



## Court Martial Review

**CANADIAN BAR ASSOCIATION  
MILITARY LAW SECTION**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Military Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Military Law Section.

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# Court Martial Review

## I. INTRODUCTION

The Judge Advocate General (JAG) has directed the Deputy Judge Advocate General for Military Justice (DJAG MJ) to conduct a comprehensive review of the Canadian Armed Forces (CAF) court martial system. The purpose of this comprehensive review, found in its May 2016 Terms of Reference (ToR), is “to conduct a legal and policy analysis of all aspects of the CAF’s court martial system and, where appropriate, to develop and analyze options to enhance the effectiveness, efficiency, and legitimacy of that system.” The Court Martial Comprehensive Review Team (CMCRT) is then to “assess whether changes to any features of this system are required or advisable in order to promote greater systemic effectiveness, efficiency, or legitimacy.” The comprehensive review was to commence no later than July 15, 2016, and the CMCRT must present its final report to the JAG no later than July 15, 2017.

The Canadian Bar Association is a national association of over 36,000 lawyers, law students, notaries and academics, and our mandate includes seeking improvements in the law and the administration of justice. The CBA’s Military Law Section (CBA Section), consisting of lawyers from across the country who specialize in military law, appreciates the opportunity to contribute its views to the comprehensive review.

## II. SCOPE OF THE REVIEW

Although the CBA Section believes that this review pursues a legitimate goal, we see its scope as too limited. Ideally, we recommend an open and comprehensive Parliamentary review of the military justice system, with ample opportunity for public input and scrutiny, whose report is made easily accessible and publicly available.

In the context of the current review, the court martial system represents only a portion of Canadian military justice as one of two forms of service tribunals under the *National Defence Act*<sup>1</sup> (*NDA*). The other is the summary trial process, where about 95% of disciplinary cases are

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<sup>1</sup> Under RSC 1985, c N-5, s.2, service tribunal “means a court martial or a person presiding at a summary trial”. Summary trial “means a trial conducted by or under the authority of a commanding officer

handled.<sup>2</sup> However, the two processes are so interconnected that changes in one will almost invariably have an impact on the other. For that reason, we believe that any review conducted as though the two systems operate in silos risks missing the target.

A more thorough review of the Canadian military justice system and how it provides “processes that would assure the maintenance of discipline, efficiency and morale of the military”<sup>3</sup> is an important and worthwhile endeavour that should, at a minimum, encompass both forms of service tribunals. The overwhelming majority of charges laid under the *NDA* are decided at summary trials presided over by Commanding Officers, Superior Commanders or Delegated Officers, and those trials should be included in this review.

Bill C-71, introduced in the House of Commons about two years ago, proposed substantial reforms to Canadian military justice. It included drastic modifications to the summary trial system, and adapted the *Canadian Victims Bill of Rights* (CVBR) to the Canadian military justice system. Bill C-71 died on the order paper with the 2015 federal election. No other iteration of Bill C-71 has since been introduced, and we suggest it would be appropriate to also include the main elements of that Bill in the scope of the current review.

A review of the military justice system, not just of the court martial system, ought also to address issues raised by numerous commentators, such as the jurisdiction of summary trial presiding officers and the training of assisting officers.<sup>4</sup> A truly comprehensive review should

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pursuant to section 163 and a trial by a superior commander pursuant to section 164 [of the *NDA*]. Court martial “includes a General Court Martial [GCM] and a Standing Court Martial [SCM]”.

*NDA* s. 167 says: A general court martial “is composed of a military judge and a panel of five members.” *NDA* s. 174 says: “Every military judge is authorized to preside at a Standing Court Martial, and a military judge who does so constitutes the Standing Court Martial.” Under *NDA* s. 173, a SCM “may try any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence.”

Service offence means “an offence under [the *NDA*], the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline”. The most severe punishment for a service offence is imprisonment for life. (*NDA*, s. 139)

<sup>2</sup> See, [The Canadian Military Justice System](http://ow.ly/MBj130arLRh) (Summary Trials) (<http://ow.ly/MBj130arLRh>).

See also *NDA* s. 162.1: “Except in the circumstances prescribed in regulations made by the Governor in Council, an accused person who is triable by summary trial has the right to elect to be tried by court martial.” The list of offences that can be tried by a commanding officer at a summary trial are in article 108.07 of the *Queen’s Regulations and Orders for the Canadian Forces* (QR&O). This article stipulates that “an accused person triable by summary trial in respect of a service offence has the right to be tried by court martial”, except for the offences listed, under certain conditions.

<sup>3</sup> *R. v. Moriarity*, 2015 SCC 55, para 46.

<sup>4</sup> For example, see the [Lamer](#) (2003) and [Lesage](#) (2011) Reports (<http://ow.ly/ZA6530arkCh>) (<http://ow.ly/27FR30arkH2>).

involve the participation of interested Canadians, academics, practitioners and service personnel. A comparative review of foreign jurisdictions would also enhance this research.

While we appreciate that the JAG is statutorily mandated with “the superintendence of the administration of military justice in the Canadian Forces” and must “conduct, or cause to be conducted, regular reviews of the administration of military justice”, Parliament must decide what military justice system is best for Canada. A review of the administration of military justice by the JAG might well lead to proposed fundamental modifications to the *Code of Service Discipline*. For these reasons, we suggest that a thorough review be conducted in public by a Parliamentary body, with sufficient time for thoughtful and objective analysis. In particular, this would ensure better and more transparent consideration of how any reforms would be implemented.

### **III. PUBLIC CONSULTATION**

The CMCR ToR stipulates that the Canadian public must be given a reasonable opportunity to provide written input on the subjects described in the ToR and that the public consultation phase was to be completed no later than December 15, 2016. The CMCRT was also authorized “to conduct further consultation with any member of the Canadian public who has a demonstrable expertise in a subject that is relevant to the comprehensive review, at the sole discretion of the DG CMCRT.” The ToR allowed for a possible consultation phase of five months, from July 15 to December 15, 2016.

The actual public consultation phase was open from October 11, 2016 to November 7, 2016, just 28 calendar days. If the goal is to encourage as much public engagement and feedback as possible, that period was too short for meaningful participation. In general, we believe there has been inadequate public consultation on the topics at issue, and this should be remedied.

The JAG website also contains a Discussion Board enabling the public to post comments. It now reports that the “CMCRT received a total of 33 submissions from 32 individuals, and one submission from an institutional stakeholder (the Federal Ombudsman for Victims of Crime)”.

Among the individual public comments on the Discussion Board is a lengthy comment, strongly supportive of the current military justice system. The commentator refers to his extensive experience in the military, and gives his name – the same name as a Colonel presently occupying the role of Director of Military Prosecutions, who forms part of the JAG command team (see the JAG website).

If this is more than a simple coincidence, and the comment is actually from the Director of Military Prosecutions, we question why it would be included on the public Discussion Board. A legitimate public consultation process must be transparent and reflect the feedback received from the public during the review process. There is no problem if individuals with specific roles or expertise in the military justice system or other organizations are also heard, but we suggest simply that those roles and expertise should be made explicit. This practice was followed for input received from the Federal Ombudsman for Victims of Crime, noted above, posted with the public comments.

#### **IV. STRENGTHENING MILITARY JUSTICE IN THE DEFENCE OF CANADA ACT**

In 2013, the *Strengthening Military Justice in the Defence of Canada Act*<sup>5</sup> (previously Bill C-15) amended the *NDA* in significant ways. However, most of the Bill has not yet come into force, specifically intermittent sentences (s. 24), summary trials (ss. 35 and 36), Division 7.1 sentencing, which includes new provisions on victim impact statements and absolute discharges (s. 62), and criminal records (s. 75).<sup>6</sup>

Parliament passed this legislation almost four years ago. Resources are now being dedicated for the current review that includes several areas (punishments, sentencing, special needs of victims) also covered in that legislation.

The CBA Section suggests the reasons for this delay and overlap should be explained to the public. The JAG should disclose reasons for the delay in implementation of the legislation, and any plans for coming into force of these important provisions of the Act.

#### **V. FINAL REPORT**

The CMCR ToR specify that “[t]o the greatest extent possible, the final report of the CMCRT shall be unclassified, and shall not require any protected designation. *However, the report shall be marked and treated as a document that is subject to solicitor-client privilege.*” (emphasis added)

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<sup>5</sup> SC 2013, c 24.

<sup>6</sup> This would be added to the *NDA* with the coming in force of SC 2013, C.24.



An open and transparent review process would assist in ensuring public support and demonstrating respect for the rule of law, the disciplinary needs of the Canadian Forces and the individual rights of Canadians subject to the *Code of Service Discipline*. Exceptions can occur when necessary for legitimate public policy reasons, but justice is generally expected to be conducted in public in Canada. While the CBA is a staunch defender of solicitor-client privilege, it seems odd that the JAG would request public participation and input to a review that will ultimately produce a report not publicly available. The ToR do not specifically state what actions will result from the final report.

In our view, the ensuing report on military justice should be available to the public. We expect that the Minister of National Defence, the CAF and the Canadian public would have less confidence in our military justice system if the study and its final report are kept from the very public asked to participate in the review process.

## **VI. CONCLUSION**

The CBA Section supports the JAG in his statutory duties. We also believe that fundamental questions underpinning discussions of military discipline and military justice must be debated in an open and public forum. A joint Parliamentary committee would possess the necessary resources and competence to review these issues fully and share any findings with the Canadian public. The goal should ultimately be legislation that ensures Canada's military justice system both supports the discipline, efficiency and morale needs of the military and ensures that justice is done in the defence of Canada.