Annex R
to CMCR Draft Interim Report
dated 21 July 2017

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Subject: CMCRT Submission - 31 CBG/RHFC
Date: November 23, 2016 11:38:07 AM

SUBMISSION

In keeping with some direction received from the CMCRT in terms of formatting the submission, I am going to make this submission (on behalf of the Comd Tms and soldiers within 31 CBG) in an informal, point form manner.

As a brief aside, this submission relies on my experience both within the CA PRes, and within the JAG. I was an Armoured Officer from 1990-2000. Thereafter, I served with the JAG (as DJA Central, and later within DDCS). In 2011, I returned to the CA, and executed a VOT to the Infantry MOSID. In 2015, I was appointed CO, the Royal Highland Fusiliers of Canada ("RHFC"). RHFC is a PRes unit of 204 soldiers, in the light infantry role, with headquarters in the Waterloo Region. In my civilian capacity, I am the Crown Attorney of the Waterloo Region where I supervise a staff of 23 lawyers. My submissions follow:

- In general, it is suggested that efforts should be made to keep the CM "military". The way forward needs to recognize the unique character of military service for Military Judges (MJ), prosecutors and defence counsel.
- The experience level of the judicial branch of the court is concerning. It could be significantly enhanced by accessing the Reserve Judicial Officers provisions of the NDA. This shouldn't be a "break glass in case of war" provision. Rather, this section should be used as a way to get experienced trial lawyers appointed to the Court. As commanders, we depend on the court to administer justice in such a way as to concurrently enable the chain of command to maintain discipline, while also ensuring that our soldiers who are before the court have the full complement of their rights protected. This delicate balance is best performed by a bench that balances both sufficient military experience (in order to understand the unique context of service offences) with the skills and experience necessary to render justice in the complex litigation environment. The level of experience necessary to execute this function is difficult to achieve if the military judicial appointments are largely drawn from a prosecution/defence service that conduct in the neighbourhood of only +/- 70 matters per year. This is, frankly, similar to the case load of a single lawyer (or at maximum two lawyers) within the civilian justice system.
- Accordingly, there may be merit to consider revising the appointment criteria to permit the appointment of MJ (who meet the other threshold criteria), and who have at least 10 years of experience (Reg or Res) but who have retired from the CAF. In other words, the CAF could ratchet up the potential for persons having broader judicial experience by opening the appointments to retired members who have gone on to civilian careers, but who nonetheless have a sufficient body of military experience to be able to judge within the CAF context.

- Although a bit “out of the box”, perhaps we could query whether a MJ needs to be an officer appointed in a particular rank, as opposed to a member appointed simply as a “Justice”. The rank of Colonel should not be viewed as somehow required in order to properly execute the functions of a trial judge.
- Having 4 permanent judges hear approximately 70 cases per year is frankly insufficient to ensure that their abilities remain sharp. Pursue the potential for cross appointments (secondments?) of MJ to civilian trial-level courts (not the Federal Court!) to ensure continuing judicial experience for appointed members.
- Enhanced reliance on Reserve members (who are barristers and experienced trial lawyers) as Prosecutors and Defence Counsel would ensure that counsel with sufficient experience are defending our soldiers and prosecuting on behalf of Her Majesty. It is suggested that nearly the entire CM component of the MJS could be a Reserve task, supported by a small cadre of Regular Force members (akin to a “10:90” concept). This would not only engender potentially significant cost savings, but would ensure (with careful selection of Reserve Legal Officers) that our CM are conducted by experienced trial lawyers. The employment of Regular Force legal officers could then be largely (although not exclusively) focused on the solicitor/advisory side of the practice, with the ability to develop even further expertise in areas of operational law, and the LOAC.
- The CM clearly needs to be a “Standing Court” (ie not convened ad hoc), with rule making authority that exists outside of a requirement for the production of Regulations. It should be established as functionally and fully equivalent to the Superior Courts of the provinces.
- It is suggested that efforts are made to retain both the SCM, and the GCM, but concurrently, the panel is encouraged to continue to look at revising the GCM to broaden the “jury of your peers” element that is present in civilian trials. Junior ranks should be invited to participate as panel members. Exploring options for addressing rank differentials on the panel to ensure full participation by all members including assigning common “Justice” rank during the period of service on the panel would also be a progressive step that would afford members at all ranks the opportunity to participate in the justice system that affects them.
- It is suggested that legal fees for the provision of a Defence should be paid by members on a qualified/scaled “ability to pay” methodology, with a cut off floor. To make this fair for Reserve members, this should be based on an analysis of real earnings per year, not based on a “potential annual earnings” basis. Where a service member is acquitted after trial, the member’s entire contribution towards their legal fees should be reimbursed. In fairness, I should mention that my RSM and I disagree on this point. He believes that the MJS should pay for the soldiers defence up front. His perspective is solely “soldier oriented”. My perspective is directed by a broader perspective directed at the superintendence of the Military Justice System (“MJS”), and by my experience within DDCS. Having a soldier engaged in making a financial contribution for a defence on the front end may have a positive effect in terms of limiting or curtailing unmeritorious or speculative applications.
- The performance rating/meriting of the DDCS and the funding of the DDCS

office should be supervised by an appointed body that exists at arms-length to the JAG. The DDCS should not be within the JAG chain of command. The lawyers within DDCS (like the DMP) should be largely comprised of Reserve legal officers who are experienced trial lawyers. This will require that they be compensated on a basis that makes it attractive to provide services to the DDCS/DMP instead of to their civilian offices.

- The MJS should continue to prosecute both service offences, and offences under the general laws of Canada, including most specifically the Criminal Code. The present system of affording jurisdiction over the person, and over offences is appropriate for Regular members, although the provisions of s.60 NDA (pertaining to Reserve members) is badly in need of overhaul, in particular to reflect the realities of Reserve service, including Class B service. Establishing a jurisdictional link to Class A Reserve members who do not fall within the present elements of s.60 NDA, but where their impugned conduct envisions a clear and compelling connection to service would be of great assistance. This would represent the inclusion of a "unlimited but qualified liability" for Reservists, which would frankly be a step forward.
- Sentences passed at CM should reflect the civilian sentencing approach (including provisions for "consecutive time" which avoids the "hierarchical system" in favour on one that affords more discretion to the Judge, and to the circumstances of the offence and the offender. MJ should continue to pass all sentences. Service-specific sentences should be retained, as they are required in order to appropriately addressing wrongdoing and to maintain discipline. A review of minor punishments that pertain to Reserve members should be conducted with a view to affording increased sentencing flexibility and access to appropriate sanctions.
- The civilian common law of evidence is far superior to the MRE. The common law grows and expands to face new challenges, whereas the MRE are overly stilted, inflexible, and constantly at risk of being overtaken by jurisprudential, social and other evolving elements.
- CMAC judges should be comprised of panels with extensive criminal law experience. The use of Federal judges is not optimal, given their inexperience in dealing with criminal law issues. Given the recommendation above to institute a standing Court, as a Superior Court equivalent, the CMAC should be established as a true appellate court. The model that is used by the appeal courts of the NWT could be appropriate for study. This level of court does not need to be staffed exclusively by Judges having prior military experience, although the appointment of former MJ (including Reserve MJ) to the CMAC (perhaps on an ad hoc basis) should be strongly considered so that future panels can be afforded a legal "interpreter" who is familiar with the military context surrounding the offences that are being examined.
- Vulnerable victims should be afforded the protections envisioned in the Criminal Code, including publication bans, and the potential for the use of testimonial aides, including CCTV and support persons.
- While the theoretical requirement for a CM to sit outside of Canada still exists, and while the court should retain sufficient jurisdictional flexibility to establish a sittings outside of Canada, given the length of most operational tours in the modern period, CM should not be convened outside of Canada unless there

are very specific reasons to do so. Any suggestion that limits appointments of any member of the court (Judge, prosecutor or defence) because of a required connection to an “unlimited liability to serve” should be assiduously avoided.

- As a further general point, the convening of CM at garrison locations (as opposed to a centralized location) should continue to be encouraged. While it is possible to bring the soldier to the court, it is better to bring the court to the soldier. If military justice (and particularly sentencing aims including general deterrence and denunciation) is to be supported, it is important for our soldiers (both those involved, and those not involved) to see justice being effected. To that end, further support needs to be provided on the front end of the CM process. Legal advice remains difficult to access, and very substantial delays are experienced at the unit level. The process of affording legal advice at the pre-charge and post-charge stage should be integrated so that experienced prosecutors are advising on charging drafting issues from the outset in order to avoid the left hand/right hand legal advice problem that is currently experienced.

I would be pleased to follow up on any of these points if it would be of assistance. Thank you very much for conducting this important review.

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