Annex J
to CMCR Draft Interim Report
dated 21 July 2017

CMCRT – Summary of In-Person Consultation with Lieutenant-Colonel (Retired) Perron, former Military Judge

On 12 June 2017, three members of the CMCRT conducted an in-person targeted engagement with retired Lieutenant-Colonel Jean-Guy Perron, formerly a Canadian Armed Forces infantry officer and military judge.

Mr. Perron stated that any discussion on military justice must firstly focus on the concept of discipline. Military justice is a means of last resort to enforce discipline.

Mr. Perron queried why the court martial system would need jurisdiction over ordinary criminal offences unrelated to military discipline (e.g. domestic violence offences), but went on to point out that having jurisdiction over a wide variety of offences allows the court martial system to prevent impunity whenever the civilian justice system is unable or unwilling to prosecute a particular matter. Mr. Perron added that, if functioning properly, the court martial system should be able to deal with relatively minor, but still criminal, misconduct more quickly than a civilian court.

Mr. Perron suggested that he understood why the chain of command might feel disengaged from the court martial system. He attributed this disengagement to law reforms that took place in 1998, and that essentially put far more control of the court martial system into the hands of military lawyers. He felt, both at the time the changes were made and still today, that these changes had a negative impact on the chain of command's involvement in the military justice system. He noted that in his view, in order for the chain of command to be engaged in the system, it would need to be much faster, and could not continue to be an administrative burden.

On the subject of differences between the military and civilian justice systems, Mr. Perron said that the former served an educative purpose that was not necessarily served within the latter. He indicated that his written decisions, as a military judge, were structured so as to allow the small number of people in attendance at most courts martial, and any readers of the decision after it was posted online, to understand certain basic realities about Canadian law and the military justice system. He suggested that this was why it will often take longer for a military judge to deliver a decision than a civilian criminal judge.

With respect to delays in the court martial system, Mr. Perron stated that, in his view, the disciplinary benefit of holding a court martial one year or more after an alleged offence took place approaches zero. He suggested that, in order to meet the CAF's disciplinary needs, action must be taken immediately, not in a matter of years.

Regarding prosecution and defence counsel services, Mr. Perron noted that military knowledge was important within those services, but that the perception of their independence was also important. In his view, the fact that the DMP and DDCS are characterized publicly as part of the "JAG Command Team" is extremely problematic. He indicated that a better structure would involve placing the DDCS organization under the Minister of National Defence, but functionally independent from the Minister, in much the same way as the Office of the Chief Military Judge is situated relative to the Minister.

The CMCRT asked Mr. Perron about how rank differentials (e.g.: between a judge and an accused person, or between a prosecutor and a witness for the defence) might have an adverse impact within the court martial system. Mr. Perron indicated that he had presided over at least one trial wherein the accused person, the prosecutor, and the defence lawyer all outranked him as the military judge, and that he had no issues performing his duties impartially and free from any influence of these ranks. He noted that in his experience he never observed a problem due to rank between counsel and witnesses.

The discussion then turned toward the concept of deployed courts martial. Mr. Perron suggested that section 132 of the NDA (which essentially transforms all offences under the law of a foreign country in which a person is located into service offences that can be tried by court martial) is extremely useful as a means of demonstrating to host nations that the CAF can deal effectively with any misconduct by its members. He stressed that this section should be preserved. He was also of the view that a court martial should be held wherever it will have the most impact on discipline. (As an aside, he also noted that having a permanent military court would be useful as a way of dealing with such preliminary issues as location, etc., and he reiterated this recommendation for creating a permanent court in his concluding remarks).

When the CMCRT noted that most CAF deployments are six months in duration, and asked Mr. Perron whether he thought it would be possible to hold courts martial within six months of an offence taking place so that it would make sense to hold them in a deployed theatre of operations, Mr. Perron gave a very qualified answer. He said that he believed courts martial could happen within six months if the case was minor or relatively straight-forward, and if everyone involved recognized the need for unusual speed in that particular case and worked to much faster than normal timelines. However, he expressed significant doubt as to whether a system could be designed to ensure that courts martial could take place within six months in a majority of cases.

The CMCRT noted that in order to maintain the capability to deploy a court martial into a theatre of hostilities at any given time, military judges would need to maintain a very high level of personal operational readiness. The CMCRT asked Mr. Perron whether the obligation that all CAF members are under to complete regular deployment readiness training and verifications (such as requalifying on a personal weapon, completing an operational physical fitness test, or completing Chemical, Biological, Radiological and Nuclear warfare refresher training) was a hindrance to a military judge's ability to perform his or her duties, and whether maintaining a high level of personal operational readiness would be an unmanageable burden on military judges. Mr. Perron forcefully noted that these obligations could not be imposed on members of the military judiciary, since it would compromise their judicial independence if a member of the executive branch of the government, like the Commander of Canadian Joint Operations Command, could tell a military judge what he or she must do before being allowed to deploy to Afghanistan or another theatre of operations in order to conduct a trial or, even worse, could deny the deployment of the court for that reason. He suggested that the same measure of independence also applied to members of a General Court Martial panel once they have been appointed, since – at that stage – they are part of the Court, and the Court is independent. Mr. Perron noted that when the Minister of National Defence, or Canadian Senators, visit CAF troops in a theatre of operations, they are not first required to fire a weapon or complete chemical warfare training, so this clearly is not absolutely required of military judges either.

At this point, the CMCRT asked whether the military status of a military judge brought a distinct benefit to the court martial system, or whether civilian judges (e.g.: recently retired officers with ten years of experience as lawyers and sufficient military experience) might be just as effective. Mr. Perron acknowledged that it was an option that might strengthen perceptions of independence.

The CMCRT asked Mr. Perron about the number of sitting days for each military judge in any given year. Mr. Perron said that sitting days were a flawed metric for thinking about judicial schedules, because a judge might sit on a first day, then adjourn for three days to deliberate and write reasons, and then sit on a fifth day to deliver reasons. In this case, there are only two sitting days, but the judge was working for five days. He did agree that technology such a VTC could be used in more simple matters, such as guilty pleas with joint sentencing submissions, to resolve matters without any need for travel, but in more complex cases, he felt that an in-person trial was more appropriate.

The CMCRT asked Mr. Perron who the military judges are speaking for when they deliver their reasons, and specifically, whether they purport to speak for the military chain of command. Mr. Perron emphatically stated that military judges speak not on behalf of the chain of command, but on behalf of justice; more precisely, military justice. A decision on sentence was similar, in that it also represented the broad interests of justice rather than the interests of military leaders, but he noted that a sentencing decision also included a disciplinary voice, wherein a military judge would speak about what discipline demanded in that case.

Mr. Perron also observed that, if one looks to the text of the NDA and the instructions of the judge to the members of the panel, it is clear that a court martial panel is only empowered to make determinations of fact, not to represent the interests of the military chain of command.

In closing, suggested that the Court Martial Appeal Court should be supported by legal counsel, be it an *Amicus Curiae* or some other transparent means of providing the CMAC with an experienced and knowledgeable third party that could draw the Court's attention to particular military issues in appeals that might be beyond the ordinary comprehension of the Court. He also observed that it was extremely problematic for the Office of the JAG to be directly involved in hosting or coordinating judicial education for judges of the Court Martial Appeal Court, since this connection could compromise the Court's independence; instead, he suggested, this education should be coordinated through the National Judicial Institute.