superior courts of criminal jurisdiction with respect to all "matters necessary or proper for the due exercise of its jurisdiction," including the attendance, swearing and examination of witnesses, the production and inspection of documents, and the enforcement of their orders.

23. At a court martial, the prosecution is conducted by a legal officer from the office of the Director of Military Prosecutions (DMP). In accordance with s. 249.19 of the NDA and QR&O 101.20, an accused person is entitled to legal representation by or under the supervision of the Director of Defence Counsel Services (DDCS), and, as a matter of policy, this legal

representation is provided to an accused person at no cost to the accused person. An accused person may also choose to retain a lawyer at his or her own expense.

24. There are two types of courts martial provided for under the NDA: General Courts Martial and Standing Courts Martial.

A. **General Court Martial:** The General Court Martial is comprised of a military judge and a panel of members. The panel is roughly analogous to a jury in a civilian criminal court and includes five CAF members. The panel is responsible for the finding on the charges (e.g. guilty or not guilty), while the military judge makes all legal rulings and imposes the sentence. At present, when the accused is an officer, the court martial panel consists entirely of officers and when the accused is a non-commissioned member, the panel must include two non-commissioned members at or above the rank of Warrant Officer or Petty Officer First Class. Provisions of Bill C-15, the *Strengthening Military Justice in the Defence of Canada Act* (which are not yet in force) will make the following changes to the composition of a panel:

- **Rank of senior member:** the senior member of the panel must be an officer of or above the rank of lieutenant-colonel.
- **Rank for trial of colonel:** the senior member of the panel must be an officer of or above the rank of the accused person and the other members of the panel must be of or above the rank of lieutenant-colonel.
- **Rank for trial of lieutenant-colonel or lower-ranked officer:** the members of the panel other than the senior member must be of or above the rank of the accused person.
- **Rank for trial of non-commissioned member:** the panel is composed of the senior member, one other officer and three non-commissioned members who are of or above both the rank of the accused person and the rank of sergeant.

A decision of the panel in respect of a finding of guilty or not guilty, of unfitness to stand trial or of not responsible on account of mental disorder is determined by the unanimous vote of its members. A decision in respect of any other matter is determined by a majority vote.

B. **Standing Court Martial:** The Standing Court Martial is conducted by a military judge sitting alone who is responsible for the finding on the charges and imposing a sentence if the accused is found guilty.

25. For the most serious class of offences under the NDA, a General Court Martial will be generally be convened, while for the least serious class of offences, a Standing Court Martial will be convened. In all other cases, the accused person has the right to choose between trial by General or Standing Court Martial.

26. An accused person has the right to be tried in the official language of his or her choice. Approximately one-fifth of all courts martial are conducted in French.

27. Both an offender convicted by court martial and the MND (or counsel instructed by the MND) have a right to appeal most decisions to the CMAC, a court comprised of civilian, federally-appointed judges. CMAC decisions may be appealed to the SCC. Such appeals may be made on any question of law on which a judge of the CMAC dissents, or on any question of law if leave to appeal is granted. The CMAC typically hears several appeals each year. Appeals to the SCC are less frequent, but the SCC recently granted leave to appeal in three decisions, while leave to appeal to the SCC has been sought in a fourth decision. Several of these appeals will likely be heard by the SCC within the next two years.

IV. KEY CONCEPTS IN THE MILITARY JUSTICE SYSTEM

A. INDEPENDENCE

28. The Director of Military Prosecutions, military judges, the Court Martial Administrator, and the Director of Defence Counsel Services enjoy meaningful independence within the Canadian military justice system in ways that allow these actors to fairly and effectively fulfill their various functions. In particular, military judges enjoy all the same constitutionally mandated forms of judicial independence (such as such a security of tenure, financial security, and administrative independence) as civilian judges enjoy in the performance of their duties.

B. DOUBLE JEOPARDY

29. At law an individual cannot be placed in criminal jeopardy for the same, or a substantially similar, offence more than once. This is referred to as the rule against double jeopardy. Notwithstanding this rule, administrative action and/or disciplinary action may be taken in relation to the same incident, since administrative sanctions are non-penal measures relating to performance and conduct, and action under the CSD involves criminal or disciplinary sanctions. Administrative action must not be seen as a substitute for disciplinary action when such charges are warranted.

C. MANDATORY CONSULTATION WITH UNIT LEGAL ADVISOR

30. QR&O 107.03 identifies the circumstances when members authorized to lay charges are required to obtain legal advice before laying charges. These circumstances include when an offence is not authorized to be tried by summary trial under QR&O 108.07, when an offence is alleged to have been committed by an officer or non-commissioned member above the rank of sergeant, and if a charge would give rise to a right to elect trial by court martial. This legal advice is normally given by the unit legal advisor. The charge-layer shall obtain legal advice concerning the sufficiency of the evidence, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge. QR&O 107.11 requires presiding officers to obtain pre-trial legal advice under identical circumstances.

D. LIMITATION PERIOD

31. A limitation period is a specified period of time within which a charge must be laid. In general, the limitation period begins the instant the conduct that is the subject of the charge occurs. If a charge is not laid within the applicable limitation period, the authority to try the accused for the offence charged is lost.

32. At present, in order to proceed by summary trial with respect to any offence, the summary trial must begin within one year of the date on which the service offence is alleged to have been committed. A provision of Bill C-15 (yet to be brought into force) would amend the NDA such that a presiding officer could not try an accused person by summary trial unless the charge is laid within six months after the day on which the service offence is alleged to have been committed **and** the summary trial commences within one year after the date of the alleged offence. This amendment also provides for a waiver of the limitation period by the accused person. Note that the summary trial does not have to be completed before the one-year date, but merely started. According to QR&O 108.05, a summary trial commences when the accused, accompanied by the assisting officer, is brought before the presiding officer and the presiding officer takes the oath and causes the charges to be read.

E. INDEPENDENT REVIEW

33. The NDA requires the MND to cause independent reviews of certain portions of the NDA, including the CSD, to be conducted at regular intervals. These reviews ensure that the military justice system continues evolving to reflect current Canadian legal standards and values. The first independent review was conducted by former Chief Justice of Canada, the Right Honourable Antonio Lamer, in 2003. The second independent review was conducted by former Chief Justice of the Ontario Superior Court, the Honourable Patrick LeSage, in 2011. Both of these reviews found that the military justice system works effectively, and they both made recommendations aimed at improving certain aspects of the system.

V. KEY ACTORS IN THE MILITARY JUSTICE SYSTEM

A. THE JUDGE ADVOCATE GENERAL (JAG)

34. In addition to being the legal advisor to the Governor General, the MND, DND, and the CAF in matters of military law, the JAG also has superintendence of the administration of military justice in the CAF. In this latter capacity, the JAG fulfils oversight and reporting functions in relation to the administration of military justice.

B. MILITARY JUDGES AND COURT MARTIAL ADMINISTRATOR

35. Courts martial are presided over by military judges, who are appointed by the Governor in Council (GiC). Military judges must be officers, but they are independent from the Office of the Judge Advocate General and the rest of the chain of command. QR&O 204.22 provides a formula for calculating the salaries of military judges which is not based on personnel performance evaluations. Once appointed, military judges may remain in office up to age 60.

Military judges may only be removed by the GiC upon the recommendation of an independent inquiry committee.

36. The Governor in Council designates one military judge to be the Chief Military Judge. The Chief Military Judge is the commanding officer of the Office of the Chief Military Judge, an independent CAF unit. He or she assigns judges to preside at courts martial. The Office of the Chief Military Judge includes a Court Martial Administrator, whose duties include convening courts martial and selecting panel members for General Courts Martial.

C. DIRECTOR OF MILITARY PROSECUTIONS (DMP)

37. The DMP is responsible for determining which charges are to be tried at court martial, and for the conduct of those prosecutions. The DMP is appointed by the MND and holds office during good behaviour, subject only to removal for cause upon the recommendation of an independent inquiry committee. The DMP's appointment is for a term not exceeding four years, but he may be re-appointed for subsequent terms.

38. The DMP acts under the general supervision of the JAG, who may issue written general instructions or guidelines regarding prosecutions to the DMP, but any such instructions must be made public. Consistent with his statutory role having superintendance of the administration of military justice, the JAG can also issue specific instructions or guidelines regarding a particular prosecution, which must be made available to the public unless the DMP considers that it would not be in the best interest of the administration of military justice to do so.

D. DIRECTOR OF DEFENCE COUNSEL SERVICES (DDCS)

39. Accused persons tried by court martial are entitled to legal representation provided by or under the supervision of the Director of Defence Counsel Services. The DDCS is appointed by the MND and holds office during good behaviour, subject only to removal for cause upon the recommendation of an independent inquiry committee. The DDCS' appointment is for a term not exceeding four years, but he may be re-appointed for subsequent terms. Although the DDCS acts under the general supervision of the JAG, DDCS is independent of the Office of the JAG and other CAF/DND authorities when carrying out duties and functions that pertain to the defence of clients at many stages of investigative and adjudicative processes. The JAG may issue written general instructions or guidelines in respect of defence counsel services, and the DDCS is required to make these general instructions or guidelines available to the public. However, unlike with the DMP, the JAG has no authority to issue instructions or guidelines in respect of a particular defence case.

VI. CONCLUSION

40. Canada has a sound, fair, and effective military justice system. The system has operated successfully throughout its existence, most recently through over a decade of intense operational activity with elements of the CAF deployed in Afghanistan and throughout the world. This operational crucible (through which military justice systems must all ultimately be tested)

provides clear evidence that Canada's military justice system continues to meet the needs of the CAF.

41. Canada's military justice system continues to evolve in harmony with the requirements of the Canadian constitution and with Canadian values generally. However, at its core, the system remains one that is focused on contributing to the maintenance of discipline, efficiency, and morale of the CAF, and one that preserves a strong role for the chain of command at all appropriate stages. With this in mind, the JAG remains committed to the promotion of proactive military justice oversight, responsible development, and positive change in fulfillment of his responsibilities for superintendence of the administration of military justice, now and in the future.