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DRAFT INTERNAL REPORT - COURT
MARTIAL COMPREHENSIVE REVIEW

The Canadian military justice system forms an integral part of Canada's legal mosaic and the requirement for military tribunals have long been recognized in Canadian law, including the Constitution, and reinforced by Canadian courts, including the Supreme Court of Canada. This separate system of military tribunals allows the Canadian Armed Forces (CAF) to deal with matters that pertain directly to the discipline, efficiency and morale of the military.

Furthermore, Canadians have a clear expectation that their armed forces will be a disciplined one while reflecting Canadian values and ethics. All Canadians, including the proud women and men of the CAF, also expect that their military tribunals will continue to evolve in accordance with Canadian law while recognizing the unique role the military justice system plays in reinforcing discipline.

The Court Martial Comprehensive Review was initiated by my predecessor by terms of reference dated 13 May 2016. The purpose of this internal review was to conduct a

ÉBAUCHE - RAPPORT INTERNE -
RÉVISION GLOBALE DE LA COUR
MARTIALE

Le système de justice militaire canadien fait partie intégrante de la mosaïque juridique du Canada et la nécessité d'avoir des tribunaux militaires est reconnue depuis longtemps dans le droit canadien, y compris dans la Constitution. Le système de justice militaire canadien a aussi reçu l'appui des tribunaux canadiens, entre autres celui de la Cour suprême du Canada. Ce système distinct de tribunaux militaires permet aux Forces armées canadiennes (FAC) de traiter de questions liées à la discipline, l'efficacité et le moral des militaires.

De plus, les Canadiens s'attendent manifestement à ce que les forces armées soient disciplinées et à ce qu'elles reflètent les valeurs et l'éthique de la population. Tous les Canadiens, y compris les femmes et les hommes qui sont fiers de servir au sein des FAC, s'attendent aussi à ce que les tribunaux militaires continuent d'évoluer en conformité avec le droit canadien, tout en reconnaissant le rôle unique que joue le système de justice militaire dans le renforcement de la discipline.

La révision globale de la cour martiale a été entreprise par mon prédécesseur par des attributions en date du 13 mai 2016. Le but de cet examen interne était de fournir une

legal and policy analysis of all aspects of the CAF's court martial system and provide options to enhance the effectiveness, efficiency, and legitimacy of that system.

The review was also designed to engage a healthy public dialogue over the future of the military justice system through online discussion boards and posted summaries from public consultations and stakeholder submissions, both supportive and critical of the current system.

On 27 June 2017, I was appointed Judge Advocate General (JAG), and in early July 2017 was briefed by the Court Martial Comprehensive Review Team (CMCRT) on the status of its work. At that time, I provided the team with broad guidance as it worked to complete the report, then due in final form by 14 July 2017. On 12 July 2017, I made amendments to the team's terms of reference. A key amendment was that the report would be changed from a legal and policy analysis, subject to solicitor-client privilege, to a policy-based analysis which would be unprivileged and could be shared publicly. The amended terms of reference also mandated the production of a draft report and extended the deadline for the production of the document to 21 July 2017.

The enclosed internal draft report was submitted to me on time in July 2017. It provides a history and overview of Canada's court martial system, a comparative international study with selected states' military justice system, offers an unusual theoretical basis for Canada's courts martial and provides a number of observations, some from CAF commanders and members, on the military justice system.

analyse des aspects juridiques et des politiques reliées au système des cours martiales des FAC et de fournir des options qui pourraient rendre ce système plus efficace, efficient et légitime.

La révision avait également pour but de lancer une saine discussion avec le public sur l'avenir du système de justice militaire grâce à des babillards électroniques et à la publication de résumés de consultations publiques et de représentations par des parties intéressées, qu'il s'agisse de points de vue favorables ou défavorables au système actuel.

Le 27 juin 2017, j'ai été nommée juge-avocat général (JAG), et au début du mois de juillet 2017, l'équipe de la révision globale de la cour martiale (ERGCM) m'a informée de l'état d'avancement de ses travaux. À l'époque, j'ai donné des conseils généraux à l'équipe qui était en voie de terminer son rapport, lequel devait être prêt le 14 juillet 2017. Le 12 juillet 2017, j'ai modifié le mandat de l'équipe. J'ai modifié, entre autres, l'objectif du rapport. Plutôt que de porter sur une analyse juridique et des politiques qui serait assujettie au secret professionnel de l'avocat, le rapport devait porter sur une analyse stratégique des politiques, sans privilège, afin d'être accessibles au grand public. Le mandat modifié exigeait aussi de rédiger un rapport provisoire et repoussait la date limite de production du document au 21 juillet 2017.

Le rapport interne provisoire ci-joint m'a été remis dans les délais en juillet 2017. Il fournit un historique et un aperçu du système des cours martiales au Canada, une étude comparative du système de justice militaire d'États sélectionnés, offre un fondement théorique inhabituel pour les cours martiales canadiennes et fournit un nombre d'observations, dont certaines proviennent de commandants et militaires des FAC.

In large part due to challenges related to methodology and a paucity of metrics and analytics, the paper is of limited assistance in assessing the current court martial system.

And so, considerable work remains to be done. As with the civilian criminal justice system, the military justice system is in constant evolution and benefits from internal and external reviews that offer meaningful evidence-based analysis and recommendations that serve to enhance it. To that end, I am looking forward to significant consultations with key stakeholders and with those who have expertise and interest in the military justice system. In terms of the external reviews, we will have much to learn from the Office of the Auditor General audit into the military justice system slated for publication in the spring of 2018 and I am looking forward to the results of the next independent review to be undertaken within the next 2 years pursuant to section 273.601 of the *National Defence Act*.

In light of the forthcoming external reviews, I have determined that no additional revision of the draft internal report will be required and that it will serve as a discussion paper. In that regards, the discussion paper represents the views of its authors. It does not represent my views or those of the Office of the Judge Advocate General. It offers perspectives that may be taken into account following receipt of the Auditor General's report, the report of the next independent review authority along with other internal and external consultations.

As the superintendent of the administration of military justice, I remain confident it is an

En raison surtout des difficultés relatives à la méthodologie et du peu de paramètres et d'analyses acceptables, le document est d'une utilité limitée pour évaluer le système actuel des cours martiales.

Par conséquent, beaucoup de travail reste à faire. Tout comme le système civil de justice pénale, le système de justice militaire est en constante évolution et tire parti d'examens à l'interne et à l'externe qui offrent une analyse fondée sur des données probantes et des recommandations visant l'amélioration de celui-ci. À cette fin, j'anticipe positivement des consultations à venir auprès des principaux intervenants et des personnes ayant une expertise et un intérêt dans le système de justice militaire. En ce qui a trait aux examens externes, nous aurons beaucoup à apprendre de la vérification du Bureau du vérificateur général concernant le système de justice militaire dont la publication est prévue pour le printemps 2018, ainsi que des résultats du prochain examen indépendant qui doit être entrepris au cours des deux prochaines années conformément à l'article 273.601 de la *Loi sur la défense nationale*.

À la lumière des examens externes attendus, j'ai conclu qu'il ne sera pas nécessaire de poursuivre la révision de l'ébauche du rapport interne, et que le document servirait à des fins de consultations. En ce sens, ce document de consultation représente les opinions de ses auteurs. Il ne représente pas mon point de vue ni celui des membres du Cabinet du juge-avocat général. Le document présente des perspectives qui pourront être prises en compte avec celles des rapports du vérificateur général, du prochain examen indépendant et des consultations à l'interne et à l'externe.

En tant que responsable de l'administration de la justice militaire, je demeure persuadée que

important and relevant system to promote the discipline, effectiveness and morale of the CAF. And, as with any other criminal justice system, the military justice system must remain in constant evolution in order to ensure that it continues to meet the needs of those who use it and are impacted by it, while meeting all applicable Canadian legal requirements. Therefore, moving forward, consideration and analysis of the various perspectives will contribute to formulate tangible options and recommendations to decision-makers to enhance the fairness, effectiveness, efficiency and, ultimately, legitimacy of Canada's military justice system.

ce système important et valable favorise la discipline, l'efficacité et le moral des FAC. Et comme pour tout système de justice pénale, le système de justice militaire doit évoluer constamment pour continuer à répondre aux besoins de ceux et celles qui s'en prévalent et qui sont touchés par celui-ci, tout en respectant les exigences juridiques canadiennes en vigueur. À cet égard, un examen et une analyse des diverses perspectives contribueront à formuler des options concrètes visant à rendre le système de justice militaire du Canada plus juste, efficace, efficient et, en définitive, plus légitime.

Juge-avocat général



Geneviève Bernatchez
Commodore
Judge Advocate General

Court Martial Comprehensive Review

Interim Report

21 July 2017

Draft - Interim - 21 Jul 17

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List of Abbreviations and Frequent References

2 Can Div Pers Svcs	2 Canadian Division Personnel Services
2 CMBG	2 Canadian Mechanized Brigade Group
4 CDSG	4 th Canadian Division Support Group
5 Can Div	5 th Canadian Division
5 RGC	5 ^e Régiment Génie du Combat
35 CBG HQ	35 Canadian Brigade Group Headquarters
ADF	Australia Defence Force
ADM (RS)	Assistant Deputy Minister (Review Services)
AP I	<i>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)</i> , 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979)
AWOL	Absence without leave
Bill C-15	Bill C-15, <i>Strengthening Military Justice in the Defence of Canada Act</i> , SC 2013, c 24
Bill C-16	Bill C-16, <i>Security of Tenure of Military Judges Act</i> , SC 2011, c 22
Bill C-60	Bill C-60, <i>An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act</i> , SC 2008, c 29
Bill C-71	Bill C-71, <i>The Victims Rights in the Military Justice System Act</i> , 2 nd Sess, 41th Parl, 2015 (died on the order of paper)
Bronson Report (DMP)	Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., <i>External Review of the Canadian Military Prosecution Service</i> , (Ottawa: Bronson Consulting Group, 2008)
Bronson Report (DDCS)	Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., <i>External Review of Defence Counsel Services</i> , (Ottawa: Bronson Consulting Group, 2009)

CA	Canadian Army
CANSOFCOM	Canadian Special Operations Forces Command
CAF	Canadian Armed Forces
CDS	Chief of Defence Staff
CEA	<i>Canada Evidence Act</i> , RSC, 1985, c C-5
CF	Canadian Forces
CMA	Court Martial Administrator
CMAC	Court Martial Appeal Court
CMCRT	Court Martial Comprehensive Review Team
CMJ	Chief Military Judge
CO	Commanding officer
CPO1	Chief Petty Officer, 1 st class
CSD	Code of Service Discipline
CSRT-SM	Strategic Response Team on Sexual Misconduct
CVBR	<i>Canadian Victims Bill of Rights</i> , SC 2015, c 13
CWO	Chief Warrant Officer
DCS	Defence counsel services
DAOD	Defence Administrative Orders and Directives
DCST	Defence Counsel Study Team

DDCS	Director of Defence Counsel Services
DDCS Report 1997	Canada, Department of National Defence, <i>Provision of Defence Counsel Services in the Canadian Forces</i> , Report of the Defence Counsel Study Team (Ottawa: Office of the Judge Advocate General, 1997)
DDP SP	Deputy Director of Public Prosecutions – Service Prosecutions
Deschamps Report	Canada, Department of National Defence, <i>External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces</i> , by Marie Deschamps C.C., Ad.E (Ottawa: Department of National Defence, 2015)
DG CMCRT	Director General of the Court Martial Comprehensive Review Team
DGDLS	Director General of Defence Legal Services
Dickson Report	Canada, Department of National Defence, <i>Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, presented to the Minister of National Defence on March 14, 1997, by the Right Honourable Brian Dickson, Lieutenant-General Charles Belzile, and Bud Bird</i> (Ottawa: Department of National Defence, 1997)
DMP	Director of Military Prosecutions
DND	Department of National Defence
DPP	Director of Public Prosecutions
DPP Act	<i>Director of Public Prosecutions Act</i> , SC 2006, c 9
DSP	Director of Service Prosecutions
GCM	General Courts Martial
HMCS	Her Majesty's Canadian Ship
IJ 700	It's Just 700

ISMLLW	International Society for Military Law and the Law of War
JAG	Judge Advocate General
JIRT	JAG Internal Review Team
Lamer Report	Canada, Department of National Defence, <i>The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.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</i> (Ottawa: Department of National Defence, 2003)
LCM	Limited Courts Martial
LeSage Report	Canada, Department of National Defence, <i>Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage</i> (Ottawa: Department of National Defence, 2011)
MARPAC	Maritime Forces Pacific
MP	Military Police
MPS	Military Prosecution Service
MRE	<i>Military Rules of Evidence</i> , CRC c 1049
NDA	<i>National Defence Act</i> , RSC, c N-5
NIS	National Investigation Service
NZDF	New Zealand Defence Force
PPSC	Public Prosecution Service of Canada
RCAF	Royal Canadian Air Force
RCN	Royal Canadian Navy
RHFC	Royal Highland Fusiliers of Canada
RMP	Regional Military Prosecutor
SART	Sexual Assault Response Team
SCC	Supreme Court of Canada
SCM	Summary Court Martial
SMRC	Sexual Misconduct Response Centre

Som Com Report	Canada, Department of National Defence, <i>Dishonoured Legacy: the Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia</i> (Ottawa: Canadian Government Publishing, 1997)
SPA	Service Prosecuting Authority
SPO	Service Prosecutions Office
SVC	Special Victims Counsel
ToR	Terms of Reference – Court Martial Comprehensive Review
UN	United Nations
VLO	Victims' Liaison Officer
YCJA	<i>Youth Criminal Justice Act</i> , SC 2002, c 1

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Executive Summary

This report, which is produced after year-long comprehensive review of Canada's court martial system, provides a policy-based analysis and discussion of the system along with a range of representative options for enhancing it. As directed by the Judge Advocate General, the review focused on assessing the effectiveness, efficiency, and legitimacy of the current system, and of options to enhance the system. It studied the following subject areas relating to the court martial system: the court / tribunal system that deals with service offences; the prosecution system; the defence counsel system; the substantive body of service offences; the punishment and sentencing system; the applicable laws of evidence; the appeal system; and, the special needs of particular groups (victims, aboriginal offenders, and young persons) that may interact with the court martial system.

Chapter 1 of this report includes an introduction to the report that provides background on the comprehensive review, describes the method that was followed by the comprehensive review team, defines terms that are used within the report, and identifies assumptions that underpin the report.

Chapter 2 describes the historical and contextual background surrounding the court martial system by tracing the evolution of the system from its origins in British military law up until the present. As the discussion in this chapter indicates, the decades since the adoption of the *Charter* have represented a period of relatively constant progression away from the court martial system's origins as a simple and command-centric tool for dealing with serious internal disciplinary matters, to a complex and sophisticated form of military criminal justice system that increasingly incorporates standards, features, and design elements that are drawn from the civilian criminal justice system. The latter portion of Chapter 2 also provides an overview of the current court martial system by describing in basic terms how each part of the system now operates under the *National Defence Act*.

Chapter 3 serves as a starting point in looking at the current court martial system by reviewing past studies and critical perspectives of the court martial system. This chapter summarizes the relevant content of past external and independent reviews (by retired judges, consulting groups, and Canada's Senate) that have focused or touched upon the court martial system between 1997 and 2015. The chapter then discusses relevant aspects of a number of internal and subjective reviews conducted between 2001 and 2012 (involving Canadian Armed Forces members, including those occupying positions of senior leadership) that have discussed the court martial system. Chapter 3 proceeds to summarize some Canadian academic and media commentary relating to the court martial system, and concludes with a discussion regarding some of the international human rights law commentary that relates to court martial systems. Chapter 3 highlights how some issues, principally concerning efficiency and delay, and perceptions of fairness and legitimacy, have been consistently noted within the current court martial system since it last underwent major changes in 1998-1999.

Chapter 4 summarizes the consultations that were undertaken by the court martial comprehensive review team. These consultations included liaison with the Department of Justice, public

consultations, targeted consultations with both institutional and individual experts (including academics, professional associations, special interest groups, and independent government bodies with an interest in areas covered by the review), and internal consultations with Canadian Armed Forces leaders and specialized stakeholders. Chapter 4 concludes with some key observations drawn from the consultations, including the following observations: delay within the court martial system is perceived as unacceptable; sentences imposed at courts martial are perceived as too lenient; both military and criminal law expertise are perceived as being needed in the system, regardless of whether the system involves military or civilian actors within key positions; and, decisions of independent military actors in the system are sometimes perceived by CAF leaders as undermining discipline and the authority of the chain of command.

Chapter 5 provides a comparative analysis of the court martial (or equivalent) systems of ten countries that were visited by the comprehensive review team – some from the Anglo-American tradition of military justice, to which Canada belongs (the United States; Ireland; the United Kingdom; Australia; and, New Zealand), and others from the Civil Law tradition of military justice whose operational focus mirrors that of Canada (Norway; Denmark; Finland; France and the Netherlands). Chapter 5 also describes aspects of the court martial (or equivalent) systems of Singapore and Israel, based on informal discussions that were held with experts from within these systems during the comprehensive review. This chapter concludes with a summary of lessons that were drawn from comparative study of other court martial (or equivalent) systems that are relevant to the comprehensive review.

Chapter 6 elaborates a theoretical model that describes the purpose of the court martial system within the broader military justice system, and then describes the principles and features that must animate the court martial system if it is to achieve its purpose. The analysis in this chapter is theory-based, and may appear aspirational in its contemplation of an “ideal” court martial system. Ultimately, the theory that is elaborated in this chapter serves as the basis for assessments of both the current court martial system and all options to enhance the system.

Chapter 7 provides a detailed assessment of the current court martial system that includes specific discussion of each subject area within the system that has been considered as part of the comprehensive review. This assessment is focused on systemic issues, not on individuals, and relies upon a wide range of sources of information, including: past critical perspectives on the court martial system; consultation; comparative study; objective data that was collected and analyzed by external experts within the Department of National Defence’s ADM Review Services / Director General Evaluations organization; and, other publicly available data sources that are cited within the chapter. The assessment concludes that the current court martial system is somewhat effective (mostly in terms of its ability to achieve a public order and welfare purpose), appears to have considerable room for improvements in efficiency, and, as a result, faces challenges to its legitimacy.

Chapter 8 provides a very brief introduction to the discussion of options for enhancing effectiveness, efficiency, and legitimacy within the court martial system. The chapter notes that all options are presented in a menu-style manner, such that different options could be combined with one another in a significant number of possible ways, and notes that the options are intended to reflect a wide spectrum of possible changes.

Each of chapters 9-17 discuss specific options for enhancing effectiveness, efficiency, and legitimacy in respect of a particular subject area under study as part of the court martial comprehensive review. Chapter 9 deals with possible changes to the current tribunal system relating to courts; Chapter 10 addresses possible changes to the current tribunal system relating to panels; Chapter 11 considers possible changes to the status and institutional structure of the current prosecution system; Chapter 12 considers potential changes to the status and institutional structure of the current defence counsel services system; Chapter 13 deals with possible options for changing the current system providing for jurisdiction over offences at courts martial; Chapter 14 addresses possible options for changing the current punishment and sentencing system; Chapter 15 considers potential changes to the applicable laws of evidence within the court martial system; Chapter 16 deals with possible changes to the current appeals system; and, Chapter 17 addresses possible changes to better account the needs and interests of specially-affected groups (victims, aboriginal offenders, and young persons) within the court martial system.

Chapter 18 provides a brief conclusion to the report that highlights the broad scope of the report, and notes the significant input into the comprehensive review that was received from a wide variety of stakeholders, without which it would have been impossible to produce this report. This chapter also closes by reiterating the comprehensive review team's conclusion regarding the current court martial system, and by noting that the options discussed within Chapters 9-17 of the report appear to offer the potential for improvements to the system across the combined principles of effectiveness, efficiency, and legitimacy.

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Chapter 1 – Introduction

1.1 Background

On 1 September 1999, amendments to the *National Defence Act* (NDA) came into force that assigned to the Judge Advocate General (JAG) of the Canadian Forces (CF) a statutory responsibility to “conduct, or cause to be conducted, regular reviews of the administration of military justice.”¹

Since that time, a number of separately provided for external reviews² have been conducted that have looked into different aspects of the administration of military justice, including aspects of the summary trial and court martial systems,³ as well as the military prosecution and defence counsel services (DCS).⁴ Additional internal reviews by Office of the Judge Advocate General (OJAG) legal officers have also been undertaken on numerous occasions, and some of these reviews have led to the development of legislative proposals to amend provisions of the NDA relating to the administration of military justice.

JAGs have also fulfilled their responsibility for the conduct of regular reviews of the administration of military justice through Military Justice Stakeholder Interviews. For instance, in December 2012, an Office of the JAG team visited seven locations across Canada where they

¹ *National Defence Act*, RSC 1985, c N-5, s 9.2(2) [NDA].

² The *Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1988, c 35, s 96, required the Minister of National Defence to undertake these reviews and to cause the reports of these reviews to be laid before each House of Parliament. In other cases, purpose specific reviews have been initiated by, for instance, the Director of Military Prosecutions.

³ For example, in September 2003, the retired former Chief Justice of Canada, Antonio Lamer, completed the first independent review of Bill C-25. See: Canada, Department of National Defence, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.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* (Ottawa: Department of National Defence, 2003) [Lamer Report]. This review focused on three main areas: aspects of the administration of military justice, the Canadian Forces’ grievance process, and the military police complaints process. The report concluded “the military justice system is generally working well” with “room for improvement.” The report included 88 recommendations for improvement.

In December 2011, the second independent review of the provisions and operation of Bill C-25 was completed. This review dealt with aspects of the administration of military justice, the Canadian Forces’ grievance process, and the military police complaints process. It was conducted by retired Chief Justice of the Ontario Superior Court, the Honourable Patrick J. LeSage (Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage* (Ottawa: Department of National Defence, 2011) [Lesage Report]). The report again found that “regarding the operation of the military justice system, specifically the summary trial and court martial processes, the system is generally working well.” The report included 55 recommendations for improvement in a variety of areas.

⁴ See Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, Ottawa: Bronson Consulting Group, 31 March 2008 [Bronson Report (DMP)], and *External Review of Defence Counsel Services*, Ottawa: Bronson Consulting Group, 15 September 2009 [Bronson Report (DDCS)], respectively.

⁵ For instance, in 2004, a JAG Internal Review Team [JIRT] was created to provide a departmental response to the Lamer Report, *supra* note 3. Similarly, in 2010, a Military Justice Strategic Review Team was created that was responsible for the policy development behind Bill C-15, *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24.

spoke with representatives of the military chain of command, charge-layers, offenders, summary trial assisting officers, court martial referral authorities, and a variety of other military justice stakeholders, about the administration of military justice. Similar review initiatives took place in 2007 and 2010. These types of initiatives assist the Office of the JAG in understanding the administration of military justice from the perspectives of those who are often most immediately affected within the military justice system.

Since 1999, there have been a number of significant developments in Canada's military justice system. In terms of legislation, for instance, the *Strengthening Military Justice in the Defence of Canada Act* received Royal Assent on June 19, 2013.⁶ More recently, Bill C-71 (the *Victims Rights in the Military Justice System Act*, dealing with victims' rights and summary trial reform) was introduced in Parliament on June 15, 2015, yet died on the order paper shortly thereafter.⁷ Additionally, several important Court Martial Appeal Court (CMAC) decisions from the last decade have led to other legislative changes. For instance, the *R v Trépanier*⁸ case from 2008 led to the enactment of Bill C-60⁹ that same year, giving accused persons the right to choose between a court martial in front of a judge presiding alone, or a court martial comprised of a judge and a panel of military members as fact-finders. Similarly, in 2011, the *R v LeBlanc*¹⁰ case led to the enactment of Bill C-16¹¹ later that year, providing military judges with secure tenure until age 60, in recognition of the constitutional requirement for their judicial independence.¹²

In light of these elements of change, along with others that impact the court martial system, the JAG concluded that a proactive purpose-specific review of the court martial system was desirable. Consequently, on 13 May 2016, the JAG directed that a comprehensive review of the court martial system be conducted (see *Terms of Reference – Court Martial Comprehensive Review*, included at Annex A (ToR)).

1.2 Scope of the Comprehensive Review

The comprehensive review includes an assessment of the current court martial system's effectiveness, efficiency, and legitimacy. The review also includes an assessment of whether changes to any features of this system are required or advisable in order to promote greater systemic effectiveness, efficiency, or legitimacy. The review has included consideration of the following subject matter areas:

- The status and institutional structure of tribunals/courts with jurisdiction over service offences, including whether they ought to be: military or civilian in character; permanent or ad hoc entities; and, capable of deploying to austere or hostile environments inside and

⁶ *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24. As of the time of writing, much of this Act is not yet in force. However, it is anticipated that almost all provisions of the Act will be brought into force within approximately one year from the date on which this report is submitted.

⁷ Bill C-71, *The Victims Rights in the Military Justice System Act*, 2nd Sess, 41th Parl, 2015 (died on the order of paper).

⁸ *R v JSKT*, 2008 CMAC 3.

⁹ Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*,

¹⁰ *R v Leblanc*, 2011 CMAC 2.

¹¹ Bill C-16, *Security of Tenure of Military Judges Act*, SC 2011, c 22.

¹² *Ibid.*

outside of Canada;

- The status and institutional structure of a prosecution service with responsibility for prosecuting service offences, including whether this service ought to be military or civilian in character, and capable of deploying to austere or hostile environments inside and outside of Canada;
- The mechanism through which defence counsel services are provided to persons accused of committing service offences, including whether such services ought to be: provided by military or civilian lawyers; provided in whole or in part at public expense; and, capable of being provided within austere or hostile environments inside and outside of Canada;
- The substantive body of service offences, including full consideration of whether any current offences ought to be updated or repealed, and whether any additional offences ought to be added;
- The punishments, sanctions, and sentencing laws that apply in respect of service offences, including full consideration of whether any current sentencing provisions ought to be updated or repealed, and whether any additional sentencing options ought to be added;
- The laws of evidence that ought to apply at trials in respect of service offences;
- The rights, grounds, and mechanisms of appeal that ought to exist for the Crown and for persons subject to the Code of Service Discipline (CSD); and,
- The special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders.

1.3 Composition of the Court Martial Comprehensive Review Team (CMCRT)

The CMCRT was comprised of the following legal officers, assigned to the following roles:

- Col Rob Holman, CD, LL.B., LL.M: DJAG MJ and Director General (DG CMCRT);
- LCdr Mike Madden, CD, LL.B, LL.M.: Senior Legal and Policy Advisor;
- LCdr Clark Colwell, CD, LL.B, LL.M.: Legal and Policy Advisor; and,
- Lt(N) Amélie Aubut, LL.B, LL.M.: Legal and Policy Advisor.

This team brought a wide variety of useful qualifications and experiences to the comprehensive review. Some of these qualifications and experiences are listed below:

- All four members have graduate degrees in law;
- One member has a civil law degree in addition to a common law degree;

- One member also has a Masters degree in the humanities and has done extensive work in criminal law and procedure at the doctoral level;
- Three members have previously served as judicial law clerks at the Supreme Court of Canada (SCC), the Federal Court of Appeal, or the New Brunswick Court of Appeal, respectively;
- Three members have significant experience as legal officers working within the military justice system at the tactical level (either as a military prosecutor or a unit legal advisor);
- Two members have significant experience in providing military justice legal advice in the context of deployed operations; and,
- Three members have significant Canadian Armed Forces (CAF) experience as officers in either regular force or reserve force operational occupations within the Royal Canadian Navy (RCN), the Canadian Army (CA), or the Royal Canadian Air Force (RCAF) (specifically, within the Maritime Surface and Subsurface, Artillery, and Pilot officer occupations) prior to becoming legal officers.

Collectively, the CMCRT was well positioned to receive and understand input from a broad range of internal and external stakeholders, and to undertake the analysis and other work that was required as part of the comprehensive review.

1.4 Definitions and Terminology

As noted above, the CMCR is focused on questions of effectiveness, efficiency, and legitimacy relating to the court martial system.

For the purposes of the comprehensive review, the CMCRT has adopted the following meanings for these terms:

- **Effective:** successful in producing a desired or intended result;
- **Efficient:** capable of producing desired results without disproportionate expenditures of resources, time, or energy; and,
- **Legitimate:** capable of creating and sustaining public belief that a system is appropriate and proper for its purpose, often because of the system's conformity with recognized principles or accepted rules and standards. The term "public" in this context should be taken to include both the external Canadian and international public, and the internal CAF public.

Furthermore, because that the CMCRT was directed to consider a wide range of topics, and has examined a wide range of options for improving the court martial system, the CMCRT has adopted generalized definitions for several other terms that can usefully be applied to the full spectrum of

options and situations that the CMCRT has examined. Throughout this report, the following definitions will be used:

Court martial system / court martial-type system: refers to any justice system that applies to military personnel, and can try military offences. These terms should not necessarily be equated with any particular (e.g.: Anglo-American) model of court martial system, and should not be taken to imply any particular level of military involvement within the system. For instance, the term “court martial system” in this report would equally include systems like those used in Australia (where legally-trained military officers preside as Defence Force Magistrates and Judge Advocates), the United Kingdom (where civilian judges preside at the Court Martial), and Finland (where a specialized form of the ordinary civilian criminal courts – that includes two military members who preside together with one civilian judge – deals with offences by military personnel).

Military offences: refers to offences that fall within the jurisdiction of a court martial system. These offences typically involve more serious service misconduct, and any criminal misconduct, by military personnel. The term “military offence” in this report is not intended to include minor service misconduct that is non-criminal in nature, and that many military justice systems characterize as infractions which are dealt with through some form of summary hearing system.

Uniquely military offences: refers to military offences that are uniquely military in character, and that do not have close equivalents under civilian criminal law (e.g.: desertion, disobedience of a lawful command, misconduct in the presence of the enemy, and negligent performance of a military duty).

Civil offences / civilian offences: refers to military offences that are also criminal offences of general application under civilian law (e.g.: sexual assault, theft, possession of a controlled drug), but that are incorporated into a military penal statute.

Military personnel: refers to individuals who are subject to military law. In most countries with military justice systems that are similar to Canada’s, military personnel would include full-time members of the Regular component of the armed forces, and may also include:

- members of the part-time (Reserve) component of the armed forces;
- civilian personnel who are closely integrated into the armed forces on operations or active service;
- members of foreign armed forces who are closely integrated into the armed forces on exchange or secondment; and
- anyone engaged or employed with the armed forces who agrees to be subject to military law.¹³

¹³ See, for instance, NDA, *supra* note 1, ss 60(1)(f) and (j) for examples of how such individuals may be brought under the jurisdiction of a court martial system.

1.5 Assumptions

The CMCRT made a series of relatively uncontroversial assumptions in order to focus more of its attention on particularly challenging aspects of its review. Each of these assumptions, and the reasons for making the assumptions, are described below.

Assumption #1: A summary discipline system will continue to exist. The CMCRT assumes that some form of a commander-driven and commander-administered summary trial or summary hearing system for dealing with minor and non-criminal service misconduct by military personnel will continue to exist in Canada, separately and apart from any system for dealing with more serious and criminal-like misconduct by military personnel. More specifically, the team has assumed that a summary discipline system that is similar in principle to the system that was recently proposed in Bill C-71¹⁴ – that is to say, a system that provides for summary hearings only in respect of service-related “infractions” that are not offences, and that cannot lead to the imposition of any true penal consequences – will be established within the Canadian military justice system.

Such summary discipline systems exist as central features within national military justice systems of essentially every effective armed force around the world (regardless of the extent to which a court martial-type system has been retained in these national military justice systems). Furthermore, the continued need for a summary discipline system as a means of contributing to the effectiveness of the Canadian Armed Forces was affirmed through an abundance of public and internal consultation input that the CMCRT received.¹⁵ Finally, this assumption is consistent with Canada’s international legal obligations to ensure that members of its armed forces are subject to an internal discipline system.¹⁶

Assumption #2: Some uniquely military offences must continue to exist. The CMCRT assumes that Canadian law must continue to proscribe certain uniquely military offences, either within a national defence statute, or another penal statute.

This assumption is consistent with past Canadian jurisprudence relating to Canada’s parallel system of military justice,¹⁷ and with Canada’s international legal obligations (e.g.: to repress and punish grave breaches of the *Geneva Conventions*).¹⁸ It also reflects the prevalence of uniquely

¹⁴ *Supra* note 7.

¹⁵ This consultation is described in more detail, below, at Chapter 4 (Consultation).

¹⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1979) [AP I], art 43, requires states to ensure that their “armed forces shall be subject to an internal disciplinary system which, ‘inter alia’, shall enforce compliance with the rules of international law applicable in armed conflict.”

¹⁷ See, for instance, *R v Généreux*, [1992] 1 SCR 259, at 293: “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 serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.”

¹⁸ AP I, *supra* note 16, art 43(1):

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented

military offences within the domestic legal systems of essentially every state that has an effective armed force around the world (regardless of the extent to which a court martial-type system has been retained in these states). In order for an armed force to function effectively and to be properly subject to democratic control, the conduct of members of the armed force must be regulated by at least some additional offence-based prohibitions and requirements.

Assumption #3: It must be possible to impose true penal consequences. The CMCRT assumes that any Canadian court martial-type system will need to preserve the possibility for imposing true penal consequences in respect of a military offence. The Supreme Court of Canada has stated that – as a matter of Canadian constitutional law – “a true penal consequence is imprisonment or a fine which, having regard to its magnitude and other relevant factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance.”¹⁹

This assumption is consistent with existing realities both in Canada and around the world (where the possibility of imprisonment or some other form of incarceration exists in respect of many, if not all, military offences in most jurisdictions).

Assumption #4: Any proposed reforms must be constitutional, across the full spectrum of operations. On multiple occasions over the last several years, the Court Martial Appeal Court and the Supreme Court of Canada have upheld the constitutionality of different aspects of the court martial system. No challenges to its constitutionality are pending before any courts. The system is clearly consistent with the provisions of Canada’s Constitution. It remains imperative that constitutional risks within the court martial system be avoided.

Therefore, the CMCRT assumes that, in order to be considered relevant and feasible, any proposed changes to Canada’s court martial system must be based on constitutional grounds, capable of withstanding robust legal scrutiny. The CMCRT assumes this must be so, whether the system is functioning in peacetime or in armed conflict, in Canada or abroad, across the full spectrum of Canadian Armed Forces operations.

All of the above assumptions apply throughout the remainder of this report.

1.6 Method for the Comprehensive Review

Preliminary Remarks – Constitutionality of the Court Martial System. The CMCR commenced its review fully aware of the various constitutional challenges to aspects of the court

by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict”; see also, AP I, art 86(1): “The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

¹⁹ *Guindon v Canada*, 2015 SCC 41, at para 75. As the SCC reaffirmed in the *Guindon* case, the legal and constitutional significance of characterizing a punishment as a “true penal consequence” is that a person who is charged with an offence for which a true penal consequence can be imposed is entitled to the protection of all of the rights provided for under section 11 of the Charter of Rights and Freedoms, including the right to be tried within a reasonable time, and the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. This same significance attaches – regardless of the punishment that may be imposed – when a person charged with an offence is subjected to a proceeding that is criminal in nature.

martial system that have been advanced over the last decades, and was particularly aware of the two recent instances, in 2015 and 2016, where such constitutional challenges were unanimously rejected by the Supreme Court of Canada.²⁰ Based on these decisions and on numerous independent reviews of the court martial system over the years (discussed in more detail in Chapter 3, below), the CMCRT recognized clearly that – as of the time of writing – there is no constitutional necessity to change any particular aspect of the court martial system. Nonetheless, the CMCRT was obligated by its terms of reference to look beyond the constitutionality of the current court martial system. As noted in the Lamer Report, “[t]hose responsible for organizing and administering Canada’s military justice system have strived, and must continue to strive, to offer a better system than merely that which cannot be constitutionally denied.”²¹

Preliminary Remarks – Good Faith Effort and Intentions. The CMCRT was not undertaken in order to look into the levels of effort, motivation, or good intentions that are displayed by any particular actors within the court martial system. The CMCRT took it as a given that all of these actors were working hard in order to fulfill their respective roles within the system, subject to any limits or constraints that are imposed upon them within the current system – and this assumption was validated throughout the CMCRT process when it became apparent that all key stakeholders, including prosecutors, judges, defence counsel, and unit-level personnel were striving to their utmost to carry out their roles in the administration of military justice. Nonetheless, the CMCRT was obligated by its terms of reference to look beyond levels of effort and good faith, in order to assess effectiveness, efficiency, and legitimacy within the court martial system and – where any barriers to achieving optimized levels of these core principles could be identified – to develop options for eliminating or reducing such barriers. The CMCRT was undertaken with this fundamental approach in mind.

History. The CMCRT reviewed the history and evolution of the court martial system from its origins in British and Canadian law up to the present. With a complete understanding of how and why the system has developed over time, the CMCRT was better situated to assess the effectiveness, efficiency, and legitimacy of the system today, and to develop options for enhancing the system that are consistent with its contemporary purpose.

Review of Previous Critical Perspectives of the System. The CMCRT carefully studied a number of useful sources of information that have critically assessed or offered comment upon the current court martial system from 1997-2016. These sources were drawn from the following broad categories of material: objective, external, or independent reviews of the system; subjective and internal studies of the system; Canadian academic and media commentary on the system; and, international law discourse relevant to the system. Through awareness of how the court martial system has been perceived and assessed by others prior to the start of the current comprehensive review, the CMCRT was properly positioned to conduct a current assessment of the system’s effectiveness, efficiency, and legitimacy.

Consultation. The CMCRT engaged in extensive consultation with a variety of stakeholders from both within and outside of the CAF, in Canada and in other countries. Four types of consultation were undertaken: public consultation; internal CAF consultation; targeted expert consultation; and,

²⁰ *R v Moriarity*, 2015 SCC 55; *R v Cawthorne*, 2016 SCC 32.

²¹ Lamer Report, *supra* note 3 at 1.

other government department consultation. The purpose of this broad consultation effort was to ensure that the CMCRT – a relatively small and homogenous group of CAF legal officers – could take advantage of the opinions, ideas, experiences, and lessons learned that could be drawn from a much wider and more diverse group of contributors.

The consultation that was undertaken yielded many benefits:

- it informed, and often confirmed, aspects of the court martial system theory that was being developed;
- it provided frames of reference through which the CMCRT could assess the effectiveness, efficiency, and legitimacy of the current court martial system, or of any options under consideration for the enhancement of this system; and,
- it provided the CMCRT with a wide range of ideas for enhancement to consider in respect of almost every subject area under consideration by the team.

An overview of the consultation that was conducted, and of the results of this consultation, is contained within Chapter 4.

Comparative Analysis. The CMCRT studied in depth the court martial systems of ten other countries that all differ significantly in certain ways from the Canadian court martial system. The CMCRT then conducted in-depth technical visits with military justice experts from these countries, including lawyers, judges, administrators, and members of the military chain of command. In addition to these technical visits, the CMCRT also took advantage of opportunities for less in-depth knowledge exchanges with military justice experts from Singapore and Israel, as part of other visits to these places that were being conducted by OJAG legal officers. All of the information that was gained through these technical visits and knowledge exchanges fed into the CMCRT's comparative analysis of how other countries structure and operate their court martial systems. Many valuable insights and lessons were gained as a result of this comparative analysis, a complete description of which is included at Chapter 5.

Theory. Based on the CMCRT's historical, consultative, and comparative analyses, the CMCRT elaborated a theoretical model that attempts to describe what Canada's court martial system can and should be intended to accomplish. This model considers the fundamental purpose of the system, the key principles that must animate the system if it is to achieve its purpose, and the features that the system requires in support of each key principle. This model serves as the CMCRT's basis for assessing effectiveness, efficiency, and legitimacy (of both the existing court martial system and any proposed options to improve the system), and is described in detail in Chapter 6.

Assessment of the Current System. Informed by the CMCRT's historical, consultative, and comparative analyses, and the development of a mature court martial system theory, the CMCRT assessed the current court martial system's effectiveness, efficiency, and legitimacy. This assessment was undertaken in reliance on a combination of qualitative and quantitative data about the system that was collected in an effort to determine whether the current system was optimized

from the perspectives of effectiveness, efficiency, and legitimacy.

Since the members of CMCRT were not experts in quantitative data analysis and systemic performance measurement, the CMCRT enlisted the assistance of specialists from within the Department of National Defence's (DND) Assistant Deputy Minister (Review Services) (ADM (RS)) organization for the purposes of assisting the team in assessing the effectiveness and efficiency of the current court martial system. The assistance provided by these external experts proved invaluable. They successfully sought and obtained quantitative and qualitative data from internal CAF, and external Canadian and foreign sources, and performed analysis that was highly relevant to the CMCRT's review. They brought an informed and objective perspective to the CMCRT's work through their analysis and interpretation of the information that they collected.

The CMCRT concluded that Canada's court martial system is somewhat **effective** (mostly in terms of its ability to achieve a public order and welfare purpose), appears to have considerable room for improvements in **efficiency**, and, as a result, faces challenges to its **legitimacy**. Consequently, the CMCRT concluded that the court martial system would benefit from enhancements in certain respects. The CMCRT's full assessment of the current court martial system is provided within Chapter 7.

Development and Consideration of Options for Enhancement. Drawing upon the products of the CMCRT's historical, consultative, and comparative analyses, and its theory about what Canada's court martial system can and should strive to achieve, the CMCRT identified multiple options for each of the subject areas under review that would have the potential to enhance effectiveness, efficiency or legitimacy within the system. An introduction to the presentation of options is included at Chapter 8, followed by a description of each option and a discussion of how each option may impact various features of the court martial system within Chapters 9 - 17.

Legal Analysis. The purpose of the comprehensive review is to conduct a legal and policy analysis of all aspects of the CAF's court martial system and – where appropriate – to develop and analyse options to enhance the effectiveness, efficiency, and legitimacy of that system. The legal analysis that was necessary to support the policy analysis of this draft was undertaken by the Court Martial Comprehensive Review Team (CMCRT), with input from experts within the Department of Justice, and is not discussed within the body of the current report. This body of this report incorporates the CMCRT's complete policy analysis, including an assessment of the current court martial system and a full description of options that could, from a policy perspective, enhance the court martial system's effectiveness, efficiency, and legitimacy.

1.7 Conclusion

Consistent with amended terms of reference dated 12 July 2017 (see *Amended Terms of Reference – Court Martial Comprehensive Review*, included at Annex B), this report provides a policy-based analysis and discussion of options for enhancing the court martial system. Any decision to develop one of the included – or any other – options for improving the court martial system in more detail would need to be made by the JAG. Thus, while the Court Martial Comprehensive Review has been both thorough and extensive, it is just the first step in what may lead to other action that would more definitively advance changes to the court martial system.

In the chapters that follow, the CMCRT has worked to provide a critical blueprint for future evolution of the court martial system. This comprehensive review represents an important mechanism through which the JAG can continue to discharge her statutory responsibilities, and through which the Minister, CAF leaders and members, and the broader Canadian public can continue to have confidence in Canada's ability to operate a fair and effective court martial system.

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Chapter 2 – Historical Background and Overview of the Court Martial System

2.1 Introduction

Although this report is concerned with the effectiveness, efficiency, and legitimacy of the court martial system as it exists today, and as it may change in the future, it is also important to understand some of the historical and contextual background surrounding the court martial system. This chapter will describe the origins of Canada's court martial system, and will explain how and why the system has evolved over time. It will also provide an overview of how the court martial system currently operates. Ultimately, this chapter provides a baseline level of information about the court martial system to enable informed discussion about the current system and options for possible changes to that system.

2.2 History of the Court Martial System: Origins up to 1950

Monarchs, military generals, and political leaders have long recognized the importance of having a disciplined armed force, and therefore of the need for institutions to assist in maintaining discipline within an armed force. As Maurice de Saxe, Marshal General of France, noted in his 1732 treatise on the science of warfare, *Mes Rêveries*, military discipline “is the soul of armies. If it is not established with wisdom and maintained with unshakeable resolution you will have no soldiers. Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy.”

From earliest times – dating back to the era of the Crusades – British land forces at war or on operations outside of the country were governed by Articles of War, which were proclaimed by the Monarch as exercise of the Royal Prerogative.¹ The Articles created certain military offences (e.g.: stealing from a comrade), and prescribed the punishments (e.g.: having one's head shaven and a pot of boiling pitch poured thereupon).² Violations of the Articles eventually came to be tried in a court presided over by the Earl Marshal, who was effectively the military commander responsible for personnel matters.³ This court came to be known as the Court of the Marshal, and then simply as the “court martial.”⁴

The Articles of War did not apply during peacetime, which made it difficult for the Monarch to maintain a standing army.⁵ However, in 1689, the English Parliament passed a first *Mutiny Act* that created military offences and that applied during peacetime,⁶ which then made it possible for

¹ William J. Lawson, “Canadian Military Law” (1951) 9 Judge Advocate Journal 1, at 2.

² *Ibid.*

³ *Ibid* at 2-3.

⁴ Ronald Arthur MacDonald, *Canada's Military Lawyers* (Ottawa: Public Works and Government Services Canada, 2002), at 3 [MacDonald “CML”].

⁵ Lawson, *supra* note 1.

⁶ Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press, 1999) at 4 [Madsen].

the King to keep a disciplined standing army during such times of peace.⁷ The Articles of War continued to govern the army during times of war or extra-territorial deployments. The Royal Prerogative was eventually merged, in 1803, into legislation such that a single *Army Act* applied to govern the land forces during both times of peace and war.⁸

The Royal Navy evolved similarly: councils of war made up of senior officers, advised by a judge advocate, initially presided over alleged breaches of the Articles of War.⁹ These councils came to be known as Naval courts martial, and the process for trying offences was eventually provided for in legislation that created Naval courts martial in 1661.¹⁰

Canadian military law traces its origins to these British roots. Shortly after Confederation, the Canadian Army was first organized under the *Militia Act* of 1868.¹¹ This legislation served to incorporate the existing British *Army Act* into Canadian law, just as equivalent British laws relating to the governance of the Canadian Navy and Air Force were adopted almost in their entirety into Canadian law in 1910 and 1919, respectively.¹² In the cases of the Canadian Army and Air Force, the essentially British legislation continued to apply until 1950.¹³ In 1944, however, the Canadian Parliament passed a *Naval Services Act* that included its own disciplinary code for the Royal Canadian Navy, which was then superseded shortly afterward by the single *National Defence Act* that Parliament passed to govern all three services in 1950.¹⁴

From the time of the first courts martial up until 1950, control of the proceedings remained almost exclusively in the hands of commissioned officers within the armed forces, who were ultimately responsible for the discipline of their personnel. The charges that led to courts martial originated within the armed forces, and the officers who formed part of a court martial would decide on the charges without necessarily having the assistance of a trained lawyer or judge (“judge advocate”) during the trial to instruct them on the law.¹⁵ Furthermore, there was generally no way to appeal from the decision of a court martial.¹⁶ This process for dealing with military offences was consistent with the prevailing attitudes of the time – at least within the armed forces – that military discipline was the prerogative of commanders, and that “the soldier should learn to look to his officer alone for justice.”¹⁷

Many of the concepts that are now widely acknowledged as being necessary in order to guarantee fair trials were not entrenched within the court martial system during this period. For instance,

⁷ Lawson, *supra* note 1.

⁸ *Ibid.*

⁹ *Ibid* at 3.

¹⁰ Ronald Arthur MacDonald, “The Trail of Discipline: The Historical Roots of Canadian Military Law” (1985) 1 JAG Journal 1, at 6-7 [MacDonald “Trail of Discipline”].

¹¹ James B. Fay, “Canadian Military Criminal Law: An Examination of Military Justice” (1975) 23 Chitty’s LJ 120, at 121-122.

¹² *Ibid* at 122.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See generally MacDonald, “CML”, *supra* note 4 at 6-9.

¹⁶ See Lawson, *supra* note 1 at 10-11 (where the author describes the formation of the civilian “Court Martial Appeal Board” and the associated right of an offender to appeal to that Board that was first created within the 1950 *National Defence Act*.)

¹⁷ Madsen, *supra* note 6 at 11.

one president of a district court martial of a Canadian soldier at Shorncliffe in 1917 expressed his views about the right of an accused person to make a full answer and defence through counsel as follows:

Whatever the custom may be in Civil Courts, it should be clearly understood by all who appear as Counsel that to endeavour to persuade a Court that a man is not guilty while the evidence decidedly shows that he is, or to try and fog the court by irrelevant cross-examination and the raising of technical points on which a man might get off in a Civil Court, is not in accordance with the spirit of the law as laid down in the Army Act; further to try and get a man off on a purely technical point is tantamount to encouraging Military Crime which it is the duty of every Officer to keep down and to prevent in every way possible.¹⁸

As this example highlights, the focus of a court martial was placed far more on discipline than on what we would now call justice.

Notwithstanding this reality, military law did evolve over time, largely to provide for more humane and civilized treatment of the soldiers. For instance, the punishment of flogging and other corporal punishments were largely abolished.¹⁹ Additionally, legal officers were increasingly and more formally involved in aspects of superintendence of the administration of the court martial system,²⁰ by teaching and providing instruction to officers on the system, and by issuing guidebooks to the commanders who used the system.²¹ Nonetheless, the court martial system during this period was clearly a military commander's instrument for maintaining discipline.

2.3 History of the Court Martial System: 1950-1999

After the end of the Second World War, there was a strong interest in reforming military law within Canada, the United States, and the United Kingdom. In Canada, several factors seem to have contributed to this reform movement. First, the Minister of National Defence at the time, Brooke Claxton, was a veteran of the First World War who had a strong interest in military law and in efforts to consolidate and economize within his Cabinet portfolio.²² Second, high-profile unrest among the lower ranks in the Royal Canadian Navy had made it clear – after the report of the Mainguy Commission²³ – that “a gulf had developed between Canadian officers and the lower

¹⁸ NAC, RG 9 III B1 series 2, vol 624, file C-248-2, Major J.N.H. D'Aeth, Shorncliffe Command to Canadian Headquarters, 21 August 1917, cited in Madsen, *supra* note 6 at 45.

¹⁹ MacDonald, “Trail of Discipline”, *supra* note 10 at 9.

²⁰ MacDonald, “CML”, *supra* note 4 at 50.

²¹ Madsen, *supra* note 6 at 82-83.

²² *Ibid* at 99-100.

²³ *REPORT on certain “Incidents” which occurred on board H.M.C. Ships ATHABASKAN, CRESCENT and MAGNIFICENT and on other matters concerning THE ROYAL CANADIAN NAVY made to the Minister of National Defence by a Commission duly appointed for the above purposes and consisting of: Rear-Admiral E.R. MAINGUY, R.C.N., Chairman; L.C. AUDETTE, Esquire, Commissioner; LEONARD W. BROCKINGTON, Esquire, Commissioner.* (Ottawa: Department of National Defence, 1949). This commission looked into incidents that could have been characterized as three low-level mutinies aboard Canadian warships, and essentially concluded that the incidents were a result of poor communication between the lower and more senior ranking naval personnel, a cultural divide between these classes of personnel, and a lack of any true Canadian (as opposed to British) identity within the Navy.

deck”,²⁴ including in respect of the administration of discipline within the Navy. Finally, military and political authorities in Canada were aware that efforts were in place in the United States to enact a Uniform Code of Military Justice (that was ultimately passed on 5 May 1950), and in the United Kingdom to create an appeal mechanism for courts martial while also modernizing the scale of punishments in that jurisdiction.²⁵

The result of this pressure to reform in Canada was ultimately seen in the *National Defence Act* that received Royal Assent on 30 June 1950.²⁶ This Act was the product of years of policy work and months of legislative drafting effort by officials from within the Department of National Defence, the Department of Justice, and the Canadian Forces.²⁷ The Act also received significant scrutiny in Parliament, where Parliamentarians recommended changes to the law as they “sought to protect and increase the rights of individuals under military law.”²⁸

The 1950 NDA served many functions: it amalgamated at least six other statutes (i.e.: the *Canadian Militia Act*, *Naval Service Act*, *Royal Canadian Air Force Act*, and *Department of National Defence Act*, and the United Kingdom’s *Army Act* and *Air Force Act*) into a single law; it patriated all laws governing the Canadian Forces from the United Kingdom into one Canadian statute; it created a uniform Code of Service Discipline that applied equally to all three services; and, it modernized many aspects of military justice.²⁹

With regard to courts martial in particular, the Act represented a major evolution toward standards of justice that applied in civilian criminal courts in a number of ways. For instance, as the JAG of the day noted, the 1950 NDA created a statutory right of appeal from the findings and sentences of courts martial to the Court Martial Review Board; it provided for jurisdiction to try ordinary civil offences at courts martial, but also asserted the supremacy of civil courts; it aligned many punishments and trial procedures more closely with civilian equivalents; it required the convening authority to appoint a legally-trained “judge advocate” to officiate at every General Court Martial (where more senior personnel and more serious offences would be tried); and, it provided for a power to order a new trial in the event that new evidence is discovered.³⁰

However, many of the more command-centric features of the court martial system remained in place. For instance, no judge advocate needed to be appointed to officiate at Disciplinary Courts Martial (where only punishments of dismissal with disgrace, imprisonment for less than 2 years, and lesser punishments could be imposed);³¹ the military commander who had authority to convene a court martial would also be responsible for appointing the military officers who would

²⁴ Madsen, *supra* note 6 at 103.

²⁵ Lawson, *supra* note 1 at 6.

²⁶ *National Defence Act*, SC 1950, c 43 [1950 NDA].

²⁷ Lawson, *supra* note 1 at 5-7.

²⁸ Madsen, *supra* note 6 at 107.

²⁹ See, for instance, *House of Commons Debates*, 21st Parl, 2nd Sess, Vol II (18 April 1950) at 1681-82 (Hon. Brooke Claxton, Minister of National Defence), for an articulation of the eleven main purposes of the legislation that was provided by the sponsoring Minister at the time that the bill was being debated in Parliament.

³⁰ Lawson, *supra* note 1 at 7-11.

³¹ See 1950 NDA, *supra* note 26, s 147 (providing that a convening authority “may” appoint a judge advocate to officiate at a Disciplinary Court Martial), as contrasted with s 141 (providing that a convening authority “shall” appoint a judge advocate to officiate at a General Court Martial).

serve as members of the court martial to try the charges;³² and, military commanders had the power to overrule decisions of courts martial³³ (because “it was not considered practical to remove from higher authority the power to overrule courts martial in respect of findings”³⁴). Additionally, although the prosecutor and defence counsel were generally recommended to the convening authority for appointment from within the Office of the JAG (and were usually Deputy Judge Advocates from the local base or region), the convening authority “retained control over the actions that the prosecutor might take. Military prosecutors did not have the broad discretion that is standard for civilian prosecutors.”³⁵

This 1950 version of the NDA remained largely unchanged for almost a half-century, with only minor changes made to the court martial system at infrequent intervals between 1950 and 1998. In 1955, with an increasing presence of Canadian Forces members and their dependants in Europe, the Act was amended to provide Canadian civilian courts with jurisdiction to deal with any act outside of Canada by a person subject to the Code of Service Discipline (including dependants) that, if committed in Canada, would be an offence.³⁶ This change to the law resulted in at least two cases wherein a civilian judge was brought from Canada to try homicide cases in Europe.³⁷ In 1959, a codified set of regulations, the *Military Rules of Evidence*, were brought into force after having been drafted by three law professors.³⁸ In 1967, the law was amended to create a “Special General Court Martial” consisting only of a military Presiding Judge, with jurisdiction to try civilians who were subject to the Code of Service Discipline³⁹ (practically, as an alternative to flying a civilian judge into Europe to deal with offences committed by the dependants of military personnel).⁴⁰ At the same time, a provision of the NDA that had previously only permitted trials by a “Standing Court Martial” (consisting of a President – who would be an officer and a lawyer of at least 3 years standing at the bar – presiding alone) in times of emergency⁴¹ was amended to provide for the establishment of Standing Courts Martial at all times.⁴²

Between 1990 and 1992, as a result of constitutional litigation at the Court Martial Appeal Court⁴³ and at the Supreme Court of Canada⁴⁴ relating to the right of accused persons to a fair trial by an independent and impartial tribunal, the NDA and associated regulations were amended in a number of ways. For instance, the Act was amended to prevent a court martial convening authority from also appointing the members of a court martial panel.⁴⁵ The regulations were amended such that judge advocates at General Courts Martial were drawn from officers who were first appointed to the position of a military trial judge for a period of two to four years, and were appointed for a

³² *Ibid*, s 138(2).

³³ *Ibid*, s 171.

³⁴ Canada, Department of National Defence, *National Defence Act: Explanatory Material* (Ottawa: National Defence Headquarters, 1950) at 171-171A.

³⁵ MacDonald, “CML”, *supra* note 4 at 75.

³⁶ SC 1995, c 28, s 15; now reflected in *National Defence Act*, RSC 1985, c N-5, s 276 [NDA].

³⁷ MacDonald, “CML” *supra* note 4 at 88.

³⁸ *Ibid* at 88-89.

³⁹ *Canadian Forces Reorganization Act*, SC 1966-67, c 96, s 43.

⁴⁰ MacDonald, “CML”, *supra* note 4 at 92.

⁴¹ 1950 NDA, *supra* note 26, s 149.

⁴² *Canadian Forces Reorganization Act*, SC 1966-67, c 96, s 42.

⁴³ *R v Ingebrigtsen*, [1990] CMAJ No 2; *R v Généreux*, [1990] CMAJ No 1.

⁴⁴ *R v Généreux*, [1992] 1 SCR 259 [Généreux].

⁴⁵ *An Act to Amend the National Defence Act*, SC 1992, c 16, s 2.

particular trial by the Chief Military Trial Judge instead of the Judge Advocate General.⁴⁶ The regulatory amendments also prohibited an officer's performance as a member of a General Court Martial (GCM) or as a military trial judge from being used to determine the officer's qualification for a promotion or rate of pay.⁴⁷ All of these changes were intended to ensure that the court martial system respected fundamental rights guaranteed by the recently adopted *Canadian Charter of Rights and Freedoms*.

Many of the changes that were made between 1990 and 1992 were precipitated by issues that were explicitly discussed by the Supreme Court of Canada in its *R v Généreux* decision.⁴⁸ In that decision, Généreux challenged the constitutionality of his trial by court martial under the pre-1990 legal regime. Specifically, he alleged (among other things) that his right under s. 11(d) of the *Charter* to be tried by an independent and impartial tribunal was violated because of the various connections and influences that senior leaders of the Canadian Forces had with the judge advocates who preside at courts martial, and with the members of a General Court Martial panel. A majority of the SCC agreed that there were valid reasons for the existence of a separate and parallel military justice system:

[T]he military has its own Code of Service Discipline to allow 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 serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.⁴⁹

Additionally, the majority made the following observation:

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.⁵⁰

However, the SCC majority found that several features of the system as it existed at the time infringed upon constitutionally-required elements of judicial independence. In particular, when

⁴⁶ PC 1990-2782 of 20 Dec 90, adding articles 101.13-101.16 of *Queen's Regulations and Orders for the Canadian Forces* [QR&O], and amending articles 111.22, 111.41, 113.561 (among others) in order to provide for more military judicial control over the assignment of judge advocates at courts martial.

⁴⁷ *Ibid*, amending Chapter 26 of QR&O to provide protection for legal officers (art 26.10) and members of a General Court Martial (art 26.11) against improper consideration of their performance at a court martial for the purposes of pay or promotion.

⁴⁸ Généreux, *supra* note 44.

⁴⁹ *Ibid* at 293.

⁵⁰ *Ibid*. The idea that the purpose of the military justice system is to maintain discipline, efficiency, and morale in the military was recently affirmed by a unanimous SCC in *R v Moriarty*, 2015 SCC 55, at para 46.

assessing whether sufficient institutional independence existed within the court martial system, the majority commented as follows:

[M]ilitary officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. This close involvement is, in my opinion, inconsistent with s. 11(d) of the Charter. It undermines the notion of institutional independence that was articulated by this Court in *Valente*. The idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system. The principle of institutional independence, however, requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function. It is important that military tribunals be as free as possible from the interference of the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces.⁵¹ (emphasis added)

However, the majority noted that recent regulatory changes (made after G  n  reux's court martial but before his appeal to the SCC) "have gone a considerable way towards addressing the concerns" that the SCC majority identified in that case.⁵² The *G  n  reux* case has not subsequently been overruled or reconsidered, and remains the lengthiest and most wide-ranging decision from the SCC on a military justice topic.

At around the same time that G  n  reux's appeal was making its way to the SCC, other consequential amendments were made to the NDA. In 1991, as part of a set of comprehensive changes to the *Criminal Code*'s mental disorder regime that was necessary after the Supreme Court of Canada's decision in *R v Swain*,⁵³ the NDA was amended to ensure that a similar regime was in place in respect of trials by court martial.⁵⁴ Similar consequential amendments were made to the NDA in 1995 when Parliament passed a law regulating many aspects of firearms that, among other things, empowered courts martial to make prohibition orders in respect of convictions for certain listed offences, under certain conditions.⁵⁵ The orders would prohibit offenders from possessing any firearm, crossbow, prohibited weapon, or restricted weapon.

As the above discussion suggests, however, the core nature of courts martial between 1950 and the mid-1990s (throughout the Korean War, the Cold War, the first Persian Gulf War, and numerous peacekeeping operations) remained substantially consistent. Only relatively narrow incremental advances to the law took place during this period within a system that remained fundamentally command-centric.

2.4 History of the Court Martial System: 1999 up to the Present

Major changes to the Canadian court martial system took place at the end of the Twentieth Century, in the wake of significant public and government attention that was focused on misconduct and

⁵¹ G  n  reux, *supra* note 44 at 308.

⁵² *Ibid* at 287.

⁵³ [1991] 1 SCR 933.

⁵⁴ *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and Young Offenders Act in consequence thereof*, SC 1991, c 43.

⁵⁵ *Firearms Act*, SC 1995, c 39.

indiscipline within the Canadian Forces. As is now well known and accepted, the Canadian Airborne Regiment's 2 Commando that deployed to Somalia as part of a United Nations peacekeeping mission in 1993 showed substantial signs of indiscipline, criminality, and racism even before the unit deployed.⁵⁶ These types of misconduct manifested through the theft of pyrotechnics, the setting on fire of a duty NCO's car, and the display of Confederate flags.⁵⁷ As is also now well known, numerous members of the unit were involved during the deployment in the capture, torture, and killing of a Somali teenager, Shidane Arone. This abuse was condoned, and allegedly ordered, by senior officers.⁵⁸

A federal Commission of Inquiry was ordered into the deployment of the Canadian Forces to Somalia, and this Commission ultimately dedicated lengthy portions of its report to the topic of military justice.⁵⁹ The report made 45 detailed recommendations about changing the military justice system.⁶⁰ At approximately the same time as this Commission was concluding its work in 1997, the Minister of National Defence created a Special Advisory Group on Military Justice and Military Police Investigation Services chaired by former Chief Justice of Canada, the Right Honourable Brian Dickson. This Special Advisory Group produced a lengthy report for the Minister on 14 March 1997 that included 35 recommendations for change.⁶¹

As a result of the recommendations contained within these two reports, and several other factors, the Government introduced Bill C-25 on 4 December 1997.⁶² This bill was subsequently passed by Parliament, and received Royal Assent on 1 December 1998. Provisions of the bill came into force on 1 September 1999.

Bill C-25 represented the most extensive set of amendments to the NDA since it was first enacted in 1950. With respect to the court martial system, the bill made major institutional changes,

⁵⁶ See generally, Canada, Department of National Defence, *Dishonoured Legacy: the Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Canadian Government Publishing, 1997) [Som Com Report].

⁵⁷ Donna Winslow, "Misplaced Loyalties: The Role of Military Culture in the Breakdown of Discipline in Two Peacekeeping Operations" (2004) 6:4 Journal of Military and Strategic Studies 1, at 10:

Prior to deployment, a number of incidents in October, 1992, indicated a significant breakdown of discipline in Two Commando during the critical period of training and preparation for operations in Somalia. Military pyrotechnics were discharged illegally at a party in the junior ranks' mess; a car belonging to the duty NCO was set on fire; and various Two Commando members expended illegally held pyrotechnics and ammunition during a party in Algonquin Park, near their base in Petawawa. The illegal possession of these pyrotechnics was the result of theft from DND and the making of false statements. A search conducted on the soldiers' premises uncovered ammunition stolen from DND, as well as 34 Confederate flags. When I interviewed officers from the other commandos they told me that they were aware of the problems in Two Commando but that it was "none of their business."

⁵⁸ Som Com Report, *supra* note 56.

⁵⁹ *Ibid* at Vol 5, Chap 40.

⁶⁰ *Ibid*.

⁶¹ Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, presented to the Minister of National Defence on March 14, 1997, by the Right Honourable Brian Dickson, Lieutenant-General Charles Belzile, and Bud Bird* (Ottawa: Department of National Defence, 1997).

⁶² Department of National Defence, Press Release, NR-97.063, "Defence Minister Introduces Amendments to the National Defence Act in Parliament" (4 December 1997).

including the following:

- It made numerous changes to the Minister's quasi-judicial roles and discretionary oversight powers. For instance, the power of review of court martial decisions, and the power to appoint military judges, shifted from Minister to the Governor in Council;
- It provided a statutory basis for independent military judges, in terms of tenure, remuneration, and removal only through an inquiry committee process;
- It shifted prosecution functions to a new independent Director of Military Prosecutions (DMP), away from the supervision of senior military authorities, in a way that is now in direct parallel with the federal civilian model;
- It created an independent Director of Defence Counsel Services (DDCS), who is responsible for the provision of legal counsel to those accused persons who face courts martial;
- It shifted responsibility for convening courts martial and appointing military panel members to an independent Court Martial Administrator (CMA) (a civilian who works under the supervision of the Chief Military Judge (CMJ)) out of the hands of senior military authorities;
- It shifted responsibility for the determination of sentence from the panel of military members to the military judge presiding at a court martial;
- It eliminated the death penalty and the hard labour component of the punishment of imprisonment; and,
- It eliminated the previous 3-year limitation period for service offences tried by courts martial.

The bill also made a number of other changes to different parts of the NDA dealing with military grievances and military police (MP), among other things. Significantly, the bill also included a provision that required the Minister to have the provisions of the bill independently reviewed within 5 years, and to report to Parliament on that review.

Bill C-25 was important to the evolution of the court martial system because it established institutions and independence mechanisms within the system that substantially aligned it with Canada's civilian criminal justice system, while preserving many of the historic aspects of a court martial, such as the involvement of a panel of military members as fact-finders.

The first independent review of the provisions of Bill C-25 was conducted by former Chief Justice of Canada, the Right Honourable Antonio Lamer, in 2003.⁶³ This review focused on three main

⁶³ Canada, Department of National Defence, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25 An Act to amend the National Defence Act and to make*

areas: aspects of the administration of military justice, the Canadian Forces' grievance process, and the military police complaints process. The report of this review concluded that "the military justice system is generally working well" with "room for improvement."⁶⁴ The report included 88 recommendations for improvement.

From 2003 onward, successive governments made several separate, but unsuccessful, attempts to amend the NDA in order to implement recommendations that were contained in the Lamer Report.⁶⁵ Ultimately, Bill C-15 – addressing many of the recommendations contained in the Lamer Report – was introduced in the House of Commons on October 7, 2011, and received Royal Assent on 19 June 2013.⁶⁶ Though it took several years, with the enactment of Bill C-15 in June 2013, most of the outstanding recommendations from the Lamer Report were accepted by the Government and will be implemented.

Broadly speaking, Bill C-15 makes the following changes that are relevant within the court martial system:

- It provides for new options within the sentencing process, such as absolute discharges, intermittent sentence of imprisonment and detention, restitution orders, and the submission of Victim Impact Statements;
- It provides for the fundamental purposes (discipline, efficiency, morale, and just, peaceful, safe society) of sentencing, and the principles and objectives of sentencing, that parallel in many ways equivalent provisions of the *Criminal Code*;
- It provides for greater institutional independence of the Director of Military Prosecutions and the Director of Defence Counsel Services through authority for Treasury Board regulations to establish pay, and for the creation and process of inquiry committees regarding removal of these individuals from office for cause;
- It expands the pool of members who are eligible to sit on court martial panels to include Sergeants and Petty Officers Second Class;
- It provides in statute for the process to be followed – equivalent to the process under the *Criminal Code* – at a hearing after a finding of unfit to stand trial or not responsible on account of mental disorder.
- It provides for the establishment of a Reserve Force military judges panel (who would conceivably be relied upon somewhat like deputy judges are relied upon in the civilian

consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35 (Ottawa: Department of National Defence, September 2003).

⁶⁴ *Ibid* at 1.

⁶⁵ Bill C-7, *An Act to Amend the National Defence Act*, 1st Sess, 39th Parl, 2006; Bill C-45, *An Act to Amend the National Defence Act and to Make Consequential Amendments to other Acts*, 2nd Sess, 39th Parl, 2008; Bill C-41, *Strengthening Military Justice in the Defence of Canada Act*, 3rd Sess, 40th Parl, 2010. All of these bills died on the order paper before enactment.

⁶⁶ Bill C-15, *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24.

justice system, presiding and being compensated on a *per diem* basis).

Like Bill C-25 in 1999, Bill C-15 took further steps to align many features of the court martial system with features of the civilian criminal justice system, and strengthened the independence of key actors within the system.

While Bill C-15 was progressing through Parliament, the second independent review of the provisions and operation of Bill C-25 was completed in December 2011. This review dealt with aspects of the administration of military justice, the Canadian Forces' grievance process, and the military police complaints process. It was conducted by retired Chief Justice of the Ontario Superior Court, the Honourable Patrick J. LeSage.⁶⁷ The report again found that "regarding the operation of the military justice system, specifically the summary trial and court martial processes, the system is generally working well."⁶⁸ The report included 55 recommendations for improvement in a variety of areas. Many of the LeSage Report recommendations that the Government has accepted have already been implemented through non-legislative means. Others would have been addressed in Bill C-71 (*Victims Rights in the Military Justice System Act*),⁶⁹ but the bill died on the order paper in August 2015 when Parliament dissolved for a federal general election.

Apart from Bill C-25 and its legacy of independent reviews, and Bill C-15 which implemented recommendations of the first independent review, the NDA has been amended on several other occasions between 1999 and the present, for two main reasons: either as part of more broad civilian criminal justice system reforms that required consequential amendments to the NDA, or in response to constitutional rulings from the Court Martial Appeal Court.

In terms of consequential amendments, Bill S-10 (which received Royal Assent on 29 June 2000)⁷⁰ made amendments to the *Criminal Code* and the *DNA Identification Act*, but also to the NDA in order to authorize military judges to issue DNA warrants in the investigation of designated service offences. It also authorizes military judges to order military offenders convicted of a designated offence to provide samples of bodily substances for the purpose of the national DNA data bank. These authorities are similar to those that may be exercised by a provincial court judge under the *Criminal Code*.

Similarly, Bill S-3 (which received Royal Assent on 29 March 2007)⁷¹ made amendments to the NDA in order to create a scheme that requires offenders who have committed service offences of a sexual nature to register in a national database under the *Sex Offender Information Registration Act*. The new scheme paralleled the existing scheme in the *Criminal Code*. At the same time, the bill also made certain amendments to the *Criminal Code* and the *Sex Offender Information*

⁶⁷ Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage* (Ottawa: Department of National Defence, 2011).

⁶⁸ *Ibid* at 13.

⁶⁹ Bill C-71, *The Victims Rights in the Military Justice System Act*, 2nd Sess, 41th Parl, 2015 (died on the order of paper).

⁷⁰ *An Act to amend the National Defence Act, the DNA Identification Act and the Criminal Code*, SC 2000, c 10.

⁷¹ *An Act to amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act*, SC 2007, c 5.

Registration Act to enhance the administration and enforcement of the registration scheme for sex offender information.

Also in 2007, Bill C-18 (which received Royal Assent on 22 June of that year)⁷² made amendments to the *Criminal Code*, the *DNA Identification Act*, and the NDA, all in order to update the DNA identification regime by providing more detail to the regime, and by creating an offence for failure to comply with a DNA order.

In 2010, Bill S-2 (which received Royal Assent on 15 December of that year)⁷³ made amendments to the *Criminal Code*, the *Sex Offender Information Registration Act* and the NDA to enhance police investigation of crimes of a sexual nature and allow police services to use the national database proactively to prevent crimes of a sexual nature. It also amended the *Criminal Code* and NDA to provide that sex offenders who are subject to a mandatory requirement to comply with the *Sex Offender Information Registration Act* are also subject to a mandatory requirement to provide a sample for forensic DNA analysis.

In 2011, Bill C-48 (which received Royal Assent on 23 March of that year)⁷⁴ made consequential amendments to the NDA as part of a set of changes to the *Criminal Code* in order to ensure that the ordinary rule at section 149 of the NDA – that successive sentences are to run concurrently – is subject to section 745.51 of the *Criminal Code*, which permits a judge to order that parole ineligibility periods for successive murder sentences are to run consecutively.

Finally in 2012, Bill C-10 (which received Royal Assent on 13 March of that year)⁷⁵ made wide ranging changes to different aspects of the civilian criminal justice system, but also made consequential amendments to NDA's weapons prohibition order regime that was created in 1995. Specifically, the bill expanded the list of offences for which a weapons prohibition order may be made under the NDA to include more offences under the *Controlled Drugs and Substances Act*, in a way that mirrors the *Criminal Code*.

In addition to all of the above consequential amendments, the NDA was amended twice between 1999 and the present as a result of constitutional decisions of the Court Martial Appeal Court. In the CMAC's decision in *R v Trépanier* (2008),⁷⁶ the Court found the provision of the NDA that gave the Director of Military Prosecutions the discretion to choose the type of court martial (i.e.: a trial by military judge sitting alone or a trial by a military judge and a panel of military members who determine the verdict) to be unconstitutional, and declared the provision to be of no force or effect. The Court reasoned that the choice between modes of trial was a tactical element of an accused person's right to make a full answer and defence. The Court further stated that, where legislation provides for such a choice, then the *Charter* requires that the choice be made by an accused person rather than the Crown. As a result of this finding, Parliament passed remedial legislation within a matter of two months, in the form of Bill C-60.⁷⁷ Bill C-60 amended the NDA

⁷² *An Act to amend certain Acts in relation to DNA identification*, SC 2007, c 22.

⁷³ *Protecting Victims From Sex Offenders Act*, SC 2010, c 17.

⁷⁴ *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, SC 2011, c 5.

⁷⁵ *Safe Streets and Communities Act*, SC 2012, c 1.

⁷⁶ *R v JSKT*, 2008 CMAC 3 [Trépanier].

⁷⁷ *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, SC 2008, c 29.

in a way that was consistent with the *Criminal Code*'s structure by providing for an accused person's election for trial by Standing Court Martial or General Court Martial in most cases, and eliminating the two other types of courts martial (Special General Court Martial and Disciplinary Court Martial) that had previously existed. The bill made other amendments related to the CMAC's decision, creating a requirement for unanimity in General Court Martial panel decisions on findings of guilty, not guilty, unfit to stand trial, and not responsible on account of mental disorder, where previously only a majority vote was required (in much the same way as a unanimous jury verdict on these decisions is required in civilian criminal courts in Canada).

In 2011, the CMAC, in *R v Leblanc*,⁷⁸ held that provisions of the NDA and associated regulations that permitted military judges to be appointed for fixed five-year terms, and required them to be reappointed by the Governor in Council if they wished to serve additional terms, were unconstitutional, and were therefore of no force or effect. The Court found that these provisions infringed the constitutional principle of judicial independence, and therefore violated an accused person's right to a fair trial by an independent and impartial tribunal that is guaranteed under the *Charter*. In response to this decision, Parliament swiftly passed Bill C-16,⁷⁹ which amended the NDA to provide that military judges are now appointed by the Governor in Council until a maximum retirement age of 60, or until they release from the Canadian Forces. This amendment ensures that military judges have sufficient security of tenure – subject only to removal for cause on the recommendation of a Military Judges Inquiry Committee – to perform their functions with the degree of judicial independence that the *Charter* requires. As the judge of the CMAC who wrote the Court's decision in *Leblanc*, Mr. Justice Létourneau, subsequently noted (while writing extra-judicially),

[M]ilitary judges have now acquired the last missing component of their judicial independence. They are appointed during good behaviour and their retirement is set at age 60. [...] [M]ilitary judges were able to secure the guarantees of judicial independence necessary to the exercise of a jurisdiction in criminal law akin to provincial courts and superior courts of criminal jurisdiction.⁸⁰

As all of the above discussion illustrates, Canada's court martial system has evolved significantly over time. The decades since the adoption of the *Charter*, in particular, have represented a period of relatively constant progression away from the system's origins as a simple and command-centric tool for dealing with serious internal disciplinary matters, to a complex and sophisticated form of military criminal justice system that increasingly incorporates standards, features, and design elements that are drawn from the civilian criminal justice system.

2.5 Overview of the Current Court Martial System

The discussion that follows will briefly describe key features of the court martial system as it exists today.

2.5.1 Jurisdiction – People

⁷⁸ *R v Leblanc*, 2011 CMAC 2.

⁷⁹ *Security of Tenure of Military Judges Act*, SC 2011, c 22.

⁸⁰ Gilles Létourneau, *Introduction to Military Justice: An Overview of the Military Penal Justice System and its Evolution in Canada* (Montreal: Wilson & Lafleur ltée, 2012), at 47.

Section 60 of the NDA provides that the Code of Service Discipline applies to Regular Force (full-time) military members at all times and to Reserve Force (generally more occasional and part-time) military members in specified circumstances, such as when they are on duty, in uniform, or in a CAF vehicle, among other circumstances. The CSD can also apply to civilians in limited circumstances, such as while accompanying a CAF unit that is on service or active service. As was mentioned above, the provision of the NDA that creates this jurisdiction over civilians has been used to try dependents of CAF members who accompany the CAF member on operational service outside of Canada.

2.5.2 Offences

The NDA characterizes all offences under the CSD as “service offences.”⁸¹ For conceptual purposes, there are three broad groups of service offences: uniquely military offences; civil offences; and, foreign offences.

Sections 72-129 of the NDA create a series of uniquely military offences, such as desertion, disobedience of a lawful command, misconduct in the presence of the enemy, and negligent performance of a military duty. Under Canadian law, civilian courts have no jurisdiction to try these uniquely military offences, although a court martial has jurisdiction to deal with all of these offences.

Section 130 of the NDA provides for jurisdiction over a second group of service offences that one might refer to as civil offences. By virtue of section 130 of the NDA, all civilian offences under the *Criminal Code* and other federal laws can also be charged as service offences, regardless of whether the underlying act or omission took place inside or outside of Canada. Any of these civil offences that are charged as service offences can be tried by courts martial, subject to limited exceptions: murder, manslaughter, and *Criminal Code* offences relating to the abduction of children cannot be tried by courts martial if the alleged offences took place in Canada (although they could be tried by courts martial if the offences are alleged to have taken place outside of Canada).⁸² Canadian civilian criminal courts have concurrent jurisdiction to try any civil offences committed by military personnel inside of Canada, and in some cases these courts have concurrent jurisdiction to try civil offences committed outside of Canada (e.g.: torture, air piracy, and crimes against internationally protected persons under the *Criminal Code*⁸³). In cases where concurrent jurisdiction exists between courts martial and Canadian civilian criminal courts, no rule of primacy exists to determine where an offence should be tried. Rather, in each case, civilian and military authorities may work together to determine whether a proceeding by court martial would be more appropriate than by a trial in civilian criminal court.

A final group of service offences consists of what one might call foreign offences. Section 132 of the NDA provides for jurisdiction over acts that would constitute offences under the relevant foreign law applicable in the place where the acts are committed. Only a court martial would have jurisdiction to try a foreign offence that is charged as a service offence under section 132 of the

⁸¹ NDA, *supra* note 36, s 2, “service offence”.

⁸² *Ibid*, s 70.

⁸³ See generally, *Criminal Code*, RSC 1985, c C-34, s 7 [*Criminal Code*].

NDA, although in many cases the appropriate foreign courts will have concurrent jurisdiction to deal with the matter as an offence under local domestic law.

2.5.3 Punishments and Sentences

The following hierarchy of punishments is set out within section 139 of the NDA: imprisonment for life; imprisonment for two years or more; dismissal with disgrace from Her Majesty's service; imprisonment for less than two years; dismissal from Her Majesty's service; detention; reduction in rank; forfeiture of seniority; severe reprimand; reprimand; fine; and minor punishments.

Many of these punishments, such as reduction in rank and dismissal from Her Majesty's service, are not available to judges who sentence offenders in civilian courts, under the *Criminal Code*. Also, many of the sentencing options that are available to these same civilian court judges, such as conditional sentences of imprisonment,⁸⁴ probation orders,⁸⁵ and conditional discharges,⁸⁶ are not available to military judges who sentence offenders within the court martial system.

The rules on sentencing within the military and civilian justice systems are also different. For instance, the NDA sets out a rigid hierarchy of punishments: 1 day of detention is, by virtue of section 139 of the NDA, a more severe punishment than a reduction in rank, just as a reprimand is a more severe punishment than a \$30,000 fine. No equivalent statutory hierarchy of sentences exists under the *Criminal Code*. Further differences exist with respect to the pronouncement of sentences: in the civilian criminal justice system, judges must determine the sentence for each offence of which the offender was found guilty,⁸⁷ but a court martial only pronounces one global sentence, regardless of the number of offences of which the offender was found guilty.⁸⁸ Finally, the rules regarding how sentences are to be served are also different: in the civilian criminal justice system, a judge may order that different sentences of imprisonment are to be served either consecutively or concurrently with one another,⁸⁹ while any new sentence of imprisonment that is imposed by a court martial must be served concurrently with a previous unexpired sentence of imprisonment.⁹⁰

2.5.4 Judges

Military judges who preside at courts martial are officers in the CAF who must have at least ten years of commissioned service and ten years of experience as lawyers in order to be appointed as military judges.⁹¹ As mentioned above, they are appointed with tenure until reaching the maximum mandatory CAF retirement age of 60.⁹²

Federally-appointed civilian judges also require ten years of experience as lawyers prior to being

⁸⁴ *Ibid*, ss 742-742.7.

⁸⁵ *Ibid*, s 731.

⁸⁶ *Ibid*, s 730.

⁸⁷ *Ibid*, s 725(1)(a).

⁸⁸ NDA, *supra* note 36, s 148.

⁸⁹ *Criminal Code*, *supra* note 83, s 718.3(4).

⁹⁰ NDA, *supra* note 36, s 149.

⁹¹ *Ibid*, s 165.21(1).

⁹² *Ibid*, s 165.21(4).

eligible for appointment,⁹³ while in some jurisdictions, provincially-appointed judges require only 5 years of experience as lawyers.⁹⁴ The retirement age for civilian judges is generally either age 70⁹⁵ or 75,⁹⁶ depending on the jurisdiction.

Because of the requirement for ten years of commissioned service as an officer in the CAF, the pool of individuals who are eligible for appointment as a military judge is relatively small, and consists overwhelmingly of regular force and reserve force CAF legal officers. For the same reasons, the professional background and legal experience that each military judge possesses prior to being appointed tends to be substantially similar, and reflects the general trend for legal officers to divide their professional time between operational law, military administrative law, and military justice postings.⁹⁷

Notwithstanding their status as members of the CAF, military judges do not wear CAF uniforms when presiding at courts martial. Furthermore, they cannot be required to perform any duties that are incompatible with their judicial duties.⁹⁸

2.5.5 Panels

A Standing Court Martial consists of a military judge who presides alone and who makes all determinations of law and fact.⁹⁹ General Courts Martial, in contrast, consist of a military judge who presides together with a panel of military members.¹⁰⁰ The military judge makes all determinations on questions of law¹⁰¹ – including the sentence to be imposed on an offender¹⁰² – while the panel acts as the trier of fact, and is responsible for determining the verdict.¹⁰³ The panel's decision on a verdict must be unanimous.¹⁰⁴

The NDA provides for detailed rules as to who may form part of a panel: certain groups of military members are categorically excluded (such as all non-commissioned members below the rank of Warrant Officer,¹⁰⁵ and all officers below the rank of Captain,¹⁰⁶ lawyers,¹⁰⁷ military police,¹⁰⁸ and witnesses in the matter¹⁰⁹). The senior member of the panel must be of the rank of at least

⁹³ *Judges Act*, RSC 1985, c J-1, s 3 [*Judges Act*].

⁹⁴ See, for instance, *Provincial Court Act*, RSNS 1989, c 238, s 5.

⁹⁵ See, for instance, *Judges Act*, *supra* note 93, s 8.

⁹⁶ See, for instance, *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (UK), s 99(2).

⁹⁷ Government of Canada, "Legal Officer – Job description", online: <<https://www.canada.ca/en/department-national-defence/services/caf-jobs/career-options/fields-work/other-specialty-occupations/legal-officer.html>>

⁹⁸ NDA, *supra* note 36, s 165.23.

⁹⁹ *Ibid*, s 174.

¹⁰⁰ *Ibid*, s 167.

¹⁰¹ *Ibid*, s 191.

¹⁰² *Ibid*, s 193.

¹⁰³ *Ibid*, s 192(1).

¹⁰⁴ *Ibid*, s 192(2).

¹⁰⁵ *Ibid*, s 167(7).

¹⁰⁶ *Ibid*, s 168(e).

¹⁰⁷ *Ibid*, s 168(a).

¹⁰⁸ *Ibid*, s 168(d).

¹⁰⁹ *Ibid*, s 168(b).

Colonel.¹¹⁰ A panel that tries an officer must be comprised solely of officers.¹¹¹ A panel that tries a non-commissioned member may include up to two non-commissioned members.¹¹²

Jurisprudence from the CMAC suggests that a panel is both similar to and different from a civilian jury in a number of ways:

[M]embers of a panel can take judicial notice of matters peculiar to their community to an extent not permitted jurors, acquit or convict by majority vote and are not peers in the usual sense because they are servicemen, [...]. That being said, as we shall see, the comparison between jury trials and courts martial with a panel remains quite useful both from a historical perspective and an understanding of the objectives sought by the legislator.¹¹³

Although the NDA does not articulate a rationale for having a panel, the Supreme Court of Canada explained the panel's function in the following terms (albeit in an era when the panel still determined sentence): the panel "represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military"¹¹⁴ In this sense, a panel is quite different from a civilian jury, which is not expected to represent the concerns of government leaders or others within the executive branch of government inasmuch as it is expected to represent the concerns of society as a whole – to act as the conscience of the community.¹¹⁵

It should be noted that the SCC's comments about the function of the panel were made at a time when panels still determined the sentence to be imposed on offenders. In 1999, however, Bill C-25 changed this situation such that the presiding military judge, rather than the panel, now determines the sentence in each case. Similarly, the CMAC's comments about how a panel shares both similarities and differences with a civilian jury were made at a time when all of a panel's decisions (including decisions as to the verdict) were made by a simple majority vote. In 2008, however, Bill C-60 changed this situation such that a panel's decisions 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 now determined by unanimous vote. A decision in respect of any other matter is determined by a majority vote.

It is unclear whether the previously articulated statements about a panel's function, or about a panel's comparability to a civilian jury, would be affected by these legislative changes. The changes have had the effect of increasing similarities between panels and juries as finders of fact.

2.5.6 Prosecutions

The prosecution of military offences is undertaken by the Director of Military Prosecutions, a legal officer within the Canadian Armed Forces who currently holds the rank of Colonel, and by officers who are barristers or advocates with standing at the bar of a province who may assist and represent

¹¹⁰ *Ibid*, s 167(2).

¹¹¹ *Ibid*, s 167(3).

¹¹² *Ibid*, s 167(7).

¹¹³ Trépanier, *supra* note 76 at paras 73-74.

¹¹⁴ Généreux, *supra* note 44 at 295.

¹¹⁵ See generally, *The Jury in Criminal Trials* (Ottawa: Law Reform Commission of Canada, 1980), at 5-11, for a description of the various functions and rationales for civilian juries in Canada.

the DMP.¹¹⁶ The DMP is appointed by the Minister of National Defence for a four-year term, may only be removed for cause, and can be re-appointed for subsequent terms by the Minister.¹¹⁷ The DMP also acts as counsel for the Minister for appeals when necessary.¹¹⁸

The DMP acts under the general supervision of the Judge Advocate General,¹¹⁹ who, in turn, is responsible to the Minister of National Defence. However, in practice, the DMP is not assessed in his or her performance by the JAG, and does not receive an annual Performance Evaluation Report. The JAG may issue general instructions or guidelines in writing in respect of prosecutions, which the DMP shall ensure are available to the public.¹²⁰ The JAG may also issue instructions or guidelines in writing in respect of a particular prosecution, which the DMP shall ensure are available to the public unless the DMP considers that it would not be in the best interests of the administration of military justice for any instruction or guideline, or any part of it, to be available to the public.¹²¹ The JAG must provide the Minister with a copy of any instructions or guidelines issued to the DMP.

In many ways, the DMP is very similar to the Directors of civilian criminal prosecution services in Canada. For instance, like his civilian counterparts, the DMP is appointed by a Minister of the Crown and cannot be removed from office without cause. Similarly, like their civilian counterparts, the prosecutors who assist and represent the DMP are all lawyers who are members of a provincial bar,¹²² and who have a constitutional obligation to act independently of partisan concerns and other improper motives.¹²³ Like their civilian counterparts, the DMP and his military prosecutors consider, in each case, whether there is a reasonable prospect of conviction and whether the public interest requires that a prosecution be pursued.¹²⁴

However, Canada's military prosecution service is unique in a number of ways. For instance, unlike in many other Canadian jurisdictions (where some of the DMP's civilian counterparts are not required or eligible to be re-appointed for subsequent terms),¹²⁵ the DMP can be re-appointed after completion of a term.¹²⁶ Also unlike his civilian counterparts, the DMP is ultimately

¹¹⁶ NDA, *supra* note 36, ss 165.1(1) and 165.11.

¹¹⁷ *Ibid*, ss 165.1(2) and (3).

¹¹⁸ *Ibid*, s 165.11.

¹¹⁹ *Ibid*, s 165.17.

¹²⁰ *Ibid*, s 165.17(2)

¹²¹ *Ibid*, ss 165.17(3), (4), and (5).

¹²² *Ibid*, s 165.15.

¹²³ *R v Cawthorne*, 2016 SCC 32, at para 26.

¹²⁴ See, for instance, Director of Military Prosecutions, "DMP Policy Directive 003/00 Post-Charge Review", (17 May 2016) at para 4, online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/post-charge-review.page>>: "The Prosecutor must consider whether there is a reasonable prospect of conviction should the matter proceed to trial by court martial and whether the public interest requires that a prosecution be pursued." See also, Public Prosecution Service of Canada, "Public Prosecution Service of Canada Deskbook, Chapter 15 – The Decision to Prosecute", (2014) at para 15.2, online: <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfp/fps-sfp/fpd/ch15.html>>: "Crown counsel must consider two issues when deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued?"

¹²⁵ See, for instance, *Director of Public Prosecutions Act*, SC 2006, c 9, s 121, at s 5(1) [DPP Act]: "The Director holds office, during good behaviour, for a term of seven years, but may be removed by the Governor in Council at any time for cause with the support of a resolution of the House of Commons to that effect. The Director is not eligible to be reappointed for a further term of office."

¹²⁶ NDA, *supra* note 36, s 165.1(3).

responsible to the Minister of National Defence,¹²⁷ rather than to an Attorney General or Minister of Justice. The DMP's chain of responsibility is even more unique in that the DMP falls under the general supervision of the Judge Advocate General,¹²⁸ and only has a direct relationship with the Minister of National Defence for the purposes of appeals¹²⁹ (whereas his civilian counterparts are directly responsible to their Ministers)¹³⁰. Unlike civilian criminal prosecutors (who tend to be career criminal lawyers), military prosecutors tend to serve 4-6 years in the prosecution service before or after being posted to other military legal positions,¹³¹ which do not involve prosecuting or defending charges at courts martial.

2.5.7 Defence Counsel Services

The Director of Defence Counsel Services is a legal officer within the Canadian Armed Forces, who currently holds the rank of Colonel.¹³² The DDCS provides, supervises, and directs the provision of legal services prescribed in regulations made by the Governor in Council to persons who are liable to be charged, dealt with, and tried under the Code of Service Discipline.¹³³

The DDCS is appointed by the Minister of National Defence for a four-year term, may only be removed for cause, and can be re-appointed for subsequent terms by the Minister.¹³⁴

The DDCS acts under the general supervision of the Judge Advocate General,¹³⁵ who, in turn, is responsible to the Minister of National Defence.¹³⁶ In practice, the DDCS is not assessed in his or her performance by the JAG, and does not receive an annual Performance Evaluation Report. Additionally, as with all defence counsel in Canada, the law recognizes that the DDCS and the lawyers who are provided or supervised by the DDCS, who can either be legal officers in the CAF or civilian lawyers, owe a unique duty of loyalty and commitment to the accused persons they represent.¹³⁷ Therefore, although the JAG can issue general instructions and guidelines to the DDCS in respect of defence counsel services,¹³⁸ the JAG cannot issue such instructions and guidelines in respect of a particular case. All communications between an accused person and DDCS counsel are protected by solicitor-client privilege.¹³⁹

It is the responsibility of the DDCS to provide legal services, including full legal representation at

¹²⁷ The DMP falls under the general supervision of the JAG (NDA, *supra* note 36, s 165.17(1)), who, in turn, is responsible to the Minister of National Defence (NDA, *supra* note 36, s 9.3(1)).

¹²⁸ *Ibid.*

¹²⁹ NDA, *supra* note 36, s 165.11.

¹³⁰ See, for instance, DPP Act, *supra* note 125, ss 3(2) and (3).

¹³¹ See, for instance, Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017, at 29-32 (wherein the DMP notes that the 16 Regular Forces prosecutors within the military prosecution service have an average time of 2 years 11 months litigation experience within the military justice system, and confirms the general trend of military prosecutors being posted into the organization for approximately 5-year rotations).

¹³² NDA, *supra* note 36, s 249.18(1).

¹³³ *Ibid.*, s 249.19.

¹³⁴ *Ibid.*, ss 249.18(2) and (3).

¹³⁵ *Ibid.*, s 249.2(1).

¹³⁶ *Ibid.*, s 9.3(1).

¹³⁷ See *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, wherein a majority of the Court recognized that a defence lawyer's duty of commitment to a client's cause is a principle of fundamental justice.

¹³⁸ NDA, *supra* note 36, s 249.2(2).

¹³⁹ *Military Rules of Evidence*, CRC c 1049, Rule 77 [MRE].

no cost to the individual, to all persons who are liable to be charged, dealt with, and tried under the CSD and who indicate a desire to be represented by Defence Counsel Services.¹⁴⁰ Such representation can also be available for the purposes of appeals to the Court Martial Appeal Court, and to the Supreme Court of Canada.¹⁴¹ Publicly-funded representation, where all accused persons may benefit regardless of their incomes, is different from the civilian legal aid models used in Canada.¹⁴²

The structure for defence counsel services within the court martial system is also different from Canadian provinces and territories in a number of ways. For instance, in many Canadian jurisdictions, responsibility and accountability for legal aid services is assigned to an independent Board of Directors, or to a committee of the Law Society, or to some other entity that is at arm's length from the rest of the executive branch of the relevant government.¹⁴³ However, within the court martial system, there is a direct relationship between the DDCS and the JAG,¹⁴⁴ although the JAG has no authority to issue instructions or guidelines to the DDCS in respect of a particular case.

Additionally, unlike their counterparts within the civilian criminal defence bar (who tend to be career criminal and litigation lawyers), military defence counsel who assist the DDCS in defending accused persons at courts martial are liable to be posted to other jobs, and tend to serve between 4-7 years within the defence counsel services organization before or after being posted into other jobs which do not involve prosecuting or defending charges at courts martial.¹⁴⁵

2.5.8 Evidence

The rules of evidence at courts martial are created by a regulation called the *Military Rules of Evidence* (MRE).¹⁴⁶ The MRE came into effect on October 1, 1959, and have only been amended four times since then, in 1967, 1971, 1990, and 2001.¹⁴⁷ In each case the amendments were minor in scope. The common law of evidence has developed significantly and continuously since the MRE were last updated.

¹⁴⁰ QR&O, *supra* note 46, art 101.11.

¹⁴¹ *Ibid*, art 101.19.

¹⁴² For example, in Ontario, an individual without dependants would need an income of less than \$13,635 per year in order to automatically qualify for publicly-funded legal aid. Legal aid is not available to those whose family income is higher than \$50,803 regardless of other factors such as the number of dependants in the family (see online: <<http://www.legalaid.on.ca/en/getting/eligibility.asp>>).

Within the court martial system, a Private (the lowest rank within the CAF) who would make between \$33,672 and \$49,440 per year of full-time service, would be entitled to fully-funded defence counsel services, just as a Lieutenant-General (the second highest rank of officer within the CAF) who could make up to \$252,804 per year of full-time service, would be entitled to fully-funded defence counsel services at trial, and potentially also on appeal.

¹⁴³ For a discussion of different legal aid system governance models, see Michael Trebilcock, Report of the Legal Aid Review 2008, (Toronto: Ontario Ministry of the Attorney General, 2008), at Section IX: Governance of the Legal Aid System, online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/>>.

¹⁴⁴ NDA, *supra* note 36, s 249.2(1).

¹⁴⁵ Email: Col Fullerton (DDCS) / Col Holman (DJAG MJ), RE: Request for Feedback -- CMCR Public Consultation Document, dated 22 Sep 2016.

¹⁴⁶ MRE, *supra* note 139.

¹⁴⁷ PC 1967-2255, SOR/67-592, Canada Gazette, Part II, Vol 101, No 23, December 13, 1967; PC 1971-31, SOR/71-31, Canada Gazette, Part II, Vol 105, No 2, January 21, 1971; PC 1990-941, SOR/90-306, Canada Gazette, Part II, Vol 124, No 12, June 6, 1990; and, *Anti-terrorism Act*, SC 2001, c 41, s 41.

In many ways, the MRE are different from civilian rules of evidence in Canada. For example, military judges are permitted under the MRE to take judicial notice of “all matters of general service [military] knowledge.”¹⁴⁸ The MRE also includes different rules about hearsay evidence, confessions, and a number of other types of evidence.

It should be noted, however, that under Rule 4, any evidentiary question that cannot be determined by reference to the MRE is to be determined by the law of evidence that would be applied by a civil court in Ottawa – which is to say, by the common law of evidence that would apply in Ottawa.

2.5.9 Appeals

Currently, persons who are subject to the CSD and the Minister of National Defence have the right to appeal to the Court Martial Appeal Court from decisions of courts martial.¹⁴⁹ This is also true for appeals made to the Supreme Court of Canada.¹⁵⁰

Currently, the CMAC must be comprised of at least 4 judges of the Federal Court or the Federal Court of Appeal of Canada, and any other number of judges of superior courts of criminal jurisdiction.¹⁵¹ In fact, the CMAC is comprised of 67 civilian judges drawn from trial and appeal courts across Canada, although the vast majority (46) are drawn from the Federal Court and the Federal Court of Appeal.¹⁵²

Although appeals from courts martial are similar in many respects to criminal appeals in Canadian civilian jurisdictions, some important differences exist. For instance, as indicated above, the court that hears appeals from the decisions of courts martial in respect of disciplinary and criminal-like matters is founded on an administrative law court.

2.5.10 Specially-Affected Groups or Individuals with Special Needs

The civilian criminal justice system incorporates special rules for dealing with the special needs of members of particular groups, such as victims,¹⁵³ young persons,¹⁵⁴ and aboriginal offenders.¹⁵⁵ The court martial system has varying degrees of provisions for the special needs of these individuals. Generally speaking, however, there are more formalized and diverse special rules for these particular groups in terms of their interactions with the justice system in Canadian civilian jurisdictions than within the court martial system.

Specifically, with respect to victims, there are currently no statutory provisions that grant victims rights to information, participation, protection, and restitution within the court martial system, as now exist in the civilian criminal justice system by virtue of the *Canadian Victims Bill of Rights* (CVBR),¹⁵⁶ and the related amendments that were made to other federal statutes such as the

¹⁴⁸ MRE, *supra* note 139, Rule 16(2)(a).

¹⁴⁹ NDA, *supra* note 36, ss 230 and 230.1.

¹⁵⁰ *Ibid*, ss 245(1) and (2).

¹⁵¹ *Ibid*, s 234(2).

¹⁵² Court Martial Appeal Court, online: <<http://www.cmac-cacm.ca/about/judges-eng.shtml>>.

¹⁵³ See, for instance, *Victims Bill of Rights Act*, SC 2015, c 13.

¹⁵⁴ See, for instance, *Youth Criminal Justice Act*, SC 2002, c 1.

¹⁵⁵ See, for instance, *Criminal Code*, *supra* note 83, s 718.2(e).

¹⁵⁶ SC 2015, c 13, s 2.

Criminal Code, the *Canada Evidence Act* (CEA)¹⁵⁷, and the *Corrections and Conditional Release Act*¹⁵⁸ in order to give effect to CVBR rights.

With respect to special provisions for Aboriginal offenders, there is currently no equivalent to section 718.2(e) of the *Criminal Code* within the NDA. This provision in the *Criminal Code* requires sentencing courts to take into account the principle that “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”

The leading case interpreting this provision is *R v Gladue*,¹⁵⁹ wherein the SCC affirmed that, in order to give effect to the provision, some evidence about the circumstances of any particular Aboriginal offender will be needed in order to assist the sentencing judge. Subsequent to this decision, it has become common practice for civilian criminal courts to order “Gladue” pre-sentence reports that draw attention to unique systemic factors that may have caused a particular Aboriginal offender to come before the court, and that provide information about community-based rehabilitation that may or may not be culturally appropriate. In the absence of a provision that is equivalent to section 718.2(e) of the *Criminal Code* within the NDA, courts martial have typically not had the benefit of a “Gladue” report when sentencing Aboriginal offenders.¹⁶⁰

2.6 Conclusion

To many people, the court martial system can seem unfamiliar and confusing. However, by tracing the evolution of the system from its origins to the present, and by studying how the different component parts of the system currently operate, one can much more easily understand how and why the system exists. The system initially grew out of a recognition that military commanders needed an instrument for dealing with serious misconduct by their personnel that would swiftly and strongly promote discipline. With the increasing influence of human rights law over time – reflected in instruments like the *Charter* – and with changing societal attitudes toward due process in criminal and penal justice systems, the court martial system has evolved into less of a command-centric disciplinary tool, and more of an independence-oriented justice tool for dealing with military misconduct.

This historical background and overview information about the court martial system that is contained in this chapter provides a sound basis for subsequent discussions about effectiveness, efficiency, and legitimacy of the system, and about any future options that ought to be considered as a means of enhancing these characteristics within the court martial system.

¹⁵⁷ RSC 1985, c C-5.

¹⁵⁸ SC 1992, c 20.

¹⁵⁹ [1999] 1 SCR 688.

¹⁶⁰ However, see *R v Levi-Gould*, 2016 CM 4003, for an example of a case wherein an Aboriginal offender’s military defence counsel resourcefully sought and obtained a “Gladue” report on behalf of the offender, and offered it to the court martial to assist in determining the sentence. The court martial accepted this report, and found it useful.

Chapter 3 – Past Studies and Critical Perspectives of the Court Martial System

3.1 Introduction

The CMCRT's starting point in looking at the current court martial system is to review past studies and critical perspectives of the court martial system. The previous chapter traces the evolution of the court martial system into the present, and describes (factually and legally) how the current court martial system operates. However, it is also valuable to understand how the system has been perceived by different stakeholders over time. In this chapter, therefore, an overview of different critical perspectives of the court martial system will be described, spanning from around the time when the system was last changed in a major way (in 1998) until the time just prior to the start of the Court Martial Comprehensive Review.

The various studies and critical perspectives associated with the current court martial system fall into four broad categories: external, objective, or independent reviews; internal and subjective reviews; Canadian academic and media commentary; and, international legal perspectives. The different critical perspectives that fall within each of these categories will be described below, in sequence.

3.2 External, Objective, and Independent Reviews: 1997-2015

3.2.1 Defence Counsel Services Study, 1997

The Dickson Report,¹ and its impact on the court martial system, was mentioned in the previous chapter. Recommendation 7 from that report concerned the provision of independent defence counsel services to accused persons under the Code of Service Discipline. In order to study and respond to this recommendation, the JAG at the time established a Defence Counsel Study Team (DCST) to develop options and make recommendations about the provision of defence counsel services. The team consisted of four legal officers from the Office of the JAG: two colonels, and two lieutenant-colonels. The team produced an extensive report that was some 177 pages in length (including Annexes), and that included 28 recommendations.²

The DCST determined that the CAF needed a defence counsel service that was perceived by members as being independent, was capable of providing services in both official languages, supported just, speedy, and efficient discipline, was portable, and was practical and affordable. As a preliminary matter, before selecting options for consideration that could meet these essential criteria, the DCST noted numerous advantages that would be associated with a decision to stop providing publicly funded defence counsel to accused persons under the CSD altogether.

¹ Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, presented to the Minister of National Defence on March 14, 1997, by the Right Honourable Brian Dickson, Lieutenant-General Charles Belzile, and Bud Bird* (Ottawa: Department of National Defence, 1997).

² Canada, Department of National Defence, *Provision of Defence Counsel Services in the Canadian Forces*, Report of the Defence Counsel Study Team (Ottawa: Office of the Judge Advocate General, 1997).

However, the DCST went on, in the following three paragraphs, to reject this idea, partly because of the negative impact on CF morale that such a decision could have: “In this era of pay freezes, restricted promotions, loss of esteem, downsizing, and questions of leadership, any attempt by the Forces to divest itself of this role would likely be seen by the members as one more indication that the Forces no longer care about their welfare.”³ The DCST also thought that it would be too hard for an accused person to retain counsel outside of Canada if the government did not provide such counsel at public expense, and that the Dickson Report had not suggested such an option in any case.⁴

The DCST then went on to consider seven options: Regular Force defence counsel; Reserve Force Defence Counsel; Agreements with Provincial Legal Aid; a CAF legal aid system with certificate/contract civilian lawyers; a CAF legal aid system with permanent civilian staff lawyers; an “employee takeover” of defence counsel functions by retiring legal officers; and, hiring a civilian law firm to provide defence counsel services.

The DCST sought input from operational CAF personnel on each of these options.⁵ At four different bases around Canada, the DCST asked for questionnaires to be completed by 100 non-commissioned members, and 50 officers. A total of 540 members completed these questionnaires. In lead-up questions, 41% of respondents said they thought that military defence counsels’ performance was either “not very good” or “terrible”; while only 10% thought that civilian defence counsel were either “not very good” or “terrible.” Additionally, 46% of the same respondents thought that the military justice system was “not really fair” or “not fair at all.” (All of this data was collected prior to the enactment of major changes to the law that came in 1998/1999 through Bill C-25.) Notwithstanding these responses, however, 41% of respondents selected the Regular Force military defence counsel option as the best option, making this option by far the preferred option.

The DCST obtained a cost analysis for each option. This analysis revealed that the regular force defence counsel model was the most expensive model.⁶ The DCST also noted other disadvantages, such as the drawback of having uniformed counsel from a perception of competence and independence perspective, the potential impact on an accused person of rank differentials between prosecutors and defence lawyers at a trial, and a number of other disadvantages. Nonetheless, the option met all the essential criteria, and included other advantages such as creating a potential pool of lawyers who could train summary trial assisting officers, and who could also assist members with military grievances. The option also preserved the highest level of military knowledge, and the highest certainty that counsel would always be available when needed.

The DCST recommended this option, along with ancillary recommendations to make the option most effective if implemented.⁷ Much of this option was ultimately implemented in Bill C-25, and

³ *Ibid* at 34.

⁴ *Ibid*.

⁵ A complete summary of the results of this consultation with CAF personnel is provided, *ibid* at Annex E.

⁶ A complete breakdown of the estimated costs of each option, from \$858,850 for the least expensive model to \$1,016,760 per year for the most expensive model, is provided, *ibid* at Annex D.

⁷ For example, the DCST recommended that the head of the Defence Counsel organization be authorized to retain civilian counsel in appropriate cases, that any guidance from the JAG to the defence counsel organization be required by regulation to be made public, and that sufficient bilingual officers be posted to the organization (*ibid* at 75-76).

in policies and practices that continue to apply in respect of defence counsel services.

3.2.2 The Lamer Report, 2003

As noted above, in Chapter 2, the former Chief Justice of Canada, Antonio Lamer, conducted the first independent review of the provisions of Bill C-25 that was required by that statute, in 2003. The Lamer Report⁸ focused on the administration of military justice, the Canadian Forces' grievance process, and the military police complaints process. Lamer noted that "the military justice system is generally working well" with "room for improvement."⁹ His report was 134 pages in length (including Annexes) and included 88 recommendations for improvement.

With respect to aspects of the court martial system, Lamer made a number of recommendations that were intended to enhance the independence of key actors within the system, including the DMP, DDCCS, and military judges. For instance, Lamer recommended that each office-holder be granted more secure tenure, among other things. Almost all of the recommendations relating to the court martial system were addressed in Bill C-15, which received Royal Assent on 19 June 2013.

One series of recommendations that has not been directly¹⁰ implemented related to the creation of a permanent military court, instead of *ad hoc* courts martial. Lamer made the following observations:

Courts martial more closely resemble a judicial event than that which they are in reality - a Canadian court with the power and jurisdiction to deal with the most serious of offences under the criminal law, including murder. For example, because military judges preside over a temporary "court" (in the sense that it comes into existence only once convened by the Court Martial Administrator and it ceases to exist once the trial is complete) preliminary proceedings are problematic. Until a court martial has been convened and a military judge is assigned to preside over a trial, the military judge has no jurisdiction over issues such as pre-trial release or further and better disclosure. Military judges currently feel obliged to take an oath before every hearing. These factors have the potential to lead to delay, inefficiency and create the potential for injustice.¹¹

Lamer went on to confirm that, in his opinion, and in the reasoned opinion of another scholar whom he had consulted for the purposes of answering this question, it would be constitutionally

⁸ Canada, Department of National Defence, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.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* (Ottawa: Department of National Defence, 2003) [Lamer Report].

⁹ *Ibid* at 1.

¹⁰ A number of changes to the NDA since 2003 have indirectly achieved many of the objectives that would also be achieved by the creation of a permanent military court. For instance, Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, SC 2008, c 29, amended section 187 of the NDA to empower military judges to deal with certain preliminary matters after a charge has been preferred but before a court martial has been convened. Similarly, Bill C-15, *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24, added section 165.3 to the NDA, permitting the Chief Military Judge to make rules governing aspects of court martial practice and procedure, among other things.

¹¹ Lamer Report, *supra* note 8 at 26.

permissible for the federal Parliament to create a permanent military court of criminal jurisdiction.¹²

3.2.3 Bronson Report (DMP)

At the same time that efforts were being made to implement the Lamer Report's recommendations through legislation¹³ in 2007, the Director of Military Prosecutions engaged an external consulting group to conduct a review of the way in which military prosecution services were provided. This review was undertaken by the Bronson Consulting Group, which delivered a report that was authored by Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., who had both formerly been civilian Crown prosecutors in Ontario.¹⁴ The report was 122 pages in length (including Annexes), and contained 71 recommendations.

The purpose of the external review was to identify factors within the purview of the prosecution service that contribute to delay in the court martial system, and to make recommendations about what the service could do to reduce those delays. The reviewers spoke with all of the court martial system's key stakeholders (including the DMP, DDCS, Chief Military Judge, and senior members of the CAF chain of command). They also analysed data about the court martial system, and then compared much of this data with equivalent information taken from, and about, the civilian prosecution services in three different Canadian jurisdictions.

As a starting point for assessing the extent of delay within the court martial system, the reviewers sought input from senior members of the CAF chain of command. These officers stated with consensus that most charges must be dealt with in "six months of the incident if the enforcement of discipline is to be effective. After that, the formal military justice system becomes largely irrelevant, or worse, even counterproductive."¹⁵

Regarding the extent of delay within the court martial system, the reviewers found that the average time from incident to trial was 650 days, or 21 months. They went on to observe that "[t]his is more than three times longer than the 6 months delay that Commanding Officers [(CO)] say they can accept and still enforce discipline. The situation has not changed over the last 8 years."¹⁶ The reviewers felt that this excessive delay created a climate where:

Commanding Officers have become detached from the Courts Martial system. The process takes so long that it has become irrelevant to them for the enforcement of discipline. By the time that a trial is completed, the members who were in the Unit when the offence occurred are no longer there and do not see the consequences to the accused of his/her conduct.¹⁷

¹² *Ibid* at 27-28.

¹³ At that time, through Bill C-7, *An Act to amend the National Defence Act*, 1st Sess, 39th Parl, 2008 (died on the order of paper).

¹⁴ Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, (Ottawa: Bronson Consulting Group, 2008).

¹⁵ *Ibid* at 9.

¹⁶ *Ibid* at 10.

¹⁷ *Ibid* at 9.

The reviewers noted that the purpose of a separate military justice system is to deal with military offences “in an efficient and speedy manner.”¹⁸ The system’s “very existence is premised on its ability to deal with them more expeditiously than can be expected of the civilian justice system that has broader societal goals.”¹⁹ When the reviewers compared timelines in the military and civilian criminal justice system, and found that the civilian system had less delays, they made the following observation:

Ironically, a serious argument could be made that, if timeliness is the most important consideration, all charges presently laid under the Code of Service Discipline that are based on alleged Criminal Code or other Federal act offences should be dealt with in the civilian criminal justice systems.”²⁰

Although the reviewers were engaged to examine just the military prosecution service, they noted that “delays are system-wide and any improvements at one stage will have limited effect unless changes also take place throughout the system.”²¹ They suggested that “delays in the Court Martial tier of the Military Justice System are so severe that the very purpose of having a separate military justice system is threatened. Nothing less than a ‘sea change’ in approaches, policies, and procedures on the part of all participants is required to correct this.”²²

In identifying the sources of delays in the court martial system, the reviewers noted that “lack of resources is not a contributing factor to Court Martial delays. Some of the people who we spoke to even suggested that the system is over-resourced.”²³ Instead, the reviewers tended to attribute delays in the court martial system to the following broad causes:

- Most participants in the system “do not act with a sense of urgency”;²⁴
- “The participants are very ‘risk-adverse’” [sic];²⁵ and,
- “Many of the participants, including investigators, prosecutors, defence counsel and some military judges, are relatively inexperienced and have difficulty making quick decisions”²⁶.

The 71 recommendations made by the reviewers mainly aimed to streamline or eliminate excessive bureaucratic processes in the court martial system (such as writing lengthy documents to justify decisions to one’s superiors), build greater criminal trial and prosecutorial expertise in the relatively inexperienced corps of military prosecutors, and encourage the military judiciary to actively implement case management processes like the ones that had been implemented by civilian judges years earlier, among several other things.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid* at 10.

²¹ *Ibid* at 8.

²² *Ibid.*

²³ *Ibid* at 9.

²⁴ *Ibid* at 11.

²⁵ *Ibid.*

²⁶ *Ibid.*

Some of the reviewers' recommendations were accepted and implemented, either in whole or in part, since the report was given to the Director of Military Prosecutions in 2008. For instance, currently applicable DMP Policy Directives provide for the same standard to be applied by prosecutors in respect of both pre- and post-charge screening,²⁷ and for the delegation of decision-making authority to Regional Military Prosecutors (RMP) in far more cases than in the pre-2008 era. In practice, military prosecutors also now draft shorter opinions to substantiate their decisions to prefer or not prefer charges. The prosecution service is also now staffed with more prosecutors than in 2008, and in particular, is staffed with two additional Lieutenant-Colonels who act as supervisors of the Regional Military Prosecutors, and who carry some prosecution files themselves.

3.2.4 Bronson Report – Defence Counsel Services

Shortly after the Bronson Report (DMP) was completed, the Bronson Consulting Group was again engaged, in 2009, to conduct an external review of the manner in which defence counsel services were provided. The report of this review was 61 pages in length, and included 59 recommendations.²⁸

The report touched on a number of areas. With respect to caseloads, the report contrasted the volume of cases that were dealt with at trial each year by military defence counsel (approximately 10-12) with the volume of cases dealt with each year by civilian criminal defence counsel (approximately 70-100), and concluded that the number of files being handled by military defence counsel was very low.²⁹ The report further observed that “despite the seemingly small caseload, the DCS lawyers appeared at times to be quite fatigued and in some cases, even overwhelmed by the work.”³⁰ This information, together with “anecdotal evidence from one reservist that his average length of time to prepare for a court martial was three days,”³¹ was of concern to the authors of the report: “these statistics raise questions regarding the activities of the defence counsel as the caseload appears to be quite low in comparison with the civilian staff offices of legal aid in Ontario.”³²

On other ancillary and administrative issues, the report found that the requirement for military defence counsel to staff a 24-hour duty phone was onerous, and recommended that an answering service be engaged to screen calls, particularly after hours, on behalf of the lawyers.³³ Along similar lines, the report also found that civilian support staff were not trained or employed so as to

²⁷ Director of Military Prosecutions, “DMP Policy Directive 002/99 Pre-charge Screening”, (16 May 2016) online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/pre-charge-screening.page>>; Director of Military Prosecutions, “DMP Policy Directive 003/00 Post-Charge Review”, (17 May 2016) online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/post-charge-review.page>>. Both policy directives require prosecutors to assess whether there is a reasonable prospect of conviction and whether the public interest requires that a prosecution be pursued.

²⁸ Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of Defence Counsel Services*, (Ottawa: Bronson Consulting Group, 2009).

²⁹ *Ibid* at 16-17.

³⁰ *Ibid* at 16.

³¹ *Ibid* at 15.

³² *Ibid*.

³³ *Ibid* at 21-22.

be maximally effective, and made recommendations to correct this situation.³⁴

The report made a number of recommendations intended to address career development and litigation expertise weaknesses in the military defence counsel organization, such as creating a specialized litigation career track within the legal officer occupation, setting longer posting durations for litigation positions, and locating military defence counsel regionally across Canada in places where they could share offices with reserve force counterparts who practice criminal law in their civilian careers (as a means of passing experience from these reservists to the regular force military lawyers). As the report noted, “many of the incoming counsel lack experience and leave just when they are developing expertise in litigation,”³⁵ so the report made recommendations that could increase the level of experience in the system, so that “the quality of representation in courts martial would increase and have a positive effect on the military justice system.”³⁶

Regarding tariffs, or the establishment of limits on the amount of time a defence lawyer should spend in respect of a particular case, the report made several observations. First, the report noted that the military defence counsel “do not docket their time and can devote as much time to an absence without leave (AWOL) case as they would to a manslaughter case if they so choose.”³⁷ In contrast, the report noted that within the Ontario legal aid system, certificate-based limits are imposed on the amount of billable time that a defence lawyer can spend on a case, depending on the seriousness of the charges. Ontario uses a test to establish these limits that essentially asks the following question: would the reasonable client of modest means pay for these legal services?³⁸ The report concluded that the tariffs used in Ontario would be too low for accused persons under the Code of Service Discipline, but they nonetheless recommended that military defence counsel start using time-tracking legal software, and provide services based on the following test: “would a member of the Canadian Forces of this rank expend these funds if he/she had to pay for the services him/herself?”³⁹

The report also commented upon the concept of independence as it applies to military defence counsel: “while independence is absolutely required in order for Canadian Forces members to be properly represented, in our opinion, it has led to a lack of accountability in the offices of the DCS.”⁴⁰ As one of example of how this situation can be problematic, the report observed that the perception of some defence counsel “was that the DCS’s agenda was to reform the military justice system rather than to represent individual clients [and] at times this agenda took priority over a client’s needs.”⁴¹ The report noted, as further evidence, that in one case, a client was not even aware that his case had been appealed to the Supreme Court of Canada by military defence counsel.⁴²

On a related topic, the report observed with concern that postings to the Defence Counsel Services

³⁴ *Ibid* at 23-25.

³⁵ *Ibid* at 25.

³⁶ *Ibid* at 26.

³⁷ *Ibid* at 15.

³⁸ *Ibid* at 28-29.

³⁹ *Ibid* at 29.

⁴⁰ *Ibid* at 32.

⁴¹ *Ibid* at 32.

⁴² *Ibid*.

organization were viewed negatively within the broader Office of the Judge Advocate General.⁴³ For instance, the report noted that “more than one lawyer was warned by even very senior officers to be careful about what he/she did while at DCS because it would reflect on him/her when he/she returned to the branch.”⁴⁴ The authors of the report suggested that participants in the military justice system (mistakenly) “saw the DCS lawyers as an obstacle to military discipline and to the maintenance of the *status quo* in the operation of the system.”⁴⁵ In spite of these perceptions, and the potential adverse impact that they could have on defence counsel’s ability to fearlessly represent their clients, the report’s authors noted that “we were satisfied that counsel generally acting [sic] appropriately and in the best interests of their clients.”⁴⁶

Ultimately, some of the report’s recommendations were accepted and implemented through policies and practices that remain applicable today within the defence counsel services organization. Most of the more significant structural recommendations (relating to, for instance, regionalization and the development of a litigation career path) have not been implemented.

3.2.5 “Equal Justice” – Senate Committee on Legal and Constitutional Affairs Report, 2009

As noted above, in Chapter 2, Parliament enacted remedial legislation (Bill C-60)⁴⁷ under very rapid timelines in 2008 in response to a Court Martial Appeal Court decision that struck down provisions of the NDA and Queen’s Regulations and Orders (QR&O) without suspending the declarations of invalidity.⁴⁸ Given how quickly this bill needed to move through the House of Commons and the Senate, in order to avoid perpetuating a standstill within the court martial system while a key provision of the NDA was of no force or effect, Parliament passed the bill in spite of some Senators’ concerns about their ability to study the its provisions. In acknowledgement of these Senate members’ concerns, the Minister of National Defence requested, in writing, that the Senate Committee on Legal and Constitutional Affairs study the provisions of the bill after it became law, and make any necessary recommendations to the Minister regarding the bill.

The Senate Committee on Legal and Constitutional Affairs subsequently undertook a review of the bill from February to May, 2009. The Committee heard evidence from nine witnesses, and ultimately produced a report, entitled *Equal Justice: Reforming Canada’s System of Courts Martial*, that was 47 pages in length (including Appendices), and that included nine recommendations.⁴⁹

The first two recommendations concerned the composition of General Court Martial panels. The Committee noted that relevant sections of the NDA only permitted relatively high-ranking military

⁴³ *Ibid* at 39-40.

⁴⁴ *Ibid* at 39.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

⁴⁷ Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, SC 2008, c 29.

⁴⁸ *R v Trépanier*, 2008 CMAC 3.

⁴⁹ Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Equal Justice: Reforming Canada’s System of Courts Martial; Final Report. A Special Study on the provisions and operation of An Act to amend the National Defence Act (Court Martial) and to make a consequential amendment to another Act*, S.C.2008, c. 29 (May 2009).

members to serve as panel members. The Committee was “concerned that these sections of the NDA do not provide military personnel with a system as close to a trial by a jury of one’s peers as they potentially could or should.”⁵⁰ Although the Committee had been supplied with evidence from Office of the JAG witnesses about how the system would be “into problematic areas” if court martial panels were expanded to include all ranks,⁵¹ the Committee expressed its view that, “absent a compelling rationale for retaining them, [rank-based panel eligibility] distinctions are contrary to the spirit of equality before the law embodied in section 15 of the Charter, and should therefore be eliminated.”⁵² The Committee therefore recommended that rank-based panel eligibility distinctions be reduced.⁵³ The Committee further recommended that “in an effort to come as close as is possible to trial by a jury of one’s peers for civilians, while still preserving the unique nature and role of the military justice system,” civilians be eligible to serve on panels in any trial involving a civilian accused person.⁵⁴

With respect to sentencing matters, the Committee advocated in favour of greater flexibility within the military justice system, and recommended that absolute discharges, restitution orders, and intermittent sentences be included as sentencing options for military personnel under the NDA.⁵⁵ The Committee further recommended that even greater flexibility be created for civilians who are sentenced by courts martial, in the form of conditional discharges, probation orders, and suspended sentences,⁵⁶ and recommended that probation and suspended sentences be considered for military personnel as well.⁵⁷

The Committee made several other recommendations relating to transitional matters, summary trials, and a narrow technical issue regarding disclosure. Most of the recommendations have been addressed, at least in part, through legislation or policy. The broader issues relating to court martial panel composition and sentencing flexibility have not been implemented to the full extent that seems to be contemplated in the Committee’s report.

3.2.6 The LeSage Report, 2011

As noted above, in Chapter 2, the second independent review of the provisions and operation of Bill C-25 was completed in December 2011. This review dealt with aspects of the administration

⁵⁰ *Ibid* at 13.

⁵¹ *Ibid.* The Senate Committee noted that officials from the Office of the JAG explained the reasons for rank differentials on court martial panels as follows (*ibid* at 12-13):

Part of the rationale [for differences in panel composition based on the rank of the accused] would be that officers or senior non-commissioned officers who could potentially in the future become panel members, because of their experience, bring more to the table in terms of military ethos, understanding and leadership. When they are sitting in judgment of individuals, that is an added factor; where, with respect, a bright, intelligent young private may not bring that same element to bear.

Then it starts to cause one to think if a private could have a panel of his peers, being other privates, why could not privates sit in judgment of sergeant majors and captains and generals? We are into problematic areas.

⁵² *Ibid* at 13.

⁵³ *Ibid.*

⁵⁴ *Ibid* at 14.

⁵⁵ *Ibid* at 25-28.

⁵⁶ *Ibid* at 28-29.

⁵⁷ *Ibid* at 29-30.

of military justice, the Canadian Forces' grievance process, and the military police complaints process. It was conducted by retired Chief Justice of the Ontario Superior Court, the Honourable Patrick J. LeSage.⁵⁸ Like the Lamer Report, this report noted that, "regarding the operation of the military justice system, specifically the summary trial and court martial processes, the system is generally working well."⁵⁹ The report included 55 recommendations for improvement in a variety of areas. The LeSage Report was 142 pages in length (including Annexes) and included 55 recommendations for improvement.

The LeSage Report recommendations relating to the court martial system touched upon a number of areas. For instance, the LeSage Report recommended the creation of a distinct offence for negligent discharges of firearms, and that the elements of an offence under section 129 of the NDA (conduct to the prejudice of good order and discipline) be clarified.⁶⁰ It also echoed the Lamer Report in recommending, eight years later, that "a comprehensive review of the sentencing provisions of the NDA be undertaken to provide for a more flexible range of punishments."⁶¹ On a related point, the Report recommended that probation orders and prohibition orders similar to those found in the Criminal Code be incorporated into the NDA.⁶²

With respect to delay in the court martial system, the LeSage report made a number of recommendations. First, recognizing that it took an average of 82 days to get a charge to the Director of Military Prosecutions after the charge was laid, the report recommended that 30-day limits be imposed on actors in this process, and that "the process should be condensed so that the Commanding Officer refers the charges to the Referral Authority and the DMP at the same time."⁶³ Second, echoing a similar recommendation in the Bronson Report (DMP), the Report recommended imposing a 60-day limit on the DMP to decide whether to prefer a charge.⁶⁴ Third, the Report noted that military judges already have sufficient authority to implement case management practices, and recommended that they do so in cooperation with defence counsel and military prosecutors.

With respect to the independence of military judges, the Report noted that "a Military Judge, outside of the courtroom, should not be required to demonstrate that they are of lesser rank to a more senior officer who is about to, or has previously appeared before them."⁶⁵ In order to avoid such a situation, and to strengthen "the optics of an independent judiciary within a military structure,"⁶⁶ the report recommended that a distinct rank of "Military Judge" be created within the

⁵⁸ Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage* (Ottawa: Department of National Defence, 2011) [LeSage Report].

⁵⁹ *Ibid* at 13.

⁶⁰ *Ibid* at 18-20. It seems, however, that a recent Court Martial Appeal Court decision, *R v Goltzari*, 2017 CMAC 3, has judicially clarified the elements of an offence under section 129 of the NDA to the extent that this recommendation is no longer relevant.

⁶¹ LeSage Report, *ibid* at 26.

⁶² *Ibid* at 46-47.

⁶³ *Ibid* at 33.

⁶⁴ *Ibid* at 33-34.

⁶⁵ *Ibid* at 39-41.

⁶⁶ *Ibid* at 41-42.

⁶⁷ *Ibid* at 41.

CAF.⁶⁸

With respect to General Court Martial panel selection, the Report recommended that reserve force members be eligible for appointment to a panel, and that a random methodology for panel selection be used by the Court Martial Administrator, under the supervision of the presiding military judge in each case.⁶⁹

Regarding the laws of evidence applicable at courts martial, the Report noted that the *Military Rules of Evidence* “have not been regularly updated and have not kept pace with the common law evolution of the law of evidence.”⁷⁰ Consequently, the Report recommended that MRE “be superseded by the statutory and common law rules of evidence in the court martial system.”⁷¹

The LeSage Report made a number of other recommendations relating to the summary trial system, investigations, human resources, grievances, and the military police complaints process. Some of the LeSage Report recommendations relating to the court martial system (for instance, about panel selection) have been implemented through policy mechanisms. Most of the recommendations that would require legislative amendments have not yet been implemented; others (such as the adoption of a formalized case management system) that could be implemented through rules or practices have similarly not been implemented.

3.2.7 The Deschamps Report, 2015

During April and May of 2014, French and English Canadian media outlets published several articles which suggested that sexual assault and sexual misconduct were prevalent in the CAF.⁷² These claims seemed to contradict a previous internal CAF survey which suggested that sexual harassment in the CAF was not a significant problem.⁷³ The CAF engaged a retired judge of the Supreme Court of Canada, the Honourable Marie Deschamps, to conduct an external independent review of the CAF’s policies, procedures and programs with respect to sexual harassment and misconduct, as well as of their implementation. The final report of this external review by Madame Deschamps was delivered to the Chief of the Defence Staff on 27 March 2015; it was 102 pages in length (including Appendices), and included 10 recommendations.⁷⁴

Madame Deschamps’ mandate was limited from the outset, in that she was not to review “any decision relating to the military or criminal justice system.”⁷⁵ Consequently, almost all of her recommendations focused on subjects other than the court martial system.

However, in one section of the report, extensive discussion is included about how victims of sexual

⁶⁸ *Ibid* at 42.

⁶⁹ *Ibid* at 43-45.

⁷⁰ *Ibid* at 45.

⁷¹ *Ibid*.

⁷² Noémi Mercier and Alec Castonguay, “Crimes sexuels: le cancer qui ronge l’armée canadienne”, *L’Actualité* (22 April 2014); Noémi Mercier and Alec Castonguay, “Our Military’s Disgrace”, *Maclean’s* (5 May 2014).

⁷³ J. Coulthard, 2012 Canadian Forces Workplace Harassment Survey, 2013.

⁷⁴ Canada, Department of National Defence, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, by Marie Deschamps C.C., Ad.E (Ottawa: Department of National Defence, 2015).

⁷⁵ *Ibid* at 4.

offences feel that aspects of the military justice system are deficient.⁷⁶ The report noted that some members of the Military Police who deal with sexual assault files “were confused about the process, insensitive to the problem of sexual assault, lacking training on the basic elements of the offence, and unaware of the available resources” for victims.⁷⁷ The report noted that one of the potential causes of this problem was that “the number of incidents the military system handles is far fewer than those in the civilian justice system,”⁷⁸ which creates a kind of “deteriorating cycle: the way victims feel about their treatment by the military justice system feeds underreporting, and underreporting leaves the military police unable to develop and maintain appropriate skills to manage these sensitive and important cases.”⁷⁹

The report also noted that, in spite of the fact that “[t]he CAF [...] has the human and physical resources which, when properly marshalled, could benefit victims of sexual assault [...] these services are generally not currently performing to an appropriate level and do not adequately address the needs of victims.”⁸⁰

As a result of all of these findings and observations, and “as a first step in re-establishing trust,”⁸¹ the report recommended that victims of sexual assault should be permitted to request that their complaint be transferred from military to civilian justice authorities, and that reasons should be given if this request is not accepted by military authorities.⁸²

This recommendation has largely been addressed by an update to the Director of Military Prosecutions’ Policy Directive 004/00 *Sexual Misconduct Offences* in May 2016, wherein several paragraphs of instructions to military prosecutors direct them to take into account the wishes of any victim when making jurisdiction decisions, and to give reasons to the victim once such decisions are made.⁸³ A number of other updates were made to DMP Policy Directives at the same time in order to, among other things, better respond to the needs of victims and witnesses within the court martial system.⁸⁴

⁷⁶ *Ibid* at 69-74.

⁷⁷ *Ibid* at 70.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* at 70-71.

⁸⁰ *Ibid* at 73.

⁸¹ *Ibid* at 74.

⁸² *Ibid* at 74.

⁸³ Director of Military Prosecutions, “DMP Policy Directive 004/00 Sexual Misconduct Offences”, (17 May 2016) at paras 12-17, online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/sexual-offences.page>>.

⁸⁴ Director of Military Prosecutions, “DMP Policy Directive 007/99 Responding to Victims’ Needs, (17 May 2016) online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/responding-to-victims-needs.page>>. The updated Policy Directive acknowledges that: “[g]enerally, a victim requires more than the information required by other witnesses in court martial proceedings. For example, a victim of crime may feel aggrieved by decisions not to prosecute, or decisions to prosecute when they do not favour prosecution,” and directs that “[c]ounsel should keep the victim appropriately informed throughout the process.” The Policy Directive goes on to state that

[t]here are ways other than testimony whereby a victim can participate in court martial proceedings. The Prosecutor shall consider the victim in respect of the following: a. at any time that an accused is released from custody pending the completion of proceedings, the Prosecutor shall take reasonable steps to ensure the victim is aware of the release, the terms of release, and any amendment to terms of release; b. where the Prosecutor causes a final disposition of a matter by the exercise of prosecutorial discretion, he or she should ensure that victims of offences alleged are informed of the decision and the reasons; c. where the Prosecutor

3.3 Internal and Subjective Reviews: 2001-2012

3.3.1 Military Justice Interview Survey, 2001

After the reforms contained within Bill C-25 had been implemented, in 2001 “the JAG authorized a ‘qualitative’ survey, in which data on early reactions to the reforms of the military justice system were gathered from interviews with senior CF commanders, and Chief Warrant Officers and Chief Petty Officers.”⁸⁵ A total of 28 personnel were interviewed from different components and environments of the CAF; furthermore, because the participants had consulted widely prior to the interviews, “the views expressed during the interviews often reflected much more than the respondents’ own assessment of the functioning of the military justice system.”⁸⁶

The respondents all indicated that “the military justice system serves the needs of the chain of command capably, and that it is both necessary and relevant as a tool for maintaining disciplined, operationally ready units.”⁸⁷ However, they also all indicated that “the military justice system

discloses to defence counsel information of a sensitive nature pertaining to the victim, he or she shall consider such steps as might be prudent to protect against inappropriate use or dissemination of the materials; d. the right of the victim to timely information pertaining to plea and sentence discussions; and e. participation of the victim in sentencing hearings, by means of viva voce testimony or otherwise [footnotes omitted].

This Policy Directive exists alongside DMP Policy Directive 012/00 (Director of Military Prosecutions, DMP Policy Directive 012/00 Witness Interviews”, (May 2016) online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/witness-interviews.page>>). That Policy Directive further states:

Additional considerations apply in relation to the interview of a victim who requires more than the information required by all witnesses in court martial proceedings. With respect to a victim, the following principles apply: a. The Prosecutor shall treat all witnesses and victims in particular with courtesy, sensitivity and respect, bearing in mind the emotional interest one might reasonably expect the victim to have in the proceedings; b. The Prosecutor shall make all reasonable efforts to answer any questions posed by the victim in respect of the proceedings; c. The Prosecutor shall take all reasonable steps to ensure that the victim understands the nature of the proceedings; d. The Prosecutor shall, in appropriate cases, inform the victim of available support and counseling resources of which the Prosecutor is aware; e. The Prosecutor shall make all reasonable efforts to keep the victim informed with respect to the proceedings including plea and sentence discussions undertaken, any verdict, sentence or other final decision in the case; and f. The Prosecutor shall always consider the propriety of special accommodations, and shall discuss the availability of such matters with the victim in appropriate cases.

DMP Policy Directive 003/00 (Director of Military Prosecutions, “DMP Policy Directive 003/00 Post-Charge Review”, (17 May 2016) online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/post-charge-review.page>>) also updated in May, 2016, further obliges the prosecutor to take into account the views of the victim in deciding whether or not to exercise jurisdiction, and directs the provision of information to victims whose ‘personal integrity’ has been violated, including being informed of any decision not to proceed and the reasons for that decision. The CMCRT received the above comment from the Canadian Armed Forces Strategic Response Team on Sexual Misconduct notwithstanding that these updated Policy Directives had been in force for over a year at the time of the CMCRT’s consultations. The submission from the SMRC, reproduced at Annex H, similarly indicated to the CMCRT that victims are perceiving transparency challenges at multiple stages of both the court martial and civilian criminal justice processes.

⁸⁵ Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2000 to 31 March 2001* (Ottawa: Office of the Judge Advocate General, 2001) at 41.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 42.

needs to continue to develop and improve,”⁸⁸ especially in terms of its timeliness, the role of the chain of command within the system, and training for certain actors in the system.⁸⁹ It was clear from the respondents’ comments that timeliness concerns were not in relation to the summary trial system: “[t]imeliness concerns were directly linked to the issue of court martial delay.”⁹⁰

The issue of court martial delay at the time was discussed at length in the *JAG Annual Report 2000-2001*, where it was noted that “several indicators arose suggesting unacceptable delay in the court martial process. The indicators included court decisions relating to delay, feedback from the chain of command, and statistics gathered through the military justice review and reporting framework.”⁹¹ The report noted that delay may be largely attributable to the recent legislative changes in Bill C-25, and the associated need to create new offices (for the prosecution and defence counsel services).⁹² However, the report also remarked that “to rely on change as a full explanation for the difficulties experienced in this area would do a disservice to the military justice system as a whole and evade the obligation to address other factors that appear to be contributing to the delay problem.”⁹³

The report seemed to imply that multiple actors within the system were responsible for the delay:

Just as the evidence of delay in the court martial system cannot be ignored, neither can the complexities of the system be permitted to hinder the ability of the system to support the attainment of operational objectives. The efficiency and effectiveness of the military justice system depends on the efficiency and effectiveness of all who contribute to it, including the CF legal community, the Military Police, and all commissioned and senior non-commissioned members of the CF. **The delay problem does not spring from a particular point in the court martial process; rather, it has roots throughout the system.**⁹⁴ (emphasis added).

The report noted that several corrective measures had already been taken to address the delays, including the appointment of three additional military judges, a doubling of the number of regional military prosecutors, JAG encouragement to the Court Martial Administrator to set matters down for trial more quickly, and the issuance of general instructions from the JAG to the DMP, DDCCS, and AJAGs directing them to proceed expeditiously.⁹⁵

3.3.2 Military Justice Interview Survey of Stakeholders, 2002

The JAG directed a similar survey to be conducted in February 2002. Interviews were conducted with 85 individuals from 45 different regular and reserve force units, with a focus on hearing from

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid* at 34.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid* at 35-37.

unit commanding officers and senior non-commissioned members.⁹⁶ Again, the interviews indicated that “that the military justice system is meeting the needs of unit commanders and remains a relevant and necessary tool in ensuring unit commanding officers and senior non-commissioned members are able to enforce and maintain discipline at the unit level.”⁹⁷ Again, however, the interview responses also suggested that there were a “variety of areas where further improvement is required.”⁹⁸

For the second consecutive year, the interviews clearly indicated that timeliness was a problem: “timeliness concerns were linked to the issue of court martial delay, although there was also concern expressed by some participants with respect to the timeliness of investigations.”⁹⁹ The interviews also indicated that the system was not as effectively meeting the needs of reserve force units and CAF training establishments, that communications between an accused person’s unit and the military prosecutor and Court Martial Administrator were not happening effectively, and that summary trial training could be improved for senior non-commissioned members.¹⁰⁰

3.3.3 Military Justice Interview Survey of Stakeholders, 2007

In January 2003, the “the JAG determined that after these two series of [2001 and 2002 stakeholder] interviews, that there was no need for a similar survey to be conducted again [that] year.”¹⁰¹ Stakeholder interviews were not done in the ensuing years. However, in 2007, “the interview survey of stakeholders, which is the source of invaluable input from senior members of the chain of command on the functioning of the military justice system as a whole, was undertaken for the first time in four years.”¹⁰² These interviews were conducted between January and March 2007, and were focused on input from the Formation and Base Commander / CWO level.¹⁰³ A total of 24 commander interviews, and 17 Chief Warrant Officers (CWO) and Chief Petty Officers, 1st Class (CPO1) interviews were conducted.¹⁰⁴

Specifically with respect to the court martial system, “Approximately half of all participants shared the view that the court martial system is meeting the needs of the chain of command.”¹⁰⁵ In terms of specific criticisms of the system, which were made by a majority of respondents,

[t]he most common issues identified by both groups related to the time required for matters

⁹⁶ Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2001 to 31 March 2002* (Ottawa: Office of the Judge Advocate General, 2002) at 21-22.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid* at 23.

¹⁰⁰ *Ibid* at 23-24.

¹⁰¹ Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2002 to 31 March 2003* (Ottawa: Office of the Judge Advocate General, 2003) at 19.

¹⁰² Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2006 to 31 March 2007* (Ottawa: Office of the Judge Advocate General, 2007) at vii.

¹⁰³ *Ibid* at 15-16.

¹⁰⁴ *Ibid* at 16.

¹⁰⁵ *Ibid* at 43.

to be dealt with by court martial, which was viewed as too long, and the level of punishment being imposed at court martial. It was principally on the basis of these two concerns that some respondents expressed doubt as to whether the court martial system is meeting the needs of the chain of command.¹⁰⁶

The JAG Annual Report 2006-2007 indicated that action was being taken to address delay, such as through an increase in the number of military judges (to the same level as in 2002), and through an Office of the JAG review “into certain general and court martial specific processes for the purpose of identifying ways to increase efficiency and expediency.”¹⁰⁷

Interview participants were also asked about their views on the holding of courts martial in operational theatres (at a time when Canada had large numbers of personnel deployed in Afghanistan and elsewhere throughout the world).¹⁰⁸ “The responses provided were evenly divided among support for holding courts martial in operational settings, support for returning matters to Canada, and support for weighing relevant factors in each case.”¹⁰⁹

3.3.4 Military Justice Stakeholder Interviews, 2010

During the first quarter of 2010, the next set of stakeholder interviews were carried out at the JAG’s direction. The subjects of these interviews included summary trial presiding officers, charge-layers, summary trial assisting officers, and – for the first time – accused members.¹¹⁰ A total of 134 members were interviewed.¹¹¹ The interviews led to a number of findings that were generally quite positive, and that were largely focused on summary trial issues.¹¹² However, “concerns were nevertheless raised in relation to the timeliness of proceedings and the complexity of court martial and summary trial procedural requirements.”¹¹³ In the JAG Annual Report 2009-2010, it was deemed “worth noting at this point that the OJAG is currently working on regulatory amendments to continue to reduce delays in the system.”¹¹⁴ Although significant effort was put into development of the delay-related regulatory amendments that were referred to in that Annual Report, no such regulatory changes were ever brought into force.

3.3.5 Military Justice Stakeholder Interviews, 2012

The most recent stakeholder interviews were conducted in December 2012, and were not reported in a JAG Annual Report. These interviews were conducted across Canada at seven locations, and involved 114 interviewees, broken down as follows: 18 accused persons; 23 assisting officers; 22 charge layers; 48 presiding officers (25 delegated officers, 13 commanding officers, and 10 superior commanders); and, 3 referral authorities.

¹⁰⁶ *Ibid* at 43-44.

¹⁰⁷ *Ibid* at 44.

¹⁰⁸ *Ibid* at 46.

¹⁰⁹ *Ibid*.

¹¹⁰ Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2009 to 31 March 2010* (Ottawa: Office of the Judge Advocate General, 2010) at 21.

¹¹¹ *Ibid*.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*.

Among accused persons, there was an even split between those who felt that the military justice system was fair, and those who felt it was unfair. Among leaders in the chain of command, there were generally positive impressions of the military justice system, but dissatisfaction with several key points, including two court-martial specific points:

- The most stated concern about courts martial was that they take too long to come to completion. It was noted that there is little general deterrent effect at the unit level as a result of this delay.
- Chain of command leaders feel out of the loop, and a sense of having lost control of the matter as soon as a disciplinary matter is referred to the Director of Military Prosecutions.

With respect to delays, the interview respondents noted a number of reasons why the elapsed time in getting a matter through the court martial system was problematic. First, long intervals of time between the alleged offence and the resolution of the matter are unfair to the accused person. Second, a member facing unresolved charges is a distracted soldier, with all the potential for problems that this implies. Third, the delay problem reflects negatively on the credibility of the chain of command, specifically, and the CAF, generally.

Other issues relating to the summary trial system, and the training that CAF members receive on military justice, were also identified during the stakeholder interviews.

3.3.6 Summary Trial Working Groups I and II, 2016

In support of policy development initiatives to consider how the CAF's summary trial system might be renewed in order to promote the prompt and fair administration of military justice in respect of non-criminal breaches of discipline, the Office of the JAG sought input from the chain of command. The JAG, with approval from the Chief of Defence Staff (CDS), formed two working groups comprised of unit commanding officers and their most senior non-commissioned members with representation from all CAF environments. The first working group met in Ottawa for a week during April 2016, and the second met in Ottawa for a week during June 2016.

The issues discussed during these working groups covered a wide variety of topics focused specifically on the summary trial system and included the structure of investigations, charge-laying authorities, disciplinary infractions and sanctions in the summary trial system and also included participation in hypothetical scenarios.

Some of the participants' observations and input during these working groups nonetheless concerned or touched upon features of the court martial system. For instance, participants commented on the process for referring charges to the DMP and questioned whether the requirement for a file to be sent to a referral authority before being referred to the DMP added any value to the process.

Some participants further expressed frustration with occurrences of the DMP or military prosecutors deciding not to prefer charges that had been laid by unit personnel and then referred to the DMP. These participants suggested – within the context of discussions about summary trial reform that were predicated on an assumption similar to **Assumption 1** of this report (see Chapter

1) – that it would be preferable for the Military Police or the military prosecution service to lay criminal and criminal-like charges that could only be tried by courts martial, rather than for unit personnel to lay such charges, since the authority of unit charge-layers was undermined in each case where military prosecutors decided not to proceed with charges laid by unit personnel.

3.4 Canadian Academic and Media Commentary

Canada's court martial system is rarely the subject of academic study, and has only been discussed at any length in a small number of books and journal articles since the provisions of Bill C-25 came into force.

3.4.1 Journal Articles

From time to time, law review and academic journal articles touching upon Canada's court martial system are published. A listing of examples of such articles, with a very brief description of each article, is included below:

- **D. McNairn, “Does Canada Need a Permanent Military Court?” (2006) 18 *National Journal of Constitutional Law* 205.** In this article, the author reviews a previous independent review recommendation for the creation of a permanent military court in Canada, and offers reasons why such a court would be an improvement from the current system of *ad hoc* tribunals.
- **M.R. Gibson, “International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity” (2008) 4 *Journal of International Law and International Relations* 1.** In this article, the author identifies key principles that should animate a military court system, and explains how many modern democratic states, including Canada, have designed their military court systems to respect such principles in ways that are consistent with international human rights law obligations.
- **M. Madden, “Sui Not-So-Generous: The Unconstitutionality of Court Martial Jury Trials” (2009) 14 *Appeal: Review of Current Law and Law Reform* 24.** In this article, the author argues that General Court Martial panels likely limit an accused person's right to be tried by an independent and impartial tribunal because such panels are not representative of the broad military community, and because of the undue influence that rank disparities within the panel can have on panel deliberations. The author also argues that such limits on rights would likely be found unjustified in a free and democratic society.
- **S. Strickey, “‘Anglo-American’ Military Justice Systems and the Wave of Civilianization: Will Discipline Survive?” (2013) 2 *Cambridge Journal of International and Comparative Law* 763.** In this article, the author traces the evolution of the Canadian, American, and Australian court martial systems over time, and notes that changes began with the American system. The author describes how commanding officers, who are ostensibly at the heart of discipline, have been displaced from central roles in the Australian and Canadian court martial systems by recent law reforms. The author questions whether this development is beneficial to discipline within the respective armed forces.

3.4.2 Books

In addition to these (and a limited number of other) articles, a small number of academic books touching upon Canada's court martial system have been published since 1999. An essentially complete listing of such books, with a very brief description of each one, is included below:

- **R.A. MacDonald, *Canada's Military Lawyers* (Ottawa: Public Works and Government Services Canada, 2002).** This book is ostensibly more of a history of the Legal Branch of the CAF than a book focused on the court martial system. Nonetheless, the book traces the evolution of the court martial system since its inception, and finishes with some description of the changes that were made to the system through Bill C-25 in 1999.
- **G. Létourneau and M.W. Drapeau, *Canadian Military Law Annotated* (Toronto: Thomson Carswell, 2006).** This book, at the time that it was published, held itself out to be "the only published text on Canadian military law" (p. xv). It is essentially a consolidation of many relevant sources of military law (including both statutes and regulations) in a single text. Some annotations are included within the text to sections of the included statutes and regulations. The text is largely descriptive, and non-critical. In one section, the authors neutrally point out some important differences between military and civilian law, and allude to different constitutional concerns that appellate courts have raised with the court martial system from time to time (pp. 294-302).
- **G. Létourneau and M.W. Drapeau, *Military Justice in Action: Annotated National Defence Legislation* (Toronto: Carswell, 2011).** This book is a compilation of military justice statutes and regulations in a single text. The commentary and annotations are far more extensive than in *Canadian Military Law Annotated*. For the most part, the annotations are descriptive of relevant case law, and do not reflect the authors' own value judgements about the court martial system. In certain places, however, such value judgements are evident – for instance, in sections dealing with "Diminished Rights for Military Personnel Upon Arrest" (p. 343) and "Constitutionality of Power to Suspend" (p. 484) – where the authors state the law as they see it, rather than the law as it has been interpreted by the courts. A relatively critical perspective is also taken in the authors' "Word of Introduction", wherein they suggest that "Canada is still, in some aspects, lagging behind in modernizing its military justice legislation" (p. vii), and that, "[d]espite the absolute wording of our Constitution, there are still many disparities between Canada's common law tradition and its military law tradition, which flow from the partial application of the *Charter of Rights and Freedoms* to the *National Defence Act*" (p. viii).
- **G. Létourneau, *Introduction to Military Justice: An Overview of the Military Penal Justice System and its Evolution in Canada* (Montreal: Wilson & Lafleur Ltée, 2012).** This short book describes key features of the military justice system, and often contrasts them with equivalent features within foreign military justice systems. The book is critical to a certain extent, in that it emphasizes dissenting judgements and decisions from foreign tribunals in a way that suggests alternatives to the manner in which the law has actually developed in Canada, and in that the book concludes with recommendations to modernize

and update the system.

- **G. Létourneau and M.W. Drapeau, *Military Justice in Action: Annotated National Defence Legislation*, 2nd ed, (Toronto: Carswell, 2015).** This book includes essentially all of the same content as the first edition, with updated annotations to reflect more recent case law. The book also includes a new chapter, “Winds of Change: Proposals for the Modernization of the Canadian Military Justice System,” that contains approximately 40 pages of criticism of the current military justice system, and some recommendations for improvement. With respect to the court martial system, the authors are broadly critical of differences in procedure from the civilian criminal justice system (e.g.: the lack of a preliminary inquiry, or ability to characterize an offence as a hybrid indictable-summary conviction offence), differences in sentencing laws between the two systems, the qualifications and status of military judges, and the role of the JAG within the system (pp 42-68). The authors conclude this chapter by recommending a “full-scale independent systemic review of the Canadian military justice system to ensure that it corresponds to strict functional necessity, without encroaching, as it currently does, on the jurisdiction that can and should belong to ordinary (civilian) courts (p. 69).

As the above descriptions indicate, there have been essentially only two authors writing books about Canada’s court martial system over the last 15 years, and the themes that run through the books written by these authors, whether written individually or together as co-authors, are basically the same in each book. They have become highly critical of many facets of the court martial system, and they advocate for major change that would remove distinctions between the military and civilian criminal justice systems.

3.4.3 Popular Media

Canada’s court martial system is discussed far more frequently in popular (rather than academic) forms of media. In many cases, such popular media pieces are authored by the same two individuals who have published books about the system over the last 15 years, and reflect condensed versions or extracted versions of arguments against the system that are also contained in their books.¹¹⁵ However, a number of other more mainstream professional media commentators have also written about Canada’s court martial system over the last several years, in ways that tend to be critical of the system.

For instance, both English- and French-language national news magazines published stories in 2014 that were critical of how sexual offences are investigated and tried within the court martial system.¹¹⁶ Another article in a national daily newspaper was critical of the decision to prosecute a member well after his release from the CAF for a relatively minor instance of disciplinary misconduct.¹¹⁷ Another opinion piece in a Halifax daily newspaper criticized the different

¹¹⁵ See, for instance, Gilles Létourneau, “Canadian Military Justice System Antiquated, Unfair” *The Hill Times* (25 January 2016) at 18; and see Michel W Drapeau, “Canada’s Military Justice System Lagging Behind that of Others” (2013) 20:3 *Esprit de Corps* 24.

¹¹⁶ Noémi Mercier and Alec Castonguay, “Crimes sexuels: le cancer qui ronge l’armée canadienne”, *L’Actualité* (22 April 2014); Noémi Mercier and Alec Castonguay, “Our Military’s Disgrace”, *Macleans* (5 May 2014).

¹¹⁷ Murray Brewster, “Former Canadian soldier faces court martial over alleged rude comment, despite honourable discharge” *The National Post* (6 January 2016).

standards that apply between courts martial and civilian courts, and suggested that the latter were far less fair.¹¹⁸

As the above examples suggest, Canada's court martial system is rarely discussed in popular media commentary that is strongly supportive of the system.

3.5 International Law Discourse Relevant to Canada's Court Martial System

Some significant commentary relating to state obligations under international human rights law, particularly as this body of law applies to court martial-type systems, has emerged since the turn of the century. Although this commentary has not directly focused on Canada's court martial system, it is nonetheless a relevant element of the broad critical landscape that forms part of the military justice environment. For the purposes of the present court martial comprehensive review, there are three separate but related items that merit note.

3.5.1 The DeCaux Draft Principles

The first important item is the *Draft Principles Governing the Administration of Justice through Military Tribunals*, by the United Nations (UN) Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mr Emmanuel Decaux.¹¹⁹ These principles were developed and discussed at expert meetings on human rights and the scope of jurisdiction of military tribunals that were organized by the Office of the High Commissioner for Human Rights and the International Commission of Jurists in Geneva (in January 2004 and November 2006), and in Brasilia (in November 2007).

The DeCaux Principles, although they purport to set out "a minimum system of universally applicable rules"¹²⁰ relating to military court systems, were never adopted by a UN organ, and therefore never evolved past a "draft" stage.

The DeCaux Principles set out 20 propositions about military court systems that are, for the most part, relatively uncontroversial: military tribunals must be established by law;¹²¹ they must comply with internationally recognized guarantees of a fair trial;¹²² presiding judges should be independent;¹²³ hearings should be public but for exceptional circumstances;¹²⁴ and, the death penalty should not be imposed on particularly vulnerable people.

However, several of the DeCaux Principles were not universally endorsed by all of the experts who participated in the expert meetings that led to their development. For instance, one Canadian author who attended these meetings has written at length about how some of the principles go too far in their efforts to create universal rules that would elevate justice standards in less developed

¹¹⁸ Tim Dunne, "Courts Martial Far Less Fair than Jury Trials" *The Chronicle Herald* (18 September 2013).

¹¹⁹ *Draft Principles Governing the Administration of Justice through Military Tribunals*, 62nd Sess, UN Doc E/CN.4/2006/58 (2006).

¹²⁰ *Ibid* at para 10.

¹²¹ *Ibid* at paras 13-14 (Draft Principle No 1).

¹²² *Ibid* at para 15 (Draft Principle No 2).

¹²³ *Ibid* at paras 45-48 (Draft Principle No 13).

¹²⁴ *Ibid* at paras 49-50 (Draft Principle No 14).

legal systems, by creating rules that undermine already effective justice standards in mature and highly functioning legal systems.¹²⁵ In particular, draft principle No 5 (civilians should never be tried in military courts), No 8 (that military courts should only try offences that are military and disciplinary in character), and No 9 (that military courts should not be used for the trial of offences involving serious human rights violations) were the subject of deep criticism, because these principles would stand in the way of systems like the Canadian and American military justice systems in their efforts to hold military personnel to account for criminal and disciplinary misconduct.

3.5.2 The Knaul Report

Several years later, another United Nations special procedures mandate-holder again looked into the administration of justice through military tribunals. Specifically, in 2013, the UN Special Rapporteur on the Independence of Judges and Lawyers, Ms. Gabriella Knaul, produced a *Report of the Special Rapporteur on the Independence of Judges and Lawyers* that was exclusively focused on issues of independence, jurisdiction, and fair trial procedures relating to military court systems.¹²⁶

The Special Rapporteur appears to have produced her report largely in reliance upon information contained in questionnaire responses that she received from 22 states,¹²⁷ and gained through an expert consultation session that she conducted with a small group of military justice experts.

The Special Rapporteur recommended that the DeCaux Principles be “be promptly considered and adopted by the [UN] Human Rights Council and endorsed by the [UN] General Assembly.”¹²⁸ She also expressed a number of concerns about the administration of justice through military tribunals, and concluded with a series of recommendations that largely mirrored the DeCaux Principles: presiding judges should be independent, jurisdiction should be limited to only purely military offences, civilians should never be tried in military courts unless civilian courts cannot conduct the trial, and offences involving serious human rights violations should never be tried in military courts.¹²⁹

3.5.3 OHCHR Expert Consultation

In response to a request contained in the UN Human Rights Council’s resolution 25/4, the Office of the United Nations High Commissioner for Human Rights organized an expert consultation on human rights considerations relating to the administration of justice through military tribunals, and on the role of the judicial system in combating human rights violations. This consultation took place in Geneva on 24 November 2014, and involved the participation of 12 experts, including one Canadian expert: Mr. Patrick Gleeson (then a recently retired CAF legal officer, and now a judge

¹²⁵ Michael R Gibson, “International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity” (2008) 4 JIL&IR 1.

¹²⁶ *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 68th Sess, UN Doc A/68/285 (2013).

¹²⁷ *Ibid* at para 3 (fn 1). The states that submitted responses were as follows: Argentina, Austria, Belarus, Bulgaria, Burkina Faso, Colombia, the Czech Republic, Finland, France, Germany, Greece, Lebanon, Mexico, Montenegro, Peru, Romania, the Russian Federation, Spain, Switzerland, Tunisia, Ukraine, and Uruguay.

¹²⁸ *Ibid* at para 92.

¹²⁹ *Ibid* at paras 91-110.

of the Federal Court of Canada). This expert consultation was a public meeting open to States, intergovernmental and non-governmental organisations, national human rights organisations and other stakeholders.

The report from this expert consultation¹³⁰ highlighted the extent of disagreement about attempts to universalize too many rules relating to military court systems. For instance, both Professor DeCaux and Ms. Knaul participated as experts, and restated their concerns and recommendations from the DeCaux Draft Principles and the Knaul Report, respectively.¹³¹

Mr. Seong-Phil Hong, a member of the Working Group on Arbitrary Detention, also had concerns about military tribunals. He explained that a uniformed military judge “who is neither professionally nor culturally independent was likely to produce an effect contrary to that afforded by guarantees of a fair trial. The Working Group had determined that a court composed of military personnel could not be considered ‘a competent, independent and impartial tribunal’ under human rights law.”¹³²

Other experts took more nuanced approaches. Mr. Arne Willy Dahl, a former Judge Advocate General (i.e.: chief military prosecutor) from Norway, acknowledged a trend toward civilianization of military court systems, but noted that “what might be relevant in a peacetime perspective could prove dysfunctional when troops were deployed abroad. When soldiers committed crimes against local civilians whom they were supposed to protect, putting the accused on an airplane for prosecution at home did not make a good impression. Affected civilians needed to see that justice was done, and this was best demonstrated by having deployable courts.”¹³³

Mr. Seetulsingh, a member of the UN Human Rights Committee, seemed concerned about interpreting human rights obligations in a way that was too onerous, and “asked whether there was a danger that the uncompromising approach by the Committee might lead to a situation where the views of the Committee were more honoured in the breach than in observance.”¹³⁴

Mr. Eugene Fidell, from Yale Law School, suggested that it should be acceptable for civilians to be tried by military tribunals under certain clear circumstances. On this point, he “questioned whether negative experiences in some States with trials of civilians in military courts should preclude the trial of civilians in military courts under special circumstances.”¹³⁵

Finally, Mr. Gleeson suggested that a number of the draft DeCaux Principles were overbroad. For instance, he suggested that, as long as a military court “was properly constituted as described in draft principles 1, 2 and 12 to 15, there was no basis for a universally applicable rule, which would deny military jurisdiction over serious human rights violations.”¹³⁶ With respect to both human

¹³⁰ *Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations*, 28th Sess, UN Doc A/HRC/28/32 (2015).

¹³¹ *Ibid* at paras 59-63, and 5-7, respectively.

¹³² *Ibid* at para 26.

¹³³ *Ibid* at para 10.

¹³⁴ *Ibid* at para 24.

¹³⁵ *Ibid* at para 47.

¹³⁶ *Ibid* at para 69.

rights violations and ordinary civilian criminal offences, Mr. Gleeson noted that some people were concerned about

that military authorities might be tempted to cover up such cases. Draft principle 9 presumed that any military justice process would be inherently sympathetic to members of the military committing serious violations of human rights and be inclined to mitigate punishment imposed on the accused. Colonel Gleeson maintained that such an approach in a disciplined military force subject to appropriate civilian oversight was contrary to the ethos of a professional military. He noted, however, that should military justice systems fail in this regard and impunity concerns arise, a model of concurrent jurisdiction, which existed in Canada, provided an important safeguard by ensuring recourse to the nation's civilian justice system.¹³⁷

The Expert Consultation Summary document concludes by taking note of the disagreement on certain topics among the experts, and does not endorse any particular point of view or make any particular recommendations that would resolve this disagreement.

3.6 Conclusion

The descriptive summaries in this chapter are intended to provide a broad overview of the many critical perspectives that are relevant to a discussion about Canada's court martial system. They provide an introduction to many of the issues, such as independence, delay, and accessibility, which will emerge again in subsequent chapters of the report (i.e.: Chapter 4 – Consultation; Chapter 5 – Comparative Analysis; and, Chapter 7 – Assessment of the Current Court Martial System).

¹³⁷ *Ibid* at para 70.

Chapter 4 – Consultation

4.1 Introduction

The CMCRT was directed in its Terms of Reference to consult widely as it executed its mandate, including with the Canadian Public, other government departments, international experts, and senior CAF leaders. The CMCRT's consultation with international experts and the resulting comparative analysis that flowed from these consultations is described below in Chapter 5. This chapter describes the CMCRT's other consultation efforts, including with the Canadian Public, targeted consultations with known experts and stakeholders, and with internal stakeholders inside the Canadian Armed Forces. This chapter then summarizes what was learned through these engagements.

It must be emphasized that this chapter simply recounts what was communicated to the CMCRT by others. The CMCRT is not attempting to endorse, support, justify, criticize, or undermine any of the viewpoints expressed by contributors.¹

Some consultations yielded comments on topics outside of the CMCRT's mandate (for example, investigations, military policing, and summary trials). Where appropriate, the CMCRT forwarded such comments on to the relevant NDHQ directorate. However, as these comments were outside of the team's mandate, the CMCRT captured in the report where they were made but did not reproduce their substantive content. Where any input received intersected with areas both inside and outside of the CMCRT's mandate, the submission was included in the report and considered by the CMCRT only for the purposes of its mandate.

4.2 Liaison with the Department of Justice

On several occasions over the course of the last year, the CMCRT has engaged in person or by email with the Director General of the Department of Justice's Criminal Systems Review Group, and with other counsel from the department's Criminal Law Policy Section, in order to share information about our respective work efforts, and to identify whether any areas of overlap exist.

Through these consultations the CMCRT has concluded that – at the very broadest level – the CMCRT and officials from the Department of Justice are working toward common goals of improving the justice systems that deal with criminal and penal offences. However, at any more concrete level, it is clear that the CMCRT and the Department of Justice are pursuing independent lines of inquiry and initiative, with different mandates and different timelines for completion. As a result, consultations with the Department of Justice ultimately served the single dominant purpose of mutual information sharing.

Additional liaison has taken place with other Department of Justice stakeholder groups on specific legal and policy issues. For instance, on 26 April 2017, the CMCRT participated in a Federal Victims Strategy meeting led by the Department of Justice's Policy Centre for Victim Issues, an

¹ Where appropriate, the CMCRT does indicate in this chapter where some claims made by contributors were supportable by any factual data or historical information in the CMCRT's possession.

organization with which the Office of the JAG's Military Justice Division has had an ongoing and productive relationship over the last several years.

Finally, where specific legal opinions relevant to the CMCR were produced by the CMCRT, these opinions were shared with relevant subject matter experts from within the Department of Justice for input. The CMCRT benefited from the exchanges of military and other legal expertise that resulted from these issue-specific consultations with the Department of Justice.

4.3 Public Consultation

In the JAG's Annual Report to the Minister of National Defence on the Administration of Military Justice (2015-2016),² the JAG signalled his intention to conduct the Court Martial Comprehensive Review during the 2016-2017 fiscal year.³ On 22 July, 2016, the CAF issued a news release notifying Canadians of the Court Martial Comprehensive Review. This news release also indicated that the comprehensive review would include a variety of consultations.⁴

On 12 September 2016, the Deputy JAG for Military Justice and Director General of the CMCRT, Col Rob Holman, gave an interview with Lee Berthiaume of the Canadian Press concerning the CMCR that was published on 9 October, 2016 in several English and French language media outlets.⁵

On 11 October 2016, the CMCRT issued a news release, in English and French, announcing the launch of Public Consultations for the Court Martial Comprehensive Review. The release was posted on the "News" section of the Government of Canada website.⁶

The CMCR public consultation effort incorporated an active social media campaign, which included a video (widely circulated online) where in both English and French Col Holman invited Canadians to have their voices heard.

Infographics, information, and videos were shared multiple times across DND and the CAF's social media channels on Facebook and Twitter. There were five posts overall, two of which used the video mentioned above. Each post received an average of approximately 30,000 impressions, with the video posts attracting even more impressions (an average of 40,000). Social media posts through Facebook received a total of 198,495 impressions, 578 'Likes', 52 comments, 109 'Shares', and 285 clicked links. Posts through Twitter received 42,167 impressions, 613 engagements, 62 'Likes', 67 'Retweets', and 82 clicked links.

In order to facilitate informed contribution to the review, the CMCR used a web page, in both

² Tabled in Parliament in June, 2016. See Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2015 to 31 March 2016* (Ottawa: Office of the Judge Advocate General, 2016), online: <<http://jag.mil.ca/publications/office-cabinet/annrep-rappann-15-16-eng.pdf>>.

³ *Ibid* at iv.

⁴ Online: <<http://news.gc.ca/web/article-en.do?nid=1103399>>.

⁵ See, for instance, online: <<http://www.cp24.com/news/military-justice-review-to-consider-leaving-sex-crimes-with-civilian-court-1.3108603>>.

⁶ See online: <<http://news.gc.ca/web/article-en.do?nid=1135649>>.

English and French, dedicated to providing information, resources, and online access to submissions during the Public Consultation period.⁷ Canadians were informed of their options to provide input to the CMCRT through multiple communications channels, which included filling out a form online, sending an email, or mailing a letter. All three methods were used by contributors. The web page included a “Discussion Board”, where input received as a part of public consultations was posted, without editorial changes,⁸ for anyone to view.

In order to maximize the efficiency of its own resources, and acutely aware of the legal and practical complications that can exist for CAF members desiring to express their personal opinions on CAF subjects, the CMCRT determined the most expeditious and convenient way to solicit input from individual CAF members was to leverage the already ongoing public consultations.

On 14 October, 2016, The Chief of Defence Staff issued CANFORGEN 186/16 – CDS GUIDANCE COURT MARTIAL COMPREHENSIVE REVIEW CONSULTATION, wherein he authorized, and encouraged, individual CAF members to share their views as private citizens on the court martial system through the public consultation process. The CDS imposed only two minor conditions: 1) CAF members could not purport to be engaging on behalf of the CAF itself; and 2) members could not suggest that their personal views had been endorsed by the Government of Canada, the DND, or the CAF. This was essentially the same approach that was taken to facilitate contributions from CAF members regarding the Defence Policy Review that had commenced earlier in 2016.

Articles were also published in Canadian Armed Forces newspapers, and the Canadian Military Families Magazine, in order to maximize awareness of the consultation opportunity.

The CMCRT received input from 11 persons who identified themselves as either having current, or previous, military experience, representing a third of all input received from individuals during the period of public consultation. Their contributions are incorporated into the summary of public consultations, below.

Canadians were also given the option of submitting comments on the condition that these comments would not be made public. Several contributors took advantage of this option. While their comments were not posted to the Discussion Board, they received equal attention from the CMCRT.

4.3.1 Public Consultation – Summary of Results

During the public consultations, the CMCRT received a total of thirty-three submissions from thirty-two individuals, and one submission from an institutional stakeholder (the Federal Ombudsman for Victims of Crime). After the period of public consultation closed, the CMCRT received further submissions from other stakeholders. These submissions are discussed below under the heading of targeted consultations.

⁷ The URL remains active as of the date of this report’s completion. See online: <<http://www.forces.gc.ca/en/about-reports-pubs-military-law-court-martial-comprehensive-review/index.page>>.

⁸ The CMCRT reserved the right to edit submissions for offensive content, though it did not in fact have to do so. The moderation rules of the Discussion Board were public, and was posted online: <<http://www.forces.gc.ca/en/about-reports-pubs-military-law-court-martial-comprehensive-review/moderation-rules.page>>.

Perhaps not surprisingly, public consultation yielded no consensus on any individual issue. Once the period of consultation closed, the CMCRT publicly posted a summary of the input received,⁹ which is reproduced in the following paragraphs.

In submissions from the public, some were skeptical whether “ordinary criminal offences” – or offences under civilian law – ought to be triable at all within the court martial system, where others suggested that these offences should only be triable when the facts of the offence have some kind of connection to military service.

Some people felt that the court martial system should not have jurisdiction to deal with offences of a sexual nature, especially when those offences concern the families of CAF members or young persons, including ‘cadets’. Others noted that, where inappropriate sexual behaviour, assault, or harassment does occur, the system must take the matter seriously and the perpetrator must be dealt with sufficiently harshly.

Still on the topic of jurisdiction, some people insisted that the military must have at least some way to discipline its members, given how important discipline is in the CAF and considering the unique kinds of tasks the CAF is trusted to carry out. Some suggested that, in light of this trust, military members ought to be held to a higher standard than ordinary citizens, and that this higher standard should be formalized in law. Since military service in Canada is completely voluntary, some saw military members as having agreed to be held to this higher standard when they enrolled.

On the other hand, some people submitted that the current court martial system is not capable of promoting or reinforcing military discipline, partly because court martial proceedings take too long, and partly because the results are often out of touch with the perspectives of the chain of command. Some suggested the current system is actually harming discipline, and asserted that there is a perception, widely held among junior CAF members, that accused persons who elect trial by court martial are much more likely: 1) to have their charges dropped by the military prosecutor; 2) to receive a finding of not guilty due to some ‘technicality’; or, 3) when found guilty, to receive a punishment much more lenient than those common at summary trials for similar conduct in similar circumstances. Some also suggested that courts martial require an inordinate resource commitment from units (in terms of persons, time, and expense) given their net impact on unit discipline, and that the combination of these negative factors may actually end up incentivizing those responsible for discipline to deal with misconduct in other ways, such as through informal or administrative measures, or by ‘undercharging’ in order to keep matters at summary trials and out of the court martial system.

On the specific topic of court martial tribunals, some people felt that ‘military’ judges would be better positioned to judge in a military system. They were skeptical whether a civilian judge could be able to understand the unique circumstances of a military accused. Others felt that civilian judges would inspire more objective public confidence, by being seen to be more independent and transparent. It was suggested that in rare, highly technical cases, civilian judges could rely on expert military witnesses to fill in any knowledge gaps.

⁹ See online: <<http://www.forces.gc.ca/en/about-reports-pubs-military-law-court-martial-comprehensive-review/summary.page>>.

Some people commented that it was absolutely necessary that courts martial be capable of deploying forward with CAF operations, in order to ensure that discipline could be seen being carried out both by the deployed members and the local population. Others suggested that attempts to keep an accused in theatre awaiting trial could result in a dangerous distraction from the mission and could be harmful to discipline. They suggested that it would be better to send any accused back to Canada and to hold the trial there.

There were public comments that suggested the head of any military prosecution service should be a civilian, as this might inspire more public confidence in the prosecution service's objectivity and transparency. Others felt that military prosecutors could be used as trial counsel, but that they ought to have specialized careers paths.

Some contributors suggested that the sentencing options at court martial should be expanded to include options currently available in the civilian criminal justice system – for example, discharges or restitution orders. Others felt that if the principles and purposes of sentencing at courts martial are to be different from those in the civilian criminal justice system, then they should be codified in legislation.

It was further suggested that, if the military panel was to be kept as finders of fact at courts martial, then the panel should be permitted to make recommendations to the judge on sentencing. It was also suggested that 'military' and 'community' impact statements should be admissible during sentencing processes at courts martial.

It was suggested by some that the Military Rules of Evidence are too far out of date, and no longer serve a clear purpose. This led to a suggestion that the Rules could be discontinued, and the law of evidence at courts martial could be the *Canada Evidence Act* and the common law.

Several contributors made submissions concerning the victims of service offences, and their rights within the military justice system. All those who submitted on this topic felt that in a court martial system, victims should have rights at least equal to, and access to resources at least as good as, those available in the civilian criminal justice system in Canada. Some contributors recommended that victims' resources in the court martial system could be made even better than most civilian systems – for example, by providing victims with free legal representation in certain circumstances.

Lastly, some suggested that the court martial system could benefit from a comprehensive performance measurement system, which would assist future assessments of how effective the system is at contributing to the discipline, efficiency, and morale of the CAF, as well as future evaluations of whether aspects of the system should be rationalized, taking into account that level of effectiveness

In the interests of transparency, the Discussion Board remained available online after the period of consultation closed so that any member of the public could continue to read the actual, original

input to the public consultations.¹⁰ The Discussion Board is reproduced at Annex C.

4.4 Targeted Consultations

In order to fulfill its Terms of Reference, and in order to ensure maximum value from consultation, the CMCRT sent targeted invitations to a variety of stakeholders, including academics and media commentators on both military and criminal law matters. A total of 71 individuals were invited to contribute, some of whom were also invited to respond on behalf of, or in tandem with, the various organizations that they represent.

Notable individuals targeted for consultation and invited to contribute included professor Eugene Fidel of Yale Law School; Gilles Létourneau (a retired justice of the Court Martial Appeal Court), and Michel Drapeau (a retired CAF colonel who is now a lawyer and prolific commentator on Canadian military justice).

The CMCRT also invited 42 foreign military justice experts, being those persons consulted during the comparative study detailed below in Chapter 5, to offer, in their personal capacity, any input they might have on Canada's court martial system.

A complete list of individuals and organizations invited to submit to the CMCRT as a part of targeted consultations can be found at Annex D.

Out of **135** total requests for submissions as a part of targeted consultation, the CMCRT received six eventual submissions: a written submission from Professor Eugene Fidel from Yale Law School (which was posted on the Public Consultation Discussion Board and is reproduced as a part of Annex C), a written submission from the Federal Ombudsman for Victims of Crime; a written submission from the Canadian Bar Association – Military Law Section; an in-person consultation and written submission from the Department of National Defence Sexual Misconduct Response Centre; an in-person consultation with Military Judge (retired) Jean-Guy Perron, and Lieutenant-Commander (retired) Pascal Levesque, and a written submission from the victims' advocacy group It's Just 700.

4.4.1 Submission from the Federal Ombudsman For Victims of Crime

The CMCRT received a submission from Sue O'Sullivan, the Federal Ombudsman for Victims of Crime. The submission (reproduced below at Annex E) was received in both English and French, and was posted by the CMCRT on the public consultation discussion board,¹¹ and was also posted by the Ombudsman on her own webpage.¹² Her submission made two recommendations.

The first recommendation was: "Bring victims' rights under the *National Defence Act* in line with those under the *Canadian Victims Bill of Rights*."

¹⁰ See online: <<http://www.forces.gc.ca/en/about-reports-pubs-military-law-court-martial-comprehensive-review/discussion-board.page>>.

¹¹ See online: <<http://www.forces.gc.ca/en/about-reports-pubs-military-law-court-martial-comprehensive-review/discussion-board-comment-ombudsman.page>>.

¹² See online: <<http://www.victimfirst.gc.ca/vv/SCMCR-MCRCM/index.html>>.

The second recommendation was: “That the Canadian Armed Forces ensure its internal policies, procedures and practices as they relate, or could relate, to victims of crime address victims’ needs and concerns.”

CMCRT’s mandate, contained in its Terms of Reference, permits it to make recommendations on areas of court martial policy, procedure and practice, and specifically directs it to consider the needs of victims. The CMCRT appreciates the Ombudsman’s voicing of the benefits of doing so:

In addition to the benefits to individual victims, providing a more equal and supportive environment for victims of crime in the military would help to enhance confidence and potentially participation in the Canadian military justice system. This is important not only for the treatment of victims, but also for the effectiveness of the overall system. Members of the CAF who have been victimized, or who see others who have been victimized, may look to past experiences as a deciding factor in whether or not to report crime. If victims’ experiences in the military justice system are such that victims feel marginalized or less protected than even the average Canadian, they may be more reluctant to come forward. This reluctance may contribute to a culture of unreported crime and ongoing victimization. Providing a system that is fair and respectful of victims’ needs and concerns can help to encourage reporting and, therefore, assist the CAF in becoming aware of – and having the opportunity to address – acts of violence and crime within its organization. Without knowledge of these crimes, or the impacts these crimes have on its members, the military may miss important opportunities for change in its work to ensure a safe and healthy environment for all staff.

4.4.2 Submission from the Canadian Bar Association – Military Law Section

Several members of the Canadian Bar Association – Military Law Section were contacted by the CMCRT as a part of its targeted consultation efforts. The Section itself contacted the CMCRT via email on 12 December, 2016 (Annex F).

Though the deadline for public consultation had passed, the CBA indicated in its letter that it desired to ‘meaningfully contribute to [the CMCR] process’, and wanted to take ‘consideration of the many subject areas involved’. The CMCRT was correspondingly very interested in receiving input from the CBA, and agreed to the CBA’s suggested submission date of not later than 31 March, 2017.

The CBA – Military Law Section provided its five-page written submission to the CMCRT via email on 31 March, 2017, which is reproduced at Annex G.

The submission contained multiple criticisms of the CMCR itself.¹³ The CMCRT forwarded the criticisms on to the Judge Advocate General for his consideration, but noted that the JAG did not

¹³ The CBA-NMLS submission also contained criticisms entirely unrelated to the CMCR, which the CMCRT treated in the same manner as similar submissions from other contributors – i.e. it forwarded them on to the appropriate NDHQ directorate. The submission further suggested that the CMCRT ought to engage in targeted consultations with experts and stakeholders, as well as conduct an international comparative study. Both of these tasks were explicitly mandated in the CMCR’s Terms of Reference; at the time the CBA-NMLS’s submission was received, targeted consultations were still ongoing, and the international comparative study was complete.

himself possess the authority to address the criticisms.¹⁴ The CBA's submission included no recommendations for enhancing the effectiveness, efficiency or legitimacy of the court martial system, nor did it highlight any perceived problems concerning any subject matter area in the CMCRT's Terms of Reference.

4.4.3 The Sexual Misconduct Response Centre

On 13 March, 2017, The CMCRT requested input from the Department of National Defence Sexual Misconduct Response Centre. Established on 1 September 2015 in response to the recommendation made in the Report of the External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces,¹⁵ the Centre is independent of the Canadian Armed Forces and the chain of command. Its mission is to "support CAF members affected by inappropriate sexual behaviour by helping them make informed choices on available options and provide resources to meet their individual needs". The Centre offers confidential, personal, and bilingual assistance, providing information, reassurance, support, and referrals to the various services offered to CAF members.

Two members of the CMCRT met with the Centre's acting director, as well as most of its counsellors, at the Centre on 29 March 2017. The SMRC provided written submissions on 18 April, 2017.

The SMRC provided the CMCRT with valuable "qualitative and quantitative data regarding member experience of the military criminal justice system". While the SMRC noted that "the data are primarily a subjective description of the person's lived experience with the military criminal justice system as a whole, as very few who contacted the SMRC made a distinction between the component parts of the system be they Chain of Command, MP/National Investigation Service (NIS), JAG and Court Martial," the CMCRT was still inclined to make use of whatever information was available, paying proper attention to its accepted limits.

In addition to the data products, the SMRC also provided the CMCRT with general recommendations. First, the SMRC advised the CMCRT to consider the impact a system's design can have on victims, both individually and systemically. For example, a system's design can negatively impact an individual victim, but it might also discourage many victims from engaging in the process or even making a report. Using the example of sexual assault cases in the current system, the SMRC advised the CMCRT:

As a result of their experience, victims of sexual assault are required to navigate numerous services within the military justice system (ex: Chain of Command, Military Police/NIS, JAG, civilian police). This means that at any point in time, depending on the victim's experience with any of these points of contact, they may decide to withdraw from the process. For example, a victim could have a very positive experience with a NIS officer but decide to withdraw after feeling dismissed by a JAG. A victim could also decide to

¹⁴ The JAG does not possess the authority, for example, to direct Parliament to conduct a review of the *Code of Service Discipline*, as recommended by the CBA-NMLS.

¹⁵ Canada, Department of National Defence, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, by Marie Deschamps C.C., Ad.E (Ottawa: Department of National Defence, 2015) [Deschamps Report].

withdraw right after feeling re-victimized during a victim interview with the NIS. Therefore, when reviewing the court martial process and its impact on victims, it is important to consider the system as a whole and how it interacts together to best support the members.¹⁶

The SMRC went on to list specific areas for potential improvement in the court martial system, again within the context of sexual offences, with reasons:

Improving the [...] integrity of the current court martial system would include elements such as provision of victim advocates, victim access to independent JAG legal advice to assist with specific legal questions, procedural or otherwise, improving transparency and the responsiveness of all component parts of the military criminal justice process by reducing silos between systems and finally increasing the overall level of education and awareness of victim behaviour re: neurobiology of trauma and Forensic Experiential Trauma Investigation.¹⁷

The SMRC provided a detailed submission concerning victims' advocacy¹⁸ in the court martial system. In the SMRC's view, in the court martial system, victims of sexual offences are disadvantaged compared to the majority of Canadian society, "where most victims have access to advocacy services in the form of sexual assault crisis centres."¹⁹ The Centre pointed out recent reforms that have taken place in the Australian and the American military justice systems,²⁰ and described for the CMCRT the potential benefits of such services.²¹

The SMRC was careful to note, and the CMCRT is also aware, that enhanced victim support, including some of the above listed services, is currently being studied by the CAF Strategic Response Team on Sexual Misconduct (CSRT-SM), as well as other key CAF stakeholders. The CMCRT correspondingly also coordinated with the CSRT-SM, detailed below, as a part of internal consultations.

The SMRC submission is reproduced at Annex H.

4.4.4 It's Just 700

On 26 June 2017, in response to a request for input from the CMCRT, the team received a written submission from It's Just 700, an organization that was formed specifically to help support Canadian military sexual trauma survivors. This complete written submission is included at Annex I.

This submission highlighted the perception among military sexual trauma survivors that greater

¹⁶ Annex H, Submission from the SMRC to the CMCRT, 5 April 2017. See, Briefing Note to CMCRT, "Analysis of Victim Expressed Experience", 5 April 2017.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.* The research referenced by the SMRC was summarized in a literature review attached to the Centre's submission, included at Annex H.

expertise in dealing with sexual assault files exists within the civilian criminal justice system as compared to within the court martial system, largely because of the higher volume of cases that actors encounter in the former system. However, the submission endorsed the view that, “even where a case of sexual assault is referred to civilian authorities, the CAF should carry out its own parallel assessment as to whether any administrative sanctions should be imposed.”

The submission recommended that civilian processes be adopted, and suggested that a model from France could be a useful example. The submission was also critical of delays within the system, and noted that “[i]t is hard to recover from a trauma while pursuing legal action. Expediting the legal process will allow a quicker recovery and could avoid unnecessary medical releases.”

The submission indicated that much more should be done to support victims through the various processes, and that victims should be provided with counsel to help prepare the victims for interrogations, among other things.

The submission suggested that harsher penalties are required for those who engage in sexual misconduct, and reiterated a previous observation that “[o]nly strong sanctions, through military justice, disciplinary and administrative action, will deter further assaults.” This observation led It’s Just 700 to further recommend that minimum sentences and sanctions be established for sexual offences, so that it would be obvious that perpetrators are not just getting a “slap on the wrist”. It was also recommended that perpetrators be prevented from relying on past good character or remorse as a mitigating factor at sentencing.

The submission expressed concern about the possibility of retaliation or reprisals against those who come forward to make allegations of sexual misconduct, and recommended that such inappropriate actions should be criminalized as a means of protecting those who come forward.

The submission recommended better training relevant to sexual offences for court martial system actors, and suggested that better measurements of effectiveness or quality assurance in relation to complaints of sexual misconduct be created.

Finally, the submission recommended the imposition of quotas or some other similar mechanism for promoting gender and other forms of equality within the military legal profession, the military judiciary, and the military police occupation.

4.4.5 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. A complete summary of the CMCRT’s discussions with Mr. Perron, the content of which has been verified for accuracy and confirmed by Mr. Perron, is included at Annex J.

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 DDCCS are characterized publicly as part of the "JAG Command Team" is extremely problematic. He indicated that a better structure would involve placing the DDCCS 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, Mr. Perron 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.

As a retired military judge, and as someone who participated in in-depth and in-person discussions with the CMCRT, the team placed significant weight on the input that it received from Mr. Perron, particularly on matters relating to the military judiciary.

4.4.6 Lieutenant-Commander (Retired) Levesque, Ph.D. (Military Law)

On 12 June 2017, three members of the CMCRT conducted an in-person targeted engagement with retired Lieutenant-Commander Pascal Levesque, formerly a Canadian Armed Forces legal officer with extensive experience both as defence counsel at courts martial, and in the development of military justice policy. A complete summary of the CMCRT's discussions with Mr. Levesque, the content of which has been verified for accuracy and confirmed by Mr. Levesque, is included at Annex K. Mr. Levesque followed up after this consultation to provide the CMCRT with written submissions explaining his points in more detail, which are included at Annex L.

Mr. Levesque began his input by noting that the court martial system must be ready for a large scale armed conflict at any time, and must be capable of operating effectively in such a situation. He also suggested that the military justice system serves two purposes – a public order and welfare purpose and a disciplinary purpose – while the civilian criminal justice system only serves the former purpose.

Regarding the structure of prosecution and defence counsel services, Mr. Levesque was of the view that there are as many reasons to civilianize these offices as there are to keep them in their

current form, so the balance should weigh in favour of the status quo. However, he suggested a number of changes to these offices that he felt would enhance them, including all of the following:

- Create a sub-occupation of “Litigator” within the military legal occupation, that requires at least five years of experience as prosecutor or defence lawyer as a prerequisite;
- Allow litigation counsel to remain in their postings indefinitely, and compensate them; and,
- Provide greater control over assessment and promotion of litigation counsel to the respective litigation Directors (DMP and DDCS, respectively).

Mr. Levesque also noted that the JAG’s multiplicity of roles under the NDA created clear conflicts in certain cases. In particular, the JAG’s role as legal advisor to government on military justice matters, superintendent of the administration of military justice, supervisor of the DMP, and supervisor of the DDCS created a web of relationships that were inherently problematic. Mr. Levesque likened this situation to a game of Chess, where the JAG makes all the rules, then controls the Black team’s plays, then control’s the White team’s plays. Mr. Levesque felt that it would be far more principled to have the DDCS organization fall under the Minister of National Defence’s supervision, but with an independent Board of Directors appointed to oversee the operation of the DDCS organization.

The CMCRT asked Mr. Levesque 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. Ultimately, Mr. Levesque was of the opinion that the accuracy of testimony and the fairness of proceedings would not be affected by the different ranks of participants in a court martial in Canada. He acknowledged that such an effect could exist in other systems where there is greater deference to rank and social class distinctions, however.

With respect to the conduct of courts martial in deployed theatres of operations, Mr. Levesque noted that it would ultimately be up to the operational military commanders to decide whether the CAF needs courts martial to be deployable, but Mr. Levesque seemed to think that this would be necessary. In particular, in a state of total war, he noted that a deployed system for deterring and dealing with misconduct would be essential in order to avoid incentivizing misconduct by soldiers as a means of getting back to safety in Canada.

Mr. Levesque proposed the idea of having regionalized military judicial districts across Canada where courts martial could take place, in addition to an “expeditionary” district for dealing with offences that take place outside of Canada.

When the CMCRT noted that most CAF deployments are six months in duration, and asked Mr. Levesque 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. Levesque was unequivocal in saying that this would be impossible within the current court martial system. However, he suggested that it might be possible if the system were sufficiently changed by, for instance, removing unnecessary steps between the laying of a charge and the receipt of that charge by the DMP.

Mr. Levesque also made a number of observations about summary trial reforms that were outside of the scope of the review.

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

On 10 November 2017, two members of the CMCRT conducted an in-person targeted engagement with retired Brigadier General Jan Peter Spijk, formerly Head of the Military Legal Services of the Netherlands' Armed Forces, and current president of the International Society for Military Law and the Law of War (ISMLLW) – an expert group on matters of military law that has held “consultative status” with the United Nations since 1997.²² Mr. Spijk also chairs several Advisory Boards for the Minister of Defence 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. The content of the summary of the CMCRT's discussions with Mr. Spijk, below, has been verified for accuracy and confirmed by Mr. Spijk.

Mr. Spijk began the discussions by providing some background on the evolution of military justice systems in Europe during the 1980s and 1990s, with particular focus on evolutions within the Dutch system. He noted that change was prevalent across many aspects of different European societies during these decades as citizens began to challenge assumptions about, and the structures of, long-standing national institutions in an effort to promote greater individual liberty. With respect to national military justice systems, he observed that they remain very much like national anthems: each one is different, and must integrate acceptably into the overall national scheme and identity. He then proceeded to describe changes that took place over time to the Dutch court martial-type system in order to bring the system into its current form.

Mr. Spijk suggested that one of the most important reform elements was the creation of a reasonably clear and principled divide between military misconduct that was disciplinary in nature (which is dealt with by commanders outside of judicial processes) and military misconduct that is criminal in nature (which is dealt with by courts). He suggested that this change transformed what had previously been a large “grey area” between these two types of misconduct, and left only a “thin grey line” that continues to exist in some cases that could arguably be characterized as either disciplinary or criminal, depending on one's perspective.

Mr. Spijk also noted that one should be clear about the purposes of a separate military justice system. In his view, such systems exist to promote three important values: discipline, accountability, and public protection.

With respect to prosecution services, Mr. Spijk indicated that prosecutions of criminal-like offences will be suspect if there is any chance that they can be influenced by the military chain of command or the military's legal service branch. He suggested that such a case would create a kind

²² The International Society for Military Law and the Law of War is an international non-profit and non-political association under Belgian law. The Society was created in 1956 and has had its seat as well as its General Secretariat in Brussels (Belgium) since 1988. The Society counts approximately 900 members worldwide, among whom many are military and civilian legal advisors, judges and prosecutors. The academic community is also well represented in the Society's membership.

of dual suspicion: either the prosecution service would use its power and discretion to protect military members from being held to account for misconduct (more often in the case of misconduct by senior personnel), or the prosecution service would use its power and discretion to unfairly target more junior members who engage in misconduct through a process that involves different or reduced protections when compared to a purely civilian system. However, Mr. Spijk indicated that, in his view, a prosecution service could avoid this suspicion as long as the head of the service was truly independent and not under any influence of the armed forces. In such a case, Mr. Spijk suggested, it would not be inappropriate to include uniformed military prosecutors within the prosecution service.

This discussion led Mr. Spijk to observe that, with the loss of conscription in the Netherlands in the mid-1990s, the country has seen a generally reduced level of military knowledge and expertise within the population, so deliberate efforts had been taken to ensure that some way of providing for this knowledge was incorporated into the Dutch tribunals and prosecution service.

With respect to military defence counsel, Mr. Spijk was of the view that a uniformed lawyer, given his or her (in principle long-term) professional relationship to the ministry of defence, would always be subject to a suspicion of not being able to provide counsel in a totally independent manner. Therefore, he advised not to use military lawyers as defence counsel within a court martial-type system. With respect to the funding of defence counsel, Mr. Spijk noted that in the Netherlands an accused person who is acquitted at trial will receive some public funding to compensate for the person's legal fees. In addition, the State funds counsel for those with minimal earnings.

On the subject of jurisdiction to deal with civil offences, Mr. Spijk noted in the first place the great diversity in national systems, in this respect. He suggested there is no clear reason why a military tribunal should need to deal with such civil offences that take place in the person's home country, in case a 'nexus' with military service (in the broadest sense) is totally absent. However, Mr. Spijk went on to say that any debate about this question becomes increasingly irrelevant as a military tribunal system grows more and more to resemble the ordinary civilian criminal justice system where such offences would otherwise be tried, in terms of independence and procedural safeguards.

4.5 Internal Consultations

It was critically important to the CMCRT when undertaking this review to understand the perspectives of the "users" of the court martial system: leaders within the CAF chain of command. Consequently, the CMCRT undertook to extensively consult internally within the CAF.

The CMCRT noted that, in almost all cases of internal consultation, those who made submissions to the team were thoughtful and well-informed. It was clear to the CMCRT that these different "users" of the court martial system understood both the system itself, and broader societal issues relating to justice and discipline, quite well.

4.5.1 CAF Strategic Response Team on Sexual Misconduct

On 11 May, 2017, three members of the CMCRT met with the Director General of the Canadian

Armed Forces Strategic Response Team on Sexual Misconduct (CSRT-CM),²³ Rear Admiral Jennifer Bennett, and members of her staff. The CSRT-SM leads the CAF's response at the strategic level to the External Review Authority report, and works towards eliminating harmful and inappropriate sexual behaviour from the Canadian military. The CSRT-SM focuses on policy, training and education, and performance measurement.

Understanding that the CMCRT and the CSRT-SM have different, though complimentary mandates,²⁴ the two teams discussed the court martial system, and how it could be improved to better deal with offences of a sexual nature.²⁵

The first point received from the CSRT-SM was that, based upon the input they have received from a variety of experts and stakeholders, that victims of offences of a sexual nature would benefit greatly from consistency in victim support services, rather than a series of 'hand-offs' as their complaint progresses through various processes (i.e. medical care; military justice; civil criminal justice; internal CAF administrative processes).

The CSRT-SM then offered that transparency of result, to CAF membership and the public but particularly victims, should be improved. In their view, it is difficult to achieve any effect from actions taken in response to inappropriate sexual behaviour if those actions are not made transparent to those affected. For example, the results of internal CAF administrative processes (e.g. Recorded Warnings; Counselling & Probation; removals from command; or even Release from the armed forces) are not made public, nor are the reasons for such actions (or lack of action). If a matter proceeds to trial, court martial results are made public, but if a matter does not get to trial, the reasons for this are not generally transparent to the CAF membership or the public (even if the reasons are legitimate). They are further often not transparent to the victim.²⁶

The CSRT-SM greatly stressed that 'timeliness matters'. In their view, there were no 'speedy trials' in the current court martial system, and this was having a very negative effect on victims of sexual offences, as well as eroding public confidence in the CAF's ability to deal with such matters.

The CSRT-SM also pointed out that there is a general lack of awareness of the independence of various actors in the military justice system (e.g. The Provost Martial; the Director of Military Prosecutions; the JAG), and why this independence is importance in a penal system (like the court martial system). It was discussed whether or not having various actors in the court martial system 'in uniform' is a benefit or a hindrance to perceptions of independence and accountability, as well as legitimacy in the eyes of those affected by the system ("does having a uniform legitimize the

²³ The CSRT-SM was stood up by the CDS on 25 February 2015, in response to the Deschamps Report, *supra* note 15.

²⁴ Paragraph 10 of the CMCRT's Terms of Reference (Annex A) states: "any options that are considered by the CMCRT as a means of achieving greater effectiveness, efficiency, or legitimacy within the court martial system should be consistent with efforts that are being undertaken by other CAF authorities in support of Operation HONOUR. To this end, the CMCRT is authorized to consult with the CAF Strategic Response Team on Sexual Misconduct as approved by the DG CMCRT."

²⁵ Other topics of military law and policy were also discussed (e.g. administrative measures in response to alleged sexual harassment or sexual misconduct), but these topics, being outside of the mandate of the CMCRT, were for context only.

²⁶ On this point see above, Chapter 3 (Past Studies), at note 83 (and accompanying text).

actor?"). There was no consensus on this point.

Some members of the CSRT-SM advised that a formalized court process, whether court martial or civilian criminal court, needs to be available in all circumstances where an offence is alleged. Based upon the information they had gathered, they believed that victims of offences will be best served by having such a formalized process always available in some form, whether or not any particular victim wants to move forward with a prosecution. For example, if a CAF member is sexually assaulted by another CAF member outside Canada, there should always be a way for the victim to access a formalized, Canadian, court process, whether or not the foreign courts or domestic Canadian courts would normally have jurisdiction. Currently, the only option that is always available in that circumstance is the court martial system.

But, the CSRT-SM then stressed that the distinction between conduct that qualifies as an offence under the law, and conduct that is not an offence but is unacceptable for members of the profession of arms, is not well understood. The discussion then turned to Bill C-71, tabled during the previous Parliament but which died on the order paper at the call of the 2015 federal election, which could have been interpreted as making such a distinction more clear insofar as it would have transformed the summary trial system into a non-penal process (more analogous to professional discipline hearings) and required all penal matters to be dealt with at court martial.

If a similar bill were to be introduced in the future, the CSRT-SM advised that this would address a significant gap in the current system, where there is no public, transparent process available whenever misconduct does not constitute an offence, or where the evidence available does not result in a reasonable prospect of conviction based upon strict rules of evidence and proof beyond a reasonable doubt. If this gap could be closed, then the major remaining challenges would be timeliness and transparency of court martial proceedings.

When given the potential option of a future court martial system that relied upon ordinary civil courts, as some of Canada's European allies have done, the DG CSRT-SM remarked that so long as the chain of command, the Canadian public, the victim and the accused would retain the ability to make sure that the unique circumstances of military life and the operational environment were communicated to the tribunal, then such a change could be considered. However, without this ability, she was clear that neither the public interest, nor the needs of discipline, nor the needs of victims would be well served by such a change.

4.5.2 Chain of Command Consultation – Introduction

On 20 September 2016, the Judge Advocate General briefed Armed Forces Council on the (then) upcoming period of CMCRT public consultation. Subsequently, by letter dated 6 October 2016 (reproduced at Annex M), the JAG requested that all members of Armed Forces Council identify members of the chain of command in their respective organizations to provide leadership input to the CMCRT. This initiative was also reflected in CANFORGEN 186/16, wherein the CDS expressly indicated that input was being sought from specific CAF leaders at the strategic, operational, and tactical levels, in addition to the public consultation process.

In his letter of 6 October, the JAG requested that chain of command input be received by 25 November 2016. He also offered to have members of the CMCRT conduct personalized briefings

for any command teams or staffs that so desired. Two such personalized briefings were requested and provided.

The input the CMCRT received from the chain of command is summarized below. Where members of the chain of command made comments concerning investigations and/or the summary trial system, the CMCRT noted the recommendations, but stressed that those aspects of the military justice system were outside of the team's mandate. Those submissions, where made, are identified below, but being outside the CMCRT's mandate are not canvassed in detail.

4.5.3 Canadian Special Operations Forces Command (Regular and Reserve Force)

On 27 October, 2016, two members of the CMCRT met face-to-face with the Commander of Canadian Special Operations Forces Command (CANSOFCOM), who had requested a personalized briefing. The content of the summary of the CMCRT's discussions with the Commander of CANSOFCOM, below, has been verified for accuracy and confirmed by the Commander and his Command Sergeant-Major.

The Commander characterized the current court martial system as intolerably slow. He described a recent case where, in September of 2014, a member of his Command unintentionally shot another member during a training exercise on a range.²⁷ The trial did not commence until the summer of 2016, with final resolution on 21 June 2016, for a total of 21 months delay.

During the entire period of delay, he as the Commander wished to order an internal, administrative investigation into the incident in order to investigate ways to prevent future occurrences. He indicated his perception that he was *de facto* prevented from doing so by various military justice system participants [who may have been concerned about preserving the admissibility of evidence for a possible court martial]. This to him was unacceptable, as he felt he was essentially forced to continue with potentially unsafe training practices for over a year until the prosecutor gave him the 'green light' to move forward with an administrative investigation.

On the same case, during this delay, he also had to make command decisions relating to CANSOFCOM's operational needs (e.g. was the accused member still deployable? Was the accused member fit to remain as a part of CANSOFCOM?) Because all information related to the incident was controlled by the Military Police and the Canadian Military Prosecution Service, the Commander believed he had insufficient information to make many core command decisions.

The Commander rejected the reasons given to him for the delay. These reasons as he understood them included that the prosecution service was very busy with many files, and that they needed time in order to make an independent assessment on whether or not charges ought to proceed.

When asked about how speedy a court martial system would need to be (on serious matters) and still be useful to the Chain of Command for reinforcing discipline, efficiency, and morale, the Commander of CANSOFCOM answered that generally, six months would be acceptable. On less serious, summary trial type matters, he was adamant that seven to fourteen days is the maximum

²⁷ *R v Cadieux*, 2016 CM 4008.

amount of time that can pass between an incident and resolution before a rapid drop off in effectiveness.

The Commander of CANSOFCOM, having recently himself been an accused person at court martial,²⁸ had further observations about the current system. First, notwithstanding that in his estimation, the facts of his own case were incredibly straightforward (he also stated that he had admitted the event immediately, and cooperated with CAF authorities), the case took ten months to reach resolution. In his opinion, this was without excuse and clearly unacceptable. It was a distraction to both himself, and necessarily his entire command, for far longer than reasonable.

Both the Commander and members of his headquarters staff also commented on the specific, practical effect of the events at the trial. The CMCRT was particularly struck by comments made by the Commander's subordinates, who approached the team members on their own accord outside of the meeting with the Commander. These subordinates described the trial in harsh terms. They expressed that they were shocked that even though their Commander pleaded guilty and entered an agreed statement of facts, the military prosecutor called the Commander's own command chief warrant officer was required to testify against him. They were again disenchanted when, after the Commander's defence counsel objected, the military judge allowed the testimony. In their eyes, in circumstances where the Commander had already admitted his guilt (as a proper officer should do, in their view), calling the CWO to testify against his own Commander was completely unnecessary, distasteful, and disrespectful. They could not understand how a military prosecutor and a military judge could do something so contrary to what they believed were important military values.

The Commander's subordinates indicated that they were further disillusioned during the sentencing hearing when the military judge, an officer who to their knowledge had no combat or other operational experience, proceeded, in their view, to publically admonish their Commander, a combat veteran, and lecture him about the importance of discipline and weapons safety on operations. They heard the military judge as contemplating whether or not the Commander would re-offend, and understood the judge to express the hope that he would not. In the opinion of the members of CANSOFCOM in attendance, the military judge spoke to the Major-General, in front of his subordinates, like a he was a private or a corporal, concerning a 'disciplinary' matter which the Commander had 'owned' since the beginning.²⁹ They expressed that they now see the court

²⁸ *R v Rouleau*, 2016 CM 3015. The Commander CANSOFCOM accidentally discharged his firearm while in an operational theatre. No one was injured. On a guilty plea and joint submission on sentence, he was found guilty of one count under section 129 of the NDA, Conduct to the Prejudice of Good Order and Discipline, and sentenced to a \$2000 fine.

²⁹ The relevant sentencing portion of the military trial judge's written reasons reads:

In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors: [...] (b) with respect to the subjective seriousness of the offence, the court considers three things as aggravating factors as suggested by the prosecutor: (i) First, the rank and position. It is easy for you to imagine that expectations are very high towards someone like you, with your rank and position. I do not have to elaborate a lot about that, but because of that, your rank and position constitutes, in the circumstances, an aggravating factor. (ii) Your experience with weapons and with the C8 carbine, which was referred to by the prosecutor as your familiarity with the weapon. Clearly you knew what you were handling, you knew how to handle it, and you were negligent, so I have to consider this factor, experience with this type of weapon, as an aggravating factor. (iii) Location and circumstances. It is true it

martial system as having no credibility or legitimacy. In their eyes, there is no legitimacy for a prosecutor with no combat experience, and a judge with no combat experience, to ‘judge’ the standard of military discipline expected of a combat commander.

The Commander also shared his thoughts on the idea of permanently or temporarily embedding prosecutors within civilian prosecutions services with much higher case-volumes, in order to enhance knowledge, skills, and proficiency. The Commander offered an analogy from his own experience: Regular Force specialist physicians currently work full-time in civilian hospitals but, when the CAF needs them, they are employable and deployable at the height of their skills. In his view, this works very well, since what CANSOFCOM, and the CAF, really need are good doctors that can deploy, and the only way to maintain that competence is through volume and currency. In his view, any ‘blending’ of civilian and military experience to create efficiency and expertise “could not be anything but good”.

Overall, the Commander of CANSOFCOM offered, in his assessment of the current system from the perspective of a military commander, that the CAF “has lost sight of who owns discipline: it is the chain of command [not the lawyers]”. He expressed unhappiness at the idea that commanders might feel obliged to have legal officers take *de facto* carriage of disciplinary decisions. In his view, this may be a longer term legacy of the Somalia Affair and the reforms it

was in a war environment. What I kept from those circumstances is the location; you were not in a controlled environment like a fire range where some safety measures are taken. Basically, each soldier must rely on each other to take his own safety measures in order to avoid causing any injuries to someone. Fortunately, nothing happened, but I have to consider it as an aggravating factor.

The court has also considered the following mitigating factors: (a) First, there is your guilty plea. Clearly you accepted full responsibility for what you did since the incident occurred. There is your statement just after the incident, there is your letter, and there are your instructions to your counsel to plead guilty at the very first opportunity. You clearly recognized and took full responsibility for the incident and your actions. (b) There is no annotation on your conduct sheet, in fact, I haven’t seen any conduct sheet, but clearly there is nothing in relation to any disciplinary incidents or disciplinary matters or an indication of any criminal record that you may have. (c) Also, I take from the circumstances that it is isolated and an out-of-character incident. Some people would say that it just proves that you are a human being, sometimes those things happen. We do not want to see those things happen, but it happened, but it is not something that you are used to do. It was probably your first and last time before this court. (d) There is also your exceptional career within the Canadian Armed Forces. As expressed by Chief Warrant Officer Legault, it is not a coincidence if you achieve what you have achieved in wearing the rank that you have and I think it must be considered, in all of the circumstances, as a mitigating factor.

Usually as a matter of sentence, in such circumstances, it goes from a severe reprimand and a fine to a reprimand and a fine up to a fine as demonstrated by all of the case law provided to the court by the prosecutor. I would add [...]:

Basic military discipline requires that any service member regardless of his or her rank and responsibilities must handle his or her personal weapon with due care. The potential for the mishandling of weapons is increased tremendously as fatigue and stress also increase. This case sends a clear message that the mishandling of weapons by the failure to follow the proper safety measures is treated rigorously regardless of the status and rank of the offender.

In consequence, the Court will accept the joint submission made by counsel to sentence you to a fine in the amount of \$2,000 considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute. (citations omitted)

precipitated (i.e. a tendency to believe or feel military justice is ‘out of [the commander’s] hands’). He expressed support for the idea that if the system could be placed back in the hands of the chain of command, while still following the law and meeting all legal requirements, this would be best for operational effectiveness, but more so, for credibility and legitimacy in the eyes of CAF members.

The Commander made further comments and recommendations on the current speed and quality of investigations in the military justice system.

4.5.4 Canadian Army

The CMCRT received a high number of thoughtfully developed and responsive submissions from within the Canadian Army. The perspectives included those of both senior officers and senior non-commissioned members, from both unit- and formation-levels, and from within both the regular and reserve force. The importance of the court martial system, and its effectiveness, to these stakeholders was plainly evident to the CMCRT, and the team was grateful for the time and energy that each contributor took in communicating their views to the CMCRT.

4.5.4.1 2nd Canadian Division

4.5.4.1.1 2 Canadian Division Personnel Services – Commanding Officer (Regular Force)

The CO from 2 Canadian Division Personnel Services (2 Can Div Pers Svcs) made his submission to the CMCRT in writing, via email. The complete submission is included at Annex N.

Concerning tribunals, the CO not convinced of the need to have military judges, and indicated that in his view military judges have much less experience when compared to civilian jurists. The CO also suggested that any civilian judges assigned to the court martial system should be selected based upon a high level of criminal law trial experience and interest in military matters.

While the CO believed that the dynamics of a tactical or operational environment would be an important reality that any judge must be able to understand, he was not convinced that this would be an insurmountable challenge for an experienced civilian judge properly informed by professional lawyers and senior military staff. He was of the view that a civilian judge would be perceived, justifiably or not, as more impartial.

He was in any case not convinced that military judges have the same military experience and knowledge, or even the same culture, as military members who spend the majority of their career on a base or in a ship.

The CO cautioned that on any service offences that are also ordinary crimes, the tribunal must be capable of understanding that an ordinary offence may be more serious in an operational context, and it may not be appropriate to deal with the offender in precisely the same way as would be the case in ordinary courts.

On the topic of the court martial panel, the CO was in favour of retaining it as a finder of fact,

though he believed command experience should be mandatory for eligibility for panel membership. He expressed that former commanding officers and formation commanders would have the necessary judgment and experience to deal with the intricacies of a charge, and to understand the impact of misconduct on unit discipline and operational security.

The CO believed that courts martial should continue to be internationally deployable. While the CO believed that in the current operational climate, deployed trials are never going to occur (accused persons will be repatriated immediately, and by the time any trial could commence the rest of the deployment rotation will have also returned to Canada), he believed that if Canada were to undertake longer, larger missions, then a deployed court martial would be required.

Concerning prosecutions, the CO expressed that the most important factors for maintaining confidence in the military justice system were the expertise, sound judgment, and military knowledge of the system's actors. In his view, this would be the case whether prosecutors were military or civilian. He was very critical of the state of delay in the current system, as well as how it seems to place great emphasis on technical legal points at the expense of the interests of military justice and discipline. In his view, a system of career civilian prosecutors with developed expertise in military prosecutions could undoubtedly contribute to the credibility of the institution – as opposed to military prosecutors who only fulfil that role for a very brief period of time. The CO suggested that a mixed civilian / military prosecution office could also be an option, as well as civilian prosecutors with military advisors.

The CO had positive comments relating to military defence counsel. He was of the view that if service offences are punished more harshly than ordinary offences (and in his view, they ought to be), then state-funded legal support to accused CAF members should be greater than in the civilian system. He had a moral concern, as military members (especially, in his view, commanders) are more vulnerable than civilians to having their decisions 'second-guessed', and, unlike civilians, are liable to be charged for those decisions. The CO advised that any system of financial contribution would need to take into account these two realities.

The CO was very supportive of maintaining uniformed, military defence counsel, as he saw this as important for ensuring that military knowledge would form part of a member's defence. The CO believed that it was essential for military defence counsel to have tactical experience on operations (especially expeditionary operations). However, a civilian director (DDCS) might also help preserve the notion of fairness for members who may feel that military defence lawyers are somehow 'second rate'.

Concerning offences, the CO was of the view that continued jurisdiction over ordinary criminal offences could be advantageous, if courts martial could proceed faster than ordinary criminal courts and if sentences could be handed down through the chain of command. He was at the same time however of the view that such offences should only be handled by way of court martial instead of the ordinary courts if a member was in uniform or on duty, or if the offence was committed in the context of an expeditionary operation.

The CO was very critical of the 'hierarchy' of military punishments, as he felt this rule can cause the actual best punishment, for an offender and for the public, to be legally unavailable as somehow

‘too severe’ or ‘too lenient’. He was of the view that the most appropriate punishment should be available in all cases.

4.5.4.1.2 2 Canadian Division Personnel Services – Unit Chief Warrant Officer (Regular Force)

In addition to the submission from the unit CO, the CMCRT also received a written submission from the Unit CWO, which is included at Annex O.

The CWO was not convinced of the need to have military judges, and indicated that in his view, military judges have much less experience when compared to civilian jurists. If civilian judges were to hear cases, he thought that this might inspire more public confidence in the court martial’s transparency. The CWO suggested that in cases involving uniquely military offences, civilian judges could hear expert evidence on military matters.

The CWO did not believe that courts martial should still be capable of deploying. He suggested that it would be better to send any accused back to Canada and to hold the trial there. The CWO believed that attempts to keep an accused in theatre awaiting trial could result in a dangerous distraction from the mission.

The CWO suggested that the head of the military prosecution service could be a civilian, as this might inspire more public confidence in the prosecution service’s transparency. He gave the example of the staff supporting the Director General Canadian Forces Grievance Authority, who are civilian and who understand the ‘military environment’.³⁰

The CWO was very supportive of maintaining uniformed, military defence counsel, as he saw this as important for ensuring that military knowledge would form part of a member’s defence. He believed it was necessary for them to understand the environment and challenges faced by units. However, the CWO believed that CAF members ought to be required to contribute financially to their defence (akin to the civilian legal aid scheme).

Concerning offences, the CWO was of the view that continued jurisdiction over ordinary criminal offences would be advantageous, especially since ordinary criminal courts are overburdened. However, the CWO noted that military cases ought to be swiftly dealt with in order to maintain discipline.

The CWO believed that punishments ought to be the same under the military and civilian justice system. He was not in favour of retaining ‘military’ punishments as this was not fair to military offenders. He noted that the changes that will be brought forward by Bill C-15, when they come into force, will bring military punishments more in line with civilian ones.

On appeals, the CWO indicated that the CMAC could be composed of civilian court judges and one military judge to bring military knowledge to the court.

³⁰ On this point, the CMCRT suspects that the Unit CWO may have been referring to the Military Grievances External Review Committee, which is comprised exclusively of civilian members, rather than the Director General Canadian Forces Grievance Authority, which includes military members.

The CWO believed that there should not be any special provision for particular groups such as youths. Rather, he thought that these specific cases should be dealt with in the civilian system, especially in cases involving youths (cadets) and domestic violence (women).

4.5.4.1.3 5ieme Regiment Genie du Combat - Commanding Officer (Regular Force)

The Commanding Officer of 5ieme Regiment Genie du Combat (5 RGC) offered some specific observations on the process of referring cases to court martial. His written submission is included at Annex P.

His principal point related to the role of the CO in the referral process to court martial. In his view, when charges are laid directly by a member of the Canadian Forces National Investigation Service,³¹ (which virtually always occurs without the involvement of the member's unit), it makes no sense to oblige the members CO, and unit, to complete and send the referral package to the Director of Military Prosecutions. Since the member's chain of command would not have seen the file, and not been involved in the decision to lay charges, it seemed to him unjustifiable to insert the chain of command into the process for no other practical reason than to compile the documents and send off the referral package.

He gave further examples of how the current system's multiplicity of decision makers³² can often lead to communication challenges and role confusion, particularly between commanding officers and prosecutors. He expressed dissatisfaction with the quality and transparency of explanations provided by military prosecutors on specific decisions to proceed or not proceed with charges.

4.5.4.1.4 35 Canadian Brigade Group Headquarters - Chief Warrant Officer (Reserve Force)

The Brigade Chief Warrant Officer at 35 Canadian Brigade Group Headquarters (35 CBG HQ), expressed in his written submission (included at Annex Q) that in any court martial system, an accused military member must be tried fairly. He also expressed that victims ought to have access to assistance in the form of civilian lawyers or counsellors.

He was open to the idea of civilian judges hearing cases, except if the offence charged related to purely military matters, in which case he felt military judges would be better. If civilian judges were to hear cases, he suggested they should have access to expert advice on military matters.

However, the CWO was of the view that certain kinds of military misconduct should always be judged by other military members, and must be judged as quickly as possible in order to ensure that general deterrence is achieved and respect for the law is fortified within other military members.

The CWO was also of the view that, in certain cases, there ought to be an appeal mechanism.

³¹ *Queen's Regulations and Orders for the Canadian Forces*, art 107.02, and 107, section 3 [QR&O].

³² For example: investigator; charge-layer; CO; Referral Authority; military prosecutor.

4.5.4.2 4th Canadian Division

4.5.4.2.1 2 Canadian Mechanized Brigade Group & 4th Canadian Division Support Group – All Command Teams (Regular Force)

On 22 November 2016, two members of the CMCRT attended 4th CDSB Petawawa and met with the entire senior leadership³³ from 4th Canadian Division Support Group (4 CDSG) and 2 Canadian Mechanized Brigade Group (2 CMBG), providing the second personalized briefing. The content of the summary of the CMCRT's discussions with these senior leaders, below, has been verified for accuracy and confirmed by the respective commanders of 2 CMBG and 4 CDSG, and their staffs.

After receiving an update on the current state of military justice, the command teams discussed summary trial reform and expressed concerns with some aspects of the current system, particularly the amount of misconduct that is subject to an election to court martial. In their view, the majority of these matters ought to be swiftly dealt with as a minor disciplinary matter. Delay at the summary trial level was also a concern. The command teams agreed that in order for the summary trial system to be most effective, matters need to be dealt with within 7-14 days of an incident.

Moving on to courts martial, the entirety of the 2 CMBG and 4 CDSG command teams were in agreement: the current system is “broken.”

The overarching question, in the command teams' view, was: who precisely is the court martial system supposed to serve? If the chain of command cannot, as they cannot now: 1) meaningfully influence the process, including proceeding to trial; 2) ensure key military matters or facts are submitted as evidence and given weight; or 3) meaningfully impact submissions and outcomes (especially in cases of joint submissions) on sentencing, then they failed to see the utility in having a ‘military’ tribunal at all.

In their view, if the chain of command continues to have no meaningful role, then serious cases (e.g. criminal-like cases) could just as effectively be dealt with in local provincial criminal courts; units could easily have an attending officer³⁴ relay court dates, and have unit members attend.

The command teams of 2 CMBG and 4 CDSG did not express any attachment to having regular or reserve force ‘military’ judges, and were comfortable with the idea of civilian judges trying service offences. They expressed that if there were legal rules that ensured the views of the chain of command, and evidence about the impact of a member's misconduct on the unit, would always be entered into evidence and meaningfully considered (especially at sentencing), then it would not matter if the tribunal and/or the judge was civilian in character. A ‘military impact statement’ was one example given, but a preferred rule was one that obliged the court to hear testimony from a members' commanding officer at sentencing. The command teams did not believe that these sorts of rules would be any less effective at meeting the needs of unit discipline if they were applied in civilian criminal courts instead of at military tribunals.

³³ Specifically, the Commanding Officers, Unit Chief Warrant Officers, Brigade Group Commander, Brigade Group CWO, Support Group Commander, and Support Group CWO.

³⁴ See for example the current requirement established by QR&O art 19.57.

Some command teams expressed that such legal rules, in a civilian court, would be superior to the ‘broken’ system as it currently stands. Others went further and posited that a civilian court might actually be more inclined to give weight to the evidence from the chain of command, and relayed disappointment with how their views had been treated by military judges and prosecutors in the current system.

In unanimity, the command teams were very critical of the current court martial scheme. They described frustration with what they perceived as a relatively routine occurrence: after receiving legal advice, commanding officers and Referral Authorities,³⁵ decide that charges ought to proceed to court martial, and refer those charges to the Director of Military Prosecutions. But, once the charges are reviewed by a military prosecutor, that command decision is overruled and rendered meaningless, usually by a major or captain working far from where the misconduct took place (and where the people affected by it remain). From the perspectives of these commanders, this perceived routine occurrence undermines the credibility of the chain of command and is very harmful to discipline.

They were also skeptical that the prosecutor was better positioned to assess the ‘public interest’ in proceeding than they were. The commanders understood that prosecutorial decisions needed to be based on independent legal assessments. What they could not accept was that after they themselves received independent legal advice from their unit legal advisor recommending to proceed, that it appeared to be necessary for another military actor to be in the position to make decisions that they felt undercut their command authority and credibility. The command teams were also very critical of situations where they felt that they had not been informed of prosecutorial decisions to not proceed, or to reduce the seriousness of the charges, until after the decision had been made and a letter had been sent to the accused, and overall felt that these decisions themselves were not sufficiently transparent.

There was majority agreement that, if military justice decisions made by the chain of command could not be made meaningful, then it would probably be better for unit discipline if the true decision makers were not military – at least that way, they indicated, the authority and judgment of the commander could not be undermined, and the system itself would not be harmful to discipline.

Also concerning charges reduced or not proceeded with by the military prosecution service, the command teams stated that there should be greater transparency across the CAF concerning how often this is happening, and why it is done. They suggested that the DMP’s annual report should capture the number of charges reduced and/or not proceeded with, what those charges were, and why the decision was made in each case.³⁶

³⁵ QR&O art, 109.02: “The officers who are authorized to refer a charge to the Director of Military Prosecutions are the Chief of the Defence Staff and any officer having the powers of an officer commanding a command.”

³⁶ The latest annual report of the DMP (2016-2017) does in fact capture the number of files preferred or not preferred. However, it does not capture how many specific charges were received and not preferred, reduced to a less serious charge, or increased to a more serious charge, nor are any reasons provided for any of these decisions. See: Canada, Department of National Defence, *Director of Military Prosecutions Annual Report 2016-2017* (Ottawa: Office of the Judge Advocate General, 2017) [DMP Annual Report 2016-2017].

On a similar theme, the command teams expressed dissatisfaction with sentencing results at court martial. Generally of the opinion that the sentences were far too lenient to instill discipline, they were particularly critical of sentencing results on those cases where the matter had only been referred to court martial because, based on the facts of the case and after receiving independent legal advice, the commanding officer with summary trial jurisdiction did not believe his or her maximum summary powers of punishment (i.e. 30 days detention) were sufficient. Again, they expressed that command credibility is being significantly undermined since such cases, routinely, result in sentences of Reprimands and/or small fines at court martial, often with the consent of the military prosecutor.

In contrast with the views above on military judges and prosecutors, some commanders were more hesitant with the idea of complete civilianization of all actors. They did, however, express that after enough time away from operations, all CAF members, and especially those belonging to support occupations, can become more and more 'civilianized'. They were strongly in favour of regular and routine 're-militarization' of any military justice actors, including judges, by re-immersing them in military operations and culture, in order to maintain their appreciation for the realities of military life, and operations.

Concerning defence counsel, the command teams suggested that the current, fully-funded and virtually unlimited defence counsel model was unsustainable and unfair, but were concerned about what might befall CAF members accused of military/operational offences as a result of any reform. In their view, if Canada is going to send CAF members on dangerous operations, then there is a duty to assist them if they are accused of wrongdoing while carrying out those very operations. But on the other hand, for non-operational offences (e.g. theft; sexual assault), they were not supportive of the military paying for 'legal aid'. For military/operational offences alleged to have occurred on military missions, they expressed approval for a fully-funded legal representation policy analogous to the current Treasury Board Policy on Legal Assistance and Indemnification.³⁷

On the topic of operations, the command teams of 2 CMBG and 4 CDSG were concerned that court martial reform was being contemplated in a 'peace time' scenario, with not enough thought paid to what a court martial system would require in order to maintain discipline if in the future Canada became involved in a large-scale armed conflict. They wanted to be sure that the CMCRT was contemplating such a scenario. This point generated a large amount of discussion between the command teams themselves, as well as the CMCRT. Near-consensus was eventually reached that if Canada were to find itself in such a 'total-war' scenario, none of the commanders would want to hold courts martial in theatre, and certainly not anywhere near the front lines. The command teams agreed that courts martial are simply too resource intensive for tactical units to be considered useful at the front, and in any case would be a distraction from the mission. They came to the conclusion that what they would probably actually need in a large-scale armed conflict would be more robust summary powers.

Concerning offences and jurisdiction, the command teams were unanimous that they wanted any 'double jeopardy' between military disciplinary proceedings and criminal/ penal law proceedings eliminated. They did not want to have to wait until a court martial or civilian court had dealt with a member before they could proceed with a process of disciplining or dealing administratively

³⁷ Online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13937>>.

with their personnel, nor did they want prosecutorial decisions or outcomes at trial to serve as a barrier to a command decision to conduct a disciplinary proceeding, either before or after the trial. They were very critical of the election to court martial being available for very minor misconduct, and pointed out that court martial delay, combined with court martial outcomes that were harmful to discipline, had damaged the credibility of both military justice and the chain of command.

Lastly, the command teams from 2 CMBG and 4 CDSG agreed that for both summary discipline processes and courts martial, it was absolutely necessary to have a review or appeal process available. In their view, on summary matters, that was the only reliable way that they, as commanders and unit disciplinarians, could be made aware of mistakes. For courts martial, they believed that a strong appeal process for both the offender and the CAF should help military law develop into a better and better tool for doing what it is supposed to do: reinforcing discipline, raising morale, and enhancing operational effectiveness. They were not sure that this is what is happening now.

The command teams made further recommendations for improvements to the summary trial system.

In subsequent correspondence with the leadership of 2 CMBG, after the CMCRT had provided a copy of the above written summary of the 22 November 2016 consultation discussions to 2 CMBG, it was confirmed to the CMCRT by email from 2 CMBG staff that “[o]ur Unit Command Teams see the system is broken from start to finish and I think this is reflected in the report.”

Additionally, on behalf of 2 CMBG, the Brigade Sergeant Major reiterated by email on 27 June 2017 some of the key points that 2 CMBG feels are essential within any enhanced court martial system (with the points quoted below in their entirety):

1. A timely system;
2. A system that demonstrates openness and does not undermine Command, one that supports discipline, raises morale (due to discipline being seen to be done in a timely manner), and finally lends to operational effectiveness;
3. The difference in offences is “discipline” (the CO hears it) and “Criminal” (A Judge hears it). It will be up to the CMCR to determine what offences will be and who’s authority they fall under;
4. Agreed that Court martials do seem to be seen as lenient in their sentencing;
5. Agreed that soldiers should not be allowed to elect for what we see as minor discipline issues. This just backs up the system and/or are thrown out completely from the court martial;
6. Agree that unit command teams need to have their voices heard and the impact statements presented in writing or person; and

7. When it comes to criminal activity we all agreed that it needs to be heard by a judge (civ or military) as they have the training and education. We do however believe that for lesser disciplinary issue, a unit CO can address these, just lesson their powers of punishment (ie no jail time). Only judges should be able to put someone in jail or prison.”

The CMCRT notes that its consultations with 4 CDSG and 2 CMBG were effectively the equivalent of approximately 15 individual consultations with 2-person command team that would have otherwise been conducted with unit- and formation-level command teams from within the Canadian Army. Furthermore, these consultations took place in an in-person environment where CMCRT personnel could ask follow-up and clarifying questions in order to truly understand the essence of all points that were being made by the command team personnel. Finally, the substance of the issues that were discussed during these consultations clearly reflected the fact that the command teams were highly informed about the current court martial system, and about broader legal and policy issues that were relevant to the consultations. Consequently, in subsequent chapters, the CMCRT has placed substantial weight on the information gained during these consultations.

4.5.4.2.2 Royal Highland Fusiliers of Canada - Commanding Officer (Reserve Force)

The CMCRT received a detailed email submission from the commanding officer of the Royal Highland Fusiliers, which is included at Annex R. A reservist himself, in his civilian employment the CO is the Crown Attorney of the Waterloo Region, and oversees a team of 23 civilian prosecutors. In addition to his extensive reserve service in operational military occupations, the CO had also previously been a reserve legal officer, both as a unit legal advisor and as a member of defence counsel services. His submission touched upon all of the enumerated grounds in the CMCRT’s Terms of Reference.

In general, the CO advised that: “efforts should be made to keep the [court martial] ‘military’.” However, he highlighted several areas that, in his view, were in need of reform.

Firstly, in his assessment, “the experience level of the judicial branch of the court is concerning.” He recommended that the experience level of the military judiciary “could be significantly enhanced by accessing the Reserve Judicial Officers provisions of the [*National Defence Act*].”

He highlighted that: “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.”

In the CO’s view, some other ways to enhance the experience level of military judges would be to permit the appointment of civilian judges or lawyers who have sufficient experience as military officers, and to pursue the potential for cross-appointments of military judges to civilian criminal trial-level courts to ensure continuing judicial experience for appointed members. The CO was not convinced that military judges needed to hold a normal rank, and implied that they could instead hold a simple judicial title (e.g. ‘Judge’; ‘Justice’).

Outside of the military judiciary, the CO suggested that there should be more reliance on Reserve Force members who in their civilian lives are experienced and practicing criminal trial lawyers, for military prosecution and defence counsel services. This would, in his view, ensure that counsel with sufficient experience are defending our soldiers and prosecuting on behalf of Her Majesty.

Regarding defence counsel services, the CO was of the view that legal fees should be paid by members on an “ability to pay” basis. In his view, 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 CO was also of the view that budgetary decisions for the directorate of defence counsel services should be conducted by a body at arms-length from the Judge Advocate General. He further offered that the Director ought not to be within the JAG chain of command.

For the tribunal used at court martial, the CO believed that a permanent standing court that is fully equivalent to the Superior Courts of the provinces is needed. While the CO was supportive of retaining both judge-alone trials and trials by a panel with a judge presiding, he suggested that the composition of the panel should be reformed towards all-rank participation, including junior ranks.

The CO was not supportive of convening courts martial abroad. In his view, while the theoretical requirement for a court martial to sit outside of Canada still exists, courts martial should not be convened outside of Canada unless there are very specific reasons to do so, particularly when one considers how short operational tours outside of Canada tend to be for military personnel.

On subject matter and personal jurisdiction, the CO was of the view that courts martial should continue to prosecute both service offences, and offences under the general laws of Canada.

Concerning sentencing, the CO was of the view that sentences at courts martial should reflect the civilian sentencing approach, and he believed that sentencing should be done only by judges.

As for what rules of evidence ought to apply at court martial, the CO expressed his view that the civilian common law of evidence is far superior to the Military Rules of Evidence because it grows and expands to face new challenges, whereas the MRE are overly stilted, inflexible, and out of date.

Considering an appeals process for the court martial system, the CO was of the view that change is required in how members of the appellate court are selected. In his estimation, CMAC judges should have extensive criminal law experience. He felt that the use of Federal Court judges is not optimal, given their inexperience in dealing with criminal law issues. He also suggested that the CMAC could be established following the model that is used by the appeal courts of the North West Territories.³⁸ He felt that the appellate judges did not necessarily need prior military experience, although this type of experience could be beneficial to give the court a legal

³⁸ The Court of Appeal for the Northwest Territories does not consist of judges who are appointed exclusively to that court, but, rather, consists of judges who are cross-appointed to that court from the Courts of Appeal of Alberta and Saskatchewan, and of the judges of the Supreme Court of the Northwest Territories, who are *ex officio* judges of the Court of Appeal.

“interpreter” who is familiar with the military context surrounding the offences that are being examined.

Finally, the CO suggested that 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 closed circuit television and support persons.

The CO made some additional recommendations on streamlining the process by which charge layers and tactical commanders are provided legal advice.

The CMCRT notes that this submission from the CO reflects the informed perspective of a commander with extensive experience as a key justice system actor within Canada’s civilian criminal justice system, and as a leader in the CAF at different ranks. It was clear to the CMCRT that the CO had given due consideration to a wide variety of difficult and important issues prior to making this submission. Consequently, in subsequent chapters, the CMCRT has placed substantial weight on the information gained within this submission.

4.5.4.2.3 The Royal Regiment of Canada - Command Team (Reserve Force)

The Royal Regiment of Canada provided the CMCRT with a submission by email (included at Annex S). Their submission was focussed on several key topics: the military rules or character of the tribunal, and the nature of the prosecution and defence counsel services.

Regarding the military character of courts martial, the Regiment’s command team stated: “the expectations of military members are higher than that of regular citizens. There should remain the opportunity for military personnel to be involved in the court/trial process in order to monitor and impose the higher standard expected of the accused military person that would not otherwise be fully understood by non-military personnel.” The Regiment’s command team further submitted that: “Based on the higher expectation from military members, there would need to be a military influence in the court proceeding if it were to be tried by civilians. This would ensure that the member is held to the higher standard for their actions if/when allegations are proven. The impact of the outcome of the proceedings on discipline within the unit is also a significant factor of consideration for the process.”

Concerning prosecution services at court martial, they felt that “[i]t could be considered that only military members should prosecute in a court martial. With the higher standards expected of military members, the military prosecutor would be better positioned than a civilian counterpart with a significantly deeper understanding of the impact of the allegations against the accused and the impact of the proceedings on the victim, the accused, the home unit and the institution.”

And, for defence counsel the command team stated, “[i]t could be considered that any civilian lawyer who will be representing a military member in a court martial should have the opportunity to be formally made aware of the unique aspects of the military court’s processes prior to the commencement of the proceedings. This understanding would ensure that the military member who chooses a civilian lawyer would not be at disadvantage with a legal representative who may be inexperienced with the nuances and required additional formalities within a military court martial.”

4.5.4.3 5th Canadian Division - Division Chief Warrant Officer (Regular Force)

Fifth Canadian Division selected their Division Chief Warrant Officer to communicate their submission to the CMCRT. This submission was received in writing, and is included at Annex T. The principal concern that was expressed from the CWO was that “the time span from charge laying to the actual conduct of the [court martial] is too long”. The CWO indicated that in his experience, the delay had been “as long as 18 – 24 months.” He further indicated that he had often seen some of the charges dropped due to the delay.

The CWO further submitted that the “punishments awarded at [court martial] are viewed as more lenient than those awarded at [Summary Trial]. A good example would be a Pte [at Summary Trial] [who] was awarded 18 days in [Detention] for the theft of another soldiers kit and about 6 months later a Pte [at court martial] was awarded a fine of \$650 for stealing C4 plastic explosives from a demolition range. Understanding there are many factors considered in awarding a punishment the general sentiment is that [court martial] punishments are far more lenient.”

The 5th Canadian Division CWO further suggested that the “understanding of administration and military law at the unit level are not well understood and often mixed,” and suggested increased training during normal career coursing on the separation between military administrative law and actions (for example, remedial measures, and administrative release) and military justice.

The CWO made further comments and recommendations with regards to investigations, both at the unit level and those undertaken by the military police and the National Investigation Service, but those observations were outside of the mandate of the CMCR.

4.5.5 Royal Canadian Navy

4.5.5.1 Maritime Forces Pacific (Regular and Reserve Force)

The Commander, Royal Canadian Navy, selected Maritime Forces Pacific (MARPAF) to provide input to the CMCRT on behalf of the RCN. Commander MARPAF solicited input from all command teams in his formation, and submitted a consolidated written response to the CMCRT (included at Annex U). MARPAF noted several areas where they felt that enhancement was needed within the court martial system, alongside comments related to the summary trial system.

The first area where Commander MARPAF believed the court martial system required improvement was timeliness. In his words:

The courts martial system is seen as a very time-consuming process, with long delays, from the laying of the charge to the actual conclusion of the process. There is a widespread concern that the system is overburdened, and it takes in excess of two years to get to a Court Martial date. This is universally viewed as far too long and not serving the needs of the population. Over the last several years, the perceived limited capacity of military judges has led to unacceptable and lengthy wait times, which goes against the fundamentals of due process regarding being tried in a reasonable time frame. Furthermore, timely, swift, and balanced justice provides an effective deterrent, promotes good order and discipline, and

counters many aspects of discipline which negatively affect morale and welfare.

The second area was general deterrence, and the perception of the court martial system amongst CAF members:

The widespread perception amongst the junior sailors is that election of Court Martial over Summary Trial currently provides members with a much greater chance of getting acquitted of their charges, particularly if they enlist the services of a civilian lawyer, who are perceived to have a better understanding and application of trial law than military lawyers. Many of the acquittals over the last decade are perceived to be due to “technicalities”, and members of the CAF view the accused as having gotten away with infractions. [...] The current commonly held perception is that election for Court Martial has been used as a tactic to either delay proceedings until a member is released, or in hopes that it will be thrown out/dismissed due to a backlog.

Commander MARPAC also noted discrepancies in sentences and expectations:

[F]or the sentencing phase of both Summary Trials and Courts Martial, punishment discretion can lead to inconsistency across the Formation/RCN/CAF. Some units suggested new sentencing guidelines/ranges should be reviewed/considered. Some sailors feel that the fines are too low based on current rates of pay, with the consensus being that fines need to be increased dramatically to have an effect.

Building on this theme, Commander MARPAC advised the CMCRT that: “All units noted that there needs to be a review of what types of offences [...] are electable and which are not, with a view to shortening the list of electable offences.”

Commander MARPAC had positive comments related to the local nature, and military character, of military justice proceedings, particularly summary trials but also courts martial:

One of the strengths of the Military Justice system is that the CAF encourages participation, both through attendance at proceedings and making public the results and sentences of those proceedings. The publicity, even of minor infractions, ensures personnel have clear understanding of the consequences of their actions; this is not achieved as effectively in the civilian courts. It serves as a deterrence mechanism that helps maintain order and discipline, and reminds all personnel of the standards they are expected to maintain. The formal conduct and military tradition in Summary Trials and Courts Martial also serves as a reminder to all that the CAF is held to a higher standard for very important reasons. All units need to continue to ensure leaders attend Courts Martial to better understand the process and the outcomes.

4.5.5.2 The Crew of HMCS OTTAWA (Regular Force)

In addition to the leadership comments submitted through MARPAC, the commanding officer of Her Majesty's Canadian Ship (HMCS) OTTAWA encouraged his crew to submit their own personal thoughts, through him. This enabled HMCS OTTAWA to submit the thoughts of her crew as ‘CAF members’, augmenting the process already available to them as private citizens

under CANFORGEN 186/16. The individual submitters remained anonymous to the CMCRT, aside from their belonging to HMCS OTTAWA, but not the command team of OTTAWA. The unedited, uncensored comments were relayed in writing by OTTAWA's Commanding Officer to MARPAC, for onward distribution to the CMCRT. These consolidated comments are included at Annex V.

The crew of HMCS OTTAWA had several comments related to the military justice system as a whole, and in particular summary trials. Overall, the comments indicated that the total system was working well, and even if some areas require improvement, they believed that the military needs some internal mechanism to enforce discipline. On this note, one comment suggested that "[t]he justice system itself does not really maintain good order and discipline, that's what the [chain of command] does."

Another submitter noted that "[t]he military justice system works best when part of holistic system for dealing with behaviours that are a threat to good order and discipline in the CAF. It seems to me today though, that sometimes the [Chain of Command] will fail to exhaust other avenues of modifying a member's behaviour, such as coaching, mentoring and identifying deeper personal problems."

Some members of the crew of HMCS OTTAWA suggested that the election to court martial is now seen as a way to escape the consequences of misconduct. One of these members specified that "members electing [courts martial] are perceived to have more serious charges reduced to meet perceived higher evidence thresholds. [A] recent example is a [...] court martial where initial charges were sexual assault but the prosecutor ended up only taking charges of drunkenness to trial."

Timeliness and delay in the court martial process was a major concern for multiple members of OTTAWA's crew. One member commented on this point at length, presuming that the court martial system is under-resourced.³⁹

Recently, there has often been an unreasonable amount of time between when a charge occurs and is laid, and the time when a member receives a court martial. The amount of time between the laying of a charge and a trial has been recognized as a key component of procedural fairness by both the civilian and military justice systems, demonstrated in the statutory limits that the civilian system places necessitating when a trial can be brought to court. [...] What is clear is that the lengthening time between an offence against the [Code of Service Discipline] occurring and a Court Martial seriously impacts the procedural fairness to the member, thus undermining the fairness of the system and negatively affecting members' respect for the system.

There were also several comments concerning punishments in the military justice system, including both at summary trials and courts martial. While some members felt that the powers of punishment, at least, were fair and transparent, others indicated that they wanted parity with the civilian criminal justice system. Some crew members expressed the feeling that "the fines are too low based on members' pay. The consensus is that if members got hit with \$800 - \$900 fines rather

³⁹ The resourcing of the current court martial system will be explored below in Chapter 7 (Assessment).

then \$150 – \$200 there would be less reoffenders.” One submitter suggested that “[p]owers of Punishment are the one area where the CAF could potentially use some reform. It frequently feels that the punishments are insufficient. [...] For an example of the first issue, if a \$200 fine is the ‘going rate’ for a minor offence, say AWOL by an hour, that \$200 fine will not have the same impact on a member 10 years later when pay has gone up substantially. Similarly, punishments of ‘caution’, ‘reprimand’ and ‘severe reprimand’ are not understood by most members; they are all viewed as a ‘slap on the wrist’ by most.”

Concerning subject-matter jurisdiction, at least one member of HMCS OTTAWA suggested that “[s]exual crimes should never be tried through [the] military judicial system. As indicated in the media, crimes of a sexual nature cannot reasonably be adjudicated through military justice. [...] In a court where everyone is your co-worker, peer, or worse, a supervisor, standing up to the accused may prove to be a daunting task. In a civilian court, pressures of rank differences and military formalities are removed, thereby creating a more accommodating atmosphere for the victim.”

Concerning the nature and composition of a court martial tribunal, two crew members expressed concern at the idea of using civilian judges, out of a worry that civilians would either refuse, or would not be permitted, to serve in a theatre of hostilities if it ever became necessary in the future to do so, as well as out of a worry that fewer and fewer civilians have any personal experience with the realities of military service.

There were additional recommendations from the crew for: improved training for investigators; better education on the system for all CAF members; and improving the transparency of any administrative action taking place parallel to military justice proceedings.

4.5.6 Royal Canadian Air Force

The CMCRT received no submissions from the Royal Canadian Air Force.

4.5.7 Chief of Military Personnel

4.5.7.1 Commander, 1 Health Service Group (Regular Force)

The Commander of 1 Health Services Group provided the CMCRT with a submission in writing, which is included at Annex W. The Commander’s main concern was with delay in commencing court martial proceedings after a decision has been made to proceed. In the Commander’s words,

[D]elays [are] obviously impacting negatively both the alleged victims and accused. This has detrimental effect on their life and health in addition to creating significant issues for their unit in employing them. This is even more of a problem for our clinical [personnel] as most of the time they cannot be employed in their clinical role based on the nature of the charges against them.

The Commander pointed out that, sometimes, the delays were so extensive that the accused had “time to retire before the proceedings [took] place. This creates additional challenges for managing their entitlements at the unit level. Such delays [...] also [conflict] with the approach of the summary trial in which the principle being applied is the timelier, the better.” The Commander 1

HSG concluded with the following overarching comment: “I believe having a more timely scheduling of our Court Martials would [achieve] better results.”

4.5.8 The Director of Defence Counsel Services

The Director of Defence Counsel Services provided two submissions to the CMCRT as a part of internal CAF consultations. The first was by letter dated 3 November, 2016 (reproduced at Annex X), which coincided with the period of public consultation. The second was by letter dated 13 February 2017 (reproduced at Annex Y), and coincided with the quantitative analysis of the court martial system undertaken by DND ADM (RS) (described in more detail below in Chapter 7). In the words of the DDCS:

[I]t is my view that an overriding issue within the Military Justice system today is delay. This is an issue that affects the efficiency, the cost, the purpose and the constitutionality of the system. It touches every accused and every complainant within the system, as well as many other members of the CAF. It is, nonetheless, not an issue that can be addressed simply by trying to shorten trials or attenuate our support to an accused. It is more complex than that and has to be addressed at every stage of the process.

The DDCS canvassed those ‘stages’ of the current court martial process that, in his view, snowballed into the delay currently being experienced. He pointed out that the current ‘two-track’ charge screening process permits what he perceived as hopeless files (with no reasonable prospect of conviction) to enter the court martial system, requiring significant expenditures of energy by both prosecution and defence counsel.

The DDCS was critical of how the current processes allows for specific charges and particulars to change at several stages, as well as earlier legislative amendments that removed any legal requirement to investigate expeditiously.

One recommendation the DDCS made was with regard to the pre and post-charge screening process. In his view, in light of recent Supreme Court of Canada jurisprudence, the options for who performs what function at the charging / preferral stage is flexible, and he suggested that the current practice of having insular rolls for DJAs and RMPs should be revisited.

Concerning his own organization, the DDCS highlighted some areas that he felt could benefit from reform. He noted that the current governance structure is problematic for him, “given that defence counsel remain under the command of the JAG, a member of the executive, who controls their pay, posting and annual assessment notwithstanding the fact that their clients are litigating against the organization”.

The DDCS pointed out a particular example of this challenge, as he has recently been unable to ensure continuity of litigation experience in his organization. With no ability to control postings in or out of his team, and no knowledge of what legal officers have indicated a desire to come to DDCS, he felt that he was not able to secure comparable reliefs for several more experienced officers who retired.

On the topic of efficiency and workload, the DDCS indicated that workload was only an issue

insofar as additional work is generated by excessive delay. He indicated that the largest case-load held by any single defence lawyer on his team was 23 cases.

4.5.9 The Director of Military Prosecutions

The Director of Military Prosecutions provided, in his personal capacity, a submission to the CMCRT that was considered as part of the public consultation process, that was posted on the Discussion Board,⁴⁰ and the contents of which are included in this chapter's summary of public consultation, above.

The DMP also provided a submission to the CMCRT indirectly through ADM (RS), in response to the latter's request for input as part of their quantitative analysis of the court martial system (described in more detail below in Chapter 7). This written submission is included at Annex Z.

This submission provided a substantial extent of quantitative data relating to experience levels of military prosecutors, the amount of time that various steps within the court martial system have taken over the last five years, and the volume of cases that are dealt with by the prosecution service each year.

The submission also provided qualitative observations of both regular force and reserve force military prosecutors about different sources of delay within the court martial system, the differences between the civilian and military justice systems, and on the structure and policies of the prosecution service.

In several of the comments included within this submission, both by the DMP and other military prosecutors, it is suggested that the length of time needed to do investigations and the lack of adequate judicial resources are the major contributors to delay within the court martial system. The DMP suggests that "[t]he biggest challenge from my perspective is the inability to conduct trials in sufficient numbers to avoid an accumulation of cases. The single factor that could improve this is additional judicial capacity, something that the MJS shares with the civilian justice system." However, the DMP also noted his view that, "either more prosecutors and/or prosecutors with more experience would also logically contribute to improving the functioning of the court martial system, including delays."

The DMP cautioned against placing undue emphasis on timeliness within the court martial system as a measure of the system's effectiveness or efficiency:

It is important to remember that speed is not the sole factor through which we can measure effectiveness, efficiency and legitimacy. It might not even be the most important. It is a fact that time has the advantage of being easily measurable (just like money), more so than 'the level of discipline, effectiveness and morale' for instance. This could easily lead to an overemphasis of that aspect to the detriment to others which may be more difficult to measure, but nevertheless crucial

⁴⁰ See online: <<http://www.forces.gc.ca/en/about-reports-pubs-military-law-court-martial-comprehensive-review/discussion-board.page>>.

The DMP also suggested that an “important aspect of the court martial system’s legitimacy is how much the public knows and understands that system, as well as the decisions made within [it].” The DMP indicated that it would be ideal if some means of measuring public confidence in the court martial system could be created. However, the DMP noted that,

Even without having a clear evidence-based view of the level of public support and knowledge of the court martial system, it is empirically evident that there is a lot of misunderstanding and criticism of the court martial system. This alone militates towards better public communication about the court martial system, with a view of enhancing its legitimacy.

The DMP and other military prosecutors who commented within this submission expressed strong disagreement with the suggestion contained in the Bronson Report (DMP)⁴¹ that delay within the court martial system was so severe that it threatened the very purpose of having a separate military justice system. These individuals suggested that delay was only one factor among many that should be considered when determining whether a separate system is needed, and indicated that delay was not so severe as to be a threat to the system.

4.6 Key Observations from Consultation

Consultation generated perceptions about the court martial system. The CMCRT notes that not all elements of all submissions that were received were factually well-informed about the current court martial system and the way that it operates. What is represented in this chapter, however, is not objective truth about the court martial system, but a collection of perceptions about the system from a very wide and diverse group of individuals and organizations.

To the extent that perceptions about the court martial system are objectively accurate, these perceptions can offer very important indicators about the effectiveness, efficiency, and legitimacy of the court martial system. However, even perceptions that are somewhat misinformed or inaccurate still have value for the purposes of the court martial comprehensive review, because they speak to the legitimacy of the court martial system. The legitimacy of a system is linked in part to the system’s compliance with legal rules, but is also linked to perceptions and acceptance of a system being a proper and appropriate exercise of government power, as seen from within and outside of the system. Thus, from a legitimacy perspective, the mere fact that people hold views that call into question whether the court martial system is always a proper and appropriate exercise of government power is relevant, regardless of whether those views are objectively correct.

Notwithstanding the above point about perceptions, the CMCRT found that stakeholders who made submissions were generally quite well informed about the court martial system.

From all of the above consultation, several recurring perceptions seem to be identifiable. These recurring perceptions are each described below.

The CAF is perceived as needing a system that helps to maintain internal discipline. First, it

⁴¹ Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, (Ottawa: Bronson Consulting Group, 2008) [Bronson Report (DMP)].

appeared to the CMCRT that there was broad agreement amongst contributors that the Canadian Armed Forces must have some internal mechanism to enforce discipline amongst its members. While there is significant variety of opinion concerning what subject matter ought to be included in such a disciplinary system, what the disciplinary process ought to look like, and what consequences ought to follow, there was never any suggestion put forward that the CAF could rely entirely on external sources to enforce discipline, nor that it could simply do without any disciplinary mechanism.⁴²

Delays within the court martial system are perceived as unacceptable. Next, all contributors agreed that delay in the current court martial system is a very serious problem.⁴³ At best, delay is undermining confidence in the legitimacy of the system. At worst, claims were made that delay was actively harming discipline, causing accused persons to doubt the fairness of the proceedings, and increasing the hardship endured by victims.

Whenever the CMCRT asked court martial system stakeholders how swift court martial proceedings would need to be in order to maintain their effectiveness, the answer was almost always the same: six months.⁴⁴ During consultations, no commentator indicated that this ‘target’ was being met. Rather, submissions indicated experiences range from 10 months to almost two years.

Sentences imposed at courts martial are perceived as too lenient. According to both public and internal consultations, whenever sentencing was discussed, there was near-universal agreement that the sentences being handed down at court martial are perceived as being too low to achieve the aims of discipline or public order and welfare. Many contributors further indicated that sentences are perceived as being significantly out of step with those sentences being handed down at summary trial for similar offences conducted by similar offenders in similar circumstances.

Both military and criminal law expertise are perceived as being needed in the system – but such expertise can come from different sources. Many contributors submitted that the court martial system ought to be operated, in key positions, by military members. However, upon examination, these commenters universally did so based upon a presumption that uniformed actors would inherently provide certain core attributes to the system, in that they would:

- bring significant military knowledge and expertise to the proceedings;
- understand and give meaning to the needs of unit discipline; and
- ensure that accused members would receive fair treatment while being held to the higher

⁴² This widely held-view is consistent with Canadian legal authorities. See for example *R v MacKay*, [1980] 2 SCR 370; *R v Généreux*, [1992] 1 SCR 259.

⁴³ Delay has been a problem in the court martial system since at least the coming into force of Bill C-25 in 1999: See Bronson Report (DMP), *supra* note 41 at 10. The perception that it remains a serious issue is supported by the data: DMP Annual Report 2016-2017, *supra* note 36 at 33-35.

⁴⁴ This answer has remained unchanged for at least nine years: Bronson Report (DMP), *supra* note 41 at 9-10.

standard expected of armed forces members.⁴⁵

However, at the same time, the CMCRT heard from other contributors that simply placing uniforms on military justice system actors did not appear to produce the desired result of conferring military knowledge or expertise on these actors.⁴⁶

The CMCRT noted that more than one contributor perceived military justice system actors as not possessing an adequate amount of criminal law and procedure experience or expertise, at least not when compared to their civilian criminal justice system counterparts – while recognizing that this experience and expertise was important within the court martial system.⁴⁷

Decisions of independent military actors in the system were perceived as undermining discipline and the authority of the chain of command. Many commenters indicated that they perceived it to be harmful to discipline when another CAF officer who is independent of the chain of command made decisions that they felt were at odds with their own decisions (e.g.: to lay charges, or to refer charges to the DMP for trial by court martial), particularly when the outcomes that members of the military chain of command believe the court martial system should produce are so significantly different from the outcomes that the system actually produces.⁴⁸ While they understand and support the constitutional necessity that military prosecutors and military judges exercise their functions independently, they perceived that their own credibility and authority as

⁴⁵ See above, Chapter 4 (Consultation) at sections 4.5.4.2.1 (4 CDSG & 2 CMBG), 4.5.4.2.2 (RHFC), 4.5.4.2.3 (Royal Regiment of Canada) and 4.5.5.2 (HMCS OTTAWA Crew).

⁴⁶ See above, Chapter 4 (Consultation) at sections 4.5.3(CANSOFCOM), 4.5.4.2.1 (4 CDSG & 2 CMBG), 4.5.4.1.1 and 4.5.4.1.2 (2 Can Div Pers Svcs). This observation triangulates with what was observed during the CMCRT's comparative study, particularly concerning the UK court martial system.

⁴⁷ See above, Chapter 4 (Consultation) at sections 4.5.4.2.2 (RHFC), 4.5.4.1.1 and 4.5.4.1.2 (2 Can Div Pers Svcs). The CMCRT learned that this perception was at least partially supported by more objective sources, including the DMP Annual Report 2016-2017, *supra* note 36 at 33-34:

CMPS welcomed 5 new captains just prior to or during the reporting period. Given their lack of experience, they take more time to adequately review files of equal complexity than a more experienced prosecutor would take. They are initially assigned files of lesser complexity, generally requiring less time. They require supervision and assistance from more senior prosecutors, which takes away from the time the latter can devote to their files. The more senior prosecutors end up with a greater proportion of the more complex cases requiring more time, with less time to devote to them than if there was a greater number of senior prosecutors on the team;

See also Annex Y, Submission from the Director of Defence Counsel Services to ADM(RS), 13 February 2017: "The one issue that I do see as very concerning regarding the experience levels of military defence counsel is that, both last year and the year before, I was effectively shut out of knowing which legal officers had expressed a desire to come to DCS. This is a complete reversal from my early years in this position. It has the potential to severely influence the competence level within the organization as others unilaterally select who will come";

See also Annex BB, ADM(RS) Spreadsheet – Courts and Judges. The quantitative analysis undertaken by DND's ADM (RS) for the CMCRT (discussed in detail in the following chapter), which indicated that Canada's military judges each deal with about 17 courts martial a year, where their civilian counterparts in Canada deal with about 400 trials. 'Judge Advocates' of the Court Martial in the UK, for a military court comparison, deal with 90. The Bronson Reports likewise noted that DDCS and CMPS legal officers, without secondments to external prosecutions services, did not have sufficient case volume to reach the same level of experience and competency as their civilian counterparts.

⁴⁸ See in particular above, Chapter 4 (Consultation) at sections 4.5.3 (CANSOFCOM) and 4.5.4.2.1 (4 CDSG & 2 CMBG).

disciplinarians was undermined in such situations. Some of these contributors suggested that their perceptions in this regard were shaped by the fact that the independent decision-makers were also CAF officers, who they perceived to a large extent to exist to give effect to the disciplinary needs of the chain of command. These commenters suggested that they would not perceive the same kinds of problems being created by equivalent decisions of civilian justice system actors.

Many CAF contributors do not perceive a need for deployed court martial trials. When the issue was discussed in any detail, commenters showed widespread agreement in their perceptions that the court martial system required jurisdiction over CAF members abroad taking part in operations, including both prescriptive jurisdiction (i.e. ‘offence’ jurisdiction) and investigative capacity (i.e. the capability to conduct investigations abroad). However, the CMCRT observed a noticeable lack of consensus in perceptions of whether courts martial need to be deployable into theatres of hostilities, or even abroad at all, in order to meet the needs of justice and discipline.

Victims are perceived of as needing better rights and protections. Finally, whenever the needs of specific groups in the court martial system were discussed, the CMCRT was not surprised that contributors unanimously indicated that the court martial system ought to grant victims at least the same rights and services as are available in the civilian criminal justice system.

4.7 Conclusion

The widespread consultation that was conducted as part of the CMCR permitted each member of the CMCRT to draw upon the perspectives, knowledge, and expertise of many different individuals and groups, and allowed members of the CMCRT to see well beyond the limits of their own personal experiences. This consultation contributed significantly to work that was performed by the CMCRT.

Chapter 5 – Comparative Study

5.1 Introduction

The CMCRT's Terms of Reference explicitly authorized the team to conduct an international comparative study of how other like-minded states operate their military justice systems, and in particular their court martial (or equivalent) systems. This study was conducted in order to expose the CMCRT to a full range of military justice considerations, structures, and practices.

This chapter describes the conduct of the CMCRT's comparative study, along with the CMCRT's observations and assessments of the relevant benefits and disadvantages of various facets of the specific systems that were studied.

To achieve the goal of the comparative study, the CMCRT determined that it would be necessary to learn about the systems of nations belonging to a variety of legal traditions. Consequently, the CMCRT chose to study the systems of several countries of the Anglo-American tradition of military justice, to which Canada belongs (i.e.: the United States; Ireland; the United Kingdom; Australia; and, New Zealand), and countries with the Civil Law tradition of military justice whose operational focus mirrors that of Canada (Norway; Denmark; Finland; France and the Netherlands). Countries with Civil Law tradition tend to have an inquisitorial system where the court is actively involved in investigating the facts of the case, while countries of Anglo-American tradition tend to have an adversarial system where the role of the court is primarily that of an impartial referee between the prosecution and the defense. The court martial system of each country has been heavily influenced by its own legal tradition.

The CMCRT conducted independent research into the military justice systems of each of the above nations, then carried out in-person technical visits consisting of meetings with resident experts, system actors, and other stakeholders. These technical visits allowed the CMCRT to validate its understanding of how each nation's court martial system functioned, and also provided the necessary context to assess how particular facets of those national systems might be used as comparators to Canada's present system and to develop options to enhance the effectiveness, efficiency or legitimacy of Canada's court martial system.

Although the above-listed technical visits were the primary focus of the CMCRT's foreign study and consultation plan, the team also took advantage when opportunities presented themselves to have in-person discussions abroad with other military justice stakeholders in Singapore and Israel. These more limited consultations enhanced the CMCRT's knowledge of various trends and practices in court martial systems from around the world.

Each court martial system¹ studied by the CMCRT is discussed below, in chronological order based upon the dates during which the visits were conducted. Each section commences with a short narrative that describes the technical visit, including dates and particular individuals or offices who were consulted, along with important contextual information about each state's armed forces (e.g.: force size; types of missions; and nature of any extra-territorial deployments). This narrative is

¹ Keeping in mind the CMCRT's broad definition of "court martial system" (see above, Chapter 1 (Introduction)), which refers to any justice system that applies to military personnel, and can try military offences.

followed by a general description of each nation's court martial system that touches upon each of the enumerated areas for study that were listed at para 4 of the CMCRT's Terms of Reference.

Each section concludes with the CMCRT's own observations and assessments of relevant features of the foreign system, and how these features may or may not be useful in its analysis.

All the countries the CMCRT visited have some form of a commander-driven and commander-administered summary trial or summary hearing system for dealing with minor and non-criminal service misconduct by military personnel, separately and apart from any system for dealing with more serious and criminal-like misconduct by military personnel.

5.2 Technical Visit Country Reports – Foreign Court Martial Systems

5.2.1 The United States

5.2.1.1 Technical Visit

On 27 June 2016, two members of the CMCRT conducted an in-person technical visit to the United States. There, they met with the Chief of the Criminal Law Division (US Army Judge Advocate General's Corps²), the Staff Judge Advocate of the United States Marine Corps, US Navy and Marine Corps legal officers involved in military justice policy development, the Director of the US Air Force Judiciary, and the Chief of the US Air Force Military Justice Division.

The American military total around 1,429,995 regular force members, with about 818,000 additional members of the reserve force. The United States regularly commits its armed forces to international operations.

5.2.1.2 The American Court Martial System

5.2.1.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

There are three types of courts-martial in the United States: summary, special, and general.

A summary court-martial is a trial before a single officer, who is not a judge and who is not trained as lawyer. A summary court-martial does not have jurisdiction to try officers, and may only try an enlisted accused person if the person consents to be so tried. If consent is not provided, then charges may be disposed of through other means, including by a special or general court-martial. Powers of punishment are limited at a summary court-martial.

A special court-martial consists of a military judge and at least three officers sitting as a panel or jury. The panel can, at the request of an enlisted accused person, consist of at least one-third

² The expression 'Judge Advocate General' has a varied meaning throughout the world. It can refer to the senior military legal officer (e.g. Canada, United States); a judge of a Federal court or State or Territory Supreme Court in charge of civilian oversight of the operation of the armed forces (e.g. Australia); a civilian barrister or a solicitor who is also appointed the chief judge of the Court Martial (e.g. New Zealand and United Kingdom), the senior civilian official within the military prosecution service (e.g. Norway).

enlisted personnel. An accused person can also request a trial by a judge presiding alone.

A general court-martial consists of a military judge and at least five officers sitting as a panel of court-martial members. An enlisted accused person may request a court composed of at least one-third enlisted personnel. An accused person can also request a trial by a judge presiding alone. A general court-martial is the only tribunal that can impose a sentence to death. Before a case goes to trial, a pretrial investigation under Article 32 of the Uniform Code of Military Justice (similar to a preliminary inquiry in Canadian civilian criminal courts) must be conducted, unless waived by the accused person.

Military judges who preside at special and general court-martial are lawyers drawn from the respective service's Judge Advocate General organization, who are posted into and out of judicial positions over the course of their careers. In the case of US Army and US Coast Guard judges, the postings are generally for fixed terms of three years. In the case of judges in the other services, judicial postings do not have any fixed duration, and are controlled like any other postings, at the discretion of leaders within the service and JAG leadership.

Generally speaking, a decision of a court-martial must be reviewed by the (operational, non-legal) officer in the military chain of command who convened the court-martial. This officer would have the power to overturn or change the findings and sentence. Up until recently, this was the case for all courts-martial. However, by virtue of amendments to article 60 of the Uniform Code of Military Justice (UCMJ) that were contained in the *National Defence Authorization Act for Fiscal Year 2014*, changes to the post-trial review powers of a convening authority have taken effect. As a result of these changes, a convening authority can no longer modify a finding unless the finding relates to an offence with a maximum punishment of two years (or less) imprisonment, and unless the actual punishment imposed in the case was less than six months imprisonment. Certain offences, including sexual assault offences, will never meet these criteria because of the maximum punishment associated with the offences.

Within the American court-martial system, article 37 of the UCMJ prohibits commanders from exerting unlawful command influence (UCI) – for instance, by criticizing panel members for the decisions that they reached during a court-martial, or by discouraging witnesses from testifying on behalf of an accused person – over court-martial system actors. This provision in the law has been interpreted robustly by the military judiciary. Where instances of UCI are identified on appeal, appellate courts have ordered new trials, and in cases where this would not be a sufficient remedy, have directed verdicts of acquittal.

5.2.1.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

In each service's JAG organization – and there are some subtle differences in how these are structured – there are generally a number of “Trial Counsel” or prosecution positions. These positions are held by JAG officers of different ranks, who are ultimately under the command of senior leaders in the operational chain of command. Ultimately, this command structure reflects the concentration of initial prosecutorial power that is held by the commander, who – as a convening authority for courts-martial – effectively makes the decision about whether to proceed with a prosecution at court-martial. The conduct of a particular prosecution is then assumed by

prosecutorial Trial Counsel.

Postings into Trial Counsel positions are generally limited to 18-24 months in duration. An individual officer may complete several postings within either a Trial Counsel or “Defence Counsel” military justice litigation position over the course of his or her career.

Trial Counsel can obtain different litigation skill identifiers during their careers: “basic” is achieved after completing three contested trials; “senior” is achieved after completing seven contested trials; “expert” is achieved after completing twelve contested trials; and, “master” is achieved after completing eighteen contested trials. Very few JAG officers attain the status of “master.”

By one account, it has been assessed that JAG officers who occupy military justice litigation positions, including Trial Counsel positions, have participated in an average of seven contested trials, and have spent an average of 25 months in litigation positions, over the course of their careers.

5.2.1.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

JAG officers can be posted into and out of “Defence Counsel” positions in much the same way as for “Trial Counsel” positions. The provision of defence counsel services takes place within a system that is essentially the same as the system for prosecution services. In any case where military defence counsel are provided to an accused person, then these services are provided completely at public expense, with no contribution from the accused person, and no-predetermined cap or tariff on the extent of services that can be provided.

An accused person at a summary court-martial is not entitled to representation by military defence counsel as of right, although such representation can be provided. An accused person who wishes to be represented by civilian defence counsel can choose to hire and pay for such counsel at his/her own expense.

An accused before a special or general court-martial is entitled to free legal representation by military defense counsel, and can also retain civilian counsel at his or her own expense.

5.2.1.2.4 The substantive body of service offences

The Uniform Code of Military Justice creates a series of uniquely military offences, such as desertion, disrespect toward a superior officer, and malingering. It also provides for military jurisdiction over ordinary civil offences, regardless of the service connection. The service status of the accused as someone who is subject to military law is sufficient to ground a court-martial’s jurisdiction.³

5.2.1.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

³ *Solorio v United States*, (1987) 107 S Ct 2924.

The sentences available to courts-martial are as follows: reprimand, forfeiture of pay and allowances, fine, restriction to specified (geographical) limits, hard labour without confinement, confinement, punitive separation (i.e.: various degrees of dismissal from the armed forces), and death. Many of these punishments are unique to the court-martial system, and have no equivalent in civilian criminal law.

5.2.1.2.6 The laws of evidence that apply at trials in respect of service offences

There are distinct rules of evidence applicable at courts-martial, called the *Military Rules of Evidence*, set out at Part III of the Manual for Courts-Martial, a publication issued by the President with the force of a regulation. This Manual is updated regularly (for instance, updated versions were published in 2012 and 2016). The *Military Rules of Evidence* span approximately 47 pages, and generally reflect the common law of evidence in the United States, but include a number of uniquely military rules that are distinct from the rules of evidence that would apply in local civilian criminal courts across the United States.

5.2.1.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

After any post-trial action by a convening authority in respect of a decision at a court-martial, the decision can be appealed to the relevant service's Court of Criminal Appeals. The judges of these courts are also drawn from the relevant service's JAG organization, and hear appeals in panels of three judges.

A decision can be taken on further appeal to the unified Court of Appeal for the Armed Forces (CAAF). The judges of the CAAF are civilian, nominated by the President, confirmed by Congress with secure tenure for a single 15 year term.

A final appeal can be available in limited circumstances to the United States Supreme Court, but the availability of such an appeal is less broad than it would be in the case of a criminal matter that is dealt with entirely in the civilian criminal justice system.

5.2.1.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders

In 2005, the US Department of Defence created a specialized Sexual Assault Prevention Office (SAPRO), which now serves as the Department's single point of authority for sexual assault policy and provides oversight to ensure that each of the service's programs complies with departmental policy.

Additionally, in December 2014, as part of legislative changes contained within the annual *National Defence Authorization Act*, a new and more robust "Special Victims Counsel" (SVC) program was implemented. Victims became entitled to participate in certain ways at courts-martial through SVC, which is provided through the service JAG organizations at public expense.

5.2.1.3 Observations on the American Court Martial System

The CMCRT notes that the American court martial system remains very command-focused. The system requires commanders to make decisions about whether to prosecute, and permits commanders under many circumstances to modify decisions of a court-martial in respect of both findings and sentences after a trial has been completed. The CMCRT also notes that military judges within the system enjoy periods of tenure that are somewhat less secure than the periods of tenure enjoyed by judges (including military judges) in Canada – because the periods are of fixed but shorter durations, or are of variable durations.

These aspects of the American court martial system would not be constitutional in Canada based on the Supreme Court of Canada's jurisprudence regarding judicial independence. The American constitutional framework is different from the Canadian framework, and has not precluded the type of command involvement within the American court martial system that is described above.

The CMCRT notes that various aspects of the American court martial system have been come under Congressional and other executive scrutiny in recent years. For instance, in accordance with a provision of the *National Defence Authorization Act for Fiscal Year 2013*, the Secretary of Defence established a Response Systems to Adult Sexual Assault Crimes Panel (RSP) to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses within the American armed forces. The RSP consisted of nine members from academic, legal, judicial, and other military and civilian backgrounds. The RSP issued its final report on 27 June 2014, wherein the seven-member majority of the panel recommended that military commanders' broad discretion to make decisions in respect of prosecutions (i.e.: by convening courts-martial) and in respect of reviews of the findings and sentences of courts-martial be substantially preserved. Two members of the RSP, in dissent, recommended the abolishment of this command discretion in order to permit the armed forces to deal more effectively with sexual crimes, and to better protect the rights of victims and accused persons.⁴

Generally speaking, it appeared that members of the military chain of command were relatively satisfied with the results that the court-martial system was producing. However, many also recognize that it is becoming increasingly difficult to provide justifications for the currently extensive powers that commanders have within the system that the civilian public will accept.

The CMCRT was informed that it can be a challenge for military litigation counsel to acquire the same degree of expertise in criminal matters as their civilian counterparts, since JAG officers are, by nature, generalists who complete tours in vastly different fields of law over the course of their careers, at approximately two-year intervals.⁵

⁴ United States, Department of Defence, *Report of the Response Systems to Adult Sexual Assault Crimes Panel*, (Arlington, VA: US Department of Defence, 2014), online: <http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf>; the ideas expressed by the dissenting members of the RSP were also expressed in a bill introduced by Senator Kristen Gillibrand, US, Bill S 967, *Military Justice Improvement Act*, 113th Cong, 2013-2014. (which would have also removed the commander's discretion), but the bill was defeated.

⁵ It appears that the American Military Justice System is considering establishing a career litigation track for all uniformed military prosecutors and defence counsels. A five-year "pilot" program was established to ensure that trial

5.2.2 Australia

5.2.2.1 Technical Visit

From 22 to 26 August, two members of the CMCRT conducted an in-person technical visit to Australia. There, the team members engaged in face-to-face consultations with, among others, the Head of Defence Legal Division in the Department of Defence, the Director General ADF Legal Services, the Registrar of Military Justice, the Director of Defence Counsel Services, the Director of Military Prosecutions, the Inspector General of the Australian Defence Forces, the Chief Judge Advocate, and the Judge Advocate General.

The Australian Defence Forces total around 58 000 regular force members, with about 19 000 additional members of the reserve force. Australia regularly commits its armed forces to international operations. Over the previous five years, their court martial system conducted on average about 50 trials per year. On average, there are 4-5 appeals per year.

5.2.2.2 The Australian Court Martial System

5.2.2.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

Defence Force magistrates and courts martial have jurisdiction to hear charges against members of the defence force and in certain circumstances, reservists and civilians. Defence Force magistrates and courts martial can conduct sessions abroad.

Judge Advocates both sit as Defence Force magistrates and at court martial. A Judge Advocate is appointed by the Chief of the Defence Force or a service chief on recommendation of the JAG⁶ and must be an officer who is enrolled as a legal practitioner for no less than five years. He or she is appointed for a period of up to three years and may be reappointed. While Judge Advocates enjoy a number of protections intended to promote their actual and perceived independence, they unequivocally exercise executive and not judicial authority. When they sit, Judge Advocates wear their uniform with a robe over the top.

A Defence Force Magistrate's trial is presided over by a Judge Advocate who typically holds the rank of at least Colonel.⁷ A Defence Force Magistrate has all the powers of a restricted court martial. He or she sits alone as both the decider of fact and law and has available to him or her all but the most severe of punishments allowable under the *Defence Force Discipline Act* (DFDA). A Defence Force magistrate gives reasons for decision both on the determination of guilt or not and on sentence; courts martial do not give reasons for either the verdict or the sentence imposed.

counsel and defense counsel have sufficient experience and knowledge and to issue a report at the end of those five years on their findings.

⁶ The JAG must be, or have been, a judge of a Federal court or State or Territory Supreme Court. A defence member may be appointed as the JAG. The appointment is made by the Governor-General in Executive Council for a period not exceeding 7 years. The appointment does not affect the tenure of the holder of the judicial office.

⁷ All references to Australian ranks are expressed in terms of Army ranks, but should be understood to also include the equivalent Naval and Air Force ranks.

A general court martial panel comprises a president, who is not below the rank of Colonel and not less than four military members. A restricted court martial panel consists of a president, who is not below the rank of Lieutenant Colonel, and not less than two military members. A general court martial has wider powers of punishment than a restricted court martial.

Responsibility for matters of fact and law are split at courts martial. A Judge Advocate gives binding advice to the panel on matters of law. Matters of fact are decided by the court martial panel. Only the court martial panel⁸ will decide on whether the accused is guilty or not and on the appropriate sentence, if any. Every question shall be decided by a majority of the votes of the members.

If a Defence Force Magistrate or a court martial convicts a person of a service offence, a reviewing authority shall, after obtaining legal advice from a legal officer, review the proceedings.

Various changes to the Defence Force magistrates and courts martial structure have been proposed in legislative initiatives since 2006, but the only changes that were ever enacted and implemented were through the *Defence Legislation Amendment Bill 2006* (which created the Australia Military Court). These changes were subsequently struck down as unconstitutional in 2008 by the High Court of Australia in *Lane v Morrison*⁹. Since then, interim measures have been successfully adopted, to reinstate the Defence Force magistrate / court martial system that is described above.

5.2.2.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

The Director of Military Prosecutions, who is positioned outside of the normal military chain of command, is appointed by the Minister for Defence (and reports directly to him) for a period not exceeding five years. He or she must be a legal practitioner of not less than five years' experience, and be a member of the Permanent Navy, Regular Army or Permanent Air Force, or a member of the Reserves rendering full-time service, holding a rank not lower than Brigadier.

The DMP supervises a team of prosecutors, who are mostly uniformed legal officers. The DMP has limited ability to control who is posted to his/her organization, as Defence Legal controls the postings of military prosecutors. Furthermore, there is no specialized litigation career track within the legal officer occupation. The DMP can also be assisted by reserve force legal officers who form part of the DCS Panel, mentioned hereafter.

When exercising prosecutorial discretions, prosecutors are required to take into account command interest without being bound by it. In practice, upon referral of charges to DMP (which is carried out by the charge-layer), DMP writes to affected commanders, seeking their input regarding the service interest in proceeding with the charges.

5.2.2.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

⁸ This does not include the Judge Advocate.

⁹ [2009] HCA 29.

The Director of Defence Counsel Services is appointed by the Chief of the Defence Force by written instrument. He or she is situated outside of the chain of command and reports directly to the Associate Secretary to the Department of Defence. He or she must be enrolled as a legal practitioner for at least five years and be a member of the Permanent Forces or a member of the Reserves who is rendering continuous full-time service, holding a rank not lower than Colonel. The DDCS is assisted by a legal officer, a business manager and a case manager.

The DDCS's role is essentially that of an administrator who manages the provision of legal representation and advice by legal officers to accused persons before the Tribunal. DDCS maintains a list of Australia Defence Force (ADF) legal officers who express a willingness to perform tasks as part of the wider DDCS functions. This list is referred to as a DCS Panel. DDCS assigns ADF legal officers (usually, but not exclusively, members of the Reserve forces) to act as defending officers before the Defence Force magistrate / court martial, at no expense to the accused persons.

The DDCS may not authorize the provision of legal assistance in respect of proceedings conducted before the Defence Force Discipline Appeal Tribunal (DFDAT). Legal assistance for proceedings before the DFDAT may be available to a defence member through the arrangement of the Commonwealth financial assistance program for legal proceedings.

5.2.2.2.4 The substantive body of service offences

The DFDA provides for a number of military offences, such as absence without leave and disobeying an order or service regulations which may be tried by the Defence Force magistrate / court martial.

Most civilian criminal offences are incorporated into the court martial system.

However, DFDA prosecutions can only be conducted for the purpose of maintaining or enforcing discipline.¹⁰ As a means of clarifying jurisdictional matters between the DMP and the Directors of Public Prosecution Services of the different Australian states and territories, these officials entered into a Memorandum of Understanding on 22 May 2007.¹¹ Where the DMP is in doubt as to whether a sufficient service connection or military nexus exists in respect of a civil offence, the DMP must consult with the appropriate Director of Public Prosecutions (DPP) to determine whether the public interest would be better served by a prosecution in the civilian criminal justice system.¹² In addition, in order to commence proceedings in respect of certain criminal offences (treason, murder, manslaughter, bigamy or any offence involving sexual assault), section 63 of the DFDA requires the Commonwealth Director of Public Prosecutions' consent.

5.2.2.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

¹⁰ Major General the Hon Justice Len Roberts-Smith, "A nettle grasped lightly: the introduction of the Australian military court" (Paper delivered at the Judicial Conference of the U.S. Court of Appeals for the Armed Forces, 17 May 2007) at 10-11.

¹¹ Australia, *Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions* (Australia, 2007).

¹² *Ibid* at paras 33-40.

The sentences open to the Defence Force magistrate / court martial are, in decreasing order of severity, as follows: imprisonment; dismissal from the Defence Force; detention; reduction in rank; forfeiture of service for the purposes of promotion; forfeiture of seniority; fine; severe reprimand; restriction of privileges; stoppage of leave; extra duties; extra drill; and reprimand.

In determining what action should be taken in relation to a convicted person, the DFDA provides that the Defence Force magistrate / court martial shall have regard to the principles of sentencing applied by the civilian courts, and the need to maintain discipline in the Defence Force.

5.2.2.2.6 The laws of evidence that apply at trials in respect of service offences

There is no notable specialization in the rules of evidence for military cases in Australia. The rules of evidence in force in the Jervis Bay Territory, namely the rules of evidence applicable in proceedings before a court of the Australian Capital Territory, apply in relation to proceedings before the Defence Force magistrate / court martial as if it were a court of the Jervis Bay Territory and the proceedings were criminal proceedings in the Territory.

5.2.2.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

The Defence Force Discipline Appeal Tribunal consists of a President, a Deputy President and such other persons as are appointed to be members of the DFDAT. To be appointed to the DFDAT, a person must be a Justice or Judge of a federal court or of the Supreme Court of a State or Territory.

A convicted person or a prescribed acquitted person may appeal to the DFDAT against his or her conviction or his or her prescribed acquittal but an appeal on a ground that is not a question of law may not be brought except by leave of the DFDAT. The Director of Military Prosecutions has no right of appeal to the Defence Force Discipline Appeal Tribunal.

5.2.2.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders

In 2012, the Sexual Misconduct Prevention and Response Office (SeMPRO) was established to provide services for ADF members who have been affected by sexual misconduct. SeMPRO can assist victims by supporting them making a formal complaint; through the collection of forensic evidence; and through the processes such as investigations and legal procedures. SeMPRO works closely with the Australian Defence Force Investigative Service (ADFIS) and DMP to ensure that victims are provided seamless support as their case moves through the system.

5.2.2.3 Observations on Australia's Court Martial System

It was suggested to the CMCRT by most ADF interlocutors that any reform to the Canadian court

martial system must be carefully considered and their constitutionality, thoroughly assessed.¹³ The Australian example should be viewed as a cautionary tale: its military justice reforms were struck down as unconstitutional in 2008 by the High Court of Australia in *Lane v Morrison* and almost ten years later, successive interim measure laws have been adopted to ensure the continued operation of the system.

The CMCRT was informed that the court martial system is overwhelmingly perceived by the chain of command as too slow, too complicated and too expensive and that sentences are seen as too lenient. To address delays, the Registrar of Military Justice (RMJ) had adopted a set of Key Performance Indicators (KPIs) related to case management. As a result, from the period of 1 January to 31 December 2015, within two weeks of receipt of referral from DMP or appointment of defense lawyer, 94% of matters had a trial date fixed. The average number of days to fix a trial date was 9.7 days. And, within three months of receipt of referral by the RMJ from DMP, 84% of proceedings were commenced.¹⁴ The CMCRT was also informed that, despite these measures, the chain of command continued to perceive the court martial system as too slow.

There were currently 2 regular force Judge Advocates/Defence Force Magistrates and 2 reserve force Judge Advocates/Defence Force Magistrates dealing with an average of 50 courts martial per year. According to some, having military judicial officers provided legitimacy to the system: those applying the law are also subject to the law. The CMCRT was also informed that having a mix of regular force and reserve force officers on the bench allowed for a diversity of experience and expertise (service knowledge vs. criminal law).

Although courts martial can deploy in theatre of operations, they seldom do so. One court martial was recently held in Iraq.

The CMCRT was informed that the vast majority (80%) of trials were judge-alone. When there are panels sitting, the RMJ reported that there were significant cost benefits of having panel members selected from within the region where the court martial is held, if possible.¹⁵ It was also reported to the CMCRT that there were significant cost benefits of contracting out court reporters from within the region where the court martial is being held, as opposed to having full-time military court reporters who travel to each court martial location.

The CMCRT was informed that there were benefits of having a mix of regular and reserve force legal officers within the court martial system. Regular force prosecutors tended to generally have greater service knowledge while reserve force defence counsels tended to generally have greater criminal law expertise and advocacy skills. However, the CMCRT observed that the ADF has a significantly higher establishment of reserve legal officers compared to Canada.¹⁶

Because the actual line prosecutors are supplied to DMP from the existing legal services, DMP

¹³ See above, Chapter 1 (Introduction) at section 1.5. Assumption #4 reads as follows: “Any proposed reforms must be constitutional, across the full spectrum of operations.”

¹⁴ Australia, Department of Defence, *Report of the Judge Advocate General for the period of 1 January to 31 December 2015* (Canberra: Judge Advocate General, 2015), at Q-3.

¹⁵ Panel members are randomly drawn from the same service and as much as possible, the same region as the accused. Potential panel members are required to fill a conflict of interest questionnaire.

¹⁶ There are about 400 reserve legal officers in Australia, around 80 of which are on the DCS panel.

seems to have limited ability to control who is placed on his or her staff, and when. It was reported to the CMCRT that it can be a challenge for military litigation counsel to acquire the same degree of expertise in criminal matters as their civilian counterparts, since they are, by nature, generalists who complete tours in vastly different fields of law over the course of their careers. For this reason, there appeared to be a consensus that a career litigation track would be desirable for all uniformed military prosecutors. Under this scheme, military prosecutors would be posted in for a fixed number of years in order to allow them to develop litigation skills and criminal law expertise, and would subsequently be posted as military prosecutors at every other posting.

The fact that DDCCS remains a legal officer whose budget is controlled by the executive is seen by some as feeding the perceived lack of independence. The frequent rank disproportion between military prosecutors who are higher ranking than defence counsels may also appear to influence the outcome of a case.

There appeared to be a consensus among all ADF personnel consulted on the need to have a tariff on the extent of defence counsel services that can be provided to accused persons. This could narrow the issues raised by defence counsels and diminish delays within the court martial system.

The use of uniformed prosecutors and/or defence counsel, posed a different sort of challenge as well. The CMCRT was informed that lower-ranking witnesses may at times be inhibited from providing completely candid and genuine testimony in the face of examination-in-chief or cross-examination questioning from a higher-ranking military officer; in such cases, witnesses can be intimidated by the rank of counsel (if it is not their daily practice to interact with officers of such ranks), or may be overly willing to accept a leading statement or question that is put to them by counsel (out of a habit of deference to more senior officers and a reluctance to contradict a superior). Furthermore, the opposite phenomenon can also be an issue, where uniformed trial counsel are subordinate to a witness who is being cross-examined, and where the cross-examination is not as probing, confrontational, or effective as a result of the rank differential. All of these phenomena could affect trial fairness and accuracy of the outcomes, if witness testimony is compromised to a high degree.

5.2.3 New Zealand

5.2.3.1 Technical Visit

From 29 to 30 August, two members of the CMCRT conducted an in-person technical visit to New Zealand. There, the team members engaged in face-to-face consultations with the Registrar of Military Justice, the Director of Military Prosecutions, the Assistant Director of Military Prosecutions, the Judge Advocate General and a former legal advisor to the New Zealand Defence Force (NZDF).

New Zealand's armed forces consist of about 11,500 regular force members, and 2300 reservists. New Zealand deploys its forces internationally on coalition-type missions.

Over the previous several years, their court martial system conducted on average fewer than 10 trials per year.

5.2.3.2 The New Zealand Court Martial System

5.2.3.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

In the Court Martial of New Zealand, which was established in 2009, cases are heard by a judge and three or five military members. The Court Martial, which can sit either in New Zealand or overseas, has jurisdiction to hear any charge against members of the Regular Forces and Territorial Forces, (Active Reserves) and, in certain circumstances, members of the Reserve Forces and civilians.

The Judge Advocate General (JAG), a civilian barrister, is appointed by the Governor-General and is also the Chief Judge of the Court Martial. He or she has the same security of tenure and immunities as a High Court judge, and a retirement age of 75. The other judges of the Court Martial must have been barristers for at least 7 years, or must be District Court judges. The Governor-General appoints at a minimum 6 judges, who must retire upon reaching age 70. The JAG assigns the judge who will preside in each case.

Three military members are assigned for each case, except in cases where the maximum punishment for the offence is life imprisonment or a term of imprisonment of 20 years or more, in which case, five members will be assigned. In each case the assignment is made independently of command by the Registrar.

The decision to convict or acquit will be determined by the unanimous votes of the military members alone (and not the judge). Thus, at the Court Martial, the judges do not make any findings of fact during the trial phase. If the military members are unable to reach unanimity, then the judge will discharge the military members and refer the charge to the Director of Military Prosecutions (DMP), who will decide whether or not to seek a new trial.

Sentences are determined by the panel and judge together and decided by majority vote of the judge and the military members. If there is an equality of votes, then the judge will have a casting vote. Reasons will be delivered by the judge on the sentence imposed. No reasons are given for the decision to convict or acquit by the military members.

5.2.3.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

The Director of Military Prosecutions is appointed by the Governor-General by warrant. The DMP is an officer who has been a barrister or solicitor for not less than seven years. The DMP acts under the supervision of the Solicitor-General. In his or her role, the DMP is not under the control of the Minister of Defence or under the command of Chief of Defence Force.

In practice, the DMP is also the Director or Director General of Defence Legal Services (DGDLS). However, when acting as the DMP, that officer is statutorily under the general supervision of the Solicitor-General, and is not subject to the control of the Minister for Defence, or subject to the command of any other military officer.

The DMP generally appoints a legal officer from the local base to act as the prosecutor for a case. Prosecutors can also be drawn from Crown Counsel or from private practice.

In order to take into account the view of the senior command in making prosecutorial decisions, it is mandatory for superior commanders to make non-binding recommendations regarding the disposal of the case to the prosecutor. This is limited to the question of Service interest, rather than evidential sufficiency.

5.2.3.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

An accused may request representation in the Court Martial and the Court Martial Appeal Court, the Court of Appeal, or the Supreme Court. The Armed Forces Legal Aid Scheme provides for the assignment of defence counsel (who appear as civilian legal practitioners). However, the scheme does not provide for counsel of choice. The Court Martial Registrar administers the legal aid panel and assigns counsel to each case.

The accused is ordinarily required to contribute towards the cost of legal aid. For instance, if the accused or appellant is a member of the regular forces, he or she will be required to pay 3% of his or her gross taxable pay for the 12 months immediately before the commencement of the relevant proceedings in the Court Martial.

An accused may also receive legal assistance without cost if he or she does not have sufficient means to provide for that assistance and if the interests of justice so require.

Counsel representing accused persons are compensated for a fixed number of hours in accordance with a certified scale that fixes the fees and allowances payable for work done. Counsel may request additional compensation depending on the circumstances and complexity of the case. Decisions regarding extra compensation are made by the Solicitor-General.

An accused may also engage counsel independently. When he or she does so, the accused is solely responsible for the payment of his or her fees.

An accused may also choose to be represented by a member of the Armed Forces who is not a lawyer (defender).¹⁷

5.2.3.2.4 The substantive body of service offences

The civilian Criminal Law (which can be mostly found in the *Crimes Act 1961*) applies to all military personnel. Civilian courts and military tribunals have concurrent jurisdiction to deal with these offences (without any military nexus requirement). In addition to these civil offences, a

¹⁷ If the accused wishes to be represented by a defender, he or she is to send a request to his or her CO in writing. The request is to state the service description and unit of the member requested. The member requested is to be released for duty as the accused's defender if he or she is reasonably available. If the member requested is not reasonably available, the CO may invite the accused to nominate another person.

complimentary legal regime found in the *Armed Forces Discipline Act 1971* applies to military personnel (and, in some cases, civilians) and may only be dealt with by military tribunals. It creates a number of uniquely military offences, such as absence without leave and disobeying an order.

5.2.3.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

The sentences open to the Court Martial are, in decreasing order of severity, as follows: imprisonment; dismissal from Her Majesty's Service; detention (not applicable to officers); reduction in rank; forfeiture of seniority; stay of seniority; fine; severe reprimand; reprimand.

The orders that may be made by the Court Martial in addition to, or in lieu of, a sentence, and the manner of their expression are as follows: compensation; restitution; forfeiture; order to come up for sentence if called on; detention as special patient; detention as patient; mental health release; mental health custodial order; mental health inpatient order.

The Armed Forces Discipline Committee¹⁸ produces Sentencing Guidelines to assist with sentencing members of the Armed Forces. The Court Martial must ensure that any sentence passed is consistent with these Guidelines to the extent that they are relevant to the offender's case, unless it would be contrary to the interests of justice to do so.

5.2.3.2.6 The laws of evidence that apply at trials in respect of service offences

The law of evidence applied by the Court Martial is the same as in civilian courts. There is no specialization in the rules of evidence for military cases.

5.2.3.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

The Court Martial Appeal Court may hear an appeal by a convicted Service member against his or her conviction and sentence. The Director of Military Prosecutions may appeal to the court against the sentence imposed by the Court Martial, unless the sentence is one fixed by law.

Judges of the High Court (equivalent to a Superior Court Judge in Canada) and Barristers, under certain conditions, can sit on the Court Martial Appeal Court (in benches of three). The presiding Judge is invariably a High Court Judge.

A party to an appeal may appeal, with leave, to the Court of Appeal¹⁹ or the Supreme Court against

¹⁸ The Committee is made up of Chief of the Defence Force, the Vice Chief of Defence Force, the Chiefs of the Navy, Army and Air Force, the Commander Joint Forces New Zealand, the Judge Advocate General, the Director of Military Prosecutions, and a representative of the Armed Forces Defence Counsel Panel appointed by the Judge Advocate General.

¹⁹ The right of appeal to the Supreme Court is not procedurally limited. An appellant must, however, seek leave as it the case in the civilian jurisdiction usually on the basis that the appeal is of exceptional public importance. The Supreme Court can give leave to appeal directly to it against a decision of the Court Martial or Court Martial Appeal Court if it is satisfied that exceptional circumstances justify taking the proposed appeal directly to the Supreme Court.

any decision of the court in the appeal.

5.2.3.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders

The Sexual Assault Response Team (SART) was established to provide services for New Zealand Defence Force (NZDF) members who have been affected by sexual misconduct. SART can assist victims by supporting them making a formal complaint; through the collection of forensic evidence; and through the processes such as investigations and legal procedures.

The Court Martial is required to consider the needs of victims of sexual offending, for example by providing for support persons to be present during the trial. The Court Martial has the power to suppress the publication of material relating to sexual offending, and must order that the court be cleared for the hearing of certain evidence. The Court has the inherent right to provide for evidence to be given from behind a screen.

Victims of any offending have the right to give a Victim Impact Statement which must be considered by the Court in sentencing.

Te Reo Māori (the language of the Maori people) is an official language of New Zealand. If a person wishes to speak Te Reo Māori, an interpreter will be provided. The same is true of New Zealand sign language.

In the rare circumstances of trying a child before the Court Martial the accused must be dealt with in a manner that takes account of the child's age.

5.2.3.3 Observations on New Zealand's Court Martial System

It was reported to the CMCRT that there did not seem to be significant negative consequence in the New Zealand context to having civilian judges presiding in the Court Martial, regardless of whether the individual judges did or did not have previous military service. In contrast, having a civilian judge, cross-appointed to a civilian court, presiding at the Court Martial appeared to have many advantages. The objective legitimacy and independence of the tribunal appeared to be increased, since civilian judges could not reasonably be seen as being subordinate to New Zealand's military chain of command. Furthermore, being cross-appointed to a civilian court, enhances the Court Martial's criminal and adjudicative expertise. However, it was reported to the CMCRT that the civilian judges' judicial unavailability can create challenges in the Court Martial.

Military knowledge appears to be brought to the tribunal through the panel membership (who, in New Zealand, are both finders of fact and participants in sentencing in all cases). Military knowledge also appears to be brought through the military prosecution service, either by the evidence it calls, or by the simple fact that the prosecutors themselves are usually military members. Any suggestions that civilian judges would in some respects create unfairness to the accused or to the public due to a lack of military or service knowledge appear to the CMCRT to have been largely unsubstantiated in the New Zealand context.

The CMCRT took note of the surprisingly high number of civilian judges cross-appointed to the Court Martial in proportion to the number of trials per year, due to the judges' judicial unavailability. There are currently 6 judges that deal with an average of 10 trials per year.

The CMCRT was informed that before the 2007 reform, courts martial had deployed in theatre of operations (e.g. Bosnia, Timor). The Court Martial has not deployed since its creation. There appeared to be no doubt that a civilian judge would agree to preside over such a trial; on the contrary, they would probably have too many judges who would want to deploy. That was the experience in respect of the call for volunteers to deploy from among the civilian judge advocates under the previous system. However, the team was informed that the NZDF probably do not deploy in sufficient numbers nowadays to guarantee an independent and impartial panel to the accused. It would be necessary to deploy one or more military members to compensate for this, if other considerations made a trial outside New Zealand desirable. Moreover, while the Director of Military Prosecutions acts under the supervision of the Solicitor-General in the execution of his or her prosecutorial duties, he or she can retain additional military duties and functions, in which capacity he or she would not be independent. For example, the Director of Military Prosecutions is also usually the Director or the DGDLS. Hypothetically, it would therefore be possible for the DMP to face a situation where he or she would need to decide whether to prosecute an accused person in respect of an operational offence, and where the accused person's actions were consistent with legal advice provided by the DMP in his or her other capacity as DGDLS. This creates a risk of perception of conflict of interest.

The CMCRT was also informed that a relatively low number of trials take place in the Court Martial of New Zealand each year, such that military prosecutors, who are usually legal officers drawn from the local base, may only participate in a very few trials over a couple of years. The CMCRT was informed that it could be difficult to develop litigation expertise as a military prosecutor under such circumstances.

The CMCRT was informed that having sentencing guidelines enacted by the Armed Forces Discipline Committee allows for combined input from the Chain of Command and the judiciary, which was especially important when civilian judges participate in sentencing. Furthermore, it was reported to the CMCRT that the fact that both the civilian judge and the military members participate in the sentencing process allows for sensitivity to the realities of military life while ensuring consistency in sentencing decisions.

The CMCRT was informed that the benefits of having a tariff on the extent of defence counsel services that can be provided to accused persons. This allowed to narrow the issues raised by defence counsel and diminish delays within the court martial system.

5.2.4 Ireland

5.2.4.1 Technical Visit

On 16 September, 2016, two members of the CMCRT met with system actors from the Irish court martial system, including a representative from the Court Martial Administrator, a prosecutor from the Director of Military Prosecutions' Office, and Ireland's Military Judge.

The Irish armed forces, consist of about 9200 members of the permanent force and 2400 reservists. The Irish armed forces are still regularly committed to international operations, including United Nations missions, and regularly sees anywhere between 6-10% of its total strength deployed at any given time.

There are currently 7 military lawyers serving in the Defence Forces Legal Service. Over the previous four years, their court martial system conducted on average 10 trials (including appeals from summary hearing) per year.

5.2.4.2 Ireland's Court Martial System

5.2.4.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

Ireland's court martial system has many similarities with Canada's. Ireland has three types of military tribunals, all three of which may sit at any place, both inside Ireland and abroad. The Summary Court Martial (SCM) is a standing Military Court consisting of a Military Judge sitting alone. It hears less serious offences under military law, can try all persons of or below the rank of Commandant (equivalent to the Canadian rank of Major), and has a maximum power of punishment of imprisonment for six months. It hears the vast majority of Irish court martial cases. The Summary Court Martial can also hear appeals from summary trial decisions.

Ireland also has two *ad hoc* tribunals to deal with more serious matters: Limited Courts Martial (LCM), which can only try non-commissioned members and has a maximum sentencing power of up to two years imprisonment; and General Courts Martial, which can try all ranks and has sentencing powers of up to imprisonment for life. Both LCMs and GCMs consist of a military judge, who decides all questions of law and the sentence, and a Board, made up of military members, that decides all questions of fact and the verdict on the basis of a 2/3 majority vote. The Board consists of three members in the case of a LCM, and five members in the case of a GCM.

In Ireland, a military judge is appointed by the President of Ireland, and must be a practicing barrister or solicitor of at least ten years standing. Military judges hold office until retirement, removable only for cause. Although they can be appointed from either inside or outside of the Permanent Defence Force, once they are appointed, military judges hold a rank of not less than Colonel. They are independent in the performance of their functions, and perform only judicial duties. There has not yet been more than one military judge appointed at a time.

5.2.4.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

In Ireland, the Government appoints a lawyer to be the Director of Military Prosecutions. The DMP is a military officer, but it is possible for the Government to appoint someone who was never before a member of the defence forces. The DMP makes the final decision as to whether a case will be prosecuted by court martial, is statutorily independent when carrying out his or her functions, and can only be removed for cause under statutorily enumerated grounds. The

Government must give reasons in the legislature for removing the DMP. The DMP may also have additional military duties concurrent with his or her duties as the DMP (for instance, the DMP is currently also the senior military legal advisor within the defence forces). The DMP supervises a team of prosecutors, who are military lawyers, and who are often also unit legal advisors.

5.2.4.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

An accused person at a Court-Martial may choose to be assisted by a commissioned officer of the Defence Forces (known as a “Defending Officer”), who is not usually a qualified lawyer, or by a civilian lawyer of his or her own choice.

Ireland has a legal aid scheme for courts martial, available during the stages of investigation, trial, appeal (up to the Supreme Court), and stated case. The currently prescribed Legal Aid Authority is the Military Judge of the Standing Court Martial, before whom applications for legal aid are made. The entitlement to legal aid is means-tested, alongside considerations of trial complexity, seriousness, and fairness. There is a regulatory tariff, which sets fees payable to lawyers on certificates, and the percentage payable for particular kinds of matters. If legal aid is approved, then no contribution toward the cost of the defence is required from an accused person. Only civilian counsel – usually solicitors – are engaged as defence lawyers within the legal aid scheme.

5.2.4.2.4 The substantive body of service offences

Ireland’s military offences are contained within its *Defence Act, 1954* (as revised), and are very similar to those found in Canada’s *Code of Service Discipline*. Ireland’s military legislation contains a provision which incorporates by reference all ordinary criminal offences and makes them offences under military law. For the most part, concurrent jurisdiction exists between the military and civilian criminal justice systems over these civil offences, although for a small group of the most serious offences (called “relevant offences”), the Director of Public Prosecutions has exclusive jurisdiction.

5.2.4.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

Ireland has specific military punishments, which apply differently to officers and non-commissioned members (the main difference being non-commissioned members cannot be “dismissed,” but are “discharged,” and officers cannot be sentenced to detention). Some examples of uniquely military punishments include dismissal with disgrace, reduction in rank, forfeiture of seniority, and reprimands. Both officers and non-commissioned members can be sentenced to imprisonment, for periods of up to imprisonment for life.

Irish courts martial have the ability to suspend sentences of imprisonment and detention, and can attach specific conditions to such suspensions.

5.2.4.2.6 The laws of evidence that apply at trials in respect of service offences

The law of evidence at Irish courts martial is the same as in civilian courts. There are some special rules detailing how some uniquely military matters may be proved (e.g.: what evidence can prove whether a person was a member of the defence force, or a patient in a hospital, and whether a particular ship was a State Ship).

5.2.4.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

Ireland has abolished its Court Martial Appeal Court; all appeals are now to the Irish Court of Appeal, and further appeals may be taken to the Supreme Court of Ireland. Offenders have an appeal as of right against the finding or sentence, or both, from any court martial. The DMP can also request the Court of Appeal to review the court martial sentence for undue leniency in certain circumstances.

Either the prosecution or the offender may appeal on a question of law (“case Stated”) from the Summary Court Martial, when sitting as an appeal of a summary trial.

5.2.4.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders.

Ireland’s military justice system has special procedural and jurisdictional considerations for some sexual offences. If an accused was neither on active service nor deployed, then the military justice system may only try a rape charge if the victim is military, the victim consents, and the civilian prosecutor consents.

5.2.4.3 Observations on Ireland’s Court Martial System

The CMCRT took note of the remarkable similarities between Ireland’s and Canada’s court martial systems.²⁰ However, the CMCRT was informed of some key differences.

First, the current military judge, Colonel Michael Campion, was previously a civilian lawyer with significant litigation experience who was appointed as a military judge from the civilian bar, but who was also a reserve force officer (not a legal officer) for many years. It appeared to the CMCRT, based upon discussions with multiple system actors, that the criminal law and litigation expertise possessed by the military judge was assessed as critical to the proper administration of military justice in the Irish system.

Second, while the Director of Military Prosecutions is statutorily independent in the execution of his or her prosecutorial duties, he or she can retain additional military duties and functions, in which capacity he or she would not be independent. For example, the Director of Military Prosecutions is also currently the senior military legal advisor, including on matters of military

²⁰ These similarities are not accidental. See, for instance, Mike Madden, “Keeping Up with the Common Law O’Sullivans? The Limits of Comparative Law in a Military Justice Context” (2013) 51 Alta L Rev 125, at 127-129 (noting the mutual influences of Irish and Canadian military law on one another from 1950 to the present).

operational law. Hypothetically, it would therefore be possible for the DMP to face a situation where he would need to decide whether to prosecute an accused person in respect of an operational offence, and where the accused person's actions were consistent with legal advice provided by the DMP in his other capacity as the senior military legal advisor.

Third, it was reported to the CMCRT that a relatively low number of court martial trials take place in Ireland each year, such that each military prosecutor may only participate in a few such trials. The CMCRT notes that it could be difficult to develop litigation expertise as a military prosecutor under such circumstances, but also notes that with such a small number of legal officers (7) within the Irish armed forces, it would likely be impractical to implement a more specialized career track for military prosecutors.

Furthermore, unlike Canada's fully-funded defence counsel model, legal aid is only provided to those who have demonstrated on application that they do not have the means to pay for their own counsel in the Irish system. The CMCRT was informed that the regulatory legal aid authority is the Irish Military Judge, which is unique within Anglo-American court martial systems.

The CMCRT assessed that, in Ireland, there were no apparent negative consequences flowing from the practice of having civilian defence counsel at court martial, for the accused person, the Irish public, or the armed forces. The CMCRT did note, however, that in some cases (especially those involving relatively minor offences) it appeared to be to the accused person's advantage to choose a non-legally trained officer to defend him or her, instead of a civilian lawyer. In those cases, the CMCRT perceived that the court martial might give more significant weight to the submissions of the defending officer (for example, in respect of submissions for leniency at sentencing).

In contrast to Canada's *Military Rules of Evidence*, the rules of evidence applicable in the Irish court martial system are almost entirely the same as those of civil criminal courts, with some specific, statutory rules dealing with particular military matters. This similarity of evidence laws appeared to be held as a positive feature within the two justice systems the similarity supported the presence of civilian defence counsel within the system more than uniquely military rules of evidence would allow.

Lastly, the CMCRT was informed of the requirement to obtain the consent of the civilian prosecution service in order to pursue certain ("relevant") offences, especially sexual offences, in the court martial system. The CMCRT took special note of the role that the victim can play in choosing whether a particular prosecution is taken in either the ordinary civil courts, or in the Irish court martial system.

5.2.5 United Kingdom

5.2.5.1 Technical Visit

Following their technical visit to Ireland, the same two members of the CMCRT conducted an in-person visit to the United Kingdom from 19-23 September 2016, where they conducted consultations with the following stakeholders: the UK's Director of Service Prosecutions and members of his staff; the Director of the Military Court Service; the Head of the Armed Forces Criminal Legal Aid Authority; the Head of Legislation at the Ministry of Defence; Members of

the Royal Navy's Legal Services – Discipline section; the Royal Navy Provost Marshal; and, the Judge Advocate General.

The CMCRT also received input by correspondence from the Army Legal Services – Discipline section.

The United Kingdom's armed forces, consisting principally of the Royal Navy (and the Royal Marines), the Army, and the Royal Air Force, consists of approximately 153 000 regular members, and 81 000 reserve members. Generally speaking, approximately 500 trials are conducted in the Court Martial each year.

5.2.5.2 The United Kingdom's Court Martial System

5.2.5.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

The Court Martial of the United Kingdom (UK) is a standing, permanent court. It may sit anywhere, both inside of the UK and abroad.

The current tribunal model evolved into its present form through a series of incremental legislative changes that were largely responsive to decisions of the European Court of Human Rights in the case of *Findlay v UK* (judgment of 25 February 1997), *Morris v UK* (no. 38784/97, ECHR 2002-I), and *Cooper v UK* (no. 48843/99, ECHR 2003), and *Grievs v UK* (no. 57067/00, ECHR 2003), which (collectively) held that aspects of the previous ad hoc tribunal system were problematic in terms of the right to an independent and impartial trial that is guaranteed under article 6 of the *European Convention on Human Rights*. The most comprehensive of these legislative changes came in the form of the *Armed Forces Act 2006*, which replaced the previously separate Army, Royal Naval and Royal Air Force service discipline systems with a single system, and which created a civilian permanent Court Martial, and an independent Service Prosecuting Authority.

Judges of the Court Martial, referred to as "Judge Advocates," are civilians. They are appointed by the Lord Chancellor on the recommendation of the independent Judicial Appointments Commission in the same manner as District and Circuit Court judges, must have at least ten years standing as a barrister, solicitor, or advocate, and are not required to have prior military service. They are regularly cross-appointed to the civilian Crown Court (which hears serious, indictable offences, and conducts jury trials).

The chief judge of the Court Martial holds the title of Judge Advocate General. He or she is appointed by Her Majesty the Queen, and is currently also cross-appointed to the Crown Court and the High Court. In addition to his or her judicial and supervisory duties, the JAG provides guidance to all stakeholders in the Services' criminal justice system on practices and procedures, developments and reforms, and advises on the system's efficiency and effectiveness, although it is important to note that the setting of policy is solely a matter for Her Majesty's Government.

At the Court Martial, findings of fact are made by the Board, which almost always consists of three to five commissioned officers and Warrant Officers, depending upon the seriousness of the case.

There are certain circumstances in which the Board can be increased to six or seven members (i.e.: proceedings likely to last more than ten court days, or proceedings held outside the UK and Germany that are likely to last more than five court days). Guilt is determined by majority vote. The Board and Judge Advocate determine the sentence together.

All persons subject to service law, and civilians subject to service discipline, may be tried by the Court Martial. Members of the regular forces are subject to service law at all times and in all places, while members of the reserve forces are subject to service law only under enumerated circumstances (essentially, when on call-out or full-time service). Civilians (often dependents of service members) are subject to service discipline in specific circumstances.

When trying civilians, the Court Martial can be constituted with a Board consisting of civilians, and the Judge Advocate will sentence alone.

Judge Advocates can also sit, alone, as a Service Civilian Court, but only outside of the UK. The Service Civilian Court has jurisdiction to try civilians subject to service discipline, and usually does so for minor offences. Civilians are only subject to service discipline when accompanying the Armed Forces overseas. The Service Justice System has no jurisdiction over civilians within the UK.

From a court administration perspective, court reporting services are provided to the Court Martial on a contractual basis with civilian service providers. These services are relied upon to rapidly produce transcripts in all environments where the Court Martial sits, including outside of the United Kingdom.

5.2.5.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

In the UK, a barrister or solicitor, or advocate, of at least 10 years standing, may be appointed as the Director of Service Prosecutions (DSP) by Her Majesty the Queen. The DSP is a senior civil servant, and is completely independent from the military chain of command.

The DSP leads the Service Prosecuting Authority (SPA), and has a team of prosecutors who may either be military members or civilians. Such prosecutors answer to the DSP regarding the performance of their duties, but as either barristers or solicitors, they are also responsible to the Bar Standards Board or the Solicitors Regulatory Authority (respectively) for the performance of their duties as lawyers. At the time of the CMCRT's technical visit, the SPA consisted of only military officers as prosecutors who were posted into positions with the SPA by military authorities within the Army, Royal Navy, and Royal Air Force.

The DSP and the SPA fall under the general superintendence of the Attorney General, and not of the Secretary of State for Defence.

5.2.5.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

The UK has a well-developed legal-aid scheme for persons accused of offences under service law, designed to mirror the civilian legal aid scheme. There is an application process, with means-tested thresholds. Persons whose disposable income falls between the high- and low-income thresholds may qualify for legal aid, but are obliged to make contributions towards the cost of their defence based upon their assessed ability to pay. Defence lawyers are either barristers or solicitors, and are generally civilians. Persons above the high-income threshold are entitled to legal aid but would pay 100% contribution. This means that if acquitted they recover all of their costs (which would not be permissible if they funded their defence privately). Persons below the low-income threshold are entitled to legal aid and are not required to make contributions.

Accused persons have the option of requesting a service lawyer from the Royal Navy, Royal Air Force, or Army. In practice, only the Royal Navy provides defence services at Court Martial. As long as that service lawyer is available, able, and willing to take the case, then this representation can be provided free of charge.

5.2.5.2.4 The substantive body of service offences

Service offences in the UK are divided into ‘disciplinary’ and ‘criminal conduct’ offences. Disciplinary offences capture the kind of misconduct that is unique to the armed forces. Section 42 of the *Armed Forces Act, 2006*, makes it a service offence for those subject to service law to commit “criminal conduct” punishable under the criminal law of England or Wales, and has extra-territorial application (unlike within the civilian criminal justice system, where jurisdiction over criminal offences is generally limited to acts or omissions that take place within the territory of the United Kingdom).

Within the United Kingdom, there is concurrent jurisdiction between military and civilian justice authorities in respect of “criminal conduct” (civil) offences. However, the Director of Service Prosecutions and the Director of Public Prosecutions have entered into a Protocol wherein they have agreed as to how this jurisdiction should be exercised.²¹ In general terms, the Protocol recognizes: that civilian jurisdiction should take precedence over military jurisdiction in any cases of doubt; that the DPP will ultimately have decision-making power in such cases of doubt; and, that cases affecting civilians persons or property should normally be tried within civilian courts.²²

5.2.5.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

The punishments available in the UK service justice system include: imprisonment; dismissal and dismissal with disgrace; detention (not applicable to officers); forfeiture of seniority (applies only to officers); reduction in rank; fines; service community orders; reprimands and severe reprimands (do not apply to junior ratings); service supervision and punishment orders; minor punishments; and service compensation orders. Only civilians can be granted discharges. The Court Martial has

²¹ United Kingdom, *Protocol on the Exercise of Criminal Jurisdiction in England and Wales between the Director of Service Prosecutions and the Director of Public Prosecutions and The Ministry of Defence* (United Kingdom: 2011), online: <http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/publication_scheme/20111007-juris_eng_and_wales.pdf>.

²² *Ibid.*

the same sentencing powers in relation to imprisonment as the Crown Court, including imprisonment for life.

Service community orders are incorporated by reference from the civilian criminal justice system, but may only be applied when the service person is also dismissed from the Service (where they can then be supervised in the community by appropriate civilian authorities). They resemble the Canadian punishment of a conditional sentence of imprisonment served in the community, and include possible orders of obligatory rehabilitation or counselling, community service, curfews, and/or electronic monitoring.

Service supervision and punishment orders somewhat resemble the minor punishments of Stoppage of Leave and Extra Work and Drill found in Canada's *Queen Regulations and Orders*, and service compensation orders somewhat resemble Canadian restitution orders.

5.2.5.2.6 The laws of evidence that apply at trials in respect of service offences

The law of evidence applicable at Courts Martial is generally the same as in UK civilian criminal courts. There are a few procedural modifications on the tendering of specific kinds of evidence (e.g.: hearsay evidence), as well as some special rules detailing how some service matters, including the content of standing orders, may be proved. The Court Martial is permitted by statute to take judicial notice of matters coming within the general service knowledge of the Court.

5.2.5.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

Appeals from Court Martial are heard before the Court Martial Appeal Court, which consists of civilian judges who are all drawn from the Court of Appeal (Criminal Division).

Offenders may, with leave, appeal against finding or sentence, or both, to the Court Martial Appeal Court.

If the Attorney General of the UK believes that any sentence passed at Court Martial for certain criminal conduct offences (generally indictable offences) is unduly lenient, then he or she may, with leave, appeal the sentence to the Court Martial Appeal Court.

Both the Offender and the Attorney General may, with leave, appeal a decision of the Court Martial Appeal Court on a question of law of general public importance to the Supreme Court of the United Kingdom.

5.2.5.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders.

The Court Martial Rules include special procedures in order to assist vulnerable witnesses in giving their testimony, including victims.

Outside of court, in most situations, victims are entitled to a victims' liaison officer (VLO). Victims also have informational rights (e.g. the right to be notified whether the accused is remanded or at large; timely communications regarding the progress of the case; timings and locations of hearings; etc.) as well as some transparency rights (e.g. reasons must be given for a decision not to prosecute, or a decision to substitute a lesser charge).

Victims are entitled to have decisions not to prosecute reviewed by higher authorities within the SPA (and ultimately, if necessary, by the DSP), and are to be notified of that entitlement and the procedure for initiating such a review. There is also a complaints process for victims, and victims are entitled to be informed about that process.²³

Offenders under the age of 18 cannot be sentenced to imprisonment by the Court Martial. In certain circumstances (i.e.: for very serious offences), offenders under the age of 18 can be sentenced to a period of detention, similar to the civilian regime.

5.2.5.3 Observations on the UK Court Martial System

The UK interlocutors reported that there were several advantages of having a permanent court instead of *ad hoc* tribunals for dealing with military offences.²⁴ The permanent nature of the Court Martial more easily enables the Court to create Rules of Court, issue orders (including on preliminary matters), make rulings regarding the enforcement of orders, immediately begin individual case management, create policy towards better systemic case management, and issue sentencing guidelines.²⁵

There did not seem to be any perceived negative consequence in the UK to having civilian judges (judge advocates) presiding at court martial, regardless of whether the individual judge advocates did or did not have previous military service. Stakeholders within the service justice system do, however, take steps to ensure that judge advocates are able to gain an insight into military life by undertaking annual visits to see where service personnel live and work. On average, each UK judge presides over approximately 90 Court Martial trials per year. Any suggestions that civilian judges would in some respects create perceptions of unfairness to the accused or to the public due to a lack of military or service knowledge appear to the CMCRT to have been largely unsubstantiated in the UK context. The CMCRT received no examples of such a phenomenon.

²³ The full policy suite regarding victims' rights in respect of prosecutorial decisions is available online: <http://spa.independent.gov.uk/test/victims_and_witnesse.htm>.

²⁴ The late Chief Justice Lamer made similar observations in his Report of the First Independent Review Authority wherein he recommended that Canada establish a permanent military court, as did Chief Justice Lesage in his report as the Second Independent Review Authority. Some, but not all, of these capabilities can be said to exist in Canada's current court martial system, by virtue of s 179 of the *National Defence Act*, RSC 1985, c N-5 [NDA].

See : Canada, Department of National Defence, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.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 (Ottawa: Department of National Defence, 2003) at 25-29. See Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage* (Ottawa: Department of National Defence, 2011) at 37-41.

²⁵ Though yet unknown in Canada, sentencing guidelines are well established in the UK civilian justice system.

This may be because such military knowledge is not actually required of a court martial judge to render the trial fair, or it may be because the military knowledge is being brought to the tribunal through the panel membership (who, in the UK, are both finders of fact and participants in sentencing) or through the military prosecution service, either by the evidence it calls, or by the simple fact that the prosecutors themselves are usually military members.

In contrast, having a civilian judge, cross-appointed to a civilian criminal court, presiding at the Court Martial appeared to have many advantages. The objective legitimacy and independence of the tribunal appeared to be increased, since civilian judges could not reasonably be seen as being subordinate to the UK's military chain of command. Furthermore, it would be difficult to reasonably criticize these judges as being "second rate" or inferior to judges in civilian criminal courts, since the judge advocates concurrently presided in such ordinary criminal courts. Their rulings were perceived as being based upon the law alone, and they did not seem to speak uniquely for or on behalf of the military chain of command, but rather on behalf of society as a whole. The UK system allows for the appointment of experts in criminal law and procedure, and also facilitates the retention of valuable knowledge and skills by providing each judge with an adequate case volume as they sit concurrently in two types of (military and civilian) criminal courts.

There did not appear to be any difficulty with having civilian judges of the Court Martial preside outside of the UK. In fact, the Court Martial has sat multiple times abroad in places like Cyprus, Belize, and the United States. So far, the Court Martial has not conducted trials in any area of active hostilities, and the CMCRT did not observe any interest among UK stakeholders to ever conduct a trial in such location, given the extent of force protection resources that would be needed to provide for the safety of the Court, and given the distraction from mission focus that a trial could represent.

On prosecutions, it was reported to the CMCRT that some advantages are associated with having a civilian Director of Service Prosecutions who falls under the superintendence of the Attorney General. A statutorily independent and civilian director cannot reasonably be seen to be subordinate to the military chain of command, and therefore may make difficult prosecutorial decisions with greater legitimacy, free from any real or perceived inappropriate influences.

It was reported to the CMCRT that there are challenges in structure of the prosecution service itself, similar to those that are faced in both Australia, Canada and the United States.²⁶ Because the actual line prosecutors are supplied to the Director from the existing legal services branches (Army, Royal Navy, and Royal Air Force Legal Service branches), the Director seems to have limited ability to control who is placed on his staff, and when. The training and experience of officers who are posted to the prosecution service varies. There is no dedicated career track for military prosecutors, so individuals are constantly moving into and out of the prosecution service with a varying degree of experience and knowledge, across all rank levels.

²⁶ It appears that the American Military Justice System is developing a career litigation stream. The United States are considering requiring the Army and Air Force JAG Corps to establish career litigation tracks for uniformed attorneys. For now, they have required the services to conduct a five-year "pilot" program to ensure that trial counsel and defense counsel have sufficient experience and knowledge and to issue a report at the end of those five years on their "findings." See online: <<http://dailysignal.com/2017/02/21/latest-case-of-jag-malpractice-shows-pressing-need-for-reform/>> <<http://dailysignal.com/2016/05/12/a-career-litigation-track-is-necessary-for-army-and-air-force-jags/>>.

There also appeared to be a challenge in the UK court martial system concerning the military knowledge of prosecutors (particularly those from the Army and Royal Air Force), who are not required to have prior military service and are not required to conduct any formal periodic re-familiarization with operational duties. Though they are uniformed armed forces members, the CMCRT noticed that some military prosecutors (through no fault of their own) can have less military knowledge than the other actors in the court room, including the panel, the judge advocate, witnesses, and sometimes experienced defence counsel. This situation could present a challenge for both internal legitimacy, as well as trial efficiency.

The CMCRT was also informed of some challenges associated with the use of military prosecutors who appear in military uniform opposite a fully gowned civilian lawyer. This difference in dress sometimes has an influence on actors within the system, such as witnesses, members of the panel, and those who are watching the proceedings. Although the differences in dress could have influences in different ways, it seemed that to some, a gowned barrister was perceived as having more credibility as trial counsel than a uniformed lawyer.

The use of uniformed prosecutors and/or defence counsel (in cases where a member has requested and been approved to receive defence counsel drawn from within the Royal Navy), posed a different sort of challenge as well. The CMCRT was informed that lower-ranking witnesses may at times be inhibited from providing completely candid and genuine testimony in the face of examination-in-chief or cross-examination questioning from a higher-ranking military officer; in such cases, witnesses can be intimidated by the rank of counsel (if it is not their daily practice to interact with officers of such ranks), or may be overly willing to accept a leading statement or question that is put to them by counsel (out of a habit of deference to more senior officers and a reluctance to contradict a superior). Furthermore, the opposite phenomenon can also be an issue, where uniformed trial counsel are subordinate to a witness who is being cross-examined, and where the cross-examination is not as probing, confrontational, or effective as a result of the rank differential. All of these phenomena could affect trial fairness and accuracy of the outcomes, if witness testimony is compromised to a high degree.

The CMCRT was informed of the special appeal process that is available to victims of offences in the UK court martial system on any decisions taken not to prosecute, and assesses that such a process would improve transparency in respect of such decisions for victims.

Lastly, it was reported to the CMCRT that, much like in Canada, delay is a major issue within the UK court martial system, although efforts (led by the judiciary) are being made to address delay through the adoption of a case management system.

5.2.6 Norway

5.2.6.1 Technical Visit

On 3 October, 2016, two members of the CMCRT conducted an in-person technical visit to Norway, where they had a face-to-face meeting with Norway's Judge Advocate General, and two of his line prosecutors.

Norway's court martial system must be understood in the broader context of information about the Norwegian armed forces. Norway's armed forces consist of approximately 17000 regular members, with an additional 7000 conscripts rotating through per year. The CMCRT heard that in current times, military service is viewed very positively by the Norwegian public, and as a result, conscripts are high-performing young people who are very motivated.

In 2015, the court martial system dealt with around 20 criminal cases.

5.2.6.2 The Norwegian Court Martial System

5.2.6.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

In peacetime, civilian courts hear military matters. These courts may be set up with military lay judges, although such an arrangement is rare in practice. Civilian judges who hear military cases do not specialize in military matters. For military offences committed abroad, trials will be held in Norway.

In wartime, a selected number of civilian courts set up with military lay judges (two in the District Court and four in the Court of Appeal) hear military matters.

Only military persons over 25 years of age who have completed their preliminary service or similar basic training and who have lived for at least three years in Norway may serve as military lay judge.

The Military Penal Code provisions are typically directed towards military personnel. Civilian personnel in the Armed Forces can be subject to the Military Penal Code both in peacetime and wartime in certain circumstances.

The longest military trial of the past six years lasted one day.

5.2.6.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

In peacetime, military criminal cases can be prosecuted by both the military prosecution service and the civilian prosecution service. However, in practice and with the approval of the Public Prosecutor, military cases (*i.e.* breaches of the Military Penal Code) are prosecuted by the military prosecution service. However, civilian criminal cases (*i.e.* breaches of the Civilian Penal Code) are prosecuted by the civilian prosecution service.

In war time, military cases will generally be prosecuted by the military prosecution service, without the need to obtain the approval of the Public Prosecutor.

The military prosecution service falls under the Public Prosecutor, who falls under the Director of Public Prosecutions, who is himself under the supervision of the Minister of Justice. In wartime, the military prosecution service falls directly under the Director of Public Prosecution.

There are two levels within the military prosecution service: first, the Judge Advocate General of the Norwegian Armed Forces (who is the senior official within the military prosecution service); and, second, Judge Advocates for each of Northern and Southern Norway (their number varies from 3 to 4 and they are supported by two assisting Judge Advocates).

In addition to prosecuting military cases, military prosecutors also give advice on disciplinary matters that are handled by summary punishment. They thus spend all of their time working on military cases; either criminal or disciplinary.

Military prosecutors are civilian lawyers who are appointed by the Ministry of Justice. The latter determines their number, their jurisdiction, and the units or staffs in which they shall serve.

5.2.6.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

All defence counsel in Norway are civilian. In most military cases, like in civilian criminal cases, an accused person is entitled to have the costs of his or her defence paid at public expense as part of a broad type of national legal aid system. The judiciary determines the reasonableness of defence counsel fees.

5.2.6.2.4 The substantive body of service offences

In peacetime, military criminal cases include only violations of the Military Penal Code that are committed by military personnel. In wartime, military criminal cases can also include any violation of any penal provision committed in a military area, theatre of operations, or outside of Norway by military personnel.

5.2.6.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

The CMCRT did not observe any notable, specialized sentencing rules or options in respect of service offences.

5.2.6.2.6 The laws of evidence that apply at trials in respect of service offences

There is no notable specialization in the rules of evidence for military cases.

5.2.6.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

Appeals of military cases are dealt with by civilian courts. Four military lay judges may sit on military cases at the Court of Appeal, although such an arrangement is rare in practice.

5.2.6.2.8 Consideration of the special needs of any particular groups who

may interact with the military justice system, including victims, young persons, and aboriginal offenders

Victims of sexual offences can receive free legal representation during legal proceedings.

5.2.6.3 Observations on the Norwegian Court Martial System

The CMCRT took note of some advantages of having a completely civilian, but dedicated and specialized, prosecution service, separate and distinct from the uniformed service of operational legal advisors. This arrangement ensured that there was total separation between those responsible for advising on operational law and the law of armed conflict, and those responsible for prosecuting breaches of such laws. The CMCRT was informed by their Norwegian interlocutors that civilianization of the prosecutors was an essential element to ensure their objective independence and legitimacy. The CMCRT heard that rank would necessarily have an influence on prosecutors if they were part of the Armed Forces.

This arrangement also allowed for specialization within the prosecution service, both in military knowledge as well as criminal law and procedure. However, to increase the prosecution services' expertise in criminal law and procedure, the military prosecution service suggested that there should be a secondment to state attorney's office to get exposure and practical experience in prosecuting serious crimes. The prosecution service also advised the chain of command on disciplinary matters, thereby ensuring they acquire service knowledge through volume. This also further maintains the distinction between operational legal advisors and disciplinary legal advisors, and helping to ensure that misconduct was always dealt with at the appropriate level (i.e.: summary discipline, or criminal court) on the basis of informed legal analysis.

Nonetheless, as Norway is contemplating reform of its military justice system, the CMCRT was informed of the possible pitfalls of civilianizing the prosecution service. If offices and resources of the military prosecution service were to be completely integrated with the state attorney's office (which is not currently the case in Norway), this would run the risk of having military cases being overshadowed by more pressing and serious civilian cases.

5.2.7 Denmark

5.2.7.1 Technical Visit

From 4-5 October 2016, two members of the CMCRT conducted an in-person technical visit to Denmark, where they engaged in face-to-face meetings with Denmark's Military Prosecutor General, Deputy Prosecutor General, and Project Manager; the Chief Military Prosecutor and Chief of Military Investigations; the Officer Commanding the Guard Company of the Royal Life Guards; and members of the Danish civilian judiciary who preside over military cases.

Similar to what was expressed in Norway, the CMCRT heard that in current times, military service is viewed very positively by the Danish public. Danish conscripts correspondingly tend to be highly motivated and high-performing young people. The CMCRT also heard that this motivation is sufficiently high that young women, who are not yet legally required for conscription but who are still eligible for military service, will often voluntarily compete with young conscripted men

for the available positions. These young women will be selected ahead of the conscripted men whenever outscoring them on the selection criteria.

The Danish Defence forces consist of approximately 15000 regular members and 12000 reservists. There are additionally over 50 000 reserve volunteers available for service in the Home Guard. The Danish Defence forces are regularly committed to international operations.

The average number of sanctions imposed through court proceedings under the Military Penal Code (excluding the civilian criminal code and other legislation) over the past five year is 218.

5.2.7.2 The Danish Court Martial System

5.2.7.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

Military criminal cases are heard by the ordinary courts, presided over in most cases by either a single civilian professional judge or a civilian professional judge with two lay civilian judges.

In peace time, military criminal jurisdiction applies to military members on active service, and in some cases military members after they are discharged. In armed conflict, whether inside or outside of Denmark, military criminal jurisdiction may extend to all members of the armed forces and anyone, including civilians, accompanying a military unit.

5.2.7.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

The Danish Military Prosecution Service (MPS) is completely separate from the military chain of command. The Military Prosecutor General heads the MPS, and is responsible directly to the Minister of Defence. The Chief Military Prosecutor works under the Military Prosecutor General, and supervises ongoing investigations and prosecutions.

Though a member of the armed forces with military status, the Military Prosecutor General holds no military rank (although he has a separate insignia corresponding to the military rank of a Major General) and is correspondingly not subordinate to any military officer. The same is true for all prosecutors, and investigators, employed within the MPS. When they are prosecuting cases in Denmark, prosecutors do not wear military uniforms and have their offices located outside of military bases.

The MPS is responsible for both investigating and prosecuting violations of the Military Penal Code, as well as civilian criminal laws related to military service. They are capable of conducting investigations both in Denmark, and abroad in theatres of operations. There are currently 5 military prosecutors' positions in Denmark.

5.2.7.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

All defence counsel in Denmark are civilian. An accused person's defence will normally be funded by either their representative association (which is somewhat akin to a labour union), or by the government upon the judicial assignment of defence counsel from a roster.

If the accused is judicially assigned state-funded counsel, and is acquitted, then he or she will not have to make any financial contribution to the cost of his or her defence. However, if convicted, the offender must pay the full cost of his or her legal defence (based upon standard rates/tariffs for their kind of case). The judiciary determines the reasonableness of defence counsel fees.

5.2.7.2.4 The substantive body of service offences

The Danish military justice system has completely separate minor disciplinary infractions, which are triable before military commanders, as distinct from military crimes, which are contained in the Military Penal Code and triable only in the ordinary courts.

The Military Penal Code contains a variety of service-related offences. The MPS can also prosecute military members for civilian offences where the subject matter of the offence falls within statutorily enumerated grounds (generally, where the circumstances are substantially connected with military service).

5.2.7.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

There is no difference in the sentences available to the ordinary courts in Denmark when dealing with a military case. Courts will determine the appropriate sentence of an offender based on civilian sentencing guidelines. The sentences of imprisonment, fines, and alternative sanctions (e.g.: community service orders) are all available, depending upon the offence. The ordinary courts also have the power to order offenders to compensate victims, and/or to surrender any proceeds of crime.

There are no special military punishments available to the ordinary courts, but the military chain of command retains their authority to discipline, administratively sanction, or discharge military offenders.

5.2.7.2.6 The laws of evidence that apply at trials in respect of service offences

The ordinary Danish law of evidence applies to military prosecutions.

5.2.7.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

The ordinary Danish law applicable to appeals applies to military cases. Serious offences generally

carry an automatic right of appeal, and minor cases require leave to appeal. Further appeals to the Supreme Court require leave, and must be on questions of law alone.

5.2.7.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders.

Danish courts have a guideline, established by the executive branch of government, which requires a trial in respect of a violent offence to be commenced within 37 days of charges being laid.

Any decision of the Chief Military Prosecutor not to prosecute in a particular case may be appealed by the victim to the Military Prosecutor General.

5.2.7.3 Observations on the Danish Court Martial System

First, Danish interlocutors reported significant benefits to the Danish military justice structure, comprising complete severance between their non-penal, summary discipline system, administered by the chain of command, and their military penal system, which is investigated and prosecuted by the military prosecution service before the ordinary civil courts. The CMCRT heard that the discipline system was working well for commanders, and that there was rarely doubt as to whether a particular matter was more appropriately dealt with as a matter of summary discipline, or as a true crime. Whenever there was such doubt, it would result in immediate consultation with a military prosecutor. This total severance allowed for speedy, fair discipline on the majority of matters of concern to commanders, who did not express the need for a system where they could impose penal sanctions at their level in the current operational environment.

It was reported to the CMCRT that it would not be acceptable to have prosecutors holding a military rank in Denmark for legal policy reasons relating to the perceived independence of the prosecutors. The CMCRT was informed of the benefits enjoyed by members of the military prosecution service (including both prosecutors and investigators who work directly under the supervision of prosecutors), in having military status but no military rank. The CMCRT assessed that this attribute would be an asset to ensure objective independence in their investigatory and prosecutorial tasks, since it would not be reasonable to perceive rank-less individuals as being subordinate to, or under the influence of, the normal military chain of command. The CMCRT heard that this allowed the most junior investigator and prosecutor to cross-examine freely the most senior of officers. Maintaining membership in the armed forces, however, allows for investigators and, if necessary, prosecutors, to enter theatres of hostilities as combatants.

A benefit of a rank-less prosecution and investigative service was particularly standing out to the CMCRT in the case of the Military Prosecutor General, who, like the heads of civilian prosecution agencies, is responsible directly to a government minister, and not to leaders of the armed forces. Furthermore, where the Military Prosecutor General is responsible to the Minister of Defence, rather than the Minister of Justice (or Attorney General), he is presumably empowered to maintain sensitivities to the needs of military discipline and the realities of service life. The CMCRT heard that armed forces members are aware that the prosecution service is outside of the chain of command, and they had confidence in its fairness and objectivity in that regard.

The CMCRT did observe, however, that the Danish military prosecution service can occasionally face some internal legitimacy challenges due to their perceived separation from the ordinary forces. Occasionally, individual prosecutorial decisions and files may be seen by operational members of the armed forces as being detached from the realities of modern armed conflict.

Similarly, the CMCRT perceived certain advantages in the Danish system of relying on ordinary civil courts to try military penal offences. The team heard that this practice has resulted in a high level of perceived internal legitimacy in the Danish armed forces, as members know they will be treated the same as any other Danish citizen should they face a criminal trial.

The CMCRT did observe one potential theoretical disadvantage, in that the ordinary Danish courts are not currently capable of sitting abroad. However, the CMCRT did not obtain any indication that this has ever actually resulted in a problem in the Danish military justice system, particularly since there are clear examples of prosecutions and trials proceeding effectively in the ordinary Danish courts in respect of operational offences that took place during armed conflicts outside of Denmark (such as in Afghanistan). In such cases, the Danish Courts would make significant use of technology (e.g. to have witnesses testify from abroad).

Regarding sentences available in military cases, the CMCRT was informed that Danish judges were satisfied with having the same sentencing options available as in the civilian justice system. They perceived particularly military sentences as inappropriate in the criminal justice system, as these were and should only be the domain of Commanding Officers.

5.2.8 Finland

5.2.8.1 Technical Visit

On 7 October 2016, two members of the CMCRT met with representatives from the Finnish Office of the Prosecutor General, including the State Prosecutor and one of his District Prosecutors; representatives from the Defence Forces, including the Head of Legal Division of the Defence Staff, the Legal Advisor to the Officer in Charge of Criminal Investigations, and a military “Judicial Officer”,²⁷ and, finally, the Chief Justice of the Helsinki Court of Appeal together with several justices of the military division of that court, including two military officers who are lay judges of the Helsinki Court of Appeal.

Like Norway and Denmark, Finland employs universal conscription for its male population. The Finnish Defence Forces consist of approximately 8000 regular force members alongside about 25000 conscripts, with approximately 900 000 reserve personnel available for service. Finland regularly deploys its regular force members on international operations.

The number of military cases roughly vary from 300 cases to 500 cases per year. The vast majority of the cases relate to absence and desertion.

²⁷ A military member who is not a lawyer, but whose duties involve advising a tactical commander on various legal events and processes.

5.2.8.2 The Finnish Court Martial System

5.2.8.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

Military criminal cases are dealt with in courts of general jurisdiction in accordance with the procedure provided for normal civilian criminal cases. Fifteen out of twenty-seven district courts deal with such military cases. The composition of the district court is different for military cases, where the court consists of a chairperson (a civilian judge) and two non-legally trained military members. Military cases must be dealt with as a matter of urgency.

The Court of Appeal appoints the military members based on nominations by the Commander of the Finnish Army, for a period of two years. Whenever a military member is not required to sit in court, he or she will resume his or her normal duties. A military member has the right, in return for his or her duties, to collect from State funds a fee for each session day, as well as a per diem and compensation for travel expenses in accordance with the grounds approved by the Ministry of Justice. Before undertaking their duties in court, military members swear an oath as a judge. Military members are functionally equivalent to regular judges, and therefore they exercise independent consideration in their decision-making, and their actions may not be monitored any more than in the case of regular judges.

The Finnish military justice system only has jurisdiction over military personnel and those performing their military service. However, there is an exception in times of peace such that, if a male citizen does not enter compulsory military service, he will be tried for his absence (AWOL) in the military version of civilian court, even though he is still a civilian.

For military offences committed abroad, the only court of competent jurisdiction is the District Court of Helsinki. In these cases, the court can conduct sessions abroad.

If a state of defence has been enacted, then military courts can also try non-military officials of the armed forces, persons other than soldiers serving in military forces, people serving in public entities, or traffic or communication officials, if they have been set under military command.

5.2.8.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

The Prosecutor General has assigned, out of 300 civilian prosecutors, 40 of them from across the country to deal with military offences, in addition to their caseload of civilian criminal cases. A prosecutor normal caseload is of approximately 200 cases per year and only a small portion of these are military cases. If they are required to, prosecutors can conduct prosecutions abroad. With military cases, the prosecutors' discretion to prosecute is more restricted than with regular criminal cases: any decision not to prosecute cannot be based on the minor significance of the offence.

The Finnish Prosecution Service is an independent organization, which exists as a branch within the Ministry of Justice. The Defence Forces fall under the Ministry of Defence and do not have any functional or administrative connection to the Prosecution Service.

Largely due to universal conscription, a high percentage of Finnish prosecutors have at least some military service. Those individuals designated as military prosecutors are eligible for periodic familiarization and training sessions at local military establishments in order to reacquaint the prosecutors with the realities of service life.

5.2.8.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

In military cases, contrary to civilian cases, every accused is entitled to his or her defence being paid at public expense. There is no means-related threshold an accused has to meet to have his or her defence fees covered. The defending lawyer cannot be a member of the Defence Forces.

5.2.8.2.4 The substantive body of service offences

In peacetime, military-configured courts hear both military offences, such as absence without leave and disobeying an order, and civilian offences, like theft and assault, provided that the accused person is a soldier and the offence was directed against another soldier or the Defence Forces. For all other criminal offences, the district court will sit in the regular, non-military configuration.

In wartime, separate military courts can be established to deal with all criminal cases relating to soldiers.

5.2.8.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

The same sentencing regime applies equally to civilians as well as soldiers.

5.2.8.2.6 The laws of evidence that apply at trials in respect of service offences

There is no notable specialization in the rules of evidence for military cases.

5.2.8.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

Appeals of the judgment of the district court are heard by the Helsinki Court of Appeal. Leave to appeal is required in most military cases.

The Helsinki Court of Appeal also functions as the court of first instance if the accused person is an officer of or above the rank of major, or someone who serves in a corresponding military position.

Appeals from decisions of the Helsinki Court of Appeal are heard by the Supreme Court of Finland. Leave to appeal is required in military cases unless the Court of Appeal hears a military case in the first instance.

The regular composition of the different appeal courts is supplemented by two lay military members in the Court of Appeal, and in the Supreme Court. Whenever a military member is not required to sit in court, he or she will resume his or her normal duties.

The Supreme Court appoints, from among persons proposed by the Ministry of Defence, the military members of the Court of Appeal. The President of the Republic appoints the military members of the Supreme Court.

5.2.8.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders

In Finland, military cases must be dealt with as a matter of priority by prosecutors.

5.2.8.3 Observations on the Finnish Court Martial System

Even though Finland relies on ordinary civilian prosecutors and ordinary courts to deal with its military offences – there is still a fairly significant degree of specialization in military cases. This specialization is created in part because serving military members are employed as lay judges, both at trial and on appeal, in military cases. These legally independent officers can be thought of as ensuring that military knowledge is present in the tribunal, both in making findings of fact and at sentencing. It was reported to the CMCRT that the military knowledge and community experience brought by the military members of the tribunal was very beneficial to the process. The CMCRT heard that military members brought legitimacy to the system in the eyes of the accused. As well, the reliability of the military members is regarded as being very high in Finland; the findings and sentences they reached are very similar to civilian courts.

The CMCRT did hear about some potential risks relating to this aspect of the Finnish system. For example, the CMCRT heard some suggestion that employing non-professional judges increases the risk that a tribunal may be perceived as relying on facts not in evidence to reach findings of guilt or at sentencing. The CMCRT also heard how this potential risk can be offset by the strong presumption that judicial actors act appropriately and according to law, and how it might in any case be significantly mitigated simply by the presence on the tribunal of the professional civilian judge. However, some interlocutors wondered whether it was really necessary to have military members sit as judges in military cases. They suggested that expert evidence could provide the required information to professional judges, which could be perceived as more transparent. The CMCRT also heard that military members of the court sometimes do not have the specific military expertise or knowledge pertinent to the case before them (e.g. a case involving an air force accident, but where there is no military member familiar with airfield operations on the panel).

The military members of the courts (who are independent in the conduct of their judicial duties during their fixed term of their appointments to the courts) also retain their normal military duties on a day-to-day basis, except when required by the court to sit in a particular case. While the CMCRT observed that such an arrangement might, under Canadian constitutional law, raise questions concerning the objective independence of such “part-time” military judges, the CMCRT was

informed that this particular arrangement was likely a practical necessity given the small size of Finland's regular armed forces, especially with respect to the officer corps.

Although the District Court of Helsinki can conduct sessions abroad, this appears to happen very rarely, as it is more convenient to conduct sessions in Finland. Nonetheless, the CMCRT heard that there has never been any problem in finding a civilian judge to sit abroad. According to one judge the CMCRT met, this is part of their judicial duties.

Finally, the CMCRT heard that COs tend to find that sentences are too low and that the process is too slow (thereby creating problems when members are required to deploy).

5.2.9 France

5.2.9.1 Technical Visit

From 7-9 November 2016, two members of the CMCRT conducted an in-person technical visit to France, where they engaged in face-to-face meetings with the following individuals:

- military Magistrate officers, military judicial clerk ("greffier") officers, and senior non-commissioned members, all from the Ministry of Defence's Military Penal Affairs Division;
- senior officers from the Gendarmerie prévoyale (the national military police force);
- civilian prosecutorial Magistrates specialized in military matters;
- civilian presiding Magistrates specialized in military matters;
- military staff officers representing the Chief of the Defence Staff; and,
- the Director of the Ministry of Defence's Office of Legal Affairs.

The French armed forces consist of approximately 208,000 regular members, 98,000 members of the Gendarmerie nationale (a national paramilitary police force that includes a number of specialized sub-components), and 28,000 reservists. France participates actively in a number of foreign and international operational deployments, and has well over 10,000 personnel operating outside of the country at any given time – largely in Africa and the Middle East. Conscription was abolished in France in 2001.

5.2.9.2 The French Court Martial System

5.2.9.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

There are two distinct systems for dealing with military offences under French law: a system that is, in principle, intended for use in peacetime; and, a system that is, in principle, intended for

activation during times of crisis and in wartime.

Within the peacetime system, three distinct jurisdictional possibilities exist for dealing with offences committed by military personnel. First, purely civilian offences that are committed outside of the context of military service are dealt with in one of France's thirty-two ordinary civilian court districts ("jurisdiction de droit commun"). Second, both uniquely military offences and civilian offences that are committed in the context of military service, in France (other than in the Paris region), are dealt with in one of France's eight regional civilian jurisdictions that have specialization in military matters ("jurisdiction de droit commun spécialisée en matière militaire"). Finally, any uniquely military offences and civilian offences that are committed in the context of military service, either within the Paris region or on operations outside of France, are dealt with in the Paris district jurisdiction that has specialization in military matters ("jurisdiction de droit commun spécialisée en matière militaire de Paris"). The courts will not conduct sessions abroad.

In all of these three classes of situations, less serious matters are tried by the High Court ("tribunal de grande instance"), and more serious matters are tried by the Assize Court ("cour d'assises"). Unlike in the ordinary civilian court districts, the Assize Court in civilian jurisdictions with specialization in military matters sits without a jury.

Also, in civilian jurisdictions with specialization in military matters, the presiding magistrates who are specialized in dealing with military cases are assisted by military judicial clerks ("greffiers") who are officers and non-commissioned members. These clerks are career military members who receive legal or paralegal training, and perform auxiliary judicial functions by assisting the presiding magistrates in, among other things, understanding the military aspects of a particular case. In general, the number of military files that a specialized presiding magistrate will deal with represents only a small portion of the total number of files that form part of that magistrate's docket.

In times of war or siege, French law permits the re-establishment by executive order of military tribunals. These tribunals would have different jurisdiction depending on whether an offence is committed within France (in which case either the Territorial Court of Armed Forces or the High Court of the Armed Forces would have jurisdiction) or abroad (in which case, the Armed Forces' Military Court would have jurisdiction). All of these tribunals would be composed of combinations of military officers and at least one civilian judge, and would have jurisdiction to deal with all offences committed by military personnel – whether in the context of military service or otherwise.

5.2.9.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

As with the court/tribunal system in France, three distinct prosecution service possibilities exist for dealing with offences committed by military personnel. First, purely civilian offences that are committed outside of the context of military service will be dealt with by prosecutors ("magistrats du parquet") in any one of France's 164 ordinary civilian prosecutorial districts. Second, both uniquely military offences and civilian offences that are committed in the context of military service, in France (other than in the Paris region), will be dealt with by civilian prosecutors from the prosecutorial district offices in one of France's eight regional civilian jurisdictions that have

specialization in military matters. Finally, a specialized section of the Paris prosecutor's office was set up in 2012 to deal with any uniquely military offences and civilian offences that are committed in the context of military service, either within the Paris region or on operations outside of France.

In the Paris specialized prosecution office, two prosecuting magistrates work full-time on military cases. In the remaining eight regional offices that form part of jurisdictions with specialization in military matters, military cases make up only a small percentage of the total caseload of the prosecuting magistrates, who also deal with purely civilian prosecutions as part of their day-to-day work.

In both the Paris specialized prosecution office and the eight other regional offices that form part of jurisdictions with specialization in military matters, the prosecuting magistrates are assisted by military judicial clerks ("greffiers") who, among other things, bring a level of military knowledge and experience to the prosecutor's office.

In all of the French jurisdictions, the prosecuting magistrates are completely independent from the normal military chain of command.

Unlike in the ordinary civilian jurisdictions, the Minister of Defence must provide input to these civilian prosecutors about each military case before the prosecutors can make their decision to proceed or not proceed with a trial of a military member. This input – most commonly provided by officials from within the armed forces on behalf of the Minister of Defence – is intended to inform the prosecuting magistrates of the military interest in the case, by noting factors such as past conduct of the accused, other pending career action, and any non-criminal disciplinary punishment that has been imposed.

5.2.9.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

In peacetime, a military accused person will be entitled to representation by a lawyer or a military member who is not necessarily trained as a lawyer. The costs of securing a lawyer will be provided out of public funds if the offence that the accused is charged with committing is one that arises from military circumstances, and not from purely personal circumstances.

In wartime, inside France, accused persons will also be entitled to representation by a lawyer or a military member. Outside of France, accused persons may also be represented by a defending officer who is named on a roster established for special military justice service.

5.2.9.2.4 The substantive body of service offences

The French *Penal Code* contains all civilian offences, while the *Code of Military Justice* creates uniquely military offences, such as desertion, military conspiracy, and disobedience of an order. Unless the military tribunals are re-established by executive order, these uniquely military offences would always be tried within a civilian jurisdiction that has specialization in military matters.

5.2.9.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

Generally speaking, tribunals that deal with military offences impose all of the same sentences as a purely civilian tribunal. These sentences are imposed in conformity with principles of sentencing that apply across both the specialized military and civilian criminal justice systems. However, a tribunal dealing with a military offence can additionally impose punishments of reduction in rank, and a form of dismissal with disgrace (“la destitution”), which can have severe implications on an offender’s pension entitlements and right to wear insignia, among other things.

5.2.9.2.6 The laws of evidence that apply at trials in respect of service offences

There are no specialized rules of evidence that apply at trials in respect of military offences.

5.2.9.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

In peacetime, no distinct appeal process exists for dealing with military offences, as compared to appeals from decisions in respect of ordinary civilian criminal offences.

In wartime, a distinct appeal process from an initial decision of a military tribunal would exist. The first instance decision would be reviewed by the same military tribunal that rendered the decision – but by a differently composed panel of that tribunal. Alternately, if this review is impossible, then the decision can be reviewed by a court that is designated for that purpose by the Criminal Chamber of the Court of Cassation. Final decisions by the military tribunals can be appealed to the Court of Cassation under limited circumstances.

5.2.9.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders

No unique rules of procedure or substance for dealing with military offences were noted regarding particular groups with special needs.

5.2.9.3 Observations on the French Court Martial System

A specialized form of justice for dealing with military offences continues to exist in France, notwithstanding claims that military justice has been abolished in that country.²⁸ Although members of the armed forces are not directly involved in the prosecution or adjudication of military offences, they continue to have indirect involvement in or influence upon these matters (e.g.: through the military “greffiers” who work in the offices of prosecuting and presiding magistrates,

²⁸ See, for instance, Antoine Krempf, “La justice militaire n’existe plus en France ?”, *Franceinfo: radio* (19 June 2015), online: <http://www.francetvinfo.fr/replay-radio/le-vrai-du-faux/la-justice-militaire-nexiste-plus-en-france_1781121.html>.

and through the requirement for prosecutors to obtain input from the Minister of Defence in any decision to prosecute a military offence). Furthermore, military accused persons remain subject to some different procedures (e.g.: they are not tried by a jury at the Court of Assizes), and military offenders are liable to be sentenced with some different punishments (e.g.: reduction in rank). Based on these differences, the CMCRT is of the view that it would be misleading to claim that “there is but one justice in France: one is a French citizen before being a soldier.”²⁹ Military personnel in France are subjected to a form of criminal justice that is somewhat different from the form of justice that applies to ordinary citizens.

Second, the CMCRT was informed that differences in procedure or structures between the normal civilian criminal jurisdictions and the jurisdictions with specialization in military matters were generally intended to ensure that adequate military knowledge was available to decision-makers in the latter jurisdiction. This military knowledge was contributed to varying degrees by the “greffiers” who worked with prosecutorial and presiding magistrates, by the subject-matter specialization that key actors in the nine specialized jurisdictions would gain over time by dealing with military files (particularly in the Paris region, where prosecuting magistrates worked full-time on military cases), and by the requirement for prosecutors to seek input from the Minister of Defence regarding the military interest in, and circumstances surrounding, the case. Generally speaking, it seemed that these measures were effective in providing for sufficient military knowledge, although members of the military chain of command would sometimes find that other civilian actors within the justice system lacked a comprehensive understanding of certain military issues in particular cases.

Third, the CMCRT was informed that there were clear efficiency benefits associated using experienced civilian prosecuting magistrates to deal with military offences. For instance, in the Paris regional prosecutions office, there were two prosecuting magistrates with specialization in military matters who dealt with all files from the Paris region involving uniquely military offences and civilian offences committed in the context of military service, and all files from outside of France involving any offences by military personnel. Between them, these two prosecuting magistrates dealt with approximately 800 files per year (this includes to some extent the supervision of police investigations). Of these 800 files, some are classified as ‘without further action’, others are dealt with alternative means to prosecution others are referred to the investigating judge for further investigation, and approximately 100 of such files are brought to trial. In the remainder of the cases that do not go to trial, the prosecutors may decide not to proceed with the charges outright, or (like their colleagues within the purely civilian system), they may decide to dispose of the file through consent-based alternatives to prosecution (similar to “alternative measures” in Canada), by requiring an accused person to complete mediation, to undergo therapy, or to remain subject to certain conditions.

Fourth, there did not appear to be any major practical or legal difficulties associated with having civilian judges dealing with offences that take place outside of France even if they do not conduct courts martial abroad. For instance, in cases where a judicial magistrate (“juge d’instruction”) was assigned to supervise an investigation (as is common procedure in many civil law jurisdictions for

²⁹ Gilles Létourneau, “The resurrection of Napoléon's principle of equal justice” (30 April 2015), *Global Military Justice Reform Blog*, online: <<http://globalmjreform.blogspot.ca/2015/04/the-resurrection-of-napoleons-principle.html>>.

investigations of more serious or complex cases), the magistrates would make themselves available by phone or other means to police investigators anywhere in the world, and would travel to the location of an offence that was being investigated if necessary. The CMCRT heard that the belief that courts martial needed to be able to deploy was considered “out of date” (“hors du temps”) given the extent of force protection resources that would be needed to provide for the safety of the Court, and given the distraction from mission focus that a trial could represent.

Finally, as a matter of practice, significant cooperation and liaison takes place between the Ministry of Defence and the various magistrates who are specialized in military matters. To begin with, several of these magistrates are assigned to positions within the armed forces, where – for the duration of their assignments – they wear unique ranks like “Magistrat Colonel” or “Magistrat Lieutenant-Colonel”. Upon being posted back into a civilian magistrate position, these individuals lose their ranks and cease to be considered part of the armed forces. The military magistrate officers act as form of bridge between the armed forces (on the one hand) and the prosecuting and presiding magistrates within the specialized civilian jurisdictions that deal with military offences (on the other hand). The military magistrate officers also facilitate opportunities for exposure to military operations and training among the civilian magistrates. It was clear that from the perspectives of both the operational military chain of command and the specialized civilian magistrates that the military magistrate officers were an essential component of the overall system for dealing with military offences in France.

5.2.10 The Netherlands

5.2.10.1.1 Technical Visit

From 10-11 November 2016, two members of the CMCRT conducted an in-person technical visit to the Netherlands, where they engaged in face-to-face meetings with the following individuals:

- the Director General of the Dutch Military Legal Service, and several Headquarters legal staff officers;
- a senior civilian Legal Advisor from within the Dutch Ministry of Defence;
- Two civilian prosecutors from the District Public Prosecutor’s office at Arnhem, who form part of that office’s “Division of Military Affairs” and who specialize full-time in the prosecution of military offences;
- The senior Military Liaison Officer who is embedded in Division of Military Affairs at the Public Prosecutor’s office;
- The Marechaussee (Military Police) Liaison Officer who is embedded in Division of Military Affairs at the Public Prosecutor’s office;
- A current and former civilian legal advisor within the Expertise Centre for Military Law that is embedded in Division of Military Affairs at the Public Prosecutor’s office;

- A civilian prosecutor within the office of the Advocate General (who is responsible for appeals in both civilian and military cases);
- A military member (judge) of the Military Chamber of the District Court at Arnhem; and,
- The civilian judge who is President of the Military Chamber of the Appeal Court at Arnhem and the civilian judge who is the President of the Military Chamber of the District Court at Arnhem.

The Dutch armed forces consist of approximately 45,000 regular members, and another 32,000 reserve members. Within the regular force, the Army accounts for about 20,000 members, the Navy (and Marines) account for about 12,000 members, and the Air Force accounts for about 7,000 members. The Marechaussee (a national para-military police force) accounts for about 6,000 members, but most of these members perform border security functions, with only about 600 employed in traditional military policing functions. The Dutch armed forces participate actively in multi-national training exercises and operations, and presently has approximately 1300 personnel deployed on operations (mostly in Africa and the Middle East).

5.2.10.2 The Dutch Court Martial System

5.2.10.2.1 The status and institutional structure of tribunals/courts with jurisdiction over service offences

In the Netherlands, all crimes by military personnel will be dealt with by the Military Chamber of the (civilian) District Court at Arnhem, and all appeals will be heard by the Military Chamber of the (civilian) Court of Appeal for the Arnhem district.

In any given case, the Military Chamber of the District Court would either be composed of a civilian judge or two civilian judges and one military member. The Military Chamber of the Court of Appeal would be composed of two civilian judges and one military member. There are three military members at each of the District Court and Court of Appeal (generally, one from each of the Army, Navy, and Air Force, at the rank of Colonel for the District Court, and at the rank of Brigadier-General for the Court of Appeal), and as many as 40 civilian judges, who could all be called upon on a rotational basis to make up a Military Chamber for a particular trial.

Military members are qualified military lawyers. There are some specific rules to guarantee their independence from command influence, in addition to granting them the same legal status and protections as judges. Military members are appointed by royal decree upon recommendation of the Minister of Security and Justice and with the consent of the Minister of Defence, for a period of four years. These judges may be renewed for up to two additional four-year terms. Military members are also appointed as Deputy Judges of the District Court or Court of Appeal (as the case may be), with all of the same pre-requisite training and certification as civilian judges, so they can also sit as civilian judges in non-military cases.

In practice, military members at the District Court-level divide their time between acting as judges (i.e.: the military member of a Military Chamber) in military cases, acting as Deputy Judges in

civilian cases, instructing members of the armed forces in military law at the Netherlands Defence Academy, facilitating working visits of the entire military chamber to military units, exercises or missions. Military members at the Court of Appeal-level are generally only needed to preside in military appeals for approximately one day per month. They may also preside in civilian appeals (although this is less common), and they also serve in full-time senior military legal positions within the armed forces when not presiding.

The jurisdiction of the military chamber, which can conduct sessions abroad, is limited to military personnel: regular force members, volunteers, conscripts (although conscription has been suspended since 1996), reservists (when they are actually serving), and in very limited circumstances, certain civilians.

In the Military Chamber of the District Court, simple cases will be tried before a single civilian judge. More complex cases, and cases in which the prosecution seeks imprisonment of more than one year, will be tried by the full Military Chamber consisting of a professional civilian judge as President, a second civilian judge, and a military member. Decisions will be taken by majority vote, but the Chamber will only express a single decision and will not indicate when there was a dissenting vote during the secret deliberations of the judges. As noted by Major Bas van Hoek, “[o]n average, 10 per cent of the cases are tried by the multiple member military chamber and 60 per cent by a single-judge military chamber. The remainder of matters are minor offences.”³⁰

5.2.10.2.2 The status and institutional structure of a prosecution service with responsibility for prosecuting service offences

The task of supervising the investigation and prosecution of criminal offences committed by members of the Dutch armed forces, falls to the Arnhem District Public Prosecution Office’s Division of Military Affairs. This specialized Division of the civilian prosecution service currently consists of two civilian public prosecutors, three clerks, two civilian legal advisors from the Expertise Centre for Military Criminal Law (“the Centre”), two Liaison Officers of the Armed Forces, and a Liaison Officer of the Royal Netherlands Marechaussee (police).

The Division’s prosecutors are civilian lawyers who, due to the relatively small number of military cases, also handle cases involving offences committed by civilians in addition to military cases. As noted by Major Bas van Hoek, “[t]he public prosecutors built their expertise by daily practice, attending military legal courses and briefings by military units and by visiting units during deployments.”³¹ If they have to, civilian prosecutors can deploy to theatre of operations, although this happens very rarely.³² Most often, they will direct cases from the Netherlands (this happened in cases where the alleged offence was committed in Afghanistan, Mali and Iraq).

The role of the Centre, which was established in 2007, is to provide military operational legal

³⁰ Major Bas van Hoek, “Military Criminal Justice in the Netherlands: The ‘Civil Swing’ of the Military Judicial Order” in Alison Duxbury and Matthew Groves, eds, *Military Justice in the Modern Age* (Cambridge: Cambridge UP, 2016) at 218-237, at 232 (fn 80) [van Hoek].

³¹ *Ibid* at 230.

³² For instance, two prosecutors and one clerk assisted by the liaison officer of the armed forces went to Afghanistan for two weeks in order to direct the investigations of a friendly fire incident in 2008 in Uruzgan, Afghanistan.

support to the public prosecutor. The legal advisors working at the Centre must be civilians with relevant operational legal experience (i.e.: mission experience as a military legal advisor). Both the prosecutors and the Centre's legal advisors are fully independent from the military chain of command, and are not responsible to the Ministry of Defence.

The role of the Liaison Officers is to facilitate the communication between both the public prosecution service and the Ministry of Defence, by assisting the public prosecutor on matters of military organization, operating procedures and the specific relevant military rules and regulations.

In spite of the different sources of information and support that are available to the public prosecutors, including from military Liaison Officers within the Division, the decision to prosecute rests exclusively with the public prosecutor, who makes this decision independently.

5.2.10.2.3 The mechanism through which defence counsel services are provided to persons accused of committing service offences

An accused person who is held in provisional custody or detention on remand may retain legal counsel at the public expense.

An accused person who is not in such custody or detention can access legal aid if the person does not have sufficient funds to retain the services of legal counsel. The paying of a small fee in the form of contribution is required, depending on the accused person's income.

The accused person can also be assisted by any military officer who is willing to defend him and who will act as a free representative. No legal background is required in this case, as the military defending officer is not expected to give thorough legal advice or support. The defending officer's task is to assist the accused in relatively simple cases, and to provide the court with specific military aspects that are relevant in relation to the behavior of the accused and the military crime.

Practically speaking, an arrangement was passed which provides that the Ministry of Defence could provide under limited conditions compensation for defence counsel.

5.2.10.2.4 The substantive body of service offences

Both the common *Criminal Code* and the *Military Criminal Code* (which contains a relatively small complimentary legal regime) apply to all military personnel. The *Military Criminal Code* defines a number of military crimes, such as absence without leave and disobeying an order or service regulations.

The Military Chamber will normally deal with military and ordinary civilian crimes committed by military personnel.

As noted by Major Bas van Hoek, "there has been a reduction in the number of military criminal cases in general, and cases concerning typical military offences in particular. Most cases relate to offences against civilian criminal law committed by service members while they are not on active duty and which lack any military quality or connection. These offences have little or no direct

bearing on the armed forces.”³³

A certain threshold must be met for the misconduct to be considered criminal (otherwise the misconduct will only be subject to disciplinary law). The test to distinguish between military crimes and disciplinary offences is as follows: if as a direct and immediate result there is damage or it is feared there will be damage to the readiness for the actual carrying out of an operation or exercise of any unit of the armed forces, or if a threat to another person’s life is to be feared or caused, or if general danger to goods is to be feared or caused, then the matter should be treated as a criminal offence.

5.2.10.2.5 The punishments, sanctions, and sentencing laws that apply in respect of service offences

The Military Chamber applies the sentencing regime that exists in the civilian justice system as well as the one that exists in military criminal law (e.g. military imprisonment). However, during wartime, the maximum penalty which can be imposed is higher for numerous military crimes.

5.2.10.2.6 The laws of evidence that apply at trials in respect of service offences

The law of evidence in the Military Chamber is the same as in civilian courts. There is no notable specialization in the rules of evidence for military cases.

5.2.10.2.7 The rights, grounds, and mechanisms of appeal for the prosecution and defence

There is no notable specialization in the rules regarding rights, grounds and mechanisms of appeal for military cases in the Netherlands, except that the Military Chamber of the Court of Appeal for the Arnhem district is the exclusive Appeal Court in respect military appeals, and complaints by a victim of a decision to prosecute or not prosecute made by a public prosecutor in the Division of Military Affairs. The Military Chamber of the Court of Appeal and is composed of two civilian judges and one military member.

The Supreme Court of the Netherlands, which can hear final appeals in military matters, does not have a Military Chamber.

Leave to appeal is required under many circumstances in order to appeal to the Military Chamber of the Court of Appeal from a decision of the Military Chamber of the District Court. However, in practice, the Court of Appeal tends to grant leave to appeal very generously. The Military Chamber of the Court of Appeal hears approximately 30-40 appeals each year, over the course of approximately ten court sessions each year of one half-day each.

³³ Van Hoek, *supra* note 30 at 232-233.

5.2.10.2.8 Consideration of the special needs of any particular groups who may interact with the military justice system, including victims, young persons, and aboriginal offenders

Anyone who has a direct interest in a case may object to a decision not to prosecute by lodging a complaint with the Court of Appeal. If the Court finds the complaint to be well founded, the Public Prosecution Service must institute proceedings before the District Court.

5.2.10.3 Observations on the Dutch Court Martial System

The CMCRT was particularly interested in the structure of the Military Chamber of the trial and appeal courts, in that they blended features of civilian independence with military expertise. It is clear that the involvement of the military members within the Military Chambers of the courts permits highly productive deliberations on questions of fact and law, in a way that takes account of the special needs and circumstances of the Dutch armed forces.

As noted by Major Bas van Hoek, "[m]ost cases relate to crimes committed by service members while they are not on active duty and which lack any military quality or connection. The rationale of the military chamber and military member have not been subject of detailed discussion in the last two decades."³⁴ However, given the low number of cases the military members sit on (less than 10%)³⁵, and the low number of cases involving uniquely military offences³⁶, the CMCRT notes that some have questioned whether the existence of the military chamber is still justified.³⁷

Military members may also be perceived as lacking the required independence³⁸. Nonetheless, the CMCRT notes that this mixed Military Chamber concept was upheld recently on two occasions by the European Court of Human Rights as being consistent with the requirements of independence that exist under the *European Convention on Human Rights*,³⁹ in part because of the legal status and protection that is granted to the military members by law.

Regarding the civilian judges sitting as judges of the military chamber, the CMCRT was informed that given their relatively small number (3 at the District Court and the 2 at the Court of Appeal) and given that they usually are part of the chamber for a couple of years⁴⁰, they will generally tend to specialize and develop military expertise. Working visits to military units, exercises or missions

³⁴ *Ibid* at 232-233.

³⁵ *Ibid* at 232 (fn 80).

³⁶ *Ibid* at 233.

³⁷ See *ibid* at 233 (fn 81): "[d]uring an interview by the local press in March 2013 a professor in criminal law at the Radboud University in Nijmegen argued that the small amount of criminal cases concerning military offences justifies the abolition of the military chamber."

³⁸ *Ibid* at 233 (fn 81): "[i]n 2011, a military member of the court saluted a military suspect in the session room. The suspect was decorated with the Military 'Willems-Orde', the oldest and highest military decoration in the Netherlands, for courage displayed in Afghanistan. One judge stated that the salute was inappropriate and suggested that such behaviour by military justice officials fostered public perceptions that a separate military chamber was no longer justified."

³⁹ *Jaloud v The Netherlands [GC]*, No. 47708/08, [2014] ECHR, at paras 195-196; *Mustafic-Mujic and others v The Netherlands [Third Section]*, No. 49037/15, [2016] ECHR, at paras 111-114.

⁴⁰ Currently, the maximum number of years a civilian judge has been sitting on the Military Chamber is three, but they are looking at adopting a policy requiring them to stay for four to five years.

(e.g. Mali) also contributes to the development of their military expertise.

The question of how to structure a prosecution service for dealing with military offences has been considered extensively in the Netherlands. An excellent summary of the various incidents, political responses, and structural changes that have ensued within the prosecution service is contained in Major Bas van Hoek's recent publication, "Military Criminal Justice in the Netherlands: The 'Civil Swing' of the Military Judicial Order".⁴¹ First, the CMCRT was informed that appointing service members on active duty as public prosecutors has been interpreted as contravening the requirement of independence in the Netherlands.⁴² The consistent challenge has thus been to balance the required civilian independence and expertise in criminal law with sufficient military knowledge and expertise. The CMCRT assessed that the current structure, with independent civilian prosecutors who are ultimately responsible for every decision to prosecute (or not) and for the conduct of each prosecution, but who have access to Military and Police Liaison Officers, and civilian legal experts on operational law within the Expertise Centre, works very effectively to achieve the correct balance. The prosecutors may not know about many facets of military life, but they can rely on their various advisors on a case-by-case basis for this.

Furthermore, this structure within the prosecution service seems to facilitate extensive cooperation between the civilian prosecutors and the military chain of command. For instance, every outgoing Dutch contingent commander meets in person with the prosecutors prior to deployment, in order to discuss and work through (or "table-top") different disciplinary and criminal scenarios, so that all stakeholders have a common understanding of how such incidents would be addressed if they arose during a deployment. Additionally, a copy of every Dutch "use of force" incident report is sent to the Expertise Centre within the prosecution service, which provides advice to the prosecutors about when any uses of force merit further investigation or prosecution. This process for reviewing the legality of use of force incidents seems well-conceived to ensure that decisions to investigate and prosecute are made by disinterested individuals who are truly impartial in each case.

Lastly, regarding the prosecution service, the CMCRT was informed that ideally, civilian prosecutors should stay in the military division for 6-8 years to ensure that they developed the relevant military knowledge as it takes one to two years for prosecutors to deeply familiarize themselves with military law and the armed forces.

5.2.11 Ancillary visits – Israel and Singapore

5.2.11.1 Singapore

On 20-21 September 2016, a member of the CMCRT and another legal officer from the Office of the JAG conducted an ancillary visit with the Registrar of the Military Court.

Singapore employs universal conscription of 2 years full-time service, followed by 10 years of reserve service. The Singaporean Armed Forces (SAF) total approximately 350,000 personnel. Singapore deploys on a variety of operations, including peacekeeping and anti-piracy operations.

⁴¹ Van Hoek, *supra* note 30.

⁴² *Ibid* at 235.

Courts martial are not held in deployed locations.

There are two types of courts martial: general courts martial and field general courts martial. Field general courts martial are held when it is impracticable to hold a general court martial as a matter of exception, and were therefore not the focus of the ancillary visit. Approximately 500 general courts martial are conducted each year.

General courts martial are held in a permanent military court where civilian judges, who each have at least 10 years' previous experience as sitting judges, are cross-appointed to the court. It was noted by the Registrar of the Court that there is a preference for judges with criminal law and adjudication expertise.

Many of the judges are reservists - either as judges who are completing obligatory service, or as judges who remain enrolled in the reserves after their obligatory service has been completed. This type of current military experience within the judiciary in the SAF brings military expertise to the tribunal. The judges preside in uniform, and are subject to the Armed Forces Act when sitting. When not sitting as military judges, the judges perform the normal judicial duties of a state court judge. The judges are not paid additional salary or benefits when sitting as military judges.

Ordinary civilian offences, when committed by military personnel, are dealt with by courts martial that are presided over by civilian judges who sit alone. When presiding as part of a court martial involving a uniquely military offence, the judge sits as a member of a panel involving two other serving military members who generally come from operational trades and are more senior in rank. The panel collectively makes all rulings of law and fact. Questions of law are deferred to the professional judge, but on questions of fact, the military members of the panel decide the questions alongside the professional judge with each panel member having equal status. The professional judge writes the reasons for the decisions of the entire panel.

The civilian criminal rules of procedures and evidence are used within the military courts, with some modifications to better account for the need for military service knowledge.

Appeals from a court martial decision are heard by the Military Court of Appeal.

Assistance for military accused persons within the court martial system is by a “defending officer”, who is a serving military member but who is not necessarily a lawyer. Prosecutions are conducted by military lawyers.

5.2.11.2 Israel

On 30 November – 1 December 2016, a member of the CMCRT and another legal officer from the Office of the JAG conducted an ancillary visit with various actors in the Israel Defence Force (IDF) military justice system. The team met with the Chief of Defence Counsel, the Chief Military Prosecutor, and military judges.

The IDF employs universal conscription. The IDF does not deploy outside of Israel, but operates in a unique operational environment where the country is in armed conflict with several entities.

Israel is also an Occupying Power.⁴³

Military courts exercise exclusive jurisdiction over uniquely military offences and concurrent jurisdiction over ordinary criminal offences.

There are three permanent regional district courts martial, in each of the regions where military commands are located: the Southern, Northern, and Central regions. There is also a special court martial for lieutenant-colonels and above, and a traffic court martial. Courts martial are presided over by a panel of three judges: a professional judge and two lay judges – serving military members who generally come from the regional districts, and who are more senior in rank. Decisions of the court martial are taken by majority vote.

Appeals from all courts martial are heard by the Military Court of Appeals. The Military Court of Appeals sits as a panel of three judges, at least two of whom are professional judges, with the third judge being a military member who is usually a senior military commander. The professional judges are required to have formerly served in the IDF. Appeals from the Military Court of Appeals are heard by the civilian Israeli Supreme Court.

Military courts rely on the ordinary rules of criminal evidence and procedure that apply in Israel.

Prosecutors and defence counsel are military lawyers who are a part of the Military Attorney General corps. Defence counsel services are fully funded by the military. The Military Attorney General is also the chief legal advisor to the Chief of the General Staff (the senior military commander of the IDF).

Victims' rights in the Israeli civilian criminal justice system were implemented in 2005 through the Victims' Rights Act and include a variety of rights related to privacy, physical protection, information, procedural rights, and the right to express a position. The Act does not formally apply in military proceedings, but has been voluntarily adopted through directives of the Chief of Military Prosecutions and the Criminal Investigative Department. There is also a Special Victims' Counsel Program that provides emotional support and information to victims about the military justice system.

5.3 International Comparative Study – Summary of Lessons

As a result of all observations made by the CMCRT, the team was able to identify some key themes despite the diverse particularities of each court martial system that the team encountered.

First, notwithstanding the fact that that some countries resort to ordinary civil courts to try military cases while others have specific military tribunals, all countries have retained some degree of specialization in military cases. This common approach can be demonstrated in the systems that can be fairly described as the most military in character (e.g.: the United States) as well as in those that can be fairly described as the most civilian in character (e.g. France). There appeared to be adherence to the principle that in military cases, there exists a requirement to ensure that some

⁴³ Military courts also exercise jurisdiction within the occupied territories. Those courts were not the subject of comparative study.

level of military or service knowledge is brought to the tribunal, other than just through individual witnesses.

Regardless of the reason for this phenomenon, its existence cannot be reasonably denied. No country studied by the CMCRT has completely “civilianized” its court martial-type system. All of these systems retain, to one degree or another, some element of military specialization through some combination of the prosecution service, the panel, or the judiciary. All have some mechanism to ensure that military knowledge and experience informs the tribunal, other than through military witnesses. The manner in which this infusion of military knowledge is achieved varies a great deal between systems, and no country appears to have found an overwhelmingly best way to accomplish this task, but all appear to believe in its importance.

At the same time, for the actors in the court martial systems of the countries studied, criminal law expertise and trial experience seems to be more important than military knowledge and experience. Almost universally, the CMCRT heard that the prosecution service, defence counsel, and judiciary must have sufficient proficiency in criminal law and procedure in order for the court martial system to function effectively and efficiently. For many countries, this need led to the creation of some mechanism whereby court martial system actors (including trial counsel and judges) were regularly involved in ordinary criminal law matters in addition to their court martial duties, in order to develop and maintain their proficiency.

On a similar note, the CMCRT took note that simply posting or appointing a person to a court martial system position did not make that person an expert in criminal law and procedure, any more than putting a uniform on a court martial system actor granted them military knowledge or experience. The team was informed that, wherever there was no institutional mechanism in a system to ensure adequate criminal law expertise and knowledge of the realities of service life, then the effectiveness, efficiency and legitimacy of that system appeared to decline.

Furthermore, the CMCRT was informed – with perhaps only one country as an exception – a consistent recognition that a higher level of military involvement or uniformed presence within the court martial-type system created at least some challenges to the perceived legitimacy to the system. In some cases, this perception related to the ability of military prosecution or defence counsel to zealously and effectively pursue their case in situations involving higher-ranking witnesses, accused persons, or victims – where counsel might feel pressure to defer to the higher-ranking member. In some cases, the perception flowed from concerns about perceived independence (usually of the judges) from the Executive branch of government and the operational military chain of command. And, in some cases, the perception concerned initial decisions within the system (e.g.: about whether to prosecute or convene a trial) being made by a person who could be perceived to have motive to be either overzealous at the expense of a suspect or accused person (e.g.: making a junior person a scapegoat in order to protect one’s own reputation) or to be unduly lenient in ways that breed impunity (e.g.: protecting a wrongdoer who is perceived as a “good soldier”). In all of these circumstances, there was a recognition that the mere fact that a key decision-maker or justice system actor wears the same uniform as the members of the armed forces who are governed by the system can weaken the system’s effectiveness, efficiency, or legitimacy.

The CMCRT was also informed incidentally that, around the world, summary discipline systems

remain the bedrock of military justice and are the preferred tools of commanders. The CMCRT clearly observed that, even in cases where countries had de-criminalized their summary discipline system and severed the relationship between summary discipline and criminal/penal law, there were no apparent negative consequences – either for the commanders imposing discipline, or for the members who were subjected to the summary discipline system. In fact, the CMCRT received significant input that suggested the opposite conclusion, indicating that a bright line between unit-level summary discipline and penal/criminal conduct enhanced perceptions of fairness from military members (so long as accused persons in a penal/criminal matter received treatment comparable to what an accused person in the civilian criminal justice system would receive), and that military commanders (who had access to a swift and simple tool to deal with the vast majority of undisciplined behaviour) were also satisfied with those summary discipline systems. The CMCRT likewise consistently heard that there was rarely difficulty in establishing whether a particular incident was penal or disciplinary in nature, and whenever there was such difficulty, it appeared quickly resolved through consultation with the relevant prosecution service.

The CMCRT noted a consistent theme that could be referred to as “parity of dealing.” In criminal and penal matters involving military personnel, the CMCRT consistently heard that perceptions of legitimacy of the relevant court martial-type system correlated with the degree of parity between the military and civilian criminal justice systems. To be clear, the CMCRT did not hear that court martial systems must be identical to, or can only be, ordinary civilian criminal courts. Rather, the CMCRT heard that, regardless of whether any particular process or tribunal was more military or civilian in character, the most important legitimacy criterion was the extent to which the main features of a system (e.g.: burden of proof; rules of evidence; judiciary; sentences) were relatable – even if not identical – to the ordinary civilian criminal justice system. Where there were high levels of comparability between the military and civilian system, then there tended to also be high levels of internally- and externally-perceived legitimacy within the military system.

Lastly, the CMCRT notes that many countries do not employ a full-time, fully-funded, military defence counsel model. When providing state-supported legal counsel to a military accused, all other nations employ some combination of means-testing, financial contribution, part-time counsel and/or certificates, tariffs and/or judicial or quasi-judicial review of defence counsel hours and fees.

In conclusion, the CMCRT took note of all the lessons learned during its comparative study of how other like-minded states operate their court martial (or equivalent) systems. In particular, this study exposed the CMCRT to a full range of military justice considerations, structures, and practices which have informed the CMCRT in its assessment of the Canadian court martial system⁴⁴ and options descriptions to improve it.⁴⁵

⁴⁴ See above, Chapter 7 (Assessment).

⁴⁵ See above, Chapter 7 (Assessment).

Chapter 6 – The Theoretical Basis for a Court Martial System

6.1 Introduction

As noted in Chapter 1, the purpose of the Court Martial Comprehensive Review is to conduct a legal and policy analysis of all aspects of the Canadian Armed Forces' court martial system and, where appropriate, to develop and analyse options to enhance the effectiveness, efficiency, and legitimacy of that system.

Since the concepts of “effectiveness”, “efficiency”, and “legitimacy” all refer or relate to an ability to produce a desired *result* or to an underlying *purpose*, the CMCRT cannot assess these attributes within the current court martial system, or any options to enhance the current system, without first understanding the desired results that the court martial system is intended to produce.

The focus of this chapter, therefore, will be on developing and describing a theoretical model as a basis for answering important questions related to the purpose and design of a court martial system. What **should** the system be intended to do? What principles must animate the system, and what features must it possess, if it is to accomplish its intended purpose? The answers to questions such as these then provide a frame of reference – to be used in subsequent chapters – for assessing the current system and any options to enhance the system.

Ultimately, in any effective national military force, the laws, regulations, and orders that govern the armed forces must support the government's ability to control and use the armed forces in furtherance of state objectives. This is the purpose for circumscribing military power and authority in law – to ensure that the armed forces will be both subordinate to the government that directs its use, and that it will be effective in responding to the government's need when called upon. The laws, regulations, and orders that apply in respect of military justice systems are no exception, and must also ultimately support the government's ability to control and use the armed forces whenever and wherever this is required in furtherance of national interests.

As will be described below, the Canadian government,¹ Parliament,² Canadian courts,³ CAF leaders,⁴ and successive JAGs⁵ have collectively asserted that the goal of Canada's military justice system is to fulfill both a disciplinary purpose and a public order and welfare purpose as a means of enabling the government to control and use the armed forces whenever and wherever necessary.

The current summary trial system is primarily focused on achieving the disciplinary purpose of

¹ Online : <<http://www.forces.gc.ca/en/news/article.page?doc=canada-s-military-justice-system/hnea75sh>>.

² Bill C-15, *An Act to amend the National Defence Act and to make consequential Amendments to Other Acts*, SC 2013, c 24, s 62 [Bill C-15] (enacting both disciplinary and public order and welfare purposes as fundamental purposes of sentencing, at s 203.1 of the *National Defence Act*, RSC, 1985, c N-5 [NDA]).

³ *R v Généreux*, [1992] 1 SCR 259 [Généreux].

⁴ See, for instance, the testimony of Major-General Steve Noonan, before the American Response Systems to Adult Sexual Assault Crimes Panel, Transcript of Testimony, RSP Public Meeting at 167-172 (Sept. 24, 2013), online <http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/24_Sep_13_Day1_Final.pdf>.

⁵ See, for instance, a recent interview with former JAG, Major-General Blaise Cathcart: Cristin Schmitz, “Q&A with Maj.-Gen. Blaise Cathcart”, *The Lawyers Daily* (7 May 2017) online: <<https://www.thelawyersdaily.ca/articles/3117/q-a-with-maj-gen-blaise-cathcart>>.

the military justice system, although it can incidentally have an ability to reinforce the public order and welfare purpose of the system in at least some cases through its limited jurisdiction over some ordinary criminal offences and its ability to impose penal and criminal consequences on offenders. Under circumstances such as those set out in **Assumption 1** (see Chapter 1), where a CAF summary discipline system would not have jurisdiction to deal with criminal offences or to impose true penal consequences, such a system could be seen as only addressing the disciplinary purpose of the military justice system.

The court martial system, in theory, should be focused on achieving both the disciplinary and the public order and welfare purposes of the military justice system, although the extent to which it addresses each purpose will vary depending on the circumstances of each case.

The court martial system will need to be grounded in three principles if it is to achieve its ultimate purpose of enabling the government to effectively control and use the armed forces: effectiveness, efficiency, and legitimacy. Each of these principles can be supported by a variety of features that, when present in the court martial system, strengthen the system's ability to achieve its ultimate purpose.

6.2 The Purpose of Canada's Military Justice System

In the analysis that will follow, the CMCRT will attempt to elaborate the purpose of Canada's military justice system, and then, more specifically, the purpose of Canada's court martial system. This analysis is theory-based; when compared with actual practice, results, and perceptions of the current system – particularly from the users of the system – it may appear aspirational in its contemplation of an “ideal” court martial system. The CMCRT will identify what it sees as the fundamental purposes of these systems, by reference to what the systems have tried to accomplish, and by reference to its assessment of what the systems should strive to achieve.

The overarching purpose of the Canadian Armed Forces is to use military power in furtherance of national objectives, both in Canada and around the world.⁶ The military justice system must support this purpose. Therefore, the CMCRT assesses that the fundamental purpose of the military justice system is to contribute to the maintenance of an operationally effective fighting force that can be used and controlled by the Canadian government in support of state objectives.⁷ This first-order purpose is, ultimately, the same one that military laws, regulations, and orders generally strive to achieve, so the laws, regulations, and orders that pertain to the military justice system should be no exception.

This characterization of the fundamental purpose of the military justice system as a tool for

⁶ See, for instance, Canada, Department of National Defence, *Strong, Secure, Engaged: Canada's Defence Policy* (Ottawa: Department of National Defence, 2017) at 59: “Canada must have a responsive and capable military. As an instrument of national power, the military is an important and unique capability that the Government of Canada can use to advance national interests, promote Canadian values, and demonstrate leadership in the world.”

⁷ See, for instance, Canada, Department of National Defence, *Duty with Honour: The Profession of Arms in Canada*, (Ottawa: Department of National Defence, 2009) at 13: “Conducting military operations remains the CF's overriding purpose, however, and this shapes the fighting identity of Canada's military professionals. It also delineates the profession's responsibility to the government and to society, and dictates the expertise necessary for the success of operations.”

supporting the government's ability to control and use the armed forces is consistent with existing authorities. It also helps to provide the basis for a coherent analytical framework for thinking about military justice in a way that acknowledges what the CMCRT proposes to be the two supporting purposes of the system.

The first supporting purpose is about discipline – without which it would be difficult if not impossible for the government to control and use its armed forces. As the Chief of the Defence Staff has explained, “[d]iscipline offers the means by which an armed force carries out its mandate on behalf of the State.”⁸ The term “discipline”, in this military context, means “the habit of obedience to lawful orders, even in situations of grave peril to the person who is subject to the order,”⁹ or “an instilled pattern of obedience, willingness to put other interests before one’s own, and respect for and compliance with lawful authority.”¹⁰

As one historian has noted, “soldiers who ignore, eschew, or overstep the laws, regulations, and orders governing the armed forces face the full wrath of a military justice system, **which is designed for the main purpose of enforcing discipline** and ensuring expected behaviour in battle.”¹¹ More recently, a unanimous Supreme Court of Canada found that the current purpose of the “overall system of military justice” is “to maintain the discipline, efficiency and morale of the military.”¹²

For the sake of simplicity, the CMCRT will refer to this purpose for the military justice system as the “disciplinary” purpose. It is logical that a military justice system should strive to achieve a disciplinary purpose, since discipline is an inherently desirable quality within an armed force. A more obedient military that acts uniformly and rapidly in compliance with governmental and internal directives will inevitably be more effective in advancing national interests than a military that is less obedient, and less swift in its compliance with governmental and internal directives. Thus, a system (like a military justice system) that is capable of promoting internal discipline will likely contribute positively to the overall effectiveness of the armed forces. Discipline also ensures that the armed forces will be subject to civilian control in a free and democratic society.

The goal of preserving public order and welfare among military personnel (or contributing to respect for the law and the maintenance of a just, peaceful and safe society among military personnel) also supports the more fundamental purpose of ensuring that the armed forces are capable of being used and controlled by the government, whenever and wherever they are needed.¹³ For instance, it arguably becomes easier for an armed force to train and prepare for the full spectrum of military operations when certain conditions – including the existence of a just and

⁸ Canada, Department of National Defence, *CDS Guidance to COs* (Ottawa: Department of National Defence) at para 1001.1 [CDS Guidance to COs].

⁹ *R v Ross*, 2003 CM 52, at para 13.

¹⁰ *R v Moriarity*, 2015 SCC 55, at para 54 [Moriarity] (quoting with approval from the Respondent Crown’s factum).

¹¹ Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia*, (Vancouver: UBC Press, 1999) at 3 (emphasis added).

¹² *R v Moriarity*, *supra* note 10 at para 48.

¹³ See, for instance, Canada, Department of National Defence, *Leadership in the Canadian Forces: Conceptual Foundations* (Ottawa: Department of National Defence, 2005) at 41: “The traditional purposes of military discipline are to control the armed forces to ensure that it does not abuse its power, to ensure that members carry out their assigned orders efficiently and effectively – particularly in the face of danger.”

safe environment within which this training and preparation can take place – are first satisfied. Preserving public order and welfare among military personnel also contributes more generally to the rule of law.

A number of authorities and factors suggest that the military justice system does or should also serve a public function. A majority of the SCC in *R v Généreux* observed that, “[a]lthough the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, **it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare.**”¹⁴ Similarly, Parliament seemed to intend for the military justice system to also serve a public order and welfare purpose when it enacted recent legislation amending the *National Defence Act*. When the relevant provision comes into force, it would pronounce two equally fundamental purposes of sentencing within the military justice system – namely, “to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale,” and, “to contribute to respect for the law and the maintenance of a just, peaceful and safe society.”¹⁵ This second fundamental purpose of sentencing within the military justice system mirrors, almost identically, a provision of the *Criminal Code* that articulates the fundamental purpose of sentencing within Canada’s civilian criminal justice system.¹⁶

As these authorities suggest, the military justice system also serves a public function that is distinct from its function in contributing to the maintenance of internal military discipline, since the military justice system (at least in its effects)¹⁷ does things that civilian criminal justice systems also typically do, such as protect the public from threats to public peace and safety that may be posed by offenders. For instance, a court martial – like a civilian criminal court – can try a person subject to the CSD for ordinary criminal offences even in the absence of a military nexus (s 130), can sentence an offender under the NDA to periods of imprisonment of up to imprisonment for life (s 139(1)(a)). Courts martial can also issue weapons prohibition orders (s 147.1), DNA identification orders (ss 196.11-196.25), orders that a person who was found not responsible on account of mental disorder be detained in custody in a hospital (s 202.16), and orders requiring offenders to comply with the provisions of the *Sex Offender Information Registration Act* (sections 227-227.21). All of these powers of a court martial seem to serve public order and safety purposes

¹⁴ *Généreux*, *supra* note 3 at 281.

¹⁵ Bill C-15, *supra* note 2 (enacting these fundamental purposes at s 203.1 of the NDA, *supra* note 2).

¹⁶ See *Criminal Code*, RSC 1985, c C-34, s 718: “The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society [...]”.

¹⁷ In *Moriarity*, *supra* note 12, the Supreme Court of Canada concluded that in the context of a *Charter* s 7 overbreadth analysis, the purpose of the overall system of military justice is to maintain the discipline, efficiency and morale of the military. However, *Moriarity* cannot be interpreted as purporting to overrule *Généreux*. Rather, the SCC in *Moriarity* stated that *Généreux* does not settle the purpose of the challenged provisions (ss 117(f) and 130 of the NDA, *supra* note 2) in the context of the overbreadth analysis. In *Moriarity*, the SCC seemed to indicate that its statement of purpose in the *Généreux* case took into account both the CSD’s objective and its effects in a way that was unhelpful for the purposes of an overbreadth analysis. *Généreux* therefore remains good law in that the military justice system (at least in its effects) has a broader public function of punishing specific conduct which threatens public order and welfare. See *Moriarity*, *supra* note 10 at para 47 (wherein the SCC notes that “this statement of [a public purpose for the military justice system in *Généreux*] includes both the scheme’s objective and its effects in a way that is unhelpful for the purposes of an overbreadth analysis [under s 7 of the *Charter*]”).

as much as they serve internal military discipline purposes.

For the sake of simplicity, the CMCRT will refer to this additional purpose for the military justice system as “the public order and welfare” purpose.

Regardless of how one characterizes the fundamental purpose of the military justice system, summary trials and courts martial (and indeed, every other aspect of the military justice system) should help to support the purpose of the system as a whole, but they may do so in different ways, and may therefore have different particular purposes from one another.

As noted above, in Chapter 2, Canada’s military justice system, created within Part III (the “Code of Service Discipline”) of the *National Defence Act*, and associated *Queen’s Regulations and Orders for the Canadian Forces*, currently has at its centre two types of service tribunals – summary trials and courts martial – that can try service offences committed by military personnel. Summary trials are restricted in jurisdiction to less serious offences, while courts martial tend to deal with more serious offences. Summary trials are conducted by non-judicial military officers, generally from within an accused person’s chain of command. Courts martial, in contrast, involve the participation of qualified lawyers: military prosecutors, military (or civilian) defence counsel, and professional military judges. The number of summary trials conducted in a given year is typically between ten and forty times greater than the number of courts martial conducted in the same year.¹⁸ The overwhelming majority of proceedings within the military justice system occur at the summary trial level.

Although there are many other distinctions between summary trials and courts martial, they do not need to be described in detail here. It is sufficient to note that Canada’s military justice system consists of two different types of service tribunals, that involve different actors, and that deal with a vast spectrum of offences that can range from very minor offences involving breaches of military discipline (such as brief periods of absence without leave), on the one hand, to very serious offences involving criminal misconduct (such as war crimes, sexual assault, murder, and criminal negligence causing death) on the other hand.

Since the scope of the CMCRT’s review includes only the court martial system, and not the military justice system as a whole, it will be necessary to look with greater specificity at the purpose of the court martial system so that meaningful analysis of that system’s effectiveness, efficiency, and legitimacy can be undertaken. However, some important contextual information can be obtained by first considering briefly the purpose of the summary trial system.

6.2.1 The Purpose of a Summary Discipline System

The purpose of summary proceedings, as they exist today, is articulated at QR&O 108.02: “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

¹⁸ In 2016-2017, for instance, there were 55 courts martial and 553 summary trials conducted in the CAF: Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2016 to 31 March 2017* (Ottawa: Office of the Judge Advocate General, 2017).

conflict.” The CMCRT accepts this purpose, and considers that it would remain a valid purpose for any reformed summary discipline system that is similar in principle to the system proposed within Bill C-71 (see **Assumption #1**, described in Chapter 1), except that the purpose would relate to minor “infractions” rather than minor “service offences.”

In looking at the stated purpose of the summary trial system, it seems to support the disciplinary purpose of the military justice system more than the public order and welfare purpose. The phrase “contribute to the maintenance of military discipline and efficiency” does not connote a jurisdiction to deal with matters that present an immediate threat to the public, or that are of an immediate public concern, but rather with matters that are of a relatively local, internal CAF concern.

Some indication about the purpose of the summary trial system can also be inferred by identifying the key actors within the system: commanders and commanding officers.

The Chief of the Defence Staff reminds COs that “[t]he responsibility to maintain **discipline** falls most directly on a unit Commanding Officer (CO). This is the reason for the concentration of legal authority and powers at the CO level.”¹⁹ The CDS also notes in his *Guidance to Commanding Officers*, “you [Commanding Officers] occupy a level of command where it is still possible for you to know by name all of your officers, warrant officers, soldiers, sailors, airmen and airwomen. When subordinates are known by their COs, it will shape their spirit, instil cohesion, and enable them to achieve what might otherwise be considered impossible.”²⁰ Unit COs are in many ways at the most critical juncture in any CAF chain of command – high enough in the chain to understand and implement tactical, operational, and strategic direction, but sufficiently close to the tactical and sub-tactical level personnel to be able to influence their discipline, efficiency, and morale through effective leadership. This is why numerous external experts have observed that “[t]he commanding officer is at the heart of the entire system of discipline.”²¹

Viewed through the lens of professional military leadership, summary trials represent a kind of locally-administered professional discipline tribunal – similar but not identical to the professional bodies that regulate the conduct of doctors, lawyers and teachers in Canada: a senior member of the profession of arms (who presides at a summary trial) determines when another member in the unit has fallen below of expected standards of conduct, and then determines what sanction should be imposed in order to maintain the profession’s standards. Although most civilian professional discipline tribunals in Canada are slightly different from one another, summary trials perform many of the same functions as these tribunals do within other self-regulating professions by allowing members of the profession to enforce the standards that govern all members’ professional conduct.

¹⁹ CDS Guidance to COs, *supra* note 8 at para 1001.3 (emphasis added).

²⁰ *Ibid* at para 101.1.

²¹ Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, presented to the Minister of National Defence on March 14, 1997, by the Right Honourable Brian Dickson, Lieutenant-General Charles Belzile, and Bud Bird* (Ottawa: Department of National Defence, 1997), at 12; Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage* (Ottawa: Department of National Defence, 2011), at 11.

An additional indicator of the purpose of the summary trial system can be seen by looking at the punishments that may be imposed on an offender at a summary trial. These punishments are generally corrective and disciplinary in nature, are often leadership-related, and are limited to those which fall on the lower end of the severity scale. For instance, in describing the punishment of detention, note A to QR&O 104.09 provides as follows:

In keeping with its disciplinary nature, the punishment of detention seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience in a structured, military setting, through a regime of training that emphasizes the institutional values and skills that distinguish the Canadian Forces member from other members of society.

Similarly, in describing minor punishments, note B to QR&O 104.13 explains that “[t]he goal of minor punishments is to correct the conduct of service members who have committed service offence [sic] of a minor nature while allowing those members to remain productive members of the unit.”

All of the above discussion relating to the purpose of summary trials, as they exist today, suggests that these trials are primarily intended to achieve the disciplinary purpose of the military justice system. That is not to say, however, that summary trials are incapable of also contributing to the achievement of the military justice system’s public order and welfare purpose.

For instance, although the punishment of detention at summary trial is disciplinary in nature, it is still a form of incarceration that segregates an offender from society for the duration of the punishment – so this punishment could reinforce public safety in the same way as would a punishment of imprisonment under the *Criminal Code*. Additionally, regulations currently permit summary trials to deal with certain ordinary civilian criminal offences under section 130 of the NDA,²² which suggests that the summary trial system is likely intended to achieve the same kind of public order and welfare purpose as civilian criminal courts that would otherwise deal with such offences.

However, when one considers previously contemplated reforms to the summary trial system (see **Assumption #1**, described in Chapter 1) that would remove both the jurisdiction to deal with criminal matters, and the jurisdiction to impose true penal consequences, from the summary trial system, it becomes arguable that – at that point – the system would only exist to serve a disciplinary purpose. Without any power or jurisdiction to uphold public order and welfare (by trying criminal offences and by imposing punishments that protect the public) and with the removal of the punishment of detention, the summary discipline system would no longer have any capacity to directly or incidentally achieve a public order and welfare purpose.

This understanding of the summary trial system can help one to make better sense of academic or

²² See *Queen Regulations and Orders for the Canadian Forces*, art 108.07 [QR&O]. These offences are, in respect of the *Criminal Code* offences under sections 129 (Offences Relating to Public or Peace Officer), 266 (Assault), 267 (Assault with a Weapon or Causing Bodily Harm), 270 (Assaulting a Peace Officer), 334 (Punishment for Theft), where the value of what is stolen does not exceed five thousand dollars, 335 (Taking Motor Vehicle or Vessel Without Consent), 430 (Mischief), except mischief that causes actual danger to life, 437 (False Alarm of Fire). Additionally, in respect of the *Controlled Drugs and Substances Act*, an offence under section 4(1) (Possession of Substance) can also be tried at a summary trial.

judicial suggestions that the military justice system is primarily concerned with the maintenance of discipline,²³ since the summary trial system – which has an almost-exclusively disciplinary purpose – deals with at least 90% of the total volume of cases within the military justice system. Thus, from a purely mathematical perspective, it is entirely correct to suggest that the military justice system is primarily about the maintenance of military discipline, since the military justice system is mostly about summary trials, at least in terms of the system’s throughput.

6.2.2 The Dual Purposes of the Court Martial System

Unlike the summary trial system, the court martial system does not have a separately enunciated purpose within any statute or regulation. Given the assumed changes to the summary trial system (see **Assumption 1**), it is clear that one of the purposes of the court martial system is to support the Government’s ability to control and use the CAF by promoting respect for the law and the maintenance of a just, peaceful, and safe society – a public order and welfare purpose, which, under **Assumption 1**, the court martial system is uniquely able to achieve. That said, any misconduct by military personnel can also represent indiscipline,²⁴ so the court martial system must also support the disciplinary purpose of the military justice system as well.

6.2.3 The Public Order and Welfare Purpose of the Court Martial System

To a certain extent, a sense of the purpose of the court martial system can be gained by considering the maximum punishments that can be imposed at a court martial. By virtue of section 139 of the NDA, the maximum punishment that can be imposed by a court martial is imprisonment for life. Furthermore, with one narrow exception,²⁵ every uniquely military offence provided for under sections 72-129 of the NDA is punishable by a maximum punishment of at least imprisonment for less than two years (i.e.: two years less a day), and many of these offences carry a maximum punishment of imprisonment for life.

Such punishments can only be imposed through a process that respects all of the guarantees and rights that are contained within section 11 of the *Charter*, including the right to a fair trial by an independent and impartial tribunal. Practically speaking, this means that only a judge who possesses all of the hallmarks of judicial independence – such as a judge presiding in a court of criminal jurisdiction with secure tenure, financial security, and administrative independence – can impose a punishment of imprisonment.²⁶

The potential for courts martial to impose punishments of imprisonment strongly suggests that one purpose of a court martial is the same as the purpose of other proceedings wherein punishments of

²³ *Supra* notes 8, 9, and 11.

²⁴ See, for instance, *R v Moriarity*, *supra* note 12 at para 51: “The objective of maintaining ‘discipline, efficiency and morale’ is rationally connected to dealing with criminal actions committed by members of the military even when not occurring in military circumstances.” See also *ibid* at para 52: “Criminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale.”

²⁵ The offence of drunkenness under section 97 of the NDA, when committed by a non-commissioned member, who is not on active service (i.e.: who is not a member of the Regular Force, and who is not a member of the Reserve Force who is outside of Canada), is punishable by a maximum of 90 days detention. In all other cases, this offence is punishable by less than two years imprisonment.

²⁶ See generally *R v Wigglesworth*, [1987] 2 SCR 541, and *Guindon v Canada*, 2015 SCC 41.

imprisonment are imposed. The overwhelming majority of such proceedings in Canada are criminal trials that serve public order and welfare purposes.²⁷

As with the summary trial system, further indications of the public order and welfare purpose of the court martial system can be inferred by considering the identity of the key actors within the system. Members of an accused person's chain of command play a small role in the court martial system: unit personnel may still be the charge-layers in cases that proceed to court martial (although cases wherein independent members of the National Investigation Service lay charges are far more common at court martial than at summary trial); a unit CO initiates an application for disposal of a charge at court martial; a more senior referral authority refers the charges to the DMP; and, during a court martial, unit personnel serve as escorts for the accused person, officers of the court, and provide some general logistical and administrative support to the court martial.

However, the central actors at any court martial are the military judge, the military prosecutor, and defence counsel (who are most often military). These individuals are legal professionals whose qualifications and functions are almost identical to those of judges, prosecutors, and defence lawyers, respectively, in civilian criminal courts. These key participants in a court martial are individuals who are less directly connected to an accused person than the person's CO, and whose functions in the justice system go beyond the promotion of military discipline.

In terms of prosecutions, for instance, the Court Martial Appeal Court has observed that "the role played by the DMP is similar to that exercised by the Attorney General,"²⁸ who prosecutes offences in the public interest. Military prosecutors must consider the public interest in exercising their functions. This includes the interests of the Canadian Armed Forces as a primary – but certainly not exclusive – factor.²⁹ The examination of broader public interest considerations by military prosecutors suggests that they are intended to contribute – at least in part – to a public order and welfare purpose within the court martial system.

The same reasoning could be applied to military judges. Their independence from the rest of the CAF makes them far more identifiable as members of the judicial profession than as members of the profession of arms.³⁰ They preside in judicial robes with medals, providing the only visible cue to their military status. In rendering their decisions, they purport to speak on behalf of the ideals of "justice" or "military justice," and do not purport to represent the interests of the military chain of command – although they may consider these military interests alongside other factors.

In this sense, by looking at information (pertaining to qualifications, independence, and roles) about the decision-makers in a court martial, one can infer that one purpose of a court martial is to contribute to respect for the law and the maintenance of a just, peaceful and safe society in the

²⁷ It is possible for punishments of imprisonment to be imposed in respect of regulatory (non-criminal) offences in Canada, but this is not commonplace.

²⁸ *R v Wehmeier*, 2014 CMAAC 5, at para 31.

²⁹ Director of Military Prosecutions, "DMP Policy Directive 003/00 Post-Charge Review", (17 May 2016) at para 4, online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/post-charge-review.page>>.

³⁰ On this point, see the input received from a former Military Judge above, at Chapter 4 (Consultation), section 4.4.5 (LCol (ret'd) Perron), wherein the subject of military judges' independence from key leaders within the CAF – even on matters such what pre-deployment readiness measures must be taken before conducting a court martial in a theatre of operations – is described.

same way that any other criminal court would contribute to these ideals. This, in turn, suggests that one purpose of the court martial system is to support the Government's ability to control and use the CAF through the achievement of a public order and welfare purpose.

6.2.4 The Disciplinary Purpose of the Court Martial System

In addition to supporting a public order and welfare purpose within the military justice system, the court martial system also works to achieve a disciplinary purpose. Just as summary trials can sometimes reinforce discipline while also having positive effects on public order and welfare, the court martial system can also sometimes achieve both purposes.

For instance, a single court martial trial may involve charges that are a combination of ordinary civilian criminal offences (such as trafficking in narcotics), uniquely military offences that are predominantly disciplinary in nature (such as absence without leave), and uniquely military offences that are more criminal-like in character (such as negligent performance of a military duty). In such a case, elements of both a public order and welfare purpose and a disciplinary purpose could be present at the trial – to greater or lesser degrees – depending on the offences that are the focus of the trial at any given time. The extent to which one purpose predominates within the court martial system depends on the circumstances of the individual case.

Even in cases involving only ordinary civilian criminal offences, it may be possible for a court martial to serve both a public order and welfare and a disciplinary purpose, by – for instance, contributing to increased morale among military members who see justice being done very visibly within their own community in respect of misconduct that they feel should be condemned. In this sense, effectively achieving a public order and welfare purpose would lead to the promotion of morale among those who are aware of the outcomes in a way that reinforces the court martial system's disciplinary purpose.

Looking at the issue from a different perspective, it is possible that a single punishment imposed by a court martial could work to achieve both purposes of the court martial system. For instance, the same punishment of imprisonment that is imposed by a military judge can have both a general deterrent effect that strengthens public order and welfare (by discouraging the commission of offences), and a positive disciplinary effect (by encouraging members of the CAF to cultivate a habit of obedience to lawful authority). As a matter of theory, it is hard to argue with the proposition that measures taken in respect of CAF members as a means of strengthening public order and welfare could also strengthen discipline.

Within the current court martial system, some cases may involve an exclusively disciplinary purpose. This might be the case, for instance, where a matter involving relatively minor disciplinary charges is referred for trial by court martial solely because an accused person has elected to be tried by court martial, or because the accused person is of a senior rank in respect of which no jurisdiction to proceed by summary trial exists.

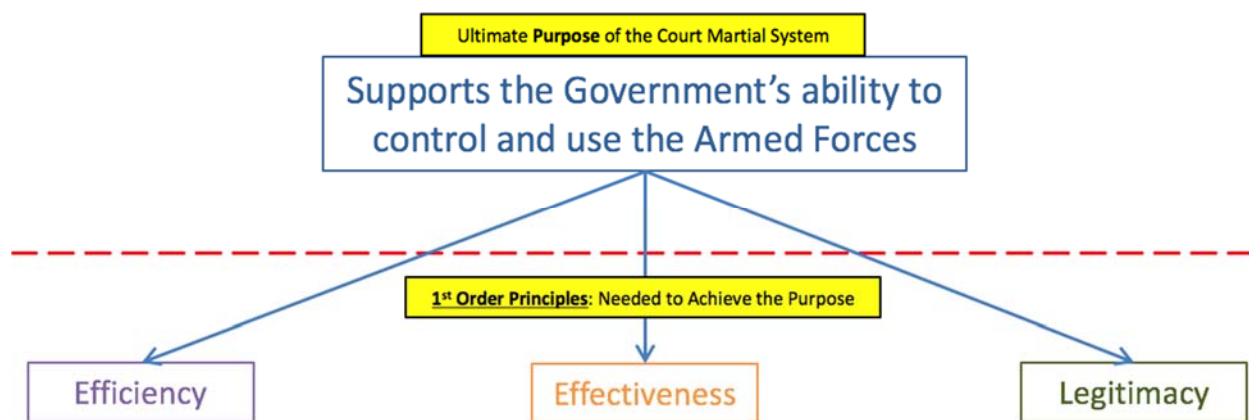
For all of these reasons, the CMCRT has concluded that the court martial system must exist in order to serve both a public order and welfare purpose, and a disciplinary purpose, within a broader military justice that also serves both of these purposes.

6.3 Developing a Purpose-Driven, Principled Basis for the Court Martial System

It is now possible to consider in more detail what principles this system must be founded upon, and what features and elements must be present in the system in order for it to be capable of achieving its ultimate purpose. Once these principles and features have been identified and explained, they will be used in subsequent chapters as the basis for assessing the current court martial system, and any options for enhancing the system.

6.3.1 1st Level – Principles Needed to Achieve the Court Martial System’s Purpose

A graphical representation of the purpose and principles of the court martial system would look like this:



1. Effectiveness. The court martial system must clearly be effective in supporting the government’s ability to both control and use the CAF. Since this is the ultimate purpose of the court martial system, the court martial system must actually and successfully contribute to this purpose of the system by promoting public order and welfare and/or by promoting discipline, efficiency, and morale within the CAF.

To the extent that the court martial system strives to contribute to the maintenance of discipline, efficiency, and morale of the CAF, it facilitates the government’s ability to use the CAF whenever and wherever needed. The CMCRT takes it as a given that a disciplined, efficient force with high morale can be employed across a wider range of missions, and with higher degrees of success, than an undisciplined and inefficient force that suffers from morale problems. Thus, by supporting these contributors to operational effectiveness within the CAF, the court martial system would promote the government’s ability to use the CAF as required in furtherance of state objectives.

To the extent that the court martial system strives to contribute to respect for the law and the maintenance of a just, peaceful and safe society, it facilitates the government’s ability to control the CAF. Controlling the CAF involves ensuring that the armed forces are ultimately subordinate to civil authorities, and that the armed forces respects all laws and other lawful directions that are communicated to members of the armed forces, especially in situations where the armed forces may be called upon to use violence in furtherance of state objectives. History (and to a certain

extent, contemporary affairs in different places around the world) suggests that armed forces which exist within, and contribute to, just, peaceful, and safe societies can be controlled by civil governments with more certainty and stability than armed forces that exist apart from and outside of the rules of such societies. In this sense, by striving to achieve a public order and welfare purpose, the court martial system supports basic concepts of democratic control over the armed forces which form the foundation of the government's ability to control the CAF.

The different features that the court martial system would need to possess in order to **effectively** promote public order and welfare, and the discipline, efficiency, and morale of the CAF, are discussed in more detail in the following section.

2. Legitimacy. In order to maintain the confidence of those who are the “users” of the court martial system, those who are subject to the system, and the broader public that requires its armed forces to show respect for the law and to contribute to the maintenance of a just, peaceful, and safe society, the court martial system must be, and must be perceived to be, a legitimate system. In order to be legitimate, the system and the way that the system is used must be both lawful, and generally accepted as a proper and appropriate exercise of government power, as seen from within and outside of the CAF.

At a very practical level, the principle of legitimacy is necessary in order to provide the government with a full ability to control and use its armed forces, because foreign states and the international community might restrict or otherwise limit the CAF's ability to participate in missions abroad if Canada's court martial system were not seen as a legitimate accountability mechanism for preventing or dealing with serious misconduct. Such a situation would also likely put Canada in breach of obligations that have been taken on under international law, such as the obligation to repress grave breaches of the laws of armed conflict.³¹

Legitimacy within the court martial system is also necessary in order to promote the degree of (both Canadian and local foreign) public support that is essential to the success of any operations by the CAF. Any indicators of illegitimacy within the court martial system, in contrast, could hamper the government's ability to control and use the CAF by, for instance, harming morale and fostering mistrust between subordinates, superiors, and court martial system officials, or by creating recruiting and retention problems (among those who perceive the court martial system as an oppressive exercise of government power that deters them from joining or remaining in the CAF).

The different features that the court martial system would need to possess in order to **legitimately** promote public order and welfare, and the discipline, efficiency, and morale of the CAF, are

³¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979), art 86(1):

The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.” See also *ibid* art 43(1), which requires that the armed forces of a Party to an armed conflict be “subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

discussed in more detail in the following section.

3. Efficiency. Government resources – and, more particularly, resources dedicated to national defence and national security – are finite, and every expenditure on one government program or commitment likely decreases the overall amount of funding that might otherwise be available for different programs and commitments – including programs and commitments that could more directly facilitate control and use of the armed forces. Thus, a court martial system must be efficient. An efficient system is one that produces positive results in support of its purposes without expending disproportionate resources. It is not enough for a court martial system to be effective in producing a desired result, or to be legitimate, if the system incurs excessive costs in doing so. Instead, the government should expect efficiency within the court martial system, so that the system’s benefits (in terms of reinforcing the government’s ability to control and use the CAF) are produced at a reasonable and proportionate cost.

While some of the data that contributes to measurements of efficiency is quantitative, the notion of proportionality (and therefore of efficiency) must be assessed qualitatively. The goals of a system may, from a qualitative perspective, be sufficiently important as to warrant the expenditure of additional resources that might, to other perspectives, appear excessive.

The different features that the court martial system would need to possess in order to **efficiently** promote public order and welfare, and the discipline, efficiency, and morale of the CAF, are discussed in more detail in the following section.

Interconnections between Principles. The CMCRT notes that there can be numerous points of overlap and connection between each of the above three principles. On the one hand, a system must be efficient, to at least a certain degree, if it is to be accepted as legitimate by the public as a proper and appropriate exercise of government power. On the other hand, the extent to which a system is legitimate could have a real effect on how efficient the system is, since the need to expend otherwise available resources on litigation and public relations efforts could increase as public trust in the lawfulness and appropriateness of a system decreases. These same kinds of connections can be traced between effectiveness and efficiency, and between effectiveness and legitimacy. Thus, while the CMCRT sees a value in trying to separately identify the relevant principles that should form the basis of the court martial system, it is acknowledged that in many cases, the lines between each of these key principles can be blurred.

Additionally, it must be accepted that trade-offs will often exist between principles, and that a systemic change to strengthen one principle may come at the expense of a weakening another principle. For instance, a law reform option that eliminated altogether the possibility of appeals might significantly increase systemic efficiency (by achieving final outcomes more quickly and at less expense), but might seriously compromise legitimacy (by offending community notions of fairness). Therefore, from a system design perspective, it is desirable to seek an appropriate balance within the system between principles of effectiveness, efficiency and legitimacy, while recognizing the unlikelihood of finding a single design option that provides for the maximization of all three principles.

6.3.2 2nd Level – Features within the Court Martial System to Support Key Principles

Based on the above descriptions of the concepts of effectiveness, efficiency, and legitimacy, the CMCRT has attempted to further identify the constituent features or elements of each of these concepts that support the three core principles. This effort has led to the identification of 12 key features that – to the extent that they are present within the court martial system – will support the system’s effectiveness, efficiency, and legitimacy.

Because many of the features within a court martial system are capable of supporting more than one principle, a complete graphical representation of the relationships between the purposes, principles, and features of the court martial system is included in Annex AA.

1. Proportionate Financial and Human Resource Costs – money and personnel resources invested in operating the court martial system should be proportionate to the benefits that the system generates. This feature is primarily needed to support the principle of efficiency, but it can also support the promotion of effectiveness (by ensuring that government resources are not spent unnecessarily on the court martial system, potentially making such resources available for the conduct of military training and operations) and legitimacy (by promoting public confidence in the court martial system as an economically appropriate means of dealing with military offences).

2. Timely Outcomes – the court martial system should be capable of producing timely outcomes in the majority of cases. In order to produce timely outcomes, the court martial system would likely need to be built upon a set of expeditious processes, wherein the procedural complexity involved at any stage of proceedings would be proportionate to the seriousness of the interests that are at stake in the proceedings. A system that produces timely outcomes would mostly support the principle of efficiency (because the time invested in dealing with a case would be proportionate to the benefits gained from dealing with the case) and the principle of effectiveness (because swift administration of justice would minimize distractions from the operational focus of unit personnel, and would encourage respect for the law among those who see justice being done swiftly). To a certain extent, a system that produces timely outcomes might also support the principle of legitimacy, since proceedings can begin to look unfair from all perspectives (i.e.: from the perspectives of victims, accused persons, witnesses, and society as a whole), and could become unconstitutional, if the proceedings are not concluded within a reasonable time frame.

3. Scalable – the court martial system should be capable of expanding and contracting in order to meet changing needs, ranging from those that exist during peacetime domestic operations, to those that would emerge during situations involving large-scale expeditionary operations involving all components of the CF.

The size of the CAF, the pace and nature of operations conducted by the CAF, and the demographic groups from which new CAF members are drawn are just a few of the many factors that could have significant impacts on the volume of proceedings that would need to flow through the court martial system in a given period. Since all of these factors are arguably very dynamic in a military environment, it is important to have mechanisms within the court martial system that permit the system to rapidly adapt to large changes in the volume of cases that proceed within the system.

This feature would contribute to the principles of efficiency (because the system would be built just-to-size, with capability for expansion or contraction only as needed), and effectiveness (because the system would be designed to ensure that appropriate cases can always be processed within the system, because impunity gaps would never result from unanticipated increases in the volume of cases within the system).

4. Deterrence of Misconduct by Military Personnel – the court martial system must be capable of deterring, and must actually deter, misconduct by military personnel in furtherance of both the public order and welfare and disciplinary purposes of the military justice system.

In order for the court martial system to be capable of achieving deterrence, a number of conditions within the system would first need to be met:

- Would-be offenders are somewhat rational actors whose behaviours are guided by reason;
- Would-be offenders know what conduct is prohibited, and what consequences the law may impose on offenders;
- There would be some probability that offenders would be detected, tried, and convicted; and,
- Both the punishments that are prescribed by law, and those that are actually imposed, are above a certain level of perceived severity, so as to make the possible punishment for an offence more costly to an individual than any gains that the individual would realize by committing the offence.

In other words, the court martial system would need to create, in the minds of rational and informed would-be offenders, a perception that their misconduct is at least somewhat likely to be detected, and a perception that the punishments for proven misconduct are somewhat likely to be more costly than the expected benefits of committing an offence. This deterrence feature most directly contributes to the principle of effectiveness, by reducing undesirable misconduct.

5. Rehabilitation of Military Personnel who Engage in Misconduct – the court martial system should include punishments or other alternative measures (e.g.: training, re-education, or treatment measures) that are designed to return a military wrongdoer to military and/or civilian society more equipped to abide by the law. This feature supports the principle of effectiveness, by providing military wrongdoers with the tools that they need in order to conduct themselves in more socially- and professionally-accepted ways, and in compliance with the law.

6. Protection of the Public from Military Personnel who Engage in Misconduct – the court martial system should help to reduce or eliminate dangers to the public that military wrongdoers can represent.

The public, in this sense, includes the CAF, the broader Canadian public, the local public in a foreign place wherein the CAF operates, and the international public. In order to successfully

protect the public, the court martial system would need to separate military wrongdoers from society when necessary (at any time before, during, or after being tried for a military offence), and submit these military wrongdoers to appropriate supervision when necessary.

This feature mainly supports the principle of promoting effectiveness (by helping to ensure that disciplined and law-abiding military personnel are free to conduct operations without internal threats from wrongdoers in their midst, and by isolating potential sources of indiscipline within the CAF).

7. Community Condemnation of Misconduct by Military Personnel – the court martial system should culminate in processes that are capable of expressing (military and/or civilian) community condemnation of actions or omissions by those who have chosen to seriously deviate from the community's expected standards of conduct. This condemnation should appropriately stigmatize offenders for their misconduct. A condemnation feature within the court martial system best supports the principle of effectiveness by reinforcing expected standards of conduct, and by placing community value on the importance of respecting those standards.

8. Generation of Accurate / Correct Outcomes – with respect to any charge or trial, there are two hypotheses in issue: first, an offence was committed; and, second, the accused is the person who committed the offence. The court martial system should be designed and structured to foster high rates of accuracy in assessing these hypotheses so that only those who have actually committed offences (i.e.: those who are factually guilty) are convicted of these offences.

Given the unique military environment in which military offences can be committed, and the unique demands of service in the armed forces, the court martial system should facilitate understanding of these military realities as a means of promoting accurate decision-making within the system.

Additionally, given the underlying criminal or penal nature of many of the military offences that lead to courts martial, the court martial system should also incorporate extensive criminal law and adjudicative expertise – again, to promote accurate decision-making in respect of military offences.

Finally, to a certain extent it should be recognized that the possibility of reaching accurate / correct outcomes will generally be increased through a system that includes, promotes, or requires, where appropriate, mechanisms allowing for collaborative, deliberative decision-making (such as in a jury trial, or as is seen at the Court of Appeal level in Canada's judicial system, where panels of three or more judges preside together). Where such decision-making features are present, it has been suggested that a number of accuracy-based benefits can be realized that leverage the pooled knowledge, recollection, and viewpoint of each decision-maker.³²

³² See, for instance, Toby S Goldbach and Valerie P Hans, "Juries, Lay Judges and Trials" in *Encyclopedia of Criminology and Criminal Justice*, Gerben Bruinsma and David Weisburd, eds. (NY: Springer Science and Business Media, 2014) at 2720:

At its best, jury decision making embraces many of the features of deliberative democracy. Members of the jury hold a diverse set of viewpoints which can be brought forward and evaluated through reason-based discussion. Open discussion helps ensure that trial evidence is thoroughly evaluated, that rival explanations are examined,

This accuracy feature within the court martial system most supports the principle of effectiveness (by assisting in the accurate conviction of wrongdoers, and the accurate acquittal of law-abiding military personnel), although it also supports the principle of legitimacy (since the system would not be perceived as appropriate for its purpose if it notoriously arrived at incorrect results).

9. Universality – the court martial system must be capable of achieving its effects across the full spectrum of locations (inside and outside of Canada) and environments (from peacetime training environments to full-scale armed conflicts) in which the CAF operates.

Thus, the court martial system would need jurisdiction to deal with military offences committed both inside and outside of Canada. The system would also therefore need a deployable investigative capacity that is capable of investigating offences that take place outside of Canada, in addition to a domestic Canadian investigative capacity. The system would need to incorporate rules of evidence and procedure that allow for and facilitate the use of evidence collected in foreign jurisdictions. Finally, the positive effects that the court martial system strives to produce would need to be capable of being demonstrated both in Canada and in any place where the CAF operates, for the benefit of Canadian and local populations who are affected by CAF operations – and who are especially affected by any misconduct involving CAF members.

This feature of universality is equally essential in order to support the principle of effectiveness (by ensuring that the court martial system can reach, influence, and shape the conduct of military personnel wherever they may be) and the principle of legitimacy (by demonstrating to the international community, to Canadians, and to locally-affected populations that Canada appropriately holds CAF members to account for misconduct no matter where such misconduct takes place).

10. Fairness – the court martial system must be, and be generally perceived as, fair from the perspectives of all relevant stakeholder groups (including victims, accused persons, witnesses, and community members) in order to accomplish its purpose.

Fairness is about more than simply complying with legal and constitutional principles, since a process can be lawful but still raise concerns about fairness (for example, when a harsh – but not cruel or unusual – mandatory minimum punishment is imposed on a sympathetic offender), just as a process can include a minor element of unlawfulness, while still ultimately being fair (for example, when an unreasonable police search without legal authority yields highly reliable evidence that is admitted at trial). The notion of fairness, in this sense, is therefore primarily concerned with reflecting societal values: the court martial system needs to function in a manner that is consistent with society's expectations of the way that people who are involved in criminal and penal proceedings should be treated. If the system and its procedures offend the conscience of any significant number of stakeholders, then fairness within the system will be compromised.

and that mistaken recollections are corrected. Through this process of deliberation and discussion, the jury reaches binding conclusions on the defendant's guilt or innocence. Empirical studies on group decision making confirm some but not all of the predictions of deliberative democracy theory. Studies show that groups outperform individuals in recalling facts, in correcting errors, and in pooling information. However, studies also show that during the deliberative process, once jurors are made aware of the majority view, they will tend to move in that direction, regardless of whether the view is to convict or acquit.

This feature of fairness mostly supports the principle of legitimacy (in that the population will believe the court martial system is appropriate for its purpose if there is widespread confidence in the fairness of the system), although it also supports the principle of effectiveness (since the morale of military personnel who are subject to the court martial system will tend to be higher if these people are satisfied that the system will be fair).

11. Transparency – the court martial system should operate in a manner that is transparent to both those inside and outside of the military community.

In order to achieve transparency, the system must be rule-based (rather than based on unchecked exercises of individual discretion), so that the way in which the system should function in any given case is capable of being known in advance.

Transparency also requires the system and its rules to be accessible and visible to anyone who is interested in learning about the system or observing it in action. In this sense, the rules that govern the system must be easily available for scrutiny, and court martial proceedings that take place within the system must be open to, and readily viewable by, the broader public.

Transparency within the court martial system supports the principle of legitimacy (since the population can only assess whether the system is suited for its purpose – and therefore an appropriate exercise of government power – if the population can easily and accurately see how the system works).

12. Intelligibility – the court martial system and the manner in which it functions should be intellectually intelligible to the broad public. In order to be intelligible, the system should incorporate several attributes:

- it should be somewhat **familiar** to the public (because people tend to understand more easily things that are familiar to them);
- it should be **comprehensible** to the public (in the sense that the rationale as to why the system exists and operates in a certain way should be based on articulated reasons that the public is capable of understanding); and,
- it should be **defensible** (in the sense that the reasons provided to explain why the system exists and operates in a certain way should be coherent, substantiated, and ultimately persuasive, so that the public is likely to both understand and accept the system).

The feature of intelligibility primarily supports the principle of legitimacy (by making it more possible or likely for the public to understand and accept that the system is an appropriate exercise of government power).

6.4 Conclusion

In assessing the current court martial system, or in developing options to enhance the system, a qualitative weighing and balancing of priorities must take place in order to determine how to

achieve the most benefit with the least amount of compromise. As indicated in Chapter 5, above, there are a number of different examples of ways in which other countries have tried to achieve a balance that will work for the relevant government and armed forces, but this study has also reinforced the point that there is no one “best” way to design and operate a court martial system.

For instance, systems that rely heavily on the involvement of uniformed military actors may have greater potential to operate universally (across the full spectrum of military operations, at home and abroad) but less potential to be accessible (i.e.: familiar and comprehensible) to the civilian public. Similarly, systems that rely on complex rules of evidence may have higher potential to produce accurate outcomes, but less potential to produce timely outcomes. As these examples demonstrate, no one system can clearly generate maximum levels of every desirable benefit, just as the examples suggest that any change to a system has the potential to add some benefits, but to introduce new drawbacks.

In the chapters that follow, the CMCRT will assess the current court martial system by reference to the theory that has been elaborated in this chapter (see Chapter 7), and in reference to its elements, will describe and assess a number of different options for changes to the current court martial system that all have the potential to improve the system in some ways, but that all have at least some associated drawbacks (see Chapter 8).

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Chapter 7 – Assessment of the Current System

7.1 Introduction

In this chapter, the CMCRT assesses the current court martial system against the criteria established above in Chapter 6 (The Theoretical Basis for a Court Martial System).

7.1.1 Important Note on ‘System’ Assessment

It must continue to be stressed that nothing in this chapter, nor in this report, should be taken as critical or disparaging of any specific actors in the current court martial system. The CMCRT was not mandated to assess the performance, competency, or good faith of any individual, office, or group in the court martial system, and did not make any such assessments. The assessment that follows concerns the court martial **system**.

Even the most competent, hard-working, and devoted individuals would not be able to consistently achieve results in support of the purpose of the court martial system if the system itself was not structured to best support this purpose. It is for this reason that periodic assessments of the system itself must take place, as reflected at subsection 9.2(2) of the NDA (requiring the JAG to conduct, or cause to be conducted, regular reviews of the administration of military justice).

The CMCRT’s Terms of Reference provided for a broad mandate of assessing the effectiveness, efficiency, and legitimacy of the system while implicitly envisioning that changes to the system itself could be contemplated in order to better achieve these core principles.

In accordance with the CMCRT’s mandate,¹ some potential options for enhancement are covered in the chapters that follow.

7.1.2 Sources of Information Relied Upon

The CMCRT has drawn on a wide variety of sources of information in order to ground the assessment that follows within this chapter.

For the purposes of measuring systemic efficiency, the CMCRT has relied on quantitative data and comparative analysis that was undertaken in support of the comprehensive review by officials from within the ADM (RS) Director General Evaluations organization. The individuals who compiled this data and performed this analysis are civilian employees within the Department of National Defence. The spreadsheets and the presentation that these individuals produced for the CMCRT are included at Annexes BB, CC, DD, EE and FF. The CMCRT has also drawn on its own comparative analysis, past critical perspectives on the court martial system, and other data sources such as JAG Annual Reports and publicly available court martial information, in order to assess systemic efficiency.

For the purposes of assessing both effectiveness and legitimacy, the CMCRT relied most heavily on information that was collected during the consultations that are described above at Chapter 4.

¹ i.e. Where appropriate, to develop and analyze options for enhancement of the system.

Assessments of effectiveness were informed to a greater extent by internal CAF consultations, while assessments of legitimacy drew upon all forms of public, internal, and targeted consultation. In some cases, assessments of effectiveness and legitimacy have also relied upon the past critical perspectives on the court martial system that were discussed above at Chapter 3. Where appropriate, assessments of legitimacy and effectiveness have also noted any relevant parallels between issues within the Canadian court martial system and the equivalent systems of other countries that were considered as part of the CMCRT's comparative analysis.

7.2 Overview: Assessment of the Current Court Martial System

The constitutionality of the court martial system is not seriously in doubt. Major aspects of Canada's parallel military justice system have been recently upheld by the Supreme Court of Canada² and the Court Martial Appeal Court.³ Chapter 2, above, laid out the history of Canada's court martial system and discussed relatively recent reforms and amendments, some of which were responsive to judicial rulings to former aspects of the system. At time of writing, there are no unresolved court rulings concerning the operation or constitutionality of any aspect of the system. **Canadians can have full confidence in the constitutionality of their court martial system.**

However, as former Chief Justice of Canada Antonio Lamer noted, "[t]hose responsible for organizing and administering Canada's military justice system have strived, and must continue to strive, to offer a better system than merely that which cannot be constitutionally denied."⁴ The constitutionality of the court martial system is a necessary, but not necessarily a sufficient criterion to allow the system to meet Canada's needs as an instrument for supporting the government's ability to control and use the CAF.

The CMCRT has concluded that Canada's court martial system is somewhat effective (mostly in terms of its ability to achieve a public order and welfare purpose), appears to have considerable room for improvements in efficiency, and, as a result, faces challenges to its legitimacy.

7.3 Individual Subject Area Assessments of the Current Court Martial System

In the subsections of the chapter that follow, the CMCRT has assessed each relevant subject area within the court martial system. Some of the observations that are fundamental to these assessments (such as delay, and the challenge that is created for producing **timely outcomes**) are cross-cutting, and will be discussed in detail at first, but will be referred to more briefly in subsequent contexts.

7.3.1 Status and Institutional Structure of Tribunals

From an **effectiveness** point of view, it is clear that several of the internal CAF users who were

² *R v Moriarity*, 2015 SCC 55.

³ *R v Dery*, 2017 CMAC 2.

⁴ Canada, Department of National Defence, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.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* (Ottawa: Department of National Defence, 2003), at 1 [Lamer Report].

consulted believe that the court martial tribunal system is working well.⁵

The system appears to be sufficiently **universal** to meet the needs of the CAF, in that it has dealt with offences that occurred both inside and outside of Canada. The CMCRT noted that the system is somewhat unproven in its ability to conduct deployed trials. During the CAF's participation in operations in Afghanistan, no courts martial were held in theatre. There was one instance of the taking of evidence in theatre, as part of a court martial otherwise held in Canada.⁶ In that case, the accused moved to have the court martial re-convened to Afghanistan from Gatineau, but was unsuccessful.⁷ That said, universality may not require that a court martial be deployable. Indeed, the ability to conduct deployed trials does not seem to be a requirement for many CAF leaders, some of whom have suggested that they would not want to hold a court martial in a theatre of operations.⁸

Some CAF leaders also feel that the current tribunal system is achieving a measure of **deterrence**, and feel that the system promotes respect for the law.⁹

It is not clear whether the tribunal system is consistently effective in **generating accurate and correct outcomes**. Some of those who were consulted felt that the current tribunal system is suitably structured to understand both military and criminal matters in order to arrive at decisions. Others, however, felt that the tribunal system does not incorporate the correct balance of qualities – namely, criminal law and military expertise – that is needed to promote the most appropriate decisions.¹⁰ In particular, some of the CAF leaders who were consulted suggested that military judges have far less experience as judges than civilian judges,¹¹ while another group “posited that a civilian court might actually be more inclined to give weight to the evidence from the chain of command, and relayed disappointment with how their views had been treated by military judges and prosecutors in the current system.”¹² For many of those who were consulted, there was a perception that the current system is particularly challenged in its ability to **generate accurate / correct sentencing outcomes**, because the sentences at courts martial are too lenient.¹³

Although it was not brought up to the CMCRT in consultation, the CMCRT notes that the current tribunal system appears to be **effective in protecting the public from military personnel who engage in misconduct** through the imposition of sentences. A review by the CMCRT of court martial sentencing decisions from 1 April 2012 to 31 March 2017 indicates that, out of 245 offenders during that period, 57 offenders (23%) were sentenced to some period of detention or imprisonment. This rate of imposing sentences of incarceration is comparable to the equivalent

⁵ See Annex U, Submission from the Maritime Forces Pacific (Regular and Reserve Force) to the CMCRT, 23 November 2016.

⁶ *R v Semrau*, 2010 CM 4010.

⁷ *R v Semrau*, 2010 CM 1003.

⁸ See above, Chapter 4 (Consultation) at section 4.5.4.2.1 (4 CDSG & 2 CMBG).

⁹ See above, Chapter 4 (Consultation) at sections 4.5.4.1.4 (35 CBG) and 4.5.5.1 (MARPAAC).

See above, Chapter 4 (Consultation) at sections 4.5.3 (CANSOFCOM), 4.5.4.2.1 (4 CDSG & 2 CMBG), 4.5.4.1.1 (2 Can Div Pers Svcs – CO), 4.5.4.1.2 (2 Can Div Pers Svcs – CWO) and 4.5.4.2.2 (RHFC).

¹¹ See above, Chapter 4 (Consultation) at section 4.5.4.1.2 (2 Can Div Pers Svcs – CWO).

¹² See above, Chapter 4 (Consultation) at section 4.5.4.2.1 (4 CDSG & 2 CMBG).

¹³ See above, Chapter 4 (Consultation) at sections 4.5.4.3 (5 Can Div – CWO), 4.5.5.1 (MARPAAC), 4.5.4.2.1 (4 CDSG & 2 CMBG), 4.5.5.2 (HMCS OTTAWA Crew) and 4.4.4 (IJ 700).

rate within the civilian criminal justice system,¹⁴ and – while not determinative – suggests to the CMCRT that the court martial tribunal system is achieving an effect that helps to protect the public. Most of the above points indicate to the CMCRT that the court martial tribunal system is somewhat effective – predominantly in its ability to promote public order and welfare. From a disciplinary perspective, however, there are strong indications – almost universal among CAF leaders who were consulted – that the court martial tribunal system is not effective at promoting discipline, efficiency, and morale within the CAF. The most commonly noted reason why the current tribunal system is perceived as ineffective to meet the disciplinary needs of the CAF chain of command was a failure to produce **timely outcomes**.¹⁵

With respect to a lack of **timely outcomes**,¹⁶ the CMCRT notes that, based upon data compiled by the DMP with respect to fiscal year 2016-2017, courts martial currently take, on average, **434 days** from the date charges are laid to the completion of a court martial.¹⁷ This average period can be broken down as follows: 69 days from the time charges are laid until a file is referred to the DMP; 89 days from the time a referral is received until charges are preferred; and, 250 days from the time charges are preferred until the start of a court martial.¹⁸ From this data, one can infer that the average time from the start of a court martial until completion of a court martial is 26 days. This total time period of 434 days is substantially longer than the 180 days that consulted CAF leaders view as being the maximum delay that can be experienced between an incident and resolution before the proceedings lose all relevance for the promotion of military discipline.¹⁹ It is also substantially longer than the median length of time of 112 days (from first appearance to completion of the trial) that it takes to dispose of criminal cases by trials in Canada's civilian criminal justice system.²⁰ However, for the purposes of assessing the current tribunal system, the key information is that it takes, on average, **276 days** (250 days + 26 days) from the time that a charge is preferred for trial by court martial until a court martial on those charges is completed.

This period of elapsed time exists despite the fact that military commanders,²¹ armed forces

¹⁴ Ashley Maxwell, *Adult Criminal Court Statistics in Canada 2013/2014* (Ottawa: Canadian Centre for Justice Statistics, 2015) Chart 5 at 10 (noting that, in 2013-2014, 36.2% of offenders in the civilian criminal justice system in Canada received a sentence involving custody).

¹⁵ See above, Chapter 4 (Consultation) at sections 4.4.5 (LCol (ret'd) Perron), 4.4.6 (LCdr (ret'd) Lévesque), 4.5.3 (CANSOFCOM), 4.5.4.3 (5 Can Div – CWO) and 4.5.5.1 (MARPAAC).

¹⁶ The timeliness of trials is also problematic in Canada's civilian criminal justice system. See *R v Jordan* 2016 SCC 27; *R v Cody*, 2017 SCC 31.

¹⁷ Canada, Department of National Defence, *Director of Military Prosecutions Annual Report 2016-2017* (Ottawa: Office of the Judge Advocate General, 2017), at 33 [DMP Annual Report 2016-2017].

¹⁸ *Ibid.*

¹⁹ Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, (Ottawa: Bronson Consulting Group, 2008), at 10 [Bronson Report (DMP)]. See also above, Chapter 4 (Consultation) at section 4.5.4.2.1 (CDSG and 2 CMBG).

²⁰ See Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (June 2017) at 28 (Chair: The Honourable Bob Runciman), [Senate Report 2017] online: <https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court_Delays_Final_Report_e.pdf>. The Final report of the Standing Senate Committee on Legal and Constitutional Affairs (Senate Report 2017).

²¹ See above, Chapter 4 (Consultation) at sections 4.5.3 (CANSOFCOM), 4.5.4.3 (5 Can Div – CWO) and 4.5.5.1 (MARPAAC).

members,²² analysts,²³ independent review authorities,²⁴ internal policies,²⁵ and the Supreme Court of Canada,²⁶ have all expressed that in order to meet the needs of discipline, military misconduct must be dealt with expeditiously in general and, specifically, swifter than comparable proceedings in the civilian criminal justice system.

The CMCRT heard that, for several commanders who were consulted, delay in the court martial system, alone, makes it largely irrelevant to the chain of command as a tool for promoting discipline.²⁷ This perception is consistent with an observation by the Bronson Consulting Group noted in 2008: “delays in the Court Martial tier of the Military Justice System are so severe that the very purpose of having a separate military justice system is threatened.”²⁸ An inability to produce timely outcomes – at least in terms of what CAF leaders feel is needed in order to achieve a disciplinary effect – has persisted for at least the last 17 years.²⁹ Delay has persisted during periods when both three and four military judges have been appointed to the bench, and does not seem to be meaningfully impacted by the number of judges who are capable of sitting at any given time.

The CMCRT notes that the current tribunal system is not the lone cause of delay in the court martial system; more sources of delay will be discussed below. However, there are several major areas where the tribunal is contributing unnecessarily to delay.

For instance, there is no mechanism to effectively resolve cases early by way of a guilty plea. Considering that over the last five years, 65% of cases concluded in guilty pleas,³⁰ permitting guilty pleas to occur at the earliest possible opportunity could have a significant impact on the state of delay. However, as the system currently stands, guilty pleas occur on the first day set down for trial, in the tribunal’s convened location (one that often requires travel on the part of the military judge, court reporter, defence counsel, and military prosecutor), even if all parties know that the guilty plea is going to occur. This cause of delay was noted by the Bronson Consulting Group in 2008.³¹

²² See above, Chapter 4 (Consultation) at section 4.5.5.2 (HMCS OTTAWA Crew).

²³ Bronson Report (DMP), *supra* note 19 at 10.

²⁴ Lamer Report, *supra* note 4 at 70-73; Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Department of National Defence, 1997) (Chair: The Right Honourable Brian Dickson) at 9; Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence* (Ottawa: Department of National Defence, 2011) (Chair: The Honourable Patrick J. LeSage), at 10 [LeSage Report].

²⁵ Judge Advocate General, “JAG Policy Directive 013/01, General Instructions in Respect of Delay in the Court Martial Process,” (30 March 2001), online: <http://www.forces.gc.ca/assets/FORCES_Internet/docs/fr/jag/delais-processus-cour-martiale.pdf>.

²⁶ *R v Genereux*, [1992] 1 SCR 259, at 281: “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”.

²⁷ See above, Chapter 4 (Consultation), at sections 4.5.3 (CANSOFCOM) and 4.5.4.2.1 (4 CDSG and 2 CMBG).

²⁸ Bronson Report (DMP), *supra* note 19 at 8.

²⁹ See above Chapter 3 (Past Studies) at sections 3.3.1 to 3.3.5 (Military Justice Stakeholder Input) for a summary of chain of command perspectives, including on the matter of delay.

³⁰ See Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017.

³¹ Bronson Report (DMP), *supra* note 19 at 65:

We believe that one of the improvements to the Court Martial system that would have the biggest impact on delay reduction would be to provide for a forum or procedure for dealing with early pleas of guilty. In the

Another example of tribunal delay is the practice of sentencing hearings. The Bronson Consulting Group noted in their 2008 Report that court martial sentencing hearings – even those involving joint submissions, were inordinately long.³² The CMCRT noted that lengthy sentencing hearings continue.³³

The CMCRT considered both the lack of a mechanism for early resolution and the practice of lengthy sentencing hearings to be part of the problem that Bronson Report (DMP) of 2008 would have addressed through ‘effective case management’. In addition to the above two recommendations for reform, practices like the establishment of a case management committee,³⁴ trial coordination,³⁵ improved scheduling practices,³⁶ judicial pre-trial conferences,³⁷ and confirmation hearings,³⁸ were all recommended to expedite the court martial system and to more efficiently use its substantial resources. It would appear as if the Chief Military Judge within the current tribunal system has the statutory authority to make rules that would implement a case management system.³⁹ However, to whatever extent these recommendations can be said to have been implemented (and it would appear that none of them have been implemented formally

civilian system, every attempt is made to have the resolution of cases take place earlier in special “plea courts” established for that purpose.

Bill C-45, if passed, will provide the Chief Judge with more “tools” to schedule early pleas of guilty. Consideration should be given to making greater use of the courtroom in Gatineau, Quebec for pleas of guilty in appropriate cases, with the proceedings broadcast by video to the accused’s Unit in another part of Canada.

³² Bronson Report (DMP), *supra* note 19 at 65-66:

We are advised that sentencing hearings may take two days, even if there are joint submissions. We assume that the principle endorsed by civilian appellate courts that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest, is also applied in the military system.

We realize that sentencing is a very important matter and there are special considerations involving military discipline that do not apply to the civilian justice system. However, we feel that the Court Martial system has such lengthy delays that it simply cannot afford to take up the amount of time it does on sentencing, particularly in straight-forward cases. Alternative ways must be found to put before the court information judges require on sentencing.

³³ See e.g. *R v Dowe*, 2017 CM 1009. This case took place in Yellowknife, NWT, and involved a Warrant Officer who plead guilty to one charge under section 97 of the *National Defence Act* for drunkenness. The prosecution and defence counsel agreed to make a joint submission as to the sentence. The sentencing hearing spanned two sitting days. WO Dowe was sentenced to a \$2000 fine.

³⁴ Bronson Report (DMP), *supra* note 19 at 59.

³⁵ *Ibid* at 61.

³⁶ *Ibid* at 62.

³⁷ *Ibid* at 63.

³⁸ *Ibid* at 64.

³⁹ See *National Defence Act*, RSC 1985, c N-5, s 165.3 [NDA]:

The Chief Military Judge may, with the Governor in Council’s approval and after consulting with a rules committee established under regulations made by the Governor in Council, make rules governing the following:

(a) pre-trial conferences and other preliminary proceedings;

[...]

(d) the scheduling of trials by court martial;

[...]

(g) any other aspects of practice and procedure that are prescribed in regulations made by the Governor in Council.

through regulatory rules of practice and procedure), they have not been successful in reducing delay over the last nine years.

The CMCRT noted the development in the UK Court Martial of “Better Case Management”. Remarkably similar to the recommendations made by the Bronson Group in 2008, its equivalent still does not exist in the Canadian court martial system.

[Better Case Management (Court Martial)] emphasises the importance of the effective management of proceedings whilst preserving judicial discretion and disposing of guilty plea cases at the earliest opportunity. It requires the early review and identification of those cases where the defendant is likely to plead guilty and early discussion between parties to identify the issues in contested cases. Thereafter, depending on the complexity of the case, it builds in time for cases to be prepared once the issues have been identified, allowing parties to focus on those matters in dispute and not on those which are not in contention.⁴⁰

In the UK, Better Case Management was imposed on actors within the Court Martial by the judiciary, who had seen the system in action and its positive effects on the administration of justice when they presided in Crown Court as civilian judges (as they all do for at least 3 months of every year).

It is important to recognize that challenges in producing **timely outcomes** are not unique to the court martial system. Canada’s Standing Senate Committee on Legal and Constitutional Affairs recently noted the following in its study of the civilian criminal justice system:

This committee respects judicial independence and the judiciary’s role in applying the common law and federal, provincial, and territorial statutes, including the Constitution and the *Charter of Rights and Freedoms*. At this time of reform and cultural shift, however, judges need to make broad efforts to take stock of case management practices and the opportunities provided by technology to modernize the administration of cases and courtrooms across the country.⁴¹

These comments likely apply with equal force in the court martial system, where delay is, on average, more severe than within the civilian criminal justice system.

Effectiveness within the court martial system is challenged in other ways. The court martial tribunal structure is perceived by some as being unable to meet the disciplinary needs of CAF leaders in terms of **detering misconduct by military personnel**, and expressing (military) **community condemnation of misconduct by military personnel**. Specifically, some CAF leaders perceive that the measures of independence that the tribunal needs to perform its

⁴⁰ See “Memorandum 13 – Better Case Management (Court Martial)” in *Practice in the Service Courts – Collected Memoranda (Version 6)*, (London: Military Court Service, 2016) at 56, online: <<https://www.judiciary.gov.uk/wp-content/uploads/2015/05/practice-memo-ver-6-1Sep16.pdf>>. The Better Case Management System includes mandatory timelines for court hearings and deadlines in contested cases.

⁴¹ Senate Report 2017, *supra* note 20 at 75. See also, *ibid* at 74, quoting the Honourable Terrence Matchett, Chief Judge, Provincial Court of Alberta: “Because the courts possess a degree of impartiality and authority that no other stakeholder can claim, we have a very important leadership role to play in bringing all of the parties together in our joint efforts to improve case flows and to bring cases to trial as soon as possible.”

constitutional functions actually inhibit the tribunal from taking proper note of the leader's perspectives about what discipline requires in a particular. These CAF leaders perceive that the military status of tribunal members creates a kind of disciplinary confusion that is harmful to their disciplinary authority, when the tribunal makes a decision (e.g.: on sentence) that is inconsistent with the CAF leader's view of what an appropriate decision under those circumstances would be.⁴²

In light of all of the above observations and analysis, the CMCRT concludes that the current tribunal system is **somewhat effective**, in that it often achieves a public order and welfare purpose, but it rarely achieves a disciplinary purpose (and it is sometimes perceived by some CAF leaders as harming discipline).

In terms of **efficiency**, there are indications that the current tribunal system is producing its effects at a **disproportionate financial or human resource cost**.

From a **financial cost** perspective, the average cost per court martial trial over the last five years that is attributable to judicial and court services is **\$31 880** (inclusive of pro-rated judicial and court reporter salaries, civilian salaries for the Court Martial Administrator and staff, all judicial and court services travel costs, and normal operating and maintenance costs of the judicial and court administration organizations).⁴³ Equivalent costs within comparator systems are as follows:

- **\$1811** per trial for criminal cases in Manitoba;
- **\$1778** per trial for criminal cases in Ontario; and,
- **\$8855** per trial for military cases in the Court Martial of the UK.⁴⁴

As these figures indicate, the **financial costs** per trial of the current tribunal system are over **15 times** greater than equivalent costs per trial in Canada's civilian criminal justice system, and almost **4 times** greater than the costs per trial in the UK's Court Martial. Even accounting for travel costs that are inherent in the current court martial system, the system incurs considerably more financial costs than comparators.

Over the last five years, the court martial system has conducted, on average, **63 trials** per year. From a human resources perspective, over the last five years, military judges (accounting for periods when there were both three and four military judges) each conducted on average **17.1 courts martial per year** (including both contested and uncontested matters). On average, 6 of these 17 matters would have been fully contested trials, with additionally 1 to 2 contested sentencing hearings after guilty pleas. The remaining 9-10 trials would have been ones involving guilty pleas following by joint submissions as to the sentence. These numbers can be compared

⁴² See above, Chapter 4 (Consultation) at sections 4.5.3 (CANSOFCOM) and 4.5.4.2.1 (4 CDSG & 2 CMBG).

⁴³ See Annex BB, ADM (RS) Spreadsheet – Courts and Judges.

⁴⁴ *Ibid.*

with an average of:⁴⁵

- 12.7 trials per year for military judges in Australia;
- 89.5 trials per year for judge advocates in the UK;
- 420 trials per year for judges in Ontario; and
- 431 trials per year for judges in Manitoba.⁴⁶

These approximately 17 courts martial (6 contested) per military judge, per year, required of each judge on average **59.3 sitting days**. This number can be compared with:

- 104 sitting days per year for judge advocates in the UK (for an average of 89.5 trials); and
- 119 sitting days per year for judges in Manitoba (for an average of 431 trials).⁴⁷

Because courts martial are *ad hoc* ‘events’ normally convened by the Court Martial Administrator in the location where the alleged offence took place (or, some other place based on considerations about the location of the accused person, witnesses, or other affected CAF members), courts martial involve travel and this must be taken into account. Assuming that travel was required for every court martial,⁴⁸ this would add 34 travel days to the 59 sitting days, for a total of 93 ‘court martial attributable’ days per year, per judge. This figure is closer to the numbers from the UK and Manitoba in total ‘sitting days’. However, the judges of those systems complete between **5 times and 25 times** as many trials per year as Canadian military judges. Judges must also do some judicial work on days when they are not sitting, which is not reflected in the above data regarding sitting days for either the court martial system or any of the comparator system.⁴⁹

Based upon the above comparators, it is evident that Canada’s court martial system is among the most judicially resource-intensive, even after taking account of its itinerant nature.

⁴⁵ Data is only available in respect of the comparator jurisdictions that follow regarding the total number of trials, but not regarding the percentage of these trials that are contested, are disposed of by guilty pleas, or are disposed of by guilty pleas and joint submissions regarding the sentence.

⁴⁶ See Annex BB, ADM (RS) Spreadsheet – Courts and Judges.

⁴⁷ *Ibid.*

⁴⁸ Not all courts martial occur outside of a military judge’s geographic region. Many trials happen in the National Capital Region, for example, where the Office of the Chief Military Judge is located. However, this must be balanced with the fact that some courts martial require more than one ‘trip’ to the court martial location in order to complete the trial due to participant availability.

⁴⁹ The CMCRT was sensitive to the fact that as regular force members, military judges could have time commitments in addition to their judicial duties that judges of the UK Court Martial and the ordinary courts of Manitoba and Ontario would not have. For example, all CAF members are expected to pass an annual operational physical fitness test; re-qualify annually on personal weapons; and re-qualify annually or semi-annually in Chemical, Biological, Radiological, and Nuclear (CBRN) defence. This can involve a relatively significant time commitment of a week or two each year. However, the CMCRT heard from a retired military judge that military judges could not be required to conduct this training, and that they in fact ought not to complete this training. The CMCRT was therefore confident in discounting these training obligations as a potential time and human resource commitments to be accounted for in the status and institutional structure of the court martial tribunal. (Chapter 4 (Consultation) at section 4.4.5 (LCol (ret’d) Perron).

The **human resource costs** of the tribunal other than for the judiciary are likewise relatively high. The tribunal's court administration services, consisting of the Court Martial Administrator, court reporters, and other staff, make up a total of 17 full-time personnel. Whenever a court martial is convened, local units must also provide officers of the court, and other individuals from their unit lines (who are taken away from their normal duties) to staff the court martial 'event'. These can vary from 1-2 days for a guilty plea and a joint submission, to several weeks. If a General Court Martial is convened, then there is the additional human resource cost of a military panel, whose members are taken away from their normal duties to act only as finders of fact.

In terms of **legitimacy**, it is not seriously in dispute that military judges meet the constitutional requirements for judicial independence and impartiality. Courts martial before military judges are constitutionally **fair**. Nevertheless, the CMCRT received some input which suggests the perception that courts martial do not reflect societal values in a manner that lends inherent legitimacy to the processes.

The CMCRT received a number of comments related to the **repute** of the court martial tribunal during its consultation. For example, one commanding officer expressed to the CMCRT that in his view, military judges have much less experience when compared to civilian jurists, without having the same much military experience and ethos as those being judged.⁵⁰ In another example, one reserve force commanding officer (a senior Crown prosecutor in his civilian capacity) told the CMCRT that "the experience level of the judicial branch of the court is concerning."⁵¹ These comments express a perceptions that the current tribunal system is less **fair** and less **intelligible** in its design than the civilian criminal justice system's courts, due to the relative differences in experience at the tribunal and at similar civilian criminal courts. These comments – if objectively accurate – would also indicate that the current tribunal system would have difficulty in **generating accurate / correct outcomes**.

Additionally, the military status and ranks that are held by tribunal members affected perceptions of **fairness**. The CMCRT received suggestions that individuals might question the **fairness** of a trial held before a military judge, who is a member of the regular force, and who is lower in rank than a local commander (e.g.: the Base Commander), a witness, prosecution or defence counsel, or even the accused.⁵² Similarly, public consultations suggested that an accused person might perceive a panel made up of military leaders as unfair since representatives of the very institution that is prosecuting him or her are also judging the case.⁵³ On the other hand, members of the public, especially victims, may perceive military judges and military panels as 'on the same team' as the accused, and so more likely to treat him or her leniently or, even worse, allow the accused to escape with impunity.⁵⁴

The CMCRT heard further fairness concerns with respect to the panel. At time of writing, junior ranking military members are not eligible to sit on panels. The CMCRT received input from some

⁵⁰ See above, Chapter 4 (Consultation) at section 4.5.4.1.1 (2 Can Div Pers Svcs – CO).

⁵¹ See above, Chapter 4 (Consultation) at section 4.5.4.2.2 (RHFC).

⁵² Michel W Drapeau & Gilles Létourneau, *Behind the times: Modernization of Canadian Military Criminal Justice*, (2017) at 80-81 [Drapeau & Létourneau]; LeSage Report, *supra* note 24 at 41-42.

⁵³ See above, Chapter 4 (Consultation) at section 4.3.1 (Summary of Results).

⁵⁴ See above, Chapter 4 (Consultation) at section 4.4.4 (IJ 700).

contributors suggesting that this was problematic from a perception of **fairness** perspective,⁵⁵ since almost any military member – regardless of rank – should be capable of making factual findings and contributing to the determination of verdicts, just as almost any civilian can do so as a juror.

One consequential element of the current tribunal system that may contribute to **disproportionate financial costs** is the statutory requirement for the conduct of quadrennial inquiries into the compensation of military judges. This inquiry, which is constitutionally required is conducted by a Military Judges Compensation Committee (MJCC),⁵⁶ made up of three members who are appointed by the Governor in Council who review submissions from the government and the (3 or 4) military judges about the adequacy of the military judges' compensation, and who then produce a report for the government's consideration. A similar committee is provided for under section 76 of the *Judges Act*, and enquires into the adequacy of compensation for the (approximately) 1154⁵⁷ federally-appointed civilian judges. The requirement for a separate committee and the costs associated with this committee arguably only exists because of the distinct identity of a small group of military judges, and might be dealt with in more efficient ways.

A final area of study related to the current tribunal system involves the provision of court reporting services. Comparative analysis suggests that in systems where civilian court reporting services are used on a contractual basis, transcripts are produced in a **timely** manner (generally within 24 hours) that may contribute to the **generation of accurate / correct outcomes**, at a **proportionate financial cost**, and in a manner that does not impact the system's **universality**.⁵⁸

Within the current court martial system, the use of full-time military personnel as court reporters does not appear to produce the same results. Notwithstanding QR&O 112.66, which requires that, "as soon as practical after the proceedings of a court martial are terminated," a transcript of the proceedings is to be prepared, the CMCRT understands that it has become the practice to only produce transcripts when a court martial decision is under appeal, and it can take months to produce these transcripts.

The lack of timely transcripts may lead to systemic challenges in **generating accurate / correct outcomes**. Moreover, prosecutors, defence counsel, and military judges would be able to work more efficiently if they were able to refer to an accurate transcript during the trial in order to prepare and make submissions and judgements. Furthermore, the current system appears to involve less **proportionate financial and human resource costs** and less **scalability** because an established capability level will need to be maintained regardless of the volume of court reporting work that the system requires at any given point in time.

7.3.2 The Status and Institutional Structure of the Prosecution Service

From an **effectiveness** perspective, it is clear that the current prosecution service system is achieving a measure of promotion of public order and welfare. The prosecution service system is ensuring that cases referred to the DMP are dealt with, and are frequently preferring charges for

⁵⁵ See above, Chapter 4 (Consultation) at section 4.5.4.2.2 (RHFC).

⁵⁶ NDA, *supra* note 39, s 165.33 (and following).

⁵⁷ For information about the number and location of federally-appointed judges, see online: <<http://www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx>>.

⁵⁸ See above, Chapter 5 (Comparative) at sections 5.2.2 (Australia) and 5.2.5 (United Kingdom).

trials by courts martial.⁵⁹

In terms of **universality**, the current prosecution service system supports the court martial system's effectiveness, since prosecutors have proven capable of performing their functions across the full spectrum of CAF operations and environments. The system is also somewhat **scalable**, in that more military prosecutors (regular force or reserve force) can be posted into or out of the DMP organization as needed to meet unexpected increases or decreases in systemic volume, but is not as scalable as it would be if the DMP had authority similar to that which the DDCS has to engage outside counsel or agents (who are not officers within the CAF) if required. The DMP does have a policy that permits the appointment of "special prosecutors" in certain cases, which could augment the prosecution service's capacity, but only officers who are lawyers can be appointed, so the potential for increased capacity that "special prosecutors" represent is relatively low.

As noted above (regarding tribunals), many court martial cases have led to the imposition of periods of imprisonment or detention at sentencing, which suggests that the prosecution service system is effective in contributing to **protection of the public from military personnel who engage in misconduct**. Additionally, some CAF leaders have indicated that the current court martial system is achieving a measure of **deterrence**, and feel that the system promotes respect for the law.⁶⁰ The current prosecution service system necessarily plays an important role in contributing to this deterrent effect.

The CMCRT heard several expressions of concern about whether the current prosecution service is structured to promote the **generation of accurate / correct outcomes**. For instance, some input received during public consultation suggests that, as a minimum, military prosecutors should have a specialized career path.⁶¹ Many of the CAF leaders who were consulted suggested that more should be done to ensure prosecutors contribute to the **generation of accurate / correct outcomes**, such as embedding military prosecutors with civilian prosecution services to develop better expertise through higher volumes of case loads,⁶² using career civilian prosecutors,⁶³ using a mixed civilian / military prosecution service.⁶⁴ All of these types of comments suggest that the current prosecution service system is perceived as not achieving the right balance of military and criminal law expertise that is needed to **generate accurate / correct outcomes**.

With respect to the current prosecution service system's capacity to promote discipline, efficiency, and morale, there were several indications that the current model is not optimally effective. A large group of the command teams that were consulted expressed frustration that unit discipline and command authority is undermined when a military prosecutor decides not to proceed with disciplinary charges that have been laid by unit personnel,⁶⁵ particularly when the reasons for doing so are not clearly communicated.⁶⁶

⁵⁹ Based on a five-year average, the military prosecution service prefers charges in respect of approximately 67% of the cases that are referred to the DMP.

⁶⁰ See above, Chapter 4 (Consultation) at sections 4.5.4.1.4 (35 CBG HQ) and 4.5.5.1 (MARPAAC).

⁶¹ See above, Chapter 4 (Consultation) at section 4.3.1 (Summary of Results).

⁶² See above, Chapter 4 (Consultation) at section 4.5.3 (CANSOFCOM).

⁶³ See above, Chapter 4 (Consultation) at section 4.5.4.1.1 (2 Can Div Pers Svcs – CO).

⁶⁴ See above, Chapter 4 (Consultation) at section 4.5.4.1.1 (2 Can Div Pers Svcs – CO).

⁶⁵ See above, Chapter 4 (Consultation) at section 4.5.4.2.1 (4 CDSG & 2 CMBG).

⁶⁶ See the discussion relating to **transparency**, *infra* note 97 (and accompanying text).

This frustration suggests that the current prosecution service system is not perceived as promoting a level of **community condemnation of misconduct by military personnel** that is desired by CAF leaders. The issue, as perceived by these CAF leaders, does not appear to be with the actual decisions of the prosecutors in isolation, nor with the independence of the prosecutors (which is recognized as a positive feature); rather, the issue appears to be that the current system creates a sort of disciplinary role confusion when it permits prosecutors to negate the effect that a commander had in mind when he or she referred charges to the DMP in the first place.

A more commonly expressed indication that the current system is not promoting discipline, efficiency, and morale within the CAF was grounded in the current system's inability to **produce timely outcomes**. The current prosecution service system contributes to delay. The average time that was taken by military prosecutors in 2016-2017 to decide whether to prosecute after a file has been referred to the DMP was 89 days. This amount of time – although down from the average of 103 days that was taken during 2006-2007⁶⁷ – can be contrasted with the standard that the Bronson Report (DMP) suggested exists within the civilian criminal justice system, where charge-screening decisions are made in a matter of minutes or hours, rather than in weeks or months.⁶⁸

The Bronson Report (DMP) listed numerous ways in which the reviewers felt the prosecution system had contributed to the problem of delay. The CMCRT took particular note of one such factor that still endures: the relative inexperience of military prosecutors.⁶⁹ To the extent that any recommendations of the Bronson Report (DMP) (or the LeSage Report, which echoed some of the Bronson Report) have been adopted, they have not been significantly successful in reducing delays attributable to the current prosecution service system. Furthermore, many of the recommendations (like having a specialized career track to promote faster prosecutions) have never been implemented, as reflected in the DMP's comments in his most recent Annual Report to the JAG:

CMPS welcomed 5 new captains just prior to or during the reporting period. Given their lack of experience, they take more time to adequately review files of equal complexity than a more experienced prosecutor would take. They are initially assigned files of lesser complexity, generally requiring less time. They require supervision and assistance from more senior prosecutors, which takes away from the time the latter can devote to their files. The more senior prosecutors end up with a greater proportion of the more complex cases requiring more time, with less time to devote to them than if there was a greater number of senior prosecutors on the team. However, this was a conscious investment in the future on DMP's part. These new prosecutors are extremely talented and promising. We expect that with the benefit of additional experience, those prosecutors will quickly become more efficient at reviewing files, capable of handling more complex cases, require less assistance, thus freeing more senior prosecutors to complete these files. Globally, this should result in a reduction of post-charge review timelines in 2017-2018.⁷⁰

Although the above situation described by the DMP may look unique, it is bound to recur in a system where – assuming that prosecutors all complete 5-year postings to the DMP organization

⁶⁷ Bronson Report (DMP), *supra* note 19 at 11

⁶⁸ Bronson Report (DMP), *supra* note 19 at 12.

⁶⁹ DMP Annual Report 2016-2017, *supra* note 17 at 33-34.

⁷⁰ DMP Annual Report 2016-2017, *supra* note 17 at 33-34.

– at least three prosecutors per year will be turning over. The issue of turnover leading to a new group of inexperienced prosecutors is therefore a structural one, rather than an isolated instance. Some of the ways in which this issue could be addressed (for instance, by creating a specialized litigation career stream for military prosecutors) will be addressed in a subsequent chapter.

The current prosecution service system plays a large part in creating court martial system delays that cause matters within the system to take much longer than the 6 months that those CAF leaders who were consulted have universally indicated is the limit beyond which prosecutions and trials have no meaningful (or have harmful) effects on discipline. Consequently, the current prosecution service system is largely unable to contribute to the production of **timely outcomes** in any way that would promote discipline, efficiency and morale of the CAF.

That being said, there are many inherent sources of delay within the current court martial system that are outside of the control of the prosecution service, and that contribute to the overall delay of 434 days from the time a charge is laid until the completion of a court martial. For many of the more serious charges dealt with at courts martial, the statutory and regulatory scheme currently contemplates that a charge-layer will need to transmit the charge to a Commanding Officer, who will need to apply to a referral authority for disposal of the charge at court martial, who will need to refer the charge to the DMP, whose prosecutors will need to decide whether to prefer charges. If charges are preferred, then the Court Martial Administrator will need to convene a court martial that suits the schedules of the military judge, the prosecutor, and the defence counsel. Then, the trial will need to take place. All of these steps involve time, and contribute to systemic delay.

In terms of **efficiency**, and even accounting for the (potentially) temporary inexperience issue described above, the current prosecution system does not incur **proportionate financial and human resource costs**.

From a **financial cost** perspective, the average cost per court martial trial over the last five years that is attributable to prosecutions services is **\$48 966**.⁷¹ This figure includes the total costs of all military and civilian salaries, travel costs, and normal operating and maintenance costs of the prosecution service, divided by the total number of courts martial.⁷² Equivalent costs within comparator systems are as follows:

- **\$1373** per trial for the cost of prosecutions in Manitoba;
- **\$1564** per trial for the cost of prosecutions in Ontario;
- **\$20 710** per trial for the cost of prosecuting military cases in the Court Martial of the UK; and,
- **\$51 230** per trial for the cost of prosecuting military cases at Australian military

⁷¹ See Annex CC, ADM (RS) Spreadsheet – Prosecutions.

⁷² The CMCRT notes that some officers within the prosecution service do not tend to prosecute at courts martial, but, rather, fulfill a policy role, advise the NIS, or fulfill supervisory roles. Nonetheless, for the purposes of the present calculation, the costs associated with having these officers within the prosecution service have been included, and factor into the total cost, and the total cost per court martial, of operating the current prosecution service.

tribunals.⁷³

As these figures indicate, the **financial costs** per trial of the current prosecution service system are over **30 times** greater than equivalent costs per trial in Canada's civilian criminal justice system, and more than double the costs per trial in the UK's Court Martial. However, the costs are comparable to those within the Australian military prosecution service.

In terms of **human resource costs**, the current Canadian Military Prosecution Service is staffed with 16.8 full-time equivalent prosecutors (mixed regular and reserve force).⁷⁴ In 2016/2017, the DMP's Annual Report listed the organization as staffed with 16 full-time regular force prosecutors (including the DMP himself), and 8 part-time reserve force prosecutors (with one additional reserve position currently vacant). The organization has a further 6 full-time civilian administrative support personnel, and one full-time paralegal.

As was noted above in the assessment of the court martial tribunal status and structure, the system conducts annually an average of 63 trials, 65% of which are resolved by way of guilty plea.

This means that, in terms of prosecutorial human resource requirements, based upon the previous five years, each Canadian military prosecutor (full-time and full-time equivalent) conducted on average **3.8 courts martial per year**, with **1.33 per year being the rate of contested trials**. These numbers can be compared with an average of:

- 6 trials per year for Canadian military prosecutors in 2007-2008;⁷⁵
- 4.3 trials per year for prosecutors in the Australian court martial system;
- 7.6 trials per year for prosecutors in the Danish court martial system;
- 15.2 trials per year for prosecutors in the UK court martial system;
- 112.2 trials per year for civilian prosecutors in Manitoba; and
- 152 trials per year for civilian prosecutors in Ontario.⁷⁶

It is clear that, in terms of caseloads, Canada's military prosecution service is the most resourced of the comparator systems and is significantly more resourced than the two comparator provincial prosecution services.

⁷³ See Annex CC, ADM (RS) Spreadsheet – Prosecutions.

⁷⁴ *Ibid.*

⁷⁵ The Bronson Report, *supra* note 19 at 8, noted that, on average, Regional Military Prosecutors dealt with an average of 9 cases that proceeded to court martial in 2007-2008: Bronson Report (DMP). However, the CMCRT understands that, at that time, there were a total of 13 legal officers in different roles within the prosecution service at that time (in policy, supervisory, or other roles). The CMCRT therefore assesses that the average number of cases proceeding to court martial per legal officer within the prosecution service at that time was 6 courts martial (78 courts martial, and 13 legal officers within the prosecution service).

⁷⁶ See Annex CC, ADM (RS) Spreadsheet – Prosecutions.

As the Bronson Report (DMP) also suggested with respect to the low volume of cases that are conducted by each prosecutor within the current prosecution service system, this caseload is likely insufficient to allow prosecutors within the current prosecution service system to develop the required expertise to be fully proficient prosecutors (which would have an impact on both **efficiency** and **effectiveness**). In their judgment, it would take a civilian prosecutor 3-4 years of full-time practice and litigation, with mentorship from experienced, senior litigators, in order for a prosecutor to become “fully competent”.⁷⁷ This presumes that a prosecutor would need to conduct between 300-600 trials before achieving the described standard of competency – which would take military prosecutors within the current system who have no previous criminal trial experience at least 75 years to complete, assuming each prosecutor completes four courts martial per year (slightly more than the current average).

It must be noted that the reserve force prosecutors within the DMP organization are generally also always civilian prosecutors in their civilian capacities, who have at least the minimum litigation experience that the Bronson reviewers felt was needed of a fully competent prosecutor.

The above information relating to **financial and human resources costs**, when compared to other systems that produce essentially similar or the same effects, suggests that the current prosecution service system uses such resources disproportionately, and is therefore **not efficient**.

More to the point, the current prosecution service system appears to be trending toward greater inefficiency over time. When the Bronson Report (DMP) was completed in 2008, the reviewers noted as follows: “We have concluded that lack of resources is not a contributing factor to Court Martial delays. Some of the people we spoke to even suggested that the system is over-resourced. Without going that far, we believe that delays are caused by the policies and practices employed in the system rather than by any lack of resources.”⁷⁸ Since 2008, the prosecution service has grown by 3 full-time military prosecutors (from 13 to 16),⁷⁹ while the volume of cases proceeding to court martial that have been dealt with by the prosecution service remained effectively the same.⁸⁰ Military prosecutors currently deal with fewer court martial files per person than in 2008, when it was suggested that service may already have been over-resourced – although they have reduced the average amount of time taken to make decisions to prosecute from 103 days to 89 days.

It must be recognized that military prosecutors – like all other public prosecutors in Canada – may perform a significant amount of work on a file that never leads to a trial, advising investigators as needed, and conducting a post-charge review of the file in order to make their decision whether to prosecute. However, even if one considers the total number of files handled in any way by the

⁷⁷ Bronson Report (DMP), *supra* note 19 at 69.

⁷⁸ *Ibid* at 9.

⁷⁹ This growth after 2008 continued a trend that began in 2001, when the number of Regional Military Prosecutors doubled from 4 to 8, as reported in Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2000 to 31 March 2001* (Ottawa: Office of the Judge Advocate General, 2001) at 36, and now sits at 9 RMPs. The other two additions to the DMP’s organization since 2008 are at the LCol/Cdr level, where the establishment has increased from 1 to 3 more senior/supervisory prosecuting officers.

⁸⁰ It is noted within the Bronson Report (DMP), *supra* note 19 at 8, that from 1 April 2000 until 31 March 2007, an average of 62 courts martial per year were conducted.

prosecution service within the current system – which was, in 2016-2017, a total of 300 files (the highest number in the last 4 years),⁸¹ this results in approximately 17.6 files per military prosecutor for the year.⁸²

These numbers can be compared with data drawn from the Public Prosecution Service of Canada's (PPSC) 2015-2016 Annual Report.⁸³ At the time of the report, PPSC employed 536 lawyers, and relied upon the services of another 409 standing agents. The total number of files handled during the year was 72 538. On average, this means that each lawyer / agent would handle approximately 76 files per year. Further data from the report indicates that 41 862 files (64%) were "low complexity", and a total of 313 558 prosecutorial hours of time were spent on these files (for an average of 7.5 hours of time spent on each file). Another 21 061 files (32%) were "medium complexity", and a total of 505 588 prosecutorial hours of time were spent on these files (for an average of 18.7 hours of time spent on each file). Finally, an additional 2374 files (4%) were "high complexity", and a total of 306 853 prosecutorial hours of time were spent on these files (for an average of 129 hours of time spent on each file).

Court martial files are different from PPSC files, so it is possible that court martial files could be more complex. If one assumed that one third of the files that military prosecutors dealt with were "high complexity" files (i.e.: 33% of their files, as compared to 4% of the files dealt with by PPSC prosecutors) and none of the files dealt with by military prosecutors were ever "low complexity" (i.e.: the remaining 67% of military prosecutors' files were "medium complexity"), then military prosecutors who achieved a level of efficiency that is equivalent to that of the PPSC prosecutors would have, on average, approximately 20 weeks of work each year in dealing with their 6 "high complexity" files, and another 6 weeks of work each year dealing with their 12 "medium complexity" files – assuming a 40-hour work week. This data provides an indication of what kind of **proportionate financial and human resource** outcomes could be achieved within the court martial system if the system facilitated the acquisition of the kind of litigation and criminal law expertise that seems to be present within PPSC.

With respect to **legitimacy**, it is not seriously in doubt that the status and institutional structure of the current prosecution service is constitutional. In one recent case, the Supreme Court of Canada upheld the Minister of National Defence's statutory power to appeal within the court martial system⁸⁴ (which authority is routinely exercised by the DMP on the Minister's instruction).⁸⁵ This fact suggests that the minimum standard of **fairness** exists.

The DMP acts under the general supervision of another military officer, the Judge Advocate General.⁸⁶ The JAG is empowered to issue general instructions to the DMP,⁸⁷ as well as specific

⁸¹ See Canada, Department of National Defence, *Director of Military Prosecutions Annual Report 2016-17* (Ottawa: Office of the Judge Advocate General, 2017), at 11 [DMP Annual Report 2016-2017].

⁸² "Files" included all pre- and post-charge files from all sources that were handled by prosecutors during the year.

⁸³ *Public Prosecution Service of Canada Annual Report, 2015-2016*, online: <http://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2015_2016/index.html>.

⁸⁴ *R v Cawthorne*, 2016 SCC 32.

⁸⁵ NDA, *supra* note 39, ss 165.1 and 230.1.

⁸⁶ *Ibid*, s 165.17(1).

⁸⁷ *Ibid*, s 165.17 (2).

instructions with respect to any particular prosecution.⁸⁸ Any such general or specific instructions, however, must be made available to the public,⁸⁹ providing appropriate transparency. The JAG supervises the DMP as well as the Director of Defence Counsel Services,⁹⁰ in addition to having “the superintendence of the administration of military justice in the Canadian Forces.”⁹¹ The CMCRT heard from some individuals who were consulted that this unfamiliar structure creates a perception of reduced **fairness** and **intelligibility**. In the words of one contributor, this situation is like “a game of Chess, where the JAG makes all the rules, then controls the Black team’s plays, then control’s the White team’s plays.”⁹² Regardless of the extent to which such a claim might be objectively inaccurate, the mere perception affects **legitimacy** of the prosecution service system, and has led to suggestions for a structure wherein the DMP is directly responsible to the Minister, rather than under the general supervision of the JAG.⁹³

Lastly, the very fact that the DMP is a military officer, visibly subordinate to a large number of military officers (including the JAG) can create challenges for perceptions of **fairness**. The CMCRT heard from some stakeholders during targeted consultations that criminal-like prosecutions will be suspect if there is any chance that they can be influenced by the military chain of command or the military’s legal service branch. Such a case, the CMCRT heard, creates a kind of dual suspicion: either the prosecution service would use its power and discretion to protect military members from being held to account for misconduct (more often in the case of misconduct by senior personnel), or the prosecution service would use its power and discretion to unfairly target more junior members who engage in misconduct through a process that involves different or reduced protections when compared to a purely civilian system.⁹⁴

The CMCRT noted during its international comparative study that several nations that had either civilianized the analogous position,⁹⁵ or had rendered the position ‘rank-less’,⁹⁶ enjoyed many advantages with respect to perceptions of **fairness**. The CMCRT heard similar points during public consultations.⁹⁷

The also heard during internal consultations that command teams were not being informed of the reasons for the delay in the system, nor were they being informed of prosecutorial decisions to not proceed, or to reduce the seriousness of the charges, until after the decision had been made and a letter had been sent to the accused, and overall felt that these decisions themselves were not sufficiently transparent.⁹⁸ Such comments suggest that more **transparency** within the prosecution service system could be achieved.

⁸⁸ *Ibid*, s 165.17(3).

⁸⁹ *Ibid*.

⁹⁰ *Ibid*, s 249.2(1).

⁹¹ *Ibid*, s 9.2(1).

⁹² See above, Chapter 4 (Consultation) at section 4.4.6 (LCdr (ret’d) Levesque).

⁹³ See above, Chapter 4 (Consultation) at section 4.4.5 (LCol (ret’d) Perron).

⁹⁴ See above, Chapter 4 (Consultation) at section 4.4.7 (President of the ISMLLW).

⁹⁵ See above, Chapter 5 (Comparative) at sections 5.2.5 (United Kingdom), 5.2.6 (Norway) and 5.2.8 (Finland).

⁹⁶ See above, Chapter 5 (Comparative) at section 5.2.7 (Denmark).

⁹⁷ See Annex C, Discussion Board of the CMCR’s Public Consultation. In particular, see submission from Martin Gagnon, 26 October 2016.

⁹⁸ See above, Chapter 4 (Consultation) at sections 4.5.3 (CANSOFCOM), 4.5.4.2 (4 CDSG & 2 CMBG) and 4.5.4.1.3 (5 RGC).

7.3.3 Provision of Defence Counsel Services

It is clear from internal consultation that CAF leaders believe that the current system for providing defence counsel services is **effective**, mostly because it helps the court martial system to **generate accurate / correct outcomes**. In particular, several CAF leaders expressed beliefs that the current system for providing defence counsel services has achieved a good balance of military and criminal law expertise.⁹⁹ No internal consultation suggested that there were any substantive quality problems arising within the current system for providing defence counsel services. Similarly, no observations suggest that there are any **universality** problems with the current system, which the CMCRT notes has operated across a broad spectrum of CAF operations and environments.

In terms of **efficiency**, the CMCRT heard a carefully communicated message from internal consultations: the provision of defence counsel services should be generous, but probably less generous than at present and certainly not unlimited.¹⁰⁰ This consultation suggested that – because of the extra liability to do dangerous and difficult work that is taken on by CAF members – the state should fully fund legal counsel for military accused persons where the charges arise out of military duties that the individuals have been required to perform, but not where the charges are far removed from what the accused person was expected to do under the circumstances as a military member. In the latter case, consultation suggested that a contribution model would be appropriate where accused persons contribute some or all of the cost of their defence. This input from internal CAF consultation was essential to help the CMCRT understand the scope of defence counsel services that CAF leaders felt the system ought to provide, which factored into the CMCRT’s assessment of efficiency.

With respect to the **proportionality of financial and human resource costs**, the CMCRT found that the defence counsel services system is more difficult to assess against appropriate comparators, since the court martial system’s full-time, fully-funded model is different from most other military comparators, and is very different from civilian legal aid and private criminal defence models. For instance, no other nation, except the United States, has adopted a full-time, fully-funded defence counsel model.¹⁰¹

From a **financial cost** perspective, the average cost per court martial trial over the last five years that is attributable to defence counsel services is **\$28 485** (inclusive of military and civilian salaries, travel costs, and normal operating and maintenance costs of the defence counsel service).¹⁰² To the extent that one can make comparisons, the equivalent costs within comparator systems are as follows:¹⁰³

- **\$1738** is the average cost of a legal aid certificate to defend a person within Ontario’s civilian criminal justice system; and,

⁹⁹ See above, Chapter 4 (Consultation) at sections 4.5.4.1.1 (2 Can Div Pers Svcs – CO), 4.5.4.1.2 (2 Can Div Pers Svcs – CWO) and 4.5.4.2.3 (Royal Regiment of Canada).

¹⁰⁰ See above, Chapter 4 (Consultation) at sections 4.5.4.2.1 (4 CDSG & 2 CMBG), 4.5.4.2.2 (RHFC), 4.5.4.1.1 (2 Can Div Pers Svcs – CO) and 4.5.4.1.2 (2 Can Div Pers Svcs – CWO).

¹⁰¹ See above, Chapter 5 (Comparative) at section 5.2.1 (United States).

¹⁰² See Annex DD, ADM (RS) Excel Spreadsheet – Defence Counsel Services.

¹⁰³ Data was not available to the CMCRT or ADM (RS) regarding the costs of legal aid or defence counsel services in Australia or Manitoba at the time of completion of this report.

- **\$6288** is the average cost of legal aid services per Court Martial trial (inclusive of the costs of representation at any appeals) within the UK court martial system.¹⁰⁴

As these figures indicate, the **financial costs** per trial of the current defence counsel service system are over **15 times** greater than equivalent costs per trial in Ontario's civilian criminal justice system, and more than **4 times** greater than the costs per trial in the UK's Court Martial.

When making comparisons with Canada's civilian legal aid system, however, it is important to note that many civilian justice system stakeholders, including the Canadian Bar Association, see the extent of government funding of legal aid to be inadequate: "More money for legal aid services across Canada is desperately needed."¹⁰⁵ In this case, therefore, the CMCRT sees comparison with the UK court martial system as the most appropriate comparator since, based on the CMCRT's comparative analysis, UK stakeholders appear to be wholly satisfied with the quality of defence counsel services that are received¹⁰⁶ for a fraction of the costs that are incurred within Canada's current defence counsel services system.

Regarding **human resource costs**, over the last five years, defence counsel (full-time equivalents) assigned to DCS conducted on average **6.7 courts martial** each per year. An average of **2.3 of those trials were contested**. The lawyers are supported by one paralegal and two administrative support staff. The DDCS indicated to the CMCRT that the largest case-load of any individual lawyer in his organization as of February 2017 was 23 cases. Keeping in mind that the average amount of time between a charge being laid and the completion of a court martial is more than one year (**434 days**),¹⁰⁷ the CMCRT assumes that a typical defence counsel lawyer within the current military DCS system would not deal with more than approximately 20 cases in a single year.

The CMCRT understands from the Bronson Report of 2009 that the caseloads typical of defence counsel working in legal aid offices or at the private defence bar would be more like 70-100 (or more) files per year.¹⁰⁸ The Bronson Group highlighted the extent of this dissonance:

In the Brampton Criminal Law Office there are two staff lawyers, one Director, one community legal worker and one receptionist. At present, the staffing in Ottawa is considerably less but for the purposes of comparison, we will be using the staffing in 2006 and 2007, which at the time consisted of one Director, two staff lawyers, one community legal worker and one receptionist. In 2006 and 2007 in each of the Criminal Law Offices, the staff lawyers and the Director carried a full caseload and provided legal services to clients at all levels of court including appeals to Superior Court.

[...]

The Brampton Criminal Law Office opened 314 files in 2006 and opened 162 files for the 6

¹⁰⁴ See Annex DD, ADM (RS) Excel Spreadsheet – Defence Counsel Services.

¹⁰⁵ Online: <<https://www.cba.org/Sections/Legal-Aid-Liaison/Resources/Resources/Legal-Aid-in-Canada>>.

¹⁰⁶ See above, Chapter 5 (Comparative) at section 5.2.5 (United Kingdom), where there were no indication of dissatisfaction with defense counsel services.

¹⁰⁷ DMP Annual Report 2016-2017, *supra* note 17 at 33.

¹⁰⁸ Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of Defence Counsel Services*, (Ottawa: Bronson Consulting Group, 2009), at 16-17 [Bronson Report (DDCS)].

month period from January to June of 2007. The Ottawa Criminal Law Office opened 276 files in 2006 and opened 120 files for the 6 month period from January to June of 2007. At the time both offices were staffed with one Director and two staff lawyers as well as the above-noted support staff. It must be stated that most of the files opened were for clients charged with criminal code offences for which there was little prospect of incarceration if they were convicted. Each office carried a relatively small caseload of files that would be considered “serious offences”.

Suffice it to say, the difference in caseload between the DCS counsel and the staff legal aid offices is remarkable and warrants more in-depth analysis.¹⁰⁹

Even taking account of the fact that DDCS legal officers are also responsible for the duty counsel phone line, the court martial system would appear to be **disproportionate in the extent of financial and human resource costs** that it incurs.

The significant expense of the current defence counsel service model is not surprising. In August, 1997, the CAF’s Defence Counsel Study Team noted that the current model was the most expensive option under its consideration.¹¹⁰

That same study team noted that the model would pose some challenges, given the prospective low caseload, with respect to maintaining an adequate level of expertise and proficiency¹¹¹ - in much the same way as the Bronson Report of 2008 made the same observation about prosecutors.¹¹²

The current DDCS implicitly suggested that it is a challenge to maintain proficiency levels that would be needed in order for the court martial system to run more efficiently, when he noted that the current governance structure of DDCS is problematic, “given that defence counsel remain under the command of the JAG, a member of the executive, who controls their pay, posting and annual assessment notwithstanding the fact that their clients are litigating against the organization”. He further indicated structural risks to maintaining proficiency in the organization:

The one issue that I do see as very concerning regarding the experience levels of military defence counsel is that, both last year and the year before, I was effectively shut out of knowing which legal officers had expressed a desire to come to DCS. This is a complete reversal from my early years in this position. It has the potential to severely influence the competence level within the organization as others unilaterally select who will come. Further, it is disappointing for young officers who tell me that they had wished to be posted to DCS to hear that their desires were never passed on to me.¹¹³

With no ability to control postings in or out of his team, and no knowledge of what legal officers

¹⁰⁹ *Ibid* at 17.

¹¹⁰ Canada, Department of National Defence, *Provision of Defence Counsel Services in the Canadian Forces*, Report of the Defence Counsel Study Team (Ottawa: Office of the Judge Advocate General, 1997), at 42 [DDCS Report 1997].

¹¹¹ *Ibid* at 41.

¹¹² *Ibid* at 69.

¹¹³ See Annex Y, Submission from the Director of Defence Counsel Services to ADM(RS), 13 February 2017, at 6.

have indicated a desire to come to DCS, the Director suggests that he was recently unable to secure comparable replacements for several more experienced officers who retired, frustrating any chance of maintaining continuity of litigation experience in his organization.¹¹⁴

The 1997 Defence Counsel Study noted another issue with the current model: if the system was to remain heavily resourced alongside such a small caseload, then “counsel may be tempted to research and present motions and arguments that might not otherwise warrant consideration, thereby extending the trial process and increasing the cost.”¹¹⁵ Twelve years later, the Bronson Group made the following observation in their 2009 Report:

Each lawyer is free to conduct his/her case as he/she sees fit. The lawyers do not docket their time and can devote as much time to an AWOL case as they would to a manslaughter case if they so choose [...]. We could not establish how much time the lawyers were spending on their various cases. We know from statistics that the average number of cases per staff lawyer is between ten (10) and twelve (12) cases each, per year. The reservists are supposed to take three (3) to five (5) cases per year but their caseload last year was closer to ten (10) cases each. We were provided with anecdotal evidence from one reservist that his average length of time to prepare for a court martial was three days, plus travel, plus attendance. These statistics raise questions regarding the activities of the defence counsel as the caseload appears to be quite low in comparison with the civilian staff offices of legal aid in Ontario.¹¹⁶

Furthermore, the Bronson Group also expressed that:

[W]e have concerns that clients may not be fully aware of the delay occasioned in their cases by these [Charter] motions. When we raised these concerns we were assured by some interviewees that their clients were aware of the issues associated with the motions and instructed counsel to proceed with the motions nonetheless. Other interviewees felt that in fact clients were not necessarily properly advised. As our mandate did not extend to interviewing clients, we have no way of determining the level of client involvement in the decisions made on their files. The conflicting information received from various past and present defence counsel was sufficient to cause misgivings about the issue.¹¹⁷

Finally, the Bronson Group in 2009 expressed concerns that there was a perception that:

DCS’s agenda was to reform the military justice system, rather than to represent individual clients. It was the view of some interviewees, including defence counsel, that at times this agenda took priority over a client’s needs. We were advised of one situation where a client was not aware that his case had been appealed to the Supreme Court of Canada for instance.

The CMCRT cannot say whether obviously unmeritorious or inappropriate arguments are being advanced by counsel within the current defence counsel services system, but notes that counsel for

¹¹⁴ *Ibid.*

¹¹⁵ DDCCS Report 1997, *supra* note 110 at 42.

¹¹⁶ Bronson Report (DDCCS), *supra* note 108 at 15.

¹¹⁷ *Ibid* at 48-49.

accused persons have been very successful in making successful *Charter* applications that may benefit their clients at courts martial and at the Court Martial Appeal Court. The CMCRT is also unaware of any judicial or law society comments on the activities of defence counsel which would suggest that any improper advocacy is taking place.

However, from a **proportionality of financial and human resources** perspective, the CMCRT shares the concerns expressed by the Bronson Group in 2009 about a defence counsel services system that has no external limits on, controls over, or oversight of the extent of services provided to any particular accused person at public expense. Furthermore, in light of CAF leaders' input suggesting that fully-funded counsel should only be provided in cases where an accused person was in legal jeopardy because of the military duties that he or she was required to perform, the CMCRT sees a sound basis for the Bronson Group's recommendation that DCS appropriately track the time allocated by defence counsel to files,¹¹⁸ and that a reasonable limit be placed on the extent of publicly-funded legal services:

While we agree that our military deserves the best, there must be reasonable limits. If a client [...] does not dispute the allegations giving rise to a charge and the punishment is going to be relatively minor, it makes no sense to spend thousands of dollars in time and travel. It might be appropriate to be guided by the question "Would a members of the Canadian Forces of this rank expend these funds if he/she had to pay for the services himself/ herself?"¹¹⁹

In light of all of the above information and analysis, the CMCRT has concluded that the current defence counsel services system is **somewhat inefficient**, particularly because of the absence of any over-arching and external control over the extent of services provided in each case that can lead to **disproportionate financial and human resource costs**. The CMCRT notes that in most court martial systems that offer comparable legal aid to military personnel, either a tariff setting out baseline levels of service to be provided in various classes of cases,¹²⁰ or a contribution system that requires an accused person to pay a portion of defence costs,¹²¹ appear to have been successful in promoting **efficiency** within the legal aid scheme.

In terms of **legitimacy**, the CMCRT notes that no comments received as part of internal CAF or public consultations suggested that the use of military defence counsel within the current defence counsel services system creates **fairness** or **intelligibility** problems. To the extent that DCS was mentioned during these consultations, perceptions of the service seemed positive¹²² in ways that reinforce **legitimacy**.

However, past critical perspectives of the court martial system and targeted consultation suggest that some **fairness** and **intelligibility** concerns may arise within the current defence counsel services system. For instance, the 1997 Defence Counsel Study Team noted the potential

¹¹⁸ *Ibid* at 30.

¹¹⁹ *Ibid*.

¹²⁰ See above, Chapter 5 (Comparative) at sections 5.2.3 (New Zealand) and 5.2.4 (Ireland).

¹²¹ See above, Chapter 5 (Comparative) at sections 5.2.3 (New Zealand) and 5.2.5 (United Kingdom).

¹²² See above, Chapter 4 (Consultation) at sections 4.5.4.1.1 (2 Can Div Pers Svcs – CO), 4.5.4.1.2 (2 Can Div Pers Svcs – CWO) and 4.5.4.2.3 (Royal Regiment of Canada).

challenges to perceptions of fairness if a military officer were assigned to defend. In their view:

The continuing status of defence counsel as officers does not resolve the perception problem expressed by some NCMs of defence counsel being loyal to the officer corps and the system rather than the individual member. This perception problem may be reduced somewhat by having defence counsel robe for trial rather than wearing a uniform. However, as the participants in the trial would still know the ranks for the prosecutor and defence counsel, this change would be cosmetic at best.¹²³

On a related point, the President of the International Society for Military Law and the Law of War was of the view that a uniformed lawyer, given his or her (in principle long-term) professional relationship to the ministry of defence, would always be subject to a suspicion of not being able to provide counsel in a totally independent manner. Therefore, he advised not to use military lawyers as defence counsel within a court martial-type system.

Another individual who contributed to the CMCRT's targeted consultation similarly suggested that the reporting structure within the current defence counsel services system could create legitimacy problems due to perceived issues of **fairness** and **intelligibility** because the Director reports to the same officer (JAG) who generally supervises the prosecution service and acts as legal advisor to the Minister and the CF on matters of military law.¹²⁴

The CMCRT notes that some might perceive military lawyers within the current defence counsel services system as being in a situation of ongoing conflict of interest that would undermine **fairness** and **intelligibility**: defence counsel have an ethical obligation to defend their clients by litigating against the Crown, but their careers (including posting, promotions, and corresponding pay increases) are all managed by CAF officers who fall within and primarily provide legal advice and services to the organization against which defence counsel are litigating. That being said, the CMCRT notes that it is not aware of any defence counsel within the current system who has ever sought to withdraw from representation of a client due to this type of conflict of interest. Therefore, it would appear that the lawyers themselves do not see a conflict of interest that would require them, ethically, to withdraw from representation.

In this case, notwithstanding CAF leaders' perspectives that the current defence counsel services system is fair and effective, the CMCRT has placed meaningful weight on the perspectives of experts who have identified that some **legitimacy** issues exist, relating primarily to the **fairness** of having defence counsel from within the same (military) organization that is adverse in interest to the accused persons who are being represented by military defence counsel.

The CMCRT observed during its international comparative study that in those nations where civilian defence counsel are employed in defence of military accused persons, there are high levels of confidence in the **fairness** of the proceedings.¹²⁵

7.3.4 The Substantive Body of Service Offences

¹²³ DDCS Report 1997, *supra* note 110 at 41.

¹²⁴ See above, Chapter 4 (Consultation) at section 4.4.6 (LCdr (ret'd) Levesque).

¹²⁵ See above, Chapter 5 (Comparative) at sections 5.2.5 (United Kingdom), 5.2.7 (Denmark) and 5.2.8 (Finland).

From an **effectiveness** perspective, the CMCRT did not receive any input suggesting that the current body of service offences is inadequate. Some CAF leaders who were consulted suggested that all offences should be dealt with faster inside of the court martial system than in the civilian system if the court martial system is to have jurisdiction over the offences,¹²⁶ and another suggested that fewer offences should be ‘electable’ in order to give the chain of command more ability to keep minor matters at the summary trial level.¹²⁷ This concern would be dealt with through changes to the law along the lines of what was proposed in Bill C-71 (which would have created mutually exclusive categories of “infractions” leading to summary trials, and “offences” leading to courts martial – see **Assumption 1** in Chapter 1).

The CMCRT notes that the criteria of **universality** is satisfied in respect of the current body of offences by virtue of the fact that jurisdiction over service offences exists throughout the world, regardless of where the offence may have been committed.

There did not appear to be any gaps in the current body of service offences. The CMCRT notes that there may be obsolete offences and duplicative offences within the current body of service offences, but these issues do not appear to have an impact on effectiveness. Consequently, the CMCRT assesses that the current body of service offences is **effective** in supporting the purposes of the court martial system.

With respect to **efficiency** – which requires that a system achieves its effects without disproportionate costs – the information available to the CMCRT suggests that the current body of service offences is problematic, as will be explained in the paragraphs that follow.

In many ways, the CMCRT’s assessment of the current tribunal and prosecution systems suggests that these systems are only effective in producing the same sorts of (public order and welfare) effects that the civilian criminal justice system produces in respect of civilian offences.

There is no Canadian information or precedent which suggests that the civilian criminal justice system could achieve public order and welfare purposes in respect of uniquely military offences – and the total absence of military expertise within the current civilian criminal justice system suggests that this system would struggle to **generate accurate / correct outcomes** in respect of uniquely military offences.

However, there is ample information and precedent to suggest that the civilian criminal justice system can and does achieve public order and welfare purposes in respect of ordinary criminal offences. This is the *raison d’être* for the Canadian civilian criminal justice system, and in spite of any shortcomings that the system may have relating to delay or other factors, the system is clearly effective in achieving a public order and welfare purpose.

Efficiency – Uniquely Military Offences. Where the court martial system has the necessary military expertise to generate accurate / correct outcomes in respect of uniquely military offences,

¹²⁶ See above, Chapter 4 (Consultation) at sections 4.5.4.1.1 (2 Can Div Pers Svcs – CO) and 4.5.4.1.2 (2 Can Div Pers Svcs – CWO).

¹²⁷ See above, Chapter 4 (Consultation) at section 4.5.5.1 (MARPA).

but the civilian criminal justice system does not currently have this expertise, then an **efficiency** analysis that looks at the **proportionality of financial and human resource costs** of the current court martial system that are attributable to uniquely military offences is essentially unnecessary, since no other current system can or should try such offences. In other words, the existence of jurisdiction to deal with uniquely military offences in the court martial system cannot lead to **disproportionate financial and human resource costs**, because there is no alternative to the existence of this jurisdiction without permitting a total failure to achieve the court martial system's purposes through impunity for uniquely military offences. (It must be stressed, however, that *the manner in which jurisdiction over uniquely military offences is exercised* could lead to **disproportionate financial and human resource costs**, even if the mere existence of jurisdiction to deal with military offences involves **proportionate costs**).

Efficiency – Ordinary Criminal Offences. If both the current court martial system and the current civilian criminal justice system can achieve substantially similar and acceptable public order and welfare effects in respect of ordinary criminal offences, then an **efficiency** analysis that looks at the **proportionality of financial and human resource costs** of the current court martial system that are attributable to ordinary criminal offences (tried as service offences) should focus almost exclusively on determining which system can deal with these ordinary criminal offences at less costs – since both systems can produce acceptable public order and welfare effects when dealing with such offences.

Previous sections of this chapter have identified the costs per court martial of judicial and court administration services, prosecution services, and defence counsel services. When these costs are added together, the average total cost per court martial is **\$109 331**.¹²⁸ The equivalent cost per trial (including the same three categories of costs for judicial and court administration services, prosecution services, and total criminal legal aid costs distributed across the total number of trials) in Manitoba is **\$3561**, and in Ontario is **\$3690**.¹²⁹ As these numbers indicate, the cost of conducting a trial within the current court martial system is approximately **30 times** more expensive than the cost of conducting a trial within the civilian criminal justice system.

On the basis of these numbers, and the proposition that the civilian criminal justice system and the court martial system are both capable of achieving substantially similar and acceptable public order and welfare purposes, and the proposition that the current court martial system is not achieving a disciplinary purpose in most cases, the CMCRT concludes that – from a purely public order and welfare perspective – the current body of service offences is **inefficient** because it permits ordinary civilian offences to be tried in a system that is **30 times** more costly than a suitable alternative. This aspect of the current body of service offences is currently resulting in **disproportionate financial and human resource costs** in as many as 25 court martial trials per year – the average number of trials over a five-year period involving a charge under section 130 of the NDA for an ordinary criminal offence.¹³⁰

¹²⁸ See Annex EE, ADM (RS) Spreadsheet – Overall Comparison.

¹²⁹ *Ibid.* As a matter of interest, the average cost per trial in the UK court martial system is **\$37 357**.

¹³⁰ See Annex FF, ADM (RS) CM Review Presentation, slide 13. It should be noted that some of these charges may be in respect of ordinary civilian criminal offences that are laid under section 130(1)(b) of the *National Defence Act*, as offences that take place outside of Canada, and over which Canadian civilian courts tend not to have jurisdiction. It is for this reason that the CMCRT suggests disproportionate financial and human resource costs are currently being incurred in as many as 25 court martial trials per year based on exercises of court martial jurisdiction over offences

That being said, if a disciplinary effect were being achieved through the prosecution of ordinary civilian offences (as, for instance, in the cases of military members stealing from or assaulting other military members) within the court martial system, and this effect could not be achieved through prosecutions in the civilian criminal justice system, then this **efficiency** analysis would need to change to account for the added disciplinary benefit that could – in theory – justify the extra costs of a court martial prosecution. The CMCRT notes that, in light of the length of time that it takes to complete trials within the court martial system, many of the senior CAF leaders who were consulted indicated that the system is not regularly achieving a disciplinary benefit.

From a **legitimacy** perspective, the CMCRT heard from several individuals during public consultations that the court martial system ought not to have jurisdiction over ordinary criminal offences, and from others that such jurisdiction should only exist when there is a strong connection to military service. Other contributors suggested that the system should not have jurisdiction over sexual assault offences. The CMCRT infers that such comments may have been made out of concerns regarding **fairness, intelligibility, or transparency**, but cannot be certain on this point.

As this information suggests, there are some **legitimacy** concerns relating to the existence of jurisdiction to deal with ordinary criminal offences within the current body of service offences, but no such concerns relating to the existence of jurisdiction to deal with uniquely military offences.

7.3.5 Punishments, Sanctions, and Sentencing

The CMCRT's assessment of the current sentencing and punishment system includes consideration of both the legal regime itself, and the manner in which the legal regime is being applied within the court martial system.

In terms of **effectiveness**, the CMCRT found that, due to the availability and actual use of punishments of imprisonment and detention, the court martial system was achieving a measure of **protection of the public from military personnel who engage in misconduct**. The CMCRT's review of court martial sentencing decisions from 1 April 2012 to 31 March 2017 found that 57 offenders (23% of all offenders sentenced by courts martial) were sentenced to some period of detention or imprisonment. This rate of imposing sentences of incarceration is comparable to the equivalent rate within the civilian criminal justice system,¹³¹ and suggests to the CMCRT that the court martial tribunal system is achieving an effect that helps protecting the public where necessary.

However, based on widely held perceptions among persons consulted by the CMCRT – both from

that could potentially otherwise be tried by Canadian civilian criminal courts. It is also worth noting that Canadian civilian courts do have extraterritorial jurisdiction in respect of a number of ordinary civilian criminal offences that take place outside of Canada, including all offences listed under section 7 of the *Criminal Code*, and all offences under the *Crimes Against Humanity and War Crimes Act*, among others.

¹³¹ Ashley Maxwell, *Adult Criminal Court Statistics in Canada 2013/2014* (Ottawa: Canadian Centre for Justice Statistics, 2015) Chart 5 at 10 (noting that, in 2013-2014, 36.2% of offenders in the civilian criminal justice system in Canada received a sentence involving custody).

within the CAF (among senior leaders¹³² and more lower ranked personnel¹³³) and from stakeholders outside of the CAF¹³⁴ – that sentences actually imposed on offenders are too low in many circumstances, the CMCRT is concerned that the current punishment and sentencing regime may not adequately **express community condemnation of misconduct by military personnel**.

The CMCRT heard further indications that some aspects of the current punishment and sentencing regime do not appear to have any value in **rehabilitating military personnel who engage in misconduct**, or in **expressing community condemnation of misconduct by military personnel**. Specifically, it was noted that the perception among most military personnel is that leadership-related punishments of cautions, reprimands, and severe reprimands are not understood by most members, have no practical impact, and “are viewed as a slap on the wrist by most.”¹³⁵

Finally, several contributors noted that the current hierarchy of punishments under section 139 of the NDA¹³⁶ and the absence of sentencing options that would otherwise be available within the civilian system¹³⁷ were problematic. The CMCRT infers that these comments amount to perceptions that the current punishment and sentencing regime do not necessarily facilitate the **generation of accurate / correct sentencing outcomes**.

In terms of **efficiency**, the CMCRT received no information to suggest that there are any concerns about the proportionality of financial or human resource costs within the court martial system that are attributable to the current punishment and sentencing regime.

From a **legitimacy** perspective, the CMCRT heard from several contributors that the current punishment and sentencing regime is not **fair**, because it does not achieve parity with the civilian sentencing regime in terms of options and rules.¹³⁸ On a related point, one senior CAF leader noted that the retention of uniquely military punishments was also not **fair**, since it exposed military personnel to punishments that no other Canadian would need to face.¹³⁹

Other contributors suggested that sentencing discretion within the current regime leads to inconsistent¹⁴⁰ or inappropriate¹⁴¹ sentencing results, and indicated that sentencing guidelines,¹⁴² rules of evidence that would require a court martial to hear evidence and recommendations on sentencing from the chain of command,¹⁴³ and mandatory minimum sentences for certain offences

¹³² See above, Chapter 4 (Consultation) at sections 4.5.4.3 (5 Can Div), 4.5.5.1 (MARPAAC) and 4.5.4.2.1 (4 CDSG & 2 CMBG).

¹³³ See above, Chapter 4 (Consultation) at section 4.5.5.2 (HMCS OTTAWA Crew).

¹³⁴ See above, Chapter 4 (Consultation) at section 4.4.4 (IJ 700).

¹³⁵ See above, Chapter 4 (Consultation), section 4.5.5.2 (HMCS OTTAWA Crew).

¹³⁶ See above, Chapter 4 (Consultation) at section 4.5.4.1.1 (2 Can Div Pers Svcs – CO).

¹³⁷ See above, Chapter 4 (Consultation) at sections 4.5.4.1.1 (2 Can Div Pers Svcs – CWO) and 4.5.5.2 (HMCS OTTAWA Crew).

¹³⁸ See above, Chapter 4 (Consultation) at sections 4.3.1 (Summary of results), 4.5.4.1.2 (2 Can Div Pers Svcs – CWO), 4.5.4.2.2 (RHFC) and 4.5.5.2 (HMCS OTTAWA Crew).

¹³⁹ See above, Chapter 4 (Consultation) at section 4.5.4.1.1 (2 Can Div Pers Svcs – CWO).

¹⁴⁰ See above, Chapter 4 (Consultation) at section 4.5.5.1 (MARPAAC).

¹⁴¹ See above, Chapter 4 (Consultation) at sections 4.4.4 (IJ 700) and 4.5.4.2.1 (4 CDSG & 2 CMBG).

¹⁴² See above, Chapter 4 (Consultation) at section 4.5.5.1 (MARPAAC).

¹⁴³ See above, Chapter 4 (Consultation) at section 4.5.4.2.1 (4 CDSG & 2 CMBG).

should be adopted¹⁴⁴ – possibly to increase **transparency** in sentencing decisions, and to better promote the **generation of accurate / correct sentencing outcomes**.

7.3.6 The Laws of Evidence

The CMCRT received numerous indications that the current laws of evidence that apply at courts martial, as contained within the *Military Rules of Evidence*, are only **somewhat effective** and **somewhat efficient**.

These indications were received in the course of public,¹⁴⁵ targeted,¹⁴⁶ and internal CAF consultations,¹⁴⁷ Similar indications flowed from the LeSage Report of 2011, wherein Mr. Justice LeSage made the following observations and recommendation:

In the court martial structure there have, for many years, been Military Rules of Evidence to guide and assist court martial procedure. These rules have not been regularly updated and have not kept pace with the common law evolution of the law of evidence. Today's Military Judges are well-trained and knowledgeable in law and procedure, as are counsel who appear before them. The Military Rules of Evidence are, in my view, no longer necessary for court martial proceedings. The common law rules of evidence as well as the Canada Evidence Act and, where appropriate, other provincial and federal evidence statutes, along with judicial decisions well known to Military Judges and counsel, should provide ample guidance for court martial proceedings. That is all the direction required.

Recommendation 28:

The Military Rules of Evidence should be superseded by the statutory and common law rules of evidence in the court martial system.¹⁴⁸

The military rules of evidence have been the subject of efforts for reform¹⁴⁹ and academic study¹⁵⁰ for years, but in spite of this reality, they have not been kept up to date in a manner that promotes **effectiveness** (by contributing to the **generation of accurate / correct outcomes**), or **efficiency** (by **promoting timely trial outcomes** through rules of evidence that expedite trial processes where possible).

¹⁴⁴ See above, Chapter 4 (Consultation) at section 4.4.4 (IJ 700).

¹⁴⁵ See Annex C, Discussion Board of the CMCR's Public Consultation. In particular, see submission from Bruce MacGregor, 8 November 2016, who in his professional capacity is the currently serving DMP, made his submission in his personal capacity, as was required under CANFORGEN 186/16 – CDS GUIDANCE COURT MARTIAL COMPREHENSIVE REVIEW CONSULTATION. The CMCRT gave his personal submission equal consideration along with other public contributors, while taking proper note of his in-depth knowledge of and experience in the military justice system.

¹⁴⁶ See above, Chapter 4 (Consultation) at section 4.4.5 (LCol (ret'd) Perron).

¹⁴⁷ See above, Chapter 4 (Consultation) at section 4.5.4.2.2 (RHFC).

¹⁴⁸ LeSage Report, *supra* note 24 at 45.

¹⁴⁹ See Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2001 to 31 March 2002* (Ottawa: Office of the Judge Advocate General, 2002) at 39.

¹⁵⁰ G. Herfst, *Meeting the Needs of Military Justice: An Examination of the Military Rules of Evidence*. LL.M. Thesis (unpublished) Dalhousie University, 1995.

The CMCRT did note during its international comparative study that although most nations apply the ordinary rules of evidence applicable in civilian courts in their court martial systems, many maintain a few special rules (e.g.: detailing how to prove or deem certain military matters like standing orders or what is a warship)¹⁵¹ that they view as being helpful within their systems.

Although it was not noted during consultations, the CMCRT assesses that the current laws of evidence likely pose a **legitimacy** challenge, in the sense that the rules of evidence within the court martial system are unfamiliar in comparison with equivalent rules in the civilian criminal justice system, and are therefore less **intelligible**.

7.3.7 The Rights, Grounds, and Mechanisms of Appeal

The only input that the CMCRT received regarding appeals implicitly suggested that more criminal law and military expertise would be beneficial at the Court Martial Appeal Court, which would promote the **generation of accurate / correct outcomes** in order to support **effectiveness**. Specifically, one individual suggested that the Court be permitted to appoint *Amicus Curiae* or some other means of drawing the Court's attention to particular military issues that might be beyond the ordinary comprehension of the Court.¹⁵² One other individual suggested that the CMAC be comprised of civilian judges and one military judge to bring military knowledge to the Court.¹⁵³ Another individual suggested that the use of Federal Court judges at the CMAC is not ideal, and recommended that the CMAC draw only from provincial Court of Appeal judges.¹⁵⁴

Notwithstanding these observations and suggestions, it appears to the CMCRT that the current appeals system is for the most part **effective**.

Although it was not commented upon during consultation, the CMCRT concluded that the current appeals system is **efficient**, because the CMAC leverages existing court services infrastructure, and uses only civilian judges who are already appointed to regularly sitting Canadian courts. The incremental costs are, therefore, negligible. The number and geographic dispersion of judges appointed to the court facilitates the **timely outcome** of any appeals. The model is highly **efficient**.

Again, although it was not commented upon during consultation, the CMCRT concluded that the current appeals system – in terms of the court that is used to hear appeals – is highly **legitimate**. The CMAC resembles a civilian court of appeal in most ways, and is staffed entirely with civilian judges in a way that is familiar and **intelligible**. Proceedings are as **transparent** as they would be in the Federal Court.

However, as one senior CAF leader noted, the accused person's and the Minister's rights of appeal should be the same in the court martial system as in the civilian criminal justice system.¹⁵⁵ This

¹⁵¹ See above, Chapter 5 (Comparative) at section 5.2.1 (United Kingdom).

¹⁵² See above, Chapter 4 (Consultation) at section 4.4.5 (LCol (ret'd) Perron).

¹⁵³ See above, Chapter 4 (Consultation) at section 4.5.4.1.2 (2 Can Div Pers Svcs – CWO). This is precisely how the Military Chamber of the Court of Appeal at Arnhem, in the Netherlands, is structured. See above, Chapter 5 (Comparative) at section 5.2.10 (The Netherlands).

¹⁵⁴ See above, Chapter 4 (Consultation) at section 4.5.4.2.2 (RHFC).

¹⁵⁵ See above, Chapter 4 (Consultation) at section 4.5.4.2.2 (RHFC).

point has also been raised by at least one critical commentator.¹⁵⁶ Although rights of appeal are currently similar, there are subtle differences. For instance, the Minister can appeal a finding of not guilty on a question of law alone or a question of mixed law and fact,¹⁵⁷ whereas civilian prosecutors can only appeal a finding of not guilty on a question of law alone.¹⁵⁸ These differences may not be **intelligible**, and could create some perceptions that weaken the current system's perceived **legitimacy**.

7.3.8 The Special Needs of any Particular Groups, Including Victims, Young Persons, and Aboriginal Offenders.

7.3.8.1 Victims / Survivors

The CMCRT received input from several sources which suggests that the current court martial system is perceived by many as not **fair** to victims, and not successful in **protecting victims from the consequences of misconduct by military personnel**. Specifically, the CMCRT heard from the Federal Ombudsman for Victims of Crime that victims in the court martial system should have at least the same rights they would have if the matter was being handled in the civilian justice system.¹⁵⁹ Variations of this point were made in public,¹⁶⁰ targeted,¹⁶¹ and internal consultations.¹⁶² The reality that victims remain disadvantaged in the court martial system relative to the civilian criminal justice system weakens the current system's **effectiveness**, and creates perceptions that the system is less **fair** and **legitimate**.

Limited victim-related provisions currently exist within the NDA. Many processes and procedures for the benefit and protection of victims that have existed in statutory form within the civilian criminal justice system for years do not currently exist in statutory form within the court martial system. For instance, the power to order a publication ban exists under the *Criminal Code* in relation to many situations and offences,¹⁶³ but is not expressly provided for under the NDA. In the absence of specific authority under the NDA, military judges have resorted to section 179(1)(d) of the NDA as authority to issue publication under the common law.¹⁶⁴

Similarly, matters such as "rape shield" protections and disclosure of victim records held by third parties must be addressed by the application of common law as the NDA does not include provisions similar to those in the *Criminal Code* found at section 276 (and following). Furthermore, section 278.1 (and following) of the *Criminal Code* sets out a detailed process for

¹⁵⁶ Gilles Létourneau, "L'effeuillage (strip-tease) du système de justice pénale militaire canadien" (21 March 2016), Global Military Justice Reform (blog), online : <<http://globalmjreform.blogspot.ca/2016/03/leffeuillage-strip-tease-du-systeme-de.html>>.

¹⁵⁷ NDA, *supra* note 39, s 230.1(b).

¹⁵⁸ *Criminal Code*, RCS 1985 c C-34, s 676(1)(a) [*Criminal Code*].

¹⁵⁹ See above, Chapter 4 (Consultation) at section 4.4.1 (Federal Ombudsman for Victims of Crime)..

¹⁶⁰ See above, Chapter 4 (Consultation) at section 4.3.1 (Summary of results).

¹⁶¹ See above, Chapter 4 (Consultation) at sections 4.4.1 (Federal Ombudsman for Victims of Crime), 4.4.3 (SMRC) and 4.4.4 (IJ 700).

¹⁶² See above, Chapter 4 (Consultation) at section 4.5.1 (CSRT-SM), 4.5.4.1.4 (35 CBG HQ) and 4.5.4.2.2 (RHFC).

¹⁶³ See, for instance, *Criminal Code*, *supra* note 158, ss 486.4 and 486.5, (sexual offences and proper administration of justice); s 517 (judicial interim release hearings); s 631(6) (jury selection); and ss 672.51 and 672.501 (Mental Disorder / Review Board hearings).

¹⁶⁴ See, for instance, *R v Rivas*, 2011 CM 2012; see also *Canadian Broadcasting Corp v Bolland*, [1995] 1 FCR 323

the protection of third-party records (i.e.: records that are not in the possession of or under the control of the Crown) that are sought by an accused person, such as medical or psychiatric records relating to a complainant in a sexual assault case. This statutory scheme was enacted in response to the SCC's decision in *R v O'Connor*,¹⁶⁵ and provides for a two-step process that is somewhat different than the process that the SCC set out in *O'Connor*. No equivalent scheme exists under the NDA, which means that a military judge who applies the common law (as established by the SCC in *O'Connor*) at a court martial will follow a different process than the one that Parliament determined was more appropriate within the civilian criminal justice system when it enacted section 278.1 (and following) of the *Criminal Code*. The differences between these processes – that typically apply for the benefit and protection of victims and complainants – could create perceptions that the court martial system is less **fair** and less **intelligible** than the civilian criminal justice system.

A number of provisions in Bill C-15, when brought into force, will provide victims of service offences with specific procedural rights. Victim impact statements will permit individual victims of offences, particularly those who have experienced significant, financial and emotional harm, to have a voice in the sentencing process. Restitution orders will allow the court martial to impose a restitution order on an offender in situations involving damage or loss of property, or bodily or psychological harm. This provision will permit restitution to victims of service offences without the need to resort to actions in civil court.

In spite of the positive changes that the implementation Bill C-15 will make for the benefit and protection of victims, the court martial system would still not provide the same extent of victim-centred processes and procedures as exist within the civilian criminal justice system.

The CMCRT also notes that some recent efforts have been made to improve the experiences of victims in the court martial system. The Director of Military Prosecutions recently updated his suite of Policy Directives to, among other things, better account for the needs of victims.¹⁶⁶

¹⁶⁵ *R v O'Connor*, 4 SCR 411.

¹⁶⁶ The Director of Military Prosecutions updated his Policy Directive 007/99, “Responding to Victims’ Needs”, on 17 May 2016 online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/responding-to-victims-needs.page>>. The updated Policy Directive acknowledges that: “[g]enerally, a victim requires more than the information required by other witnesses in court martial proceedings. For example, a victim of crime may feel aggrieved by decisions not to prosecute, or decisions to prosecute when they do not favour prosecution,” and directs that “[c]ounsel should keep the victim appropriately informed throughout the process.” The Policy Directive goes on to state that “[t]here are ways other than testimony whereby a victim can participate in court martial proceedings. The Prosecutor shall consider the victim in respect of the following: a. at any time that an accused is released from custody pending the completion of proceedings, the Prosecutor shall take reasonable steps to ensure the victim is aware of the release, the terms of release, and any amendment to terms of release; b. where the Prosecutor causes a final disposition of a matter by the exercise of prosecutorial discretion, he or she should ensure that victims of offences alleged are informed of the decision and the reasons; c. where the Prosecutor discloses to defence counsel information of a sensitive nature pertaining to the victim, he or she shall consider such steps as might be prudent to protect against inappropriate use or dissemination of the materials; d. the right of the victim to timely information pertaining to plea and sentence discussions; and e. participation of the victim in sentencing hearings, by means of viva voce testimony or otherwise” [footnotes omitted]. This Policy Directive exists alongside DMP Policy Directive 012/00, “Witness Interviews”, which was updated in May, 2016 as well. That Policy Directive further states: “Additional considerations apply in relation to the interview of a victim who requires more than the information required by all witnesses in court martial proceedings. With respect to a victim, the following principles apply: a. The Prosecutor shall treat all witnesses and victims in particular with courtesy, sensitivity and respect, bearing in mind the emotional interest one might reasonably expect the victim to

However, even though these updated Policy Directives had been in force for approximately one year at the time of the CMCRT's relevant targeted consultations, the CMCRT received submissions to the effect that victims continue to perceive **transparency** challenges at multiple stages of both the court martial and civilian criminal justice processes,¹⁶⁷ and acknowledges that these challenges weaken perceptions of the current system's **legitimacy**.

With respect to sexual offences, there remains a perception that the court martial system is not ideal for the handling of these offences as the civilian justice system, perhaps due to the large disparity in the volume of cases between these systems,¹⁶⁸ and perhaps due to the effects of rank and career, professional, and social impact on a military victim whose case proceeds in the court martial system.¹⁶⁹ These perceptions suggest that the current court martial system may be less **fair** than the civilian system to both victims and accused persons, which weakens the system's perceived **legitimacy**.

While the DMP has attempted to ensure that CMPS prosecutors have received additional training,¹⁷⁰ it is not clear that this training can compensate for the relatively low volume of cases that each prosecutor deals – recalling that each military prosecutor completes (on average) 3.8 courts martial per year,¹⁷¹ and that the Bronson Report (DMP) suggested that it would take 3-4 years for a civilian prosecutor (who complete over 100 trials per year)¹⁷² to become “fully competent.”¹⁷³ The CMCRT notes impressionistically that in many cases involving sexual assault charges, the DMP has relied upon reserve force prosecutors (who have extensive depth and breadth of experience as civilian prosecutors) to conduct prosecutions.

The CMCRT received further input from survivors of sexual misconduct concerning the training of court martial system actors, and the appropriateness of the system dealing with sexual offences, which also suggests that the current system faces **effectiveness** and **legitimacy** challenges in respect of how victims are treated:

have in the proceedings; b. The Prosecutor shall make all reasonable efforts to answer any questions posed by the victim in respect of the proceedings; c. The Prosecutor shall take all reasonable steps to ensure that the victim understands the nature of the proceedings; d. The Prosecutor shall, in appropriate cases, inform the victim of available support and counseling resources of which the Prosecutor is aware; e. The Prosecutor shall make all reasonable efforts to keep the victim informed with respect to the proceedings including plea and sentence discussions undertaken, any verdict, sentence or other final decision in the case; and f. The Prosecutor shall always consider the propriety of special accommodations, and shall discuss the availability of such matters with the victim in appropriate cases”. DMP Policy Directive 003/00, “Post-Charge Review”, also updated in May, 2016, further obliges the prosecutor to take into account the views of the victim in deciding whether or not to exercise jurisdiction, and directs the provision of information to victims whose ‘personal integrity’ has been violated, including being informed of any decision not to proceed and the reasons for that decision. The CMCRT received the above comment from the CSRT-SM notwithstanding that these updated Policy Directives had been in force for over a year at the time of the CMCRT's consultations. The submission from the SMRC, reproduced at Annex H, similarly indicated to the CMCRT that victims are perceiving transparency challenges at multiple stages of both the court martial and civilian criminal justice processes.

¹⁶⁷ See above, Chapter 4 (Consultation) at sections 4.4.3 (SMRC), 4.4.4 (IJ 700), and 4.5.1 (CSRT-SM).

¹⁶⁸ See above, Chapter 4 (Consultation) at section 4.4.4 (IJ 700).

¹⁶⁹ See above, Chapter 4 (Consultation) at section 4.5.5.2 (HMCS OTTAWA Crew).

¹⁷⁰ See DMP Annual Report 2016/2017, *supra* note 17 at 34, and at 58-59.

¹⁷¹ See Annex CC, ADM (RS) Spreadsheet – Prosecutions.

¹⁷² *Ibid.*

¹⁷³ Bronson Report (DMP), *supra* note 19 at 69.

All military judges should be held to the same standards as civilian judges and have Bill C-337 apply to them, mandating sexual assault law training and ongoing continuing education in this area.¹⁷⁴ As military law has many unique issues in this area, CAF should develop a military specific addition to this training for all military lawyers and judges and for all those that support this system including [Military Police] and medical personnel. More transparent oversight mechanism of judges when their behaviour/bias is in question personally or professionally. Sexual assault victims in the military tend to be female vs male and the perpetrator male and in a position of power professionally over the victim. Judges that have themselves been involved in fraternization cases should not be on the bench or at the very least should be recused from gender related cases.¹⁷⁵

Overall, despite proactive, positive efforts to improve the experiences of victims in the court martial system, they continue to be perceived by some as being disadvantaged relative to victims in civilian criminal courts.

7.3.8.2 Young Persons

There is no special regime within the court martial system to account for the special needs of accused persons who would be considered as “young persons” within the civilian criminal justice system. Although it is rare for offences involving such young persons to arise today within the court martial system, such cases still exist; for instance, a recruit who is 17 years old would be subject to CSD, and could be tried for an ordinary civilian criminal offence by a court martial that would involve processes and rules that are different from those under the *Youth Criminal Justice Act* that would apply if the person were to be tried in a civilian court. The CMCRT received no input during consultations in relation to young persons who are accused within the court martial system.

Nonetheless, the CMCRT assesses that the absence of any special procedures for young persons within the court martial system that have proven effective at promoting public order and welfare within the civilian criminal justice system calls into question the **effectiveness** and the **legitimacy** of the current court martial system’s treatment of young persons.

7.3.8.3 Aboriginal Persons

As noted above, at Chapter 2, there is currently no equivalent to section 718.2(e) of the *Criminal Code* within the NDA. This provision in the *Criminal Code* requires sentencing courts to take into account the principle that “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be

¹⁷⁴ The CMCRT notes that this bill, which would require mandatory sexual assault training for judges (among other things) has been characterized by some as constitutionally suspect. See, for instance, <http://policyoptions.irpp.org/magazines/may-2017/judicial-education-doesnt-breach-independence-but-bill-c-337-might/>.

¹⁷⁵ See above, Chapter 4 (Consultation) at section 4.4.4 (IJ 700). Regarding the IJ 700 comment about military judges who have themselves been involved in fraternization cases, the CMCRT notes a report of an allegation that the current Chief Military Judge may have committed a service offence by breaching the CAF’s policy on personal relationships by engaging in a relationship with a subordinate under the Chief Military Judge’s command, but also notes that a complaint to the Military Judges Inquiry Committee about this allegation was dismissed: https://www.thelawyersdaily.ca/articles/2075/military-judge-will-not-face-court-guns?article_related_content=1.

considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”

The leading case interpreting this provision is *R v Gladue*,¹⁷⁶ wherein the SCC affirmed that, in order to give effect to the provision, some evidence about the circumstances of any particular Aboriginal offender will be needed in order to assist the sentencing judge. Subsequent to this decision, it has become common practice for civilian criminal courts to order “Gladue” pre-sentence reports that draw attention to unique systemic factors that may have caused a particular Aboriginal offender to come before the court, and that provide information about community-based rehabilitation that may or may not be culturally appropriate.

In the absence of a provision that is equivalent to section 718.2(e) of the *Criminal Code* within the NDA, courts martial have typically not had the benefit of a “Gladue” report when sentencing Aboriginal offenders. However, in one recent case, an Aboriginal offender’s military defence counsel resourcefully sought and obtained a “Gladue” report on behalf of the offender, and offered it to the court martial to assist in determining the sentence. The court martial accepted this report, and found it useful.¹⁷⁷

Although the CMCRT did not receive any input during consultation on this point, the CMCRT assesses that the absence of any special procedures to account for the unique circumstances of aboriginal offenders within the court martial system that have proven effective at **generating accurate / correct sentencing outcomes** within the civilian criminal justice system calls into question the **effectiveness** and the **legitimacy** of the current court martial system’s treatment of aboriginal offenders.

7.3.9 Overall Assessment

The CMCRT was not mandated to assess the performance of people, and did not do so. This comprehensive review is not about people – it is about a system that, within this chapter, has been assessed as **somewhat effective** (mostly in terms of its ability to achieve a public order and welfare purpose), appears to have considerable **room for improvements in efficiency**, and, as a result, **faces challenges to its legitimacy**.

The most dedicated, industrious, and faithful individuals could not succeed in a system that is not fully designed and structured to achieve its stated purposes. The CMCRT noted the high degree of professionalism, loyalty, and ethics that were seen in all court martial system stakeholders it encountered as it conducted this review. All shared the same commitment to the fulfillment of their constitutional, statutory, and other roles within the court martial system.

7.4 Conclusion

The assessment of the current court martial system within this chapter suggests that this system – like every other justice system of which the CMCRT has knowledge – could likely benefit from at least some improvements.

¹⁷⁶ *R v Gladue*, [1999] 1 SCR 688.

¹⁷⁷ *R v Levi-Gould*, 2016 CM 4003.

Many of the areas discussed within this assessment where there appears to be the most potential for cross-cutting improvements to the court martial system are closely linked to some of the themes that emerged most frequently during the CMCRT's consultations (see Key Observations from Consultation – Chapter 4).

Specifically, as the above assessment has shown, delays within the court martial system challenge the system's effectiveness and efficiency. The perception among many of the stakeholders who were consulted that sentences are too lenient challenges the system's effectiveness and legitimacy. The perception among many of the stakeholders who were consulted that groups of key actors within the court martial system would benefit from greater criminal law, litigation, and military expertise challenges the system's legitimacy – and if the perceptions are objectively accurate, could undermine the system's effectiveness. Finally, the perception among many of the CAF leaders who commented upon this point – and who recognize and support the constitutional requirement for independent actors within the court martial system – that these independent military officers will make decisions that are not aligned with the CAF leaders' views as to what discipline requires under the circumstances challenges the system's legitimacy and effectiveness in achieving its disciplinary purpose.

In addition to these important challenges that relate directly to input that the CMCRT received during consultations, the above assessment also highlights the extent to which costs of the court martial system may be disproportionate, and signals how efficiency-based improvements to the system may alleviate some or all of this potential disproportionality.

The chapters that follow lay out several options for enhancement, according to the subject areas enumerated in the CMCRT's Terms of Reference. These options are focused **primarily** on reducing or eliminating the most significant and commonly noted weaknesses within the current court martial system, although many of the options also aim to enhance other aspects of the system in order to enhance the features that support the system's effectiveness, efficiency, and legitimacy.

Chapter 8 – Introduction to Option Description and Analysis

This chapter introduces the following nine chapters, which will each deal with different and discrete subject areas that were considered as part of the CMCR.

Rather than presenting a series of holistic options within this report – that package together ways to improve courts, panels, prosecution and defence counsel services, offences, sentences, evidence laws, appeals, and processes for vulnerable groups, as if these subject areas were all rigidly connected to one another – the CMCRT has adopted a more “menu-based” approach to its description and analysis of options.

Thus, for most of the above subject areas that are under consideration by the CMCRT, the team has considered a series of representative options, each of which could be combined with different options relating to every other subject area that is under consideration. The options that are described in the nine chapters that follow could therefore be mixed and matched with one another in many different possible combinations.

In each of the following nine chapters, representative options that all have some potential to enhance the combined principles of effectiveness, efficiency, and legitimacy will be described. After the description of each option, a detailed assessment as to how the implementation of that option would affect the 12 key features (see Chapter 6 – The Basis for a Court Martial System) that contribute to effectiveness, efficiency, and legitimacy will be provided.

A few points should be made at the outset about how each option is described and assessed within this report.

To the greatest extent possible, every assessment is grounded in a source of information (e.g.: internal CAF consultation; comparative analysis of another country’s system, etc.) that has already been discussed in this report, or that is clearly identified within the option assessment (through a footnote, or other means).

In some cases, aspects of an assessment of an option are grounded in reason and common sense, as applied by the CMCRT in its consideration of a particular option.

Assessments of different options are often not precisely quantifiable. The impact of an option on features like **timeliness** or **proportionality of human and financial resources** can generally be quantified to a certain extent. However, the impact of an option on features like **fairness** or **intelligibility** cannot realistically be expressed in a precise quantitative form. Consequently, when assessing the impact of any particular option on any particular feature, the CMCRT has attempted to identify whether such an impact would have a positive or negative effect, and has in some cases also attempted to express the magnitude of the impact in general terms through qualifiers (e.g.: “small,” “significant,” etc.).

Just as it is often impossible to ascertain with quantified precision how an option would affect a particular feature, it is equally impossible to express what the net effect of an option would be across all features (and therefore across the combined principles of effectiveness, efficiency, and

legitimacy) in a precisely quantified way. Consequently, after discussing each option's anticipated impact on each feature in the chapters that follow, the CMCRT does not attempt to offer any globalized assessment or ranking of the various options; rather the CMCRT acknowledges that a decision-maker may value certain features or principles more than others, and that these value judgements would have an impact on any globalized assessment or ranking of options. That being said, each option discussed in the following 9 chapters would offer some increases across the combined principles of effectiveness, efficiency, and legitimacy.

The CMCRT does not purport to have canvassed every possible option to improve the court martial system, nor to have directly "imported" any particular option from any other system for consideration within the Canadian court martial system. Instead, the CMCRT has attempted to describe and analyze a wide spectrum of different representative options (including options that are more focused on military actors than civilian actors and vice-versa; including options that would expand the jurisdiction of the court martial system and options that would contract the jurisdiction of the system, etc.) in order to offer subsequent decision-makers a broad snapshot of the different kinds of ways through which particular aspects of the court martial system could be enhanced. The CMCRT deliberated at length about how to structure each of the options so that each one would clearly offer the potential for improvement from the status quo, but fully acknowledges that other options, or other variations of the options discussed in the following chapters, could also be successful in creating positive change within the court martial system.

As noted in the previous chapter, the options discussed will focus upon mainly on reducing or eliminating the most significant and commonly noted weaknesses within the current court martial system, including: that the system takes too long to achieve its effect; the perception that sentences are too lenient; that groups of key actors within the court martial system would benefit from greater criminal law, litigation, and military expertise; that the current system sometimes creates a kind of disciplinary role confusion between commanders and justice system actors; and the objectively high costs of the system relative to its output. Some of the options also aim to improve other aspects of the system in order to enhance the features that support the system's effectiveness, efficiency, and legitimacy.

In each of the following nine chapters, representative options are described and assessed in "stand-alone" format. In other words, the CMCRT has provided assessments of each option in the abstract, detached from all considerations as to how other elements of the court martial system would be designed. This approach allows the CMCRT to objectively assess each option on its merits, in a way that is not dependent on complex combinations of choices about how each other aspect of the court martial system should be structured.

Within this report, the CMCRT does not make any recommendations, nor provide any legal advice, regarding any of the options discussed within this report. Keeping in mind the CMCRT's **Assumption #4 (Any proposed reforms must be patently constitutional, across the full spectrum of operations)**, it must be stressed that the options in the chapters that follow are discussed and analyzed strictly from a policy perspective, based upon criteria that were developed and described above, in Chapter 6.

Chapter 9 –Status and Institutional Structure of Tribunals (Courts)

9.1 Introduction

The CMCRT has divided the discussion of representative options related to the status and institutional structure of tribunals into two separate chapters: this one, focusing on the status and structure of courts, and the next chapter, focusing on the status and structure of panels.

As discussed in Chapter 7, there are aspects of the current court martial tribunal system that challenge the effectiveness, efficiency, and legitimacy of the court martial system overall. For instance, courts martial currently take, on average over the last five years, approximately **140 days** to complete from the time that charges are preferred by the DMP,¹ which contributes to the overall time from charging to trial completion of **434 days** within the current court martial system.² Additionally, the court martial tribunal system is perceived by some as **ineffective** to meet the disciplinary needs of the CAF chain of command due to a failure to produce **timely outcomes** and to **generate accurate / correct outcomes** when sentencing offenders. Further, from an **efficiency** perspective, there are reasons for concern that the current tribunal system produces its effects at a **disproportionate financial or human resources cost**. Lastly, on **legitimacy**, the CMCRT received comments that suggest that the tribunal system is perceived as **less fair** and **intelligible** than the civilian justice system's courts.

This chapter considers two representative options to change a number of aspects of the court martial tribunal system, with one option that is more military in character, and one option that is more civilian in character.

9.2 Overarching Considerations Relating to Tribunals / Courts

As a preliminary matter, the CMCRT notes that several overarching considerations relating to tribunals appear to emerge from the current comprehensive review that merit discussion at the outset.

9.2.1 Permanent or ad hoc

First, a policy choice exists as to whether to structure a tribunal in a permanent, standing arrangement, or in an ad hoc arrangement (as within the current system). Some observers have suggested that a permanent court would have a better ability to deal with preliminary matters, to quickly set matters down for hearing or trial, to implement rules of court, and to conduct more expedient hearings (without having to take an oath at the start of every trial).³ All of these changes

¹ See Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017 at 11.

² Canada, Department of National Defence, *Director of Military Prosecutions Annual Report 2016-2017* (Ottawa: Office of the Judge Advocate General, 2017), at 33.

³ Canada, Department of National Defence, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.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* (Ottawa: Department of National Defence, September 2003), at 25-28; Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage* (Ottawa: Department of National Defence, 2011) at 37-41.

would likely contribute positively to **more timely outcomes**, and **more proportionate financial and human resource costs** in ways that increase efficiency, for instance, by allowing the tribunal to accept early guilty pleas and to set down hearing dates and by permitting the court as a whole to deal with all hearings related to the matter.

However, it could be argued that the current ad hoc arrangement already permits many of the above possibilities. The NDA permits the Chief Military Judge to make rules governing different aspects of practice and procedure in the court martial system,⁴ although no such rules have yet been made. Furthermore, the NDA permits any military judge to deal with preliminary matters at any time after a charge has been preferred.⁵ Between these two provisions of the NDA, the benefits associated with establishing a permanent court may already be achievable within the current system.

Comparative analysis, both of foreign court martial systems⁶ and Canada's civilian criminal justice system,⁷ suggest that better case management strategies⁸ and systems would be advantageous within the court martial system in order to promote **more timely outcomes** and **more proportionate financial and human resource costs**. This point is difficult to dispute. However, it does not necessarily follow that the creation of a permanent court is the only way, or the best way, to implement a better case management system within the court martial system. It is arguable that such a system could be implemented today, independent of any changes to the current tribunal system, on the basis of authority that is already provided in the NDA.⁹

⁴ *National Defence Act*, RSC 1985, c N-5, s 165.3 [NDA].

⁵ *Ibid*, s 187.

⁶ See above, Chapter 5 (Comparative Study) at section 5.2.5 (UK).

⁷ See Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (June 2017) at 7 (Chair: The Honourable Bob Runciman), [Senate Report 2017] online: <https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court_Delays_Final_Report_e.pdf>. The Final report of the Standing Senate Committee on Legal and Constitutional Affairs (Senate Report 2017) recommended better use of case management in the civilian criminal justice system at 75:

This committee respects judicial independence and the judiciary's role in applying the common law and federal, provincial, and territorial statutes, including the Constitution and the *Charter of Rights and Freedoms*. At this time of reform and cultural shift, however, judges need to make broad efforts to take stock of case management practices and the opportunities provided by technology to modernize the administration of cases and courtrooms across the country.

⁸ For an example of where such a system has been successfully implemented by the judiciary in a court martial system, see "Memorandum 13 – Better Case Management (Court Martial)" in *Practice in the Service Courts – Collected Memoranda (Version 6)*, (London: Military Court Service, 2016) at 56, online: <<https://www.judiciary.gov.uk/wp-content/uploads/2015/05/practice-memo-ver-6-1Sep16.pdf>>. See also Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, (Ottawa: Bronson Consulting Group, 2008) [Bronson Report (DMP)], at 16:

We found that, with the exception of some recent initiatives on the part of the Chief Military Judge, modern case management techniques now widely used in the civilian criminal justice systems in Canada and elsewhere have generally not been applied to the Court Martial system. For example, there is little case-differentiation in the scheduling of trials with Standing Courts Martial routinely set to last one week, even when the allegations are relatively minor and the issues not complex.

⁹ NDA, *supra* note 4, s 165.3

9.2.2 Military or Civilian Judges

A policy choice exists as to whether it would be preferable to use military or civilian judges within a court martial system.

Generally speaking, consultation suggests that military judges are perceived as being capable of contributing to the **generation of accurate / correct outcomes** by bringing a level of military expertise to the tribunal that civilian judges will not necessarily possess.¹⁰ The CMCRT also notes that, in theory, military judges should also contribute to the system's **universality**, because their military status and training should permit them to be able to perform their judicial duties more practicably across the full spectrum of military operations. With respect to **universality**, however, the CMCRT notes that military judges may perceive that they cannot be required to perform the types of military training that would make them capable of performing their duties in more dangerous or austere environments,¹¹ which could mean that **universality** is unaffected by the military or civilian status of the judge.

Consultation suggests that civilian judges are perceived as being able to contribute to the **generation of accurate / correct outcomes** by bringing a level of adjudication and criminal law expertise to the tribunal that military judges will not necessarily possess.¹² Consultation similarly suggests that civilian judges are perceived as being able to contribute to the **fairness** of the tribunal (because of their independence from the CAF) and to the system's **intelligibility**, because civilian judges are more familiar to both members of the CAF and the broader public when it comes to the adjudication of criminal or penal offences.¹³ Additionally, comparative analysis suggests that other court martial systems that use civilian judges have not experienced problems with the **universality** of their tribunal systems.¹⁴

The CMCRT notes that, based upon the above discussion, reserve force military judges may represent a sort of hybrid judge – ideally, with comparable military status and experience to that which regular force military judges possess, but with potentially much more criminal law expertise from day-to-day practice in civilian criminal courts that deal with a significantly higher volume of cases than the court martial system. The link that reserve force personnel have to civilian society may also serve to strengthen perceptions of their independence from the CAF, and therefore of the **fairness** of proceedings over which they preside. In this sense, reserve force judges may possess a unique blend of status, skills, knowledge, and experience that would position them well to contribute to the **generation of accurate / correct and more timely** outcomes.

As this discussion indicates, the military or civilian status of a judge can have influences on a number of different features within a court martial system, so a policy choice for one type of judge

¹⁰ See above, Chapter 4 (Consultation) at sections 4.3.1 (Summary of Results), 4.5.4.2.1 (4 CDSG & 2 CMBG), 4.5.4.1.4 (35 CBQ HQ CWO) and 4.5.5.2 (HMCS OTTAWA Crew).

¹¹ See above, Chapter 4 (Consultation) at section 4.4.5 (LCol (ret'd) Perron).

¹² See above, Chapter 4 (Consultation) at sections 4.4.4 (IJ 700), 4.5.4.1.1 (2 Can Div Pers Svcs – CO), 4.5.4.1.2 (2 Can Div Pers Svcs – CWO), 4.5.4.2.1 (4 CDSG and 2 CMBG) and 4.5.4.2.2 (RHFC).

¹³ See above, Chapter 4 (Consultation) at sections 4.3.1 (Summary of Results), 4.4.5 (LCol (ret'd) Perron), 4.5.4.1.1 (2 Can Div Pers Svcs – CO), and 4.5.4.1.2 (2 Can Div Pers Svcs – CWO).

¹⁴ In particular, see above, Chapter 5 (Comparative Study) at sections 5.2.3 (New Zealand), 5.2.5 (United Kingdom), 5.2.7 (Denmark) and 5.2.10 (The Netherlands).

over another must consider both the positive and negative impacts that this choice will have across the combined principles of effectiveness, efficiency, and legitimacy.

9.2.3 Court Reporters: Military Personnel or Contracted Civilian Service Providers

A policy choice exists with respect to the provision of court reporting services between the use of full-time military personnel and the use of contracted civilian service providers. Generally speaking, the use of full-time military personnel will tend to incur **less proportionate financial and human resource costs** and will be **less scalable** because an established capability level will need to be maintained regardless of the volume of court reporting work that the system requires at any given point in time.

Additionally, although this point was not raised during consultations, the CMCRT is aware that the current mechanism of using military personnel for the provision of court reporting services does not lead to the production of transcripts in a **timely** manner. Notwithstanding QR&O 112.66, which requires that, “as soon as practical after the proceedings of a court martial are terminated,” a transcript of the proceedings is to be prepared, the CMCRT understands that it can take months to produce transcripts, and these will only be produced when a court martial decision is under appeal. This lack of timely transcripts may lead to systemic challenges in **generating accurate / correct outcomes**, since a military judge would be unable to rely on the transcript when deliberating or writing reasons for a decision.

The use of military personnel should, in theory, contribute to the system’s **universality**, because the military status and training of court reporters should permit them to be able to perform their judicial duties more practicably across the full spectrum of military operations. However, in practice, only a portion of one court martial has been held in an active theatre of operations over the last decade, and courts martial tend to be held only in safe and non-austere environments where the military status and training of the court reporters does not produce additional **universality** benefits.

Comparative analysis suggests that in systems where civilian court reporting services are used, transcripts are produced in a **timely** manner (generally within 24 hours) that may contribute to the **generation of accurate / correct outcomes**, at a **proportionate financial cost**, and in a manner that does not impact the system’s **universality**.¹⁵

9.2.4 Judicial Training Opportunities

Regardless of what type of judge presides within a court martial system, there may be some advantage to offering the judges opportunities to increase their military knowledge and expertise, through annual formalized training and exposure to the CAF.¹⁶ These opportunities, if judges engaged with them, could increase the **generation of accurate / correct outcomes** by ensuring that they are familiar with recent military practices and culture and the impact of misconduct on the CAF.

¹⁵ See above, Chapter 5 (Comparative Study) at sections 5.2.2 (Australia) and 5.2.5 (United Kingdom).

¹⁶ See above, Chapter 4 (Consultation), at section 4.5.4.2.1 (2 CMBG & 4 CDSG) and Chapter 5 (Comparative), at sections 5.2.9 (France) and 5.2.10 (The Netherlands).

However, it should be noted that a recent legislative proposal¹⁷ that would require judges to undertake sexual assault training has raised some questions regarding the constitutionality of the initiative relating to the administrative independence of the judiciary.¹⁸ While it is difficult to see any policy drawbacks associated with offers to make CAF familiarization and training opportunities available to judges, it must be acknowledged that such opportunities likely could not be mandatory, and may therefore have limited impact depending on the level of judicial willingness to engage in the opportunities that may exist.

With all of the overarching considerations relating to tribunals / courts in mind, the sections below will examine two options related to how a court or tribunal could be structured to improve upon various features of the current court martial system in ways that could have a positive impact on the effectiveness, efficiency, and legitimacy of the court martial system overall. As noted above, policy choices could easily be made to adapt these two options in a number of different ways to achieve slightly different effects.

9.3 Option 1: Military-only – Permanent military court composed of military judges

Under Option 1, a Permanent Military Court composed of military judges would be created. This court would continue to be an itinerant court, sitting inside and outside of Canada, using existing CAF infrastructure and logistics to support the court.

Under this option, the Chief Military Judge of the Permanent Military Court would be a regular force member. The current regular force judges would continue to sit, should they choose to, until a maximum compulsory retirement age of 60. Newly appointed judges would all be drawn from the reserve force panel that is currently provided for under the NDA¹⁹ and would be required to have at least ten years at the bar in order to be eligible to be appointed. Under this option, it would not be necessary for reserve force judges to be presently enrolled in the CAF in order to be considered for appointment, so long as they had prior military experience, as they could be enrolled in the reserve force immediately prior to being appointed as reserve force judges. This option would provide, to the extent possible, that persons appointed as reserve force judges must have experience, expertise and interest in, and sensitivity to, criminal law.²⁰

Under this option, reserve force judges would be remunerated on a *per diem* basis, following a set formula likely similar to the remuneration provided to judges under the *Judges Act*. Additionally, under this option, when reserve force military judges preside over courts martial they would sit

¹⁷ Bill C-337, *Judicial Accountability through Sexual Assault Law Training Act*, 1st Sess, 42th Parl, 2017 (First Reading in the Senate on 16 May 2017).

¹⁸ This bill, which would require mandatory sexual assault training for judges (among other things) has been characterized by some as constitutionally suspect. See, for instance, Thomas Harrison, “Judicial education doesn’t breach independence, but Bill C-337 might” Policy Options, 22 May 2017, online: <<http://policyoptions.irpp.org/magazines/may-2017/judicial-education-doesnt-breach-independence-but-bill-c-337-might/>>

¹⁹ NDA, *supra* note 4, s 165.22. At the time of this report there were no reserve force judges appointed to the panel.

²⁰ See for instance, the *Canadian Human Rights Act*, RSC 1985, c H-6, s 48.1(2) [CHRA]: “Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights.”

rank-less.²¹

Under this option, military units would still be required to provide members to act in certain roles to support a court martial, such as ‘officer of the court’.

9.3.1 Assessment of Option 1

It is assessed that relative to the current court martial system, this option would significantly increase the effectiveness, efficiency, and legitimacy of the current court martial system based on potentially significant increases in the **proportionality of financial and human resources costs**, potentially significant increases in **timely outcomes**, and potentially significant increases in the **generation of accurate / correct outcomes**. Furthermore, it is assessed that under Option 1, the court martial tribunal system would likely be **more scalable** and **intelligible**. Overall, the CMCRT assesses that this option would result in a significant improvement from the status quo in terms of the collective principles of effectiveness, efficiency, and legitimacy.

It is estimated that, under this option, there would be a significant increase in the **proportionality of financial and human resource costs** since, once the system has fully transformed to a reserve force judge model, military judges would only sit and be remunerated when required for a particular case. This could result in significant financial savings through a compensation model that, on an ongoing basis, ensures that just enough judicial resources are engaged by the court martial system, rather than paying annual salaries to full-time judges in a way that is less precisely calibrated to meet the exact needs of the system at any given time.

It is also assessed that this option could increase the **generation of accurate / correct outcomes** as the reserve force judges, under this option, would ideally be required by statute to have experience, expertise, and sensitivity and interest in, criminal law.²² Additionally, the military expertise may increase as the military judges would be provided with opportunities for annual training and exposure to the CAF.²³

It is assessed that this option would be as **scalable** as the current court martial tribunal system is in theory, but even **more scalable** than the current system is in practice, since it would shift toward a more heavily reserve force model over time where military judges would only sit and get paid when actually required, depending on the need for a court martial. As within the current system, the use of reserve force judges who are paid on this *per diem* compensation basis would permit the government to appoint a large number of judges to deal with unexpected increases in case volumes if the need ever arose, without incurring the liability of paying a full-time salary until all of the judges reached retirement age.²⁴ In contrast with the current system, reserve force judges would

²¹ For instance, in Denmark, prosecutors wear no military rank (although they have a separate insignia). See above, Chapter 5 (Comparative), at section 5.2.7 (Denmark).

²² See for instance, CHRA, *supra* note 20, s 48.1(2): “Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights.”

²³ See above, Chapter 4 (Consultation), at sections 4.5.3 (CANSOFCOM) and 4.5.4.2.1 (4 CDSG & 2 CMBG).

²⁴ There would be essentially no financial liability associated with the appointment of a reserve force judge; the liability would only be incurred when the reserve force judge is actually needed to preside in a particular case, and would only last for the duration of the case.

actually be appointed, and would be the principal judicial actors within the system.

However, it is estimated that under this option the court martial system may still be perceived as **less fair** by some, because accused military personnel would still be judged by members of the CAF. This perception may persist even if the judges are rank-less.²⁵ That being said, using rank-less judges could increase perceptions of fairness and independence in the system from the status quo. Additionally, the removal of military ranks from the judges' uniform could make the system more familiar to both the CAF and broader public, making the system **more intelligible**.

9.4 Option 2: Military-Civilian Combination – Permanent military court composed of civilian judges

Under Option 2, a Permanent Military Court composed of civilian judges would be created.²⁶

Under this option, civilian judges would be cross-appointed to the Permanent Military Court from the Superior Courts across Canada. They would be appointed in the same manner, and have the same security of tenure, as a Superior Court judge. They would have a maximum retirement age of 75.

The current military judges would be eligible to be appointed to the Permanent Military Court provided that they release from the CAF and provided that are first appointed as Superior Court judges. In other words, the former military judges would need to apply to be appointed as a Superior Court judge, and would be eligible, like any other eligible lawyers, to be appointed as Superior Court judges of the provinces in which they are called to the bar, and to the Permanent Military Court.

Under this option there would be an ideal target on the number of Superior Court judges who could

²⁵ See above, Chapter 4 (Consultation), at sections 4.4.5 (LCol (ret'd) Perron) and 4.5.5.2 (HMCS OTTAWA Crew), and Chapter 5 (Comparative), at sections 5.2.2 (Australia) and 5.2.8 (Finland). See also Michel W Drapeau & Gilles Létourneau, *Behind the times: Modernization of Canadian Military Criminal Justice*, (2017) at 80-81 [Drapeau & Létourneau].

See also *Draft Principles Governing the Administration of Justice through Military Tribunals*, 62nd Sess, UN Doc E/CN.4/2006/58 (2006), at para 46: “the parties have good reason to view the military judge as an officer who is capable of being ‘judge in his own cause’ in any case involving the armed forces as an institution, rather than a specialist judge on the same footing as any other. The presence of civilian judges in the composition of military tribunals can only reinforce the impartiality of such tribunals.”

See also, Gilles Létourneau, “Canadian military justice system's lack of independence unfair for military personnel”, *Ottawa Citizen* (22 January 2016), online: <<http://ottawacitizen.com/news/national/defence-watch/lack-of-independence-for-canadas-military-justice-system-unfair-for-military-personnel>>.

See also Noémi Mercier, “La justice militaire n’est pas indépendante”, *L’actualité* (18 January 2016), online: <<http://lactualite.com/societe/2016/01/18/la-justice-militaire-canadienne-nest-pas-independante/>>.

²⁶ This is similar in principle to current CMAC model. See s 234(2) NDA: “(2) The judges of the Court Martial Appeal Court are (a) not fewer than four judges of the Federal Court of Appeal or the Federal Court to be designated by the Governor in Council; and (b) any additional judges of a superior court of criminal jurisdiction who are appointed by the Governor in Council.” See also above Chapter 5 (Comparative), at sections 5.2.3 (New Zealand) and 5.2.5 (United Kingdom).

be cross-appointed to the Permanent Military Court. The purpose of this target would be to ensure that the cross-appointed judges have, to the extent possible, criminal and military expertise and, to reduce the costs associated with offering the judges military exposure and familiarization opportunities. However, more Superior Court judges would be cross-appointed to the Permanent Military Court in jurisdictions where there is a significant military presence, and less judges in jurisdictions without any standing military presence.²⁷ This option would provide that judges appointed to the Permanent Military Court preferably have experience, expertise, and interest in, and sensitivity to, criminal and military law.²⁸

The Chief Justice of the Permanent Military Court would be appointed from the Federal Court to facilitate the coordination that would be required as, under this option, the Permanent Military Court's headquarters would be co-located with Federal Court offices, and military cases would be heard in Federal Court locations across the country.²⁹

Under this option, cross-appointed judges would sit as judges of the Superior Court unless they are required to sit on the Permanent Military Court.³⁰ After consulting with the Chief Justices of the Superior Courts regarding the judges' availability, the Chief Justice of the Permanent Military Court would assign judges to military cases. Under this option, the cross-appointed judges would continue to receive their existing federal remuneration, and would not receive additional remuneration for military cases that they are assigned, as military cases would be incorporated into their already existing workload.³¹

Based on an estimated 50-100 trials³² per year flowing through the Permanent Military Court, and a moderate number of judges who would be cross-appointed, it is estimated that any additional workload for the cross-appointed judges would be almost negligible.

Under this option, if required, the Permanent Military Court could sit outside of Canada, and in such cases, cross-appointed judges would be statutorily deemed to have military status and would wear a rank-less military uniform.³³

9.4.1 Assessment of Option 2

It is assessed that relative to the current court martial system, implementation of this option would

²⁷ For example, the province of Ontario has several bases and full-time training facilities while the province of Prince Edward Island has less of a military presence, not having a base or full-time training facilities.

²⁸ See for instance, CHRA, *supra* note 20, s 48.1(2): "Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights."

²⁹ See Drapeau & Létourneau, *supra* note 25, at 80-81; Cooperation between the Federal Court and the Court Martial Appeal Court to share material and human resources currently exists and would not likely to present a serious challenge to the implementation of this option.

³⁰ See above Chapter 5 (Comparative), at section 5.2.5 (United Kingdom).

³¹ The CMCRT recognizes that this would require some federal-provincial negotiation to work out mechanisms to implement this option, as well as negotiation between the CAF and the federal Court Administration Service on similar issues.

³² The average number of courts martial from 2011/12-2015/16 was 63. However, there were 78 courts martial from 1 April 2007 to 31 March 2008 (Bronson Report (DMP), *supra* note 8, at 8).

³³ For instance, in Denmark, prosecutors wear no military rank (although they have a separate insignia), but have military status. See above, Chapter 5 (Comparative), at section 5.2.7 (Denmark).

likely increase effectiveness, efficiency, and legitimacy of the system by increasing the **proportionality of financial and human resources costs**, producing **more timely outcomes**, and likely **generating more accurate / correct outcomes** on criminal matters.

It is estimated that under this option there would be a significant increase in the **proportionality of the financial and human resource costs** in the court martial system as separate court infrastructure would not be required since the Permanent Military Court headquarters would be co-located with the Federal Court, and the cross-appointed judges would not require any additional salary or office space beyond what they have as Superior Court Judges. Additionally, the Court would use the resources of already existing Federal Court offices across the country.³⁴ Further, since the cross-appointed judges would be drawn from locations closest to the site of any particular military trial, financial savings could be gained from eliminating almost entirely the costs associated with temporary duty and travel. It would also eliminate the need for separate quadrennial Military Judges Compensation Committees,³⁵ since the compensation would be determined under the *Judges Act*.

It is also assessed that, under this option, there could be a substantial increase in the production of **timely outcomes**, and a reduction of delay in the court martial system. This option would significantly increase the level of criminal law and adjudication expertise within the judiciary dealing with military offences, since cross-appointed judges would simultaneously sit as Superior Court judges (where they regularly conduct complicated criminal and other trials). This expertise would likely be brought to bear in allowing the judges to deal with cases more quickly on their merits, leading to a potential increase in the **generation of accurate / correct outcomes**. However, military cases would rely upon resources drawn from the broader civilian justice apparatus under this option, which may result in delay and **less timely outcomes** due to the potential unavailability of judges when sitting on the Superior Court. Additionally, this option could create a perception that, even with opportunities for annual familiarization and exposure to the CAF and a preference for judges with prior military experience, the cross-appointed judges would not have sufficient military expertise.

Further, it is assessed that this option could provide an increase in **scalability** when compared with the current court martial tribunal system as the cross-appointed judges could be drawn from a very large pool of federally-appointed civilian judges, and because there would be almost no cost associated with increasing the number of these cross-appointed judges if such an increase were necessary to meet unexpected demand. Similarly, if volume in the Permanent Military Court decreased unexpectedly, then there would be no financial need to reduce the number of cross-appointed judges, and certainly no need to pay judges while they wait for their next military case (as would arguably be the case in the current court martial system if volume decreased unexpectedly). Instead, under this option, the cross-appointed judges would continue to preside in their Superior Court judicial capacity at all times when not presiding as part of the Permanent Military Court.

It is assessed that this option may increase the perceived **fairness, transparency, and intelligibility** of the court martial system because civilian judges, with military and criminal

³⁴ See Drapeau & Létourneau, *supra* note 25, at 80-81.

³⁵ NDA, *supra* note 4, s 165.33 (and following).

expertise (to the extent possible), would preside over cases. Under this option there would be less risk in perception that the judges would be unduly influenced by ranks of the participants, or that they would judge cases other than on the facts and law out of a sense of loyalty to the military family – since they would unequivocally be separate and independent from all aspect of the CAF. Additionally, comparative analysis and consultation has shown that this civilianization of the judiciary can have a substantial impact of perceptions of systemic **fairness**.³⁶ Further, as the trials could generally be held in Federal Court buildings and rooms (i.e.: not on military bases where access may be more controlled) it is assessed that the court martial tribunal system – in its actual operation – would be visible to the broad public (while still visible to the CAF public) in a way that increases **transparency**. Finally, because the public already understands and recognizes the status of civilian judges who adjudicate in respect of criminal and penal offences, this option may be more familiar and defensible to the public than the current system, and therefore **more intelligible**.

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³⁶ See, for instance, above Chapter 4 (Consultation), at sections 4.3.1 (Summary of Results), 4.5.4.1.1 (2 Can Div Pers Svcs – CO) and 4.5.4.1.2 (2 Can Div Pers Svcs – CWO). See also above Chapter 5 (Comparative), at sections 5.2.3 (New Zealand), 5.2.5 (United Kingdom), 5.2.7 (Denmark) and 5.3 (International Comparative Study – Summary of Lessons).

Chapter 10 – Status and Institutional Structure of Tribunals (Panels)

10.1 Introduction

As discussed in Chapter 9, the CMCRT has divided the discussion of the status and institutional structure of tribunals into two chapters. The previous chapter outlined representative options to improve the aspects of the current court martial system related to courts; this chapter will outline options to improve the status and institutional structure of panels within the court martial tribunal in order to improve the effectiveness, efficiency and legitimacy of the court martial system overall.

As canvassed in Chapter 7, there are aspects of the court martial system related to panels that challenge the effectiveness, efficiency and legitimacy of the court martial system. For instance, on efficiency, the CMCRT notes that when a General Court Martial is convened there is a **human resource cost** related to taking members away from their normal duties to act as finders of fact. Additional concerns arise relating to the **fairness**, and overall legitimacy, of panels. For example, junior ranking military members are not eligible to sit on a panel, regardless of the rank of the accused person, and since a panel is made up of military leaders, who are representatives of the same institution that is prosecuting the accused person and who may be influenced by their understanding of previous orders and direction, there may be a perception that the panel is unfair. Further, it is possible that members of the public, especially victims, may perceive military judges and military panels as ‘on the same team’ as the accused, and so more likely to treat him or her leniently or, even worse, allow the accused to escape with impunity.¹

As a preliminary consideration, to address the above noted challenges, the composition of panels within the current system could be open to all ranks, which would provide for a more representative panel and would likely be a more familiar model, making panels **more intelligible** and perceived as **more fair**. Additionally, a requirement for panel members to be drawn from the geographical area in the location of the court martial would result in a reduction of travel costs and would, therefore, make this aspect of the court martial system more financially **proportionate**.

In the event that further changes to panels were desired, this chapter discusses two representative options involving the potential for lay members to sit alongside a professional judge or the involvement of civilian juries. Each of the options discussed below could have a positive impact on the efficiency and legitimacy of the panel aspect of the court martial tribunal.

10.2 Option 1 – Lay Members of a Judicial Panel inside and outside of Canada

Under Option 1, two lay members would sit in military cases alongside a professional judge, both inside and outside of Canada.² As a group, these actors would constitute a judicial panel that would collectively determine the verdict and sentence in each case. The professional judge would preside over the trial, and would alone determine all questions other than the ultimate finding and

¹ See above, Chapter 9 (Tribunals).

² See above, Chapter 5 (Comparative), at sections 5.2.8 (Finland), 5.2.10 (The Netherlands), and 5.2.11 (Singapore and Israel) for examples of jurisdictions that use this type of lay member on a judicial panel. Similarly, see section 5.2.3 (New Zealand) for an example of a jurisdiction where lay members and judges determine sentence together.

sentence, which would be determined by the whole panel following deliberation. The professional judge would also be responsible for writing reasons that reflect the decisions of the judicial panel.

Under this option, lay members could be civilian part-time Governor in Council appointees for non-renewable, fixed terms.³ The lay members would not be subordinate to non-judicial authorities, including military authorities and would be removable only for cause on the recommendation of an inquiry committee, potentially similar to the current Military Judges Inquiry Committee.⁴ Under this option, the persons appointed as lay members would ideally be recently retired CAF members who had successfully undergone basic training and who were honourably released from the CAF, but in any case would have recent experience, expertise and interest in, and sensitivity to the CAF.⁵ To ensure that the lay members of the panel have the sufficient degree of military expertise, lay members of the panel could be required to have had at least 10 years in the CAF and be no more than 2 years post-retirement. Under this option, remuneration for lay members could be on a *per diem* basis, which could be similar to the *per diem* rates applicable to reserve force military judges or to deputy judges in the superior courts. Ideally, there would be a large pool of lay members appointed from across all geographic regions in Canada, so that lay members from the relatively local area could be assigned to any court martial in Canada.

Under this option, the purpose of having lay members on a judicial panel – to bring specialized understanding of matters of general military knowledge to the judicial panel in order to assist the panel in determining a finding and a sentence – would be explicitly provided for in law. Decisions to convict or acquit (or regarding any other ultimate finding⁶) and decisions about what sentence is to be imposed, would be determined by the unanimous votes of the two lay members and the presiding professional judge.⁷ All other decisions would be determined by the professional judge alone.

Under this option, lay members would only sit on cases involving uniquely military offences or civilian offences with a clear military nexus. As noted above in describing Option 1, it is estimated that essentially all courts martial would involve either uniquely military offences or civilian offences with a clear military nexus, so the panel involving lay members would be used at essentially every court martial.

10.2.1 Assessment of Option 1

It is assessed that relative to the current court martial system, implementation of this option would increase the effectiveness, efficiency, and legitimacy of the court martial system based on a likely increase in the **proportionality of financial and human resources costs**, the **generation of**

³ This model would be equivalent to many other federal boards and tribunals that use part-time Governor in Council appointees.

⁴ *National Defence Act*, RSC 1985, c N-5, s. 165.31.

⁵ See for instance, the *Canadian Human Rights Act*, RSC 1985, c H-6, s 48.1(2): “Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights”; the CMCRT acknowledges that this option could also accommodate serving military members to act as lay members of a judicial panel. However, the CMCRT assesses that this change would not achieve the same benefits as discussed in Option 1 providing for recently retired military members.

⁶ Such as a finding that a person is not responsible on account of mental disorder.

⁷ In New Zealand and in the United Kingdom, the sentence is determined by the judge and the board/panel. See above, Chapter 5 (Consultation), at sections 5.2.3 (New Zealand), 5.2.5 (United Kingdom) and 5.2.11 (Israel and Singapore).

accurate / correct outcomes, fairness, and intelligibility. However, it is also estimated that, under this option, there would likely be a decline in the **universality** of the court martial system, and in its ability to achieve **timely outcomes**.

It is estimated that, under this option, there would be a small increase in the **proportionality of the financial and human resources costs** of the court martial system as this option would draw upon lay members from the same geographic area as the place where a court martial is being held, and would see them paid accordingly on a *per diem* basis (reducing both travel and other significant compensation costs such as those associated with pensions, health care, etc., that must be taken into account when using military members to perform equivalent duties). However, savings might not be significant as, under this option, the 5-member panel model that is rarely used in the current system would be replaced by a 2-lay judge model that would be used in essentially every case under this option.

It is also assessed that this option could create a lower possibility of achieving **timely outcomes** within the court martial system, as it could conceivably take more time to schedule a trial that fits within the schedule of the judge and two lay members who make up the judicial panel than within the schedule of the one judge who presides most commonly within the current system.

Further, it is assessed that, under this option, there would likely be a significant increase in the **generation of accurate / correct outcomes**. This effect would be achieved by having lay members with military expertise involved in the decision-making processes of essentially all cases, thereby ensuring that military expertise is incorporated into the outcome⁸ and that professional judges are exposed in every case to input of lay judges with recent, direct military experience.

Under this option, it is also assessed that the **universality** of the court martial system might decrease as the court martial system could not necessarily operate across the full spectrum of operations, since lay members might not be as easily deployable to theatres of operations as judges and panel members are in the current system. If this option was to be pursued, there could be ways to mitigate this potential decrease in universality by permitting judge alone trials for courts martial overseas or by holding the trial in Canada.

It is estimated that, under this option, there is a high possibility of the court martial system being perceived as **more fair**. This increase may be achieved because lay members would be civilians who are fully independent of the CAF, and would more clearly have nothing to gain or lose from any decisions that they make in respect of CAF members who appear before them. To many observers, the mere fact that decision-makers in the court martial system wear uniforms and are part of the CAF leads to the conclusion that the decision-makers cannot act fairly – and this option would alleviate this concern altogether by eliminating the panel/jury concept entirely.

It is assessed that this option may slightly increase the **intelligibility** of the court martial system. It must be noted that this option would be far less familiar to the public because the concept of

⁸ Consultation suggests that military judges sometimes also appear to be lacking military expertise (e.g. due to the time they have been appointed on the bench or to their lack of combat experience. See above, Chapter 4 (Consultation), at sections 4.5.3 (CANSOFCOM), 4.5.4.1.1 (2 Can Div Pers Svcs – CO) and 4.5.4.2.1 (4 CDSG & 2 CMBG).

using “lay members” to adjudicate in criminal trials is completely foreign to Canadian law.⁹ However, in spite of this lack of familiarity, it is assessed that this option would be both comprehensible and defensible to the public, since the public understands and accepts the overwhelming importance that independence has for those who judge criminal trials (as reflected within section 11(d) of the *Charter*), and since the public seems to acknowledge that independence is much more in issue for those who are part of the CAF than those who are civilians outside of the CAF, and over whom the CAF has not control or authority. Furthermore, the British legal tradition, from which the Canadian common law tradition has evolved, has historically used and continues to use lay judges (magistrates) who judge alone in lower-level criminal trials,¹⁰ and lay judges or something akin to lay members are used in many other places under Canadian law.¹¹

10.3 Option 2 – Jury Trials inside of Canada and judge-alone trials outside of Canada

Under Option 2, where a trial is being held in Canada, all accused military personnel would have a right to a jury trial under substantially similar circumstances as within the civilian criminal justice system.¹² Where a trial is being held outside of Canada, there would be no right to a jury trial and trials would proceed by judge alone.

This option would provide for the creation of a federal jury¹³ in each case and would create the possibility of differently composed juries from province to province if it were decided to incorporate different provincial jury eligibility laws depending on the location of a trial.¹⁴ Further, this option could mirror the scheme provided for in the *Criminal Code* and civilian common law relating to the selection of jurors, challenges for cause, challenges to the array, peremptory challenges, and all other matters relevant to the use of a jury in a criminal trial.

10.3.1 Assessment of Option 2

It is assessed that relative to the current court martial system, implementation of this option would increase the efficiency and legitimacy of the court martial system based on a likely significant

⁹ Criminal trials in Canada do not involve lay judges akin to Magistrates who preside over minor criminal matters at Magistrates Court in the United Kingdom or lay judges who preside alongside professional judges in criminal trials in many European countries. By contrast, justices of the peace and members of boards and tribunals do not necessarily have formal legal training. (e.g. Veterans Review and Appeal Board).

¹⁰ See Courts and Tribunal Judiciary, online: <<https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/magistrates/>>.

¹¹ For instance, lay members sit on professional disciplinary bodies such as the Law Society Tribunal for the Law Society of Ontario. In Canada, jurors would be drawn from civilian society. If military cases were to be held in civilian criminal courts, the ordinary jury process would run its course. If military cases were to be held in the Permanent Military Court, the NDA would provide that the jury shall be selected according to the procedures of applicable in the province where the case is being heard. See Society of Upper Canada, online: <https://lawsocietytribunal.ca/Pages/tribunalmemberbio_en.aspx>.

¹² See above, Chapter 13 (Offences).

¹³ This federal jury for trials of military offences would be provided for pursuant to the federal government’s constitutional power to regulate the Militia, Military and Naval Service, and Defence under s. 91(7) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No. 5.

¹⁴ In some provinces, such as Ontario, military members may be disqualified to serve as jurors, in others (such as Quebec) they may request to be exempted from jury duty, while in others they may neither be disqualified nor exempted from jury duty.

increase in the **proportionality of financial and human resources costs** and an increase in **fairness** and **intelligibility**.

It is estimated that this option would likely increase the **proportionality of financial and human resource costs** of the court martial system and could result in significant long-term financial and human resource savings for the government, since the cost of employing jurors would effectively be borne by the jurors themselves (who only are paid a nominal amount during their jury service) rather than by the government (who would otherwise pay a salary to panel members within the current court martial system). However, some additional time costs would be incurred by the Court Martial Administrator (or any other position that serves a “registrant-type function) who would likely need to liaise with justice officials from each province to (ideally) leverage their information management practices for identifying jurors.

It is assessed that this option would have a significantly negative impact on **timely outcomes** in the court martial system. Recent data suggests that criminal trials in Canadian Superior Courts (the only place where criminal jury trials are held) take, on average 365 days from first appearance to conclusion, and an average of 15 appearances (although some portion of this delay is attributable to preliminary inquiries in the civilian criminal justice system).¹⁵ It could be reasonably expected that jury trials within the court martial system would take at least as long. This delay could make it virtually impossible for the system to produce suitably timely outcomes in any cases involving a jury.

It is also estimated that this option would have a positive effect on the **generation of accurate / correct outcomes** in criminal law matters. Canadian jurisprudence has long recognized that juries are “a cornerstone of Canadian criminal law”¹⁶, of the Canadian criminal justice system, that they represent “the citizen’s ultimate protection against oppressive laws and the oppressive enforcement of the law,”¹⁷ and that Canada has “a centuries-old tradition of juries reaching fair and courageous verdicts.”¹⁸ However, this option could deprive the court martial system of useful military expertise, since both inside and outside of Canada, there would be no guarantee that such expertise would be present within the tribunal. This could have a negative impact on the **generation of accurate / correct outcomes**.

Further, it is assessed that this option could maintain the current system’s **universality** and could operate across the full spectrum of operations as the provision for judge-alone trials allows for a court martial to continue to take place outside of Canada where it could be difficult or impossible to empanel a jury.

Lastly, it is assessed that this option may be perceived as **more fair** and **intelligible**, to the broader public and the CAF, compared to the current court martial system, as accused military personnel in Canada would have the same right to a jury trial as any other Canadian under almost all

¹⁵ Ashley Maxwell, *Adult criminal court statistics in Canada, 2014/2015*, (Ottawa: Canadian Centre for Justice Statistics – Statistics Canada, 2017), at 11, online: <<http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14699-eng.pdf>>.

¹⁶ *R v Find*, 2001 SCC 32, at para 1.

¹⁷ *R v Morgentaler*, [1988] 1 SCR 30, at 78.

¹⁸ *R v G (RM)*, [1996] 3 SCR 362, at para 13.

circumstances. Although s. 11(f) of the *Charter* specifically contemplates that a civilian jury trial would not be offered under military law, the concept of a jury in a criminal trial is more familiar and comprehensible than the concept of the military panel, to both the broader Canadian public and the CAF public, thereby making it **more intelligible**. However, some may still perceive that the system is **less fair** due to the differential access to a jury that would exist for offences committed inside and outside of Canada. Furthermore, the fact that military personnel would be entitled to a trial by a jury composed of different groups of people from province to province¹⁹ could also lead to perceptions of unfairness.

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¹⁹ If it is decided to incorporate the different provincial laws of jury eligibility such that the law in the province where a trial is being held would always apply to a trial by court martial.

Chapter 11 – Status and Institutional Structure of a Prosecution Service

11.1 Introduction

As discussed in Chapter 7, there are several aspects of the current system of prosecution of service offences that detract from the overall effectiveness, efficiency, and legitimacy of the court martial system overall. For example, on efficiency and effectiveness, the prosecution system's ability to achieve **proportionate financial and human resource costs**, and to contribute to the **generation of accurate / correct and timely outcomes** appear to leave room for improvements. Additionally, from a legitimacy perspective the prosecution service faces challenges relating to perceptions **fairness, transparency, and intelligibility**.

This chapter discusses a number of aspects of the prosecution service that could be changed such as modifying the current military model of prosecutions, the creation of a specialized civilian prosecution service, and the assignment of military prosecutions to civilian prosecutors within the Public Prosecution Service of Canada (PPSC).

Prior to describing these representative options in detail, as a preliminary consideration, given both the recommendations of the Bronson Report (DMP) and the LeSage Report, all of the options discussed in this chapter could also include provisions requiring a CO to provide, and the relevant Director of Prosecutions to consider, input to the prosecutors relevant to their decision to prosecute, and relevant to the appropriate sentence in the event the accused person is found guilty.¹ The CMCRT notes that OR&O Chapter 109 already permits but does not require COs and referral authorities to provide recommendations to the DMP, but the DMP is not obligated to consider these recommendations. It is estimated that adopting this approach would assist the prosecution service in contributing to the generation of **accurate / correct outcomes** and in appropriately contributing to the expression of **community condemnation of misconduct by military personnel**.

Furthermore, given **Assumption #1**, all of the options could be adapted to provide that the responsibility for laying charges for criminal misconduct would be assumed by prosecutors instead of Commanding Officers or military police personnel from the National Investigation Service.²

¹ Regarding sentencing, this was recommended in Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, (Ottawa: Bronson Consulting Group, 2008), Recommendation 5.4, at 35 [Bronson Report (DMP)]: “We recommend that, when referring cases to DMP for prosecution, the Commanding Officers indicate their views on the appropriate sentence that should be imposed for the offence if the accused pleads guilty or if adjudged guilty after a Court Martial trial. Those opinions should be taken into consideration by the RMP's, but would not be binding on them.” This is what was also recommended in Canada, Department of National Defence, Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage (Ottawa: Department of National Defence, 2011), Recommendation No 20, at 37 [LeSage Report]: “Commanding Officers should communicate their views on sentencing to the prosecutor, who would take them into consideration, but not be bound by them”; see also above, Chapter 5 (Comparative) at sections 5.2.2 (Australia), 5.2.3 (New Zealand) and 5.2.9 (France).

² Currently, *Queen's Regulations and Orders for the Canadian Forces* 107.02 provides that a commanding officer, an officer or non-commissioned member authorized by a commanding officer to lay charges; and a member of the military police assigned to investigative duties with the Canadian Forces National Investigation Service may lay charges under the Code of Service Discipline.

Within the current court martial system, once a charge has been laid, it is referred to a Regional Military Prosecutor, who determines in consideration of a number of factors whether to prefer (i.e.: proceed with) a charge. This process not only causes delay but can have a detrimental effect on discipline in cases where the prosecutor decides not to prefer a charge that a CO has laid, since the prosecutor's decision can appear to undermine the CO's decision.³ Shifting the authority to lay charges to prosecutors would likely result in significant gains in achieving **timely outcomes** (since less decision-makers would be involved in the process of determining whether a charge should proceed to court martial), **transparency** (since published prosecution service policies generally lay out a uniform test for laying a charge, and often permit or require prosecutors to explain their decisions to affected stakeholders), and **intelligibility** (since this change would put charge-laying decisions into the hands of justice system professionals, as within the civilian criminal justice system), thereby promoting **efficiency** and in the **legitimacy** of the system.⁴ All options discussed below could incorporate provisions for prosecutors to become charge-layers.⁵

An associated option could also include providing for better communication mechanisms between the prosecution service and members of the military chain of command, in order to promote mutual understanding of the roles and concerns of each group. The CMCRT notes that the current DMP is making extensive efforts to foster communication with senior CAF leaders, but also notes that some of the CAF leaders who were consulted as part of the current review continue to feel that reasons for decisions within the prosecution service could be provided more explicitly and clearly in many cases.

In each of the options described below, it would be possible to structure the relevant prosecution on either a regionalized or a centralized basis. On the one hand, regionalization may offer benefits in terms of reducing travel costs of prosecutors that would contribute to the achievement of **proportionate financial and human resource costs**. On the other hand, however, the extra administrative support overhead costs that might be associated with regionalization (such as maintaining multiple office sites across Canada, and some staff to support prosecutors at each site) may exceed the costs of travel that would otherwise be incurred in a centralized model. It is not immediately apparent whether a regionalized or a centralized prosecution service would be more capable of promoting **proportionate financial and human resource costs**, so each option below could be adapted into both regionalized and centralized variants.

Finally, as a preliminary consideration, the CMCRT notes that significant progress toward producing **more timely outcomes** could potentially be made by expediting the referral of charges to the prosecution service. If, for instance, a charge were to be sent immediately to the prosecution service after it is laid, then approximately 100 days of delay that currently exists between the time a charge is laid and the time the charge is referred to the DMP could be eliminated.⁶ Upon

³ See above, Chapter 4 (Consultation), at sections 4.5.3 (CANSOFCOM), 4.5.4.1.3 (5 RGC), 4.5.4.2.1 (4 CDSG & 2 CMBG), 4.5.7.1 (1 Health Service Group) and 4.6 (Key Observations). See also above, Chapter 7 (Assessment) at section 7.3.2 (Status and Institutional Structure of the Prosecution Service).

⁴ Similar models of charge pre-screening have been adopted in three provinces (British Columbia, New Brunswick, and Quebec) and the practice has been found to increase the efficiency of the system, particularly in terms of preventing overcharging. See Toronto Police Accountability Coalition, *Pre-charge Screening: A report* (11 June 2017) online: <http://tpac.ca/show_issues.cfm?id=209>.

⁵ As is the case in British Columbia.

⁶ See Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017, at 11.

receiving a charge, the prosecution service could then immediately begin assessing whether to proceed with the charge at a court martial (by considering the sufficiency of the evidence), while concurrently seeking input from relevant military authorities at the unit, formation, or higher level, about the CAF's interest in a prosecution at a court martial.⁷ The CMCRT notes that – while not directly related to the current prosecution system – this option for reducing delay would be highly beneficial, and would still permit prosecutors to acquire information about the military interest in a case that they need, albeit in a more expeditious manner.

The below sections will examine three representative options related to how the prosecution services could be structured to improve upon various features of the current court martial system and have a positive impact on the effectiveness, efficiency and legitimacy of the court martial system overall.

11.2 Common Elements of Options 1 and 2

There are certain elements that are shared by Options 1 and 2 that could increase **transparency** and **intelligibility**. First, both of these options would continue to maintain a separate prosecution service for the prosecution of service offences, distinct from the civilian prosecution service in the civilian criminal justice system. The head of the separate prosecution service would need to be a lawyer with at least ten years good standing at the bar of a province and would serve for a term and tenure similar to that of the civilian federal Director of Public Prosecutions (DPP).⁸ Also similar to the DPP model, these options could provide for a selection committee that would assess candidates for the position and make recommendations to the Minister.⁹ The head of prosecutions would be appointed by the Governor in Council, on the recommendation of the Minister of National Defence and would be appointed for a term of not more than seven years.¹⁰ The head of prosecutions would not be eligible to be reappointed for a further term of office.¹¹ This mirroring of the DPP scheme may be a more familiar and comprehensible structure and may increase the **intelligibility** of the system.

Second, under Options 1 and 2, the head of military prosecutions would clearly act under the supervision, and on behalf, of the Minister of National Defence, instead of the JAG. This change could reduce perceptions expressed by some stakeholders that the current governance structure for the military prosecution service is challenged in terms of **fairness** and **intelligibility**.¹² Further, under this option, the head of prosecutions would have his/her own budget as a separate line item within the Department of National Defence budget. This budget would include funds for the administrative costs of the Office, payment of the costs of witnesses for the prosecution, and any

⁷ A similar model for dealing with charges is used within the Australian court martial system. See above, Chapter 5 (Comparative) at section 5.2.2 (Australia).

⁸ *Director of Public Prosecutions Act*, SC 2006, c 9, s 121, s 5 [DPP Act] : The DPP holds office, during good behavior, for the duration of his/her term, but may be removed by the Governor in Council at any time at any time for cause with the support of a resolution of the House of Commons to that effect.

⁹ Adopt similar language to the DPP Act, *ibid*, s 4.

¹⁰ The DPP is appointed for seven years: *ibid*, s 5.

¹¹ *Ibid*, s 5.

¹² See above, Chapter 4 (Consultation), at sections 4.4.5 (LCol (Ret'd) Perron) and 4.4.6 (LCdr (Ret'd) Lévesque).

other costs associated with the prosecution of cases.¹³ Additionally, the administrative independence that these options would provide would permit the head of the prosecution service to more directly control the selection or hiring of prosecutors, and the specialized prosecutorial career progression of these prosecutors when compared to extent of the DMP's control over these matters within the current system – all of which could assist the prosecution service in contributing to the **generation of accurate / correct outcomes** through expertise and to **timely outcomes** and **proportionate human resource costs** as the prosecutors will be able to fulfill their roles more efficiently due to a greater level of experience. Under these options, the head of prosecutions would be accountable to the Minister for the time and expenses expended under this budget.¹⁴

Third, under both of these options, there could be a reduction in the number of full-time prosecutors. As discussed in Chapter 7, there are currently approximately 17 full-time prosecutors¹⁵ who in 2016-2017 handled a total of 300 file (the highest number in the last 4 years).¹⁶ This results in approximately 17.6 files per military prosecutor for the year.¹⁷ By way of contrast, the federal prosecution service employs, or otherwise contracts out, prosecution services to 945 lawyers and handles 72,358 files.¹⁸ This results in approximately 76 files per civilian prosecutor per year. Even acknowledging that there may be differences in the complexity of the files considered, the quality of investigations, the extent of travel required, and the processes by which files are referred to the respective prosecution services, these numbers seem to suggest that a significant reduction in the number of full-time equivalent prosecutors should be possible.¹⁹ In order to implement modest change incrementally and to account for the civilian work placements of prosecutors (discussed in the Option 1 below), the travel time required to appear at courts martial, and to provide for unforeseen circumstances (such as prolonged periods of illness or maternity / paternity leave), these options would reduce the number of prosecutors in the prosecution service to an initial level of approximately half the size of the current staffing levels. This change could increase the **proportionality of financial and human resource costs** of the

¹³ Canada, Department of National Defence, *Provision of Defence Counsel Services in the Canadian Forces*, Report of the Defence Counsel Study Team (Ottawa: Office of the Judge Advocate General, 1997), at 54 [DDCS Report 1997] (regarding the Director of Defence Counsel Services).

¹⁴ Similarly to what was recommended for defence counsels. See Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of Defence Counsel Services*, (Ottawa: Bronson Consulting Group, 2009), at 32 [Bronson Report (DDCS)]: “While independence is absolutely required in order for Canadian Forces members to be properly represented, in our opinion, it has led to a lack of accountability in the offices of the DCS.” See also, at 30: “We recommend that the DCS purchase and employ time management software such as Amicus in order to appropriately track their time on a file.”

¹⁵ See Annex CC, ADM(RS) – Prosecutions. The data for 2015/2016 indicates that there were 17.2 full-time-equivalent military prosecutors.

¹⁶ See Canada, Department of National Defence, *Director of Military Prosecutions Annual Report 2016-17* (Ottawa: Office of the Judge Advocate General, 2017), at 11 [DMP Annual Report 2016-2017].

¹⁷ “Files” included all pre- and post-charge files from all sources that were handled by prosecutors during the year.

¹⁸ See *Public Prosecution Service of Canada Annual Report, 2015-2016*, [PPSC Annual Report 2015-2016] online: <http://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2015_2016/index.html>. The report states that there were 536 staff lawyers and 408 standing agents from private law firms resulting in 944 lawyers.

¹⁹ See above, Chapter 4 (Consultation) at section 4.5.4.2.2 (RHFC). The CO, who is also the civilian Crown Attorney for Waterloo region, stated the following in the context of commenting on the appropriate skills and experience required for military judicial appointments: “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.”

prosecution service, as discussed separately in the options below.

Fourth, under both of these options, there would be a requirement for the prosecutors to complete work placements with other prosecution services for at least six to twelve months upon being assigned to the prosecution service and for at least three continuous months after that in order to increase their criminal law expertise.²⁰ It is estimated that this would increase the **generation of accurate / correct outcomes**.

11.3 Option 1: Military Model – Military officer as Director of Military Prosecutions and Military prosecutors

Under Option 1, there would continue to be a military prosecution service led by a military legal officer appointed as Director of Military Prosecutions (the DMP).

Under this option, the DMP would continue to be assisted by military prosecutors.²¹ This option would create a sub-occupation of “Military Prosecutor” within the “Legal Officer” occupation, and the functional/managing authority for this sub-occupation would be the DMP. The DMP would have the sole authority to select military prosecutors – ideally from among those who are interested and have shown proficiency in criminal law. Under this option, a career litigation track for military prosecutors would be intended,²² with some possibility for military prosecutors to

²⁰ This is what was recommended in the Bronson Report (DMP), *supra* note 1 at 70:

Unlike their civilian counterparts, new military prosecutors do not get much experience by handling large volume of cases. Although they have some access to experienced Reservists, and may also consult with each other, RMP's are not exposed, on a daily basis, to the same mix of prosecutors with varying experience as in the civilian system. We believe, therefore, that it would be very beneficial for new military prosecutors to be seconded for at least six to twelve months to an active civilian prosecution service. [...] A similar opportunity should be repeated after several years of experience for military prosecutors to be seconded to a civilian prosecution office for a period of time that can be negotiated. An example would be that an experienced military prosecutor could have an opportunity to “junior” to a civilian prosecutor on a serious case, such as a homicide.

According to DMP, some steps have been taken to implement a secondment-type arrangement with Quebec's civilian prosecution service (see Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017, at 33)

²¹ *National Defence Act*, RSC 1985, c N-5, s 165.1 [NDA].

²² This is what was recommended in the Bronson Report (DMP), *supra* note 1 at 13: “There is a need to recognize that prosecution is a speciality in the legal profession and it is not reasonable to expect that the work can be done effectively and efficiently by military lawyers who are ‘generalists’; The development of a corps of highly experience military lawyers who specialize in litigation, whether as prosecutors or defence counsel should be encouraged;”

See also, Bronson Report (DMP), *ibid* at 21:

the military legal officer was expected, if not encouraged, to be a “generalist” in several aspects of military law. [...] This is quite foreign to a civilian prosecution service where the prosecutor is expected to become a courtroom specialist, as is borne out by our examination of the Prosecutions Offices in New Brunswick, Nunavut and Ontario. In our experience, the prosecutor must become a specialist and must be viewed as such because of the amount of knowledge that they must acquire with respect to criminal legislation, case law, legal texts and advocacy skills. The fact that RMP may not be regarded as having to be a specialist may have the effect on the skill-sets that they are able to achieve in prosecutions, with an indirect impact on the increasing delay because of their lack of experience.

return from this career track at their request.²³ Further, military prosecutors would be required to work in placements with civilian prosecution services for at least six to twelve months upon being selected into the “Military Prosecutor” sub-occupation, and at least three continuous months per year after that.²⁴

It appears this is what the American Military Justice System is heading towards to as well. The United States are considering requiring the Army and Air Force JAG Corps to establish career litigation tracks for uniformed attorneys. For now, they have required the services to conduct a five-year “pilot” program to ensure that trial counsel and defense counsel have sufficient experience and knowledge and to issue a report at the end of those five years on their “findings.” See online: <<http://dailysignal.com/2017/02/21/latest-case-of-jag-malpractice-shows-pressing-need-for-reform/>> <<http://dailysignal.com/2016/05/12/a-career-litigation-track-is-necessary-for-army-and-air-force-jags/>>

²³ Bronson Report (DMP), *supra* note 1 at 12-13: “Most RMP’s have not been in their positions for very long and particularly lack the court experience that makes it easy for seasoned prosecutor to quickly assess a file [...] The initial appointment to the position of RMP should be for a minimum of 5 years. After that, RMP’s should be permitted to remain in the position as long as they wish if their performance is satisfactory.”

Bronson Report (DMP), *ibid* at 69: “Based on our experience in the civilian prosecution service, we have found that it takes the average lawyer three to four years of regular courtroom experience dealing with progressively more complex and serious cases to become fully competent as a prosecutor. We believe that, because of the relatively small volume of cases that RMP’s deal with at the trial level, the number of years required for them to become fully proficient as prosecutors will be even greater.”

According to DMP,

the current practice of the Office of the JAG (OJAG) usually aligns with the recommendation that the Bronson Report made that the “initial appointment to the position of (regional military prosecutor) should be for a minimum of five years.” My experience confirms the wisdom of this approach, which in my view should be formalized. I also see the wisdom of the Bronson Report recommendation that “the military prosecutors be encouraged to stay as long as possible in the RMP position. They should be permitted to spend their career as military prosecutors if they so wish. (see Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017, at 31-32)

See also DMP Annual Report 2016-2017, *supra* note 16 at 32-33 :

Moreover, CMPS welcomed 5 new captains just prior to or during the reporting period. Given their lack of experience, they take more time to adequately review files of equal complexity than a more experienced prosecutor would take. They are initially assigned files of lesser complexity, generally requiring less time. They require supervision and assistance from more senior prosecutors, which takes away from the time the latter can devote to their files. The more senior prosecutors end up with a greater proportion of the more complex cases requiring more time, with less time to devote to them than if there was a greater number of senior prosecutors on the team.

See also above, Chapter 5 (Comparative) at section 5.2.2 (Australia).

²⁴ This is what was recommended in the Bronson Report (DMP), *supra* note 1 at 70:

Unlike their civilian counterparts, new military prosecutors do not get much experience by handling large volume of cases. Although they have some access to experienced Reservists, and may also consult with each other, RMP’s are not exposed, on a daily basis, to the same mix of prosecutors with varying experience as in the civilian system. We believe, therefore, that it would be very beneficial for new military prosecutors to be seconded for at least six to twelve months to an active civilian prosecution service [...] A similar opportunity should be repeated after several years of experience for military prosecutors to be seconded to a civilian prosecution office for a period of time that can be negotiated. An example would be that an experienced military prosecutor could have an opportunity to “junior” to a civilian prosecutor on a serious case, such as a homicide.

Under this option, the DMP and military prosecutors would – as a matter of policy, and in a manner similar to investigators from the National Investigation Service – wear civilian clothing as their day-to-day dress.²⁵ Additionally, rather than wearing a uniform for trial, military prosecutors would robe in the same way that counsel robe for appearance in Superior Court within Canada’s civilian justice system.²⁶

Lastly, under this option, (and in addition to the current possibility for the DMP to rely upon reserve force members and the appointment of “special prosecutors”²⁷) there would be provision for the appointment of civilian prosecutors in specific cases, to provide the DMP with flexibility to use civilian counsel as agents acting on the DMP’s behalf when required.²⁸

11.3.1 Assessment of Option 1

It is assessed that relative to the current court martial system, this option could significantly increase the efficiency and effectiveness of the current court martial system based on a potential increase in **proportionate financial and human resources costs, timely outcomes, and in the generation of accurate / correct outcomes**.

First, this option would provide for a reduction in the number of military prosecutors of approximately one half (as a maximum initial level of staffing). This should represent a significant decrease in the expenditures of the current military prosecution service, down from approximately \$3 million²⁹ to an estimated \$2 million – assuming that a reduction in the number of prosecutors would also lead to some reduction in civilian support staff and operating and maintenance costs of the prosecution service, but not necessarily a reduction in travel costs). As a result of this decrease, there would be a corresponding decrease in the cost of prosecution services per court martial from approximately \$48,000 to \$32,000, assuming the same number of court martial trials.³⁰ These decreases represent the potential for significant savings and a decrease in the **financial costs** of

According to DMP,

in FY 2016/17, DMP obtained the concurrence of the Public Prosecution Service of Canada, of the Ontario’s Criminal Law Division, and of the Directeur des Poursuites Criminelles et Pénales du Quebec to have military prosecutors temporarily employed as a crown prosecutors with these civilian prosecution services, for the purpose of maintaining and enhancing legal skills as prosecutors, including in areas such as sexual offences. The required paperwork is currently being generated with a view of having a number of military prosecutors working on civilian cases starting in the upcoming months. DMP plans on subsequently expanding such cooperation with other provincial prosecution services. DMP will be careful that the number of prosecutors who will undertake responsibilities with civilian prosecution services at any given time, as well as the amount of time spent on those tasks, do not unduly affect the conduct of military prosecutions. (see Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017, at 33)

²⁵ See above, Chapter 5 (Comparative) at section 5.2.7 (Denmark).

²⁶ This is what was recommended for defence counsels in the DDOS Report 1997, *supra* note 13 at 41.

²⁷ See Director of Military Prosecutions, “DMP Policy Directive 016/17 Appointment of Special Prosecutors” (12 April 2017), online: <<http://www.forces.gc.ca/en/about-policies-standards-legal/special-prosecutors-appointment.page>>.

²⁸ Similar to section 249.21(1) of the NDA regarding defence counsel services: “The Director of Defence Counsel Services may be assisted by persons who are barristers or advocates with standing at the bar of a province.”

²⁹ See Annex EE, ADM (RS) – Overall Comparison. The average expenditure for DMP is \$3,038,107.10. Half of this cost is \$1,519,053.55.

³⁰ *Ibid.* The average cost of DMP per CM is \$48,966.42. Half of this cost is \$24,035.66.

the system.

Additionally, as this option would create a military prosecutor sub-occupation and a “career litigation” track, allowing for essentially indefinite periods of employment as a military prosecutor and a lower turnover rate within the military prosecution service, if desired by the DMP and the military prosecutor,³¹ and the requirement for work placements, the level of criminal law expertise should correspondingly increase, thereby increasing the military prosecution service’s ability to achieve **more accurate / correct** and **timely outcomes**.³² This is primarily due to the fact that with more specialization among the military prosecutors, less time should be required per file, which should allow military prosecutors to take on more files per prosecutor. It should be noted that, from a **human resources** perspective, the creation of a sub-occupation within the legal officer occupation and a “career litigation” track could be perceived as career-limiting for those legal officers interested in a broader career with the Office of the JAG, which could limit the number of legal officers interested in military prosecutions.³³ However, as the “career litigation” track would be solely managed by the DMP, the various career opportunities within the military prosecution service could be of specific interest to those legal officers with a special interest in litigation work. Additionally, the sub-occupation of military prosecutions within the broader legal officer occupation would still permit (but not guarantee) transitions out of the military prosecution service back into the Office of the JAG under defined circumstances (through a sub-occupation transfer back to legal officer), so there would be some possibility for military prosecutors who wish to be involved in the broader work of the Office of the JAG to transfer back to such work. It should be noted, however, that the creation of “career litigation” track may contribute to a decrease in **accurate / correct outcomes** as there may be a decrease in the military expertise of the prosecution service.

³¹ Refer to DMP Annual Report 2016-2017, *supra* note 16 at 32-33; 58 :

Regular Force military prosecutors, not unlike other legal officers, are posted from within the Office of the JAG to their prosecution position for a limited period of time, usually three to five years. As such, the training that they receive must support both their current employment as military prosecutors as well as their professional development as officers and military lawyers. The relative brevity of an officer’s posting with the CMPS requires a significant and ongoing organizational commitment to provide him or her with the formal training and practical experience necessary to develop the skills, knowledge and judgment essential in an effective military prosecutor.

See also DDOS Report 1997, *supra* note 13 at 61-62 (discussing CF Legal Aid Service Using Staff Lawyers): “Defence counsel may see this as a learning position only or as a dead end job considering the small size of the organization and the very limited possibility of advancement. This may well result in a high turnover rate with the accompanying reduction in counsel experience.”

³² Bronson Report (DMP), *supra* note 1 at 75: “We believe that, generally, the problem in the CMPS that contributes to delay is the lack of senior experienced litigators as opposed to overall shortage of prosecutors. In fact, we consider that the total complement of prosecutors is sufficient, given the relatively small caseload.”

³³ See Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017, at 31:

I also recognize, however, the challenges that this recommendation presents. For instance, given its small size, career progression opportunities uniquely within the CMPS would be more limited than within the broader OJAG from whence prosecutors come. This could act as an obstacle to attracting interesting and interested candidates. Also, being exposed, as legal advisor, to various facets of the CAF’s “business” enhances the quality of military prosecutors.

It is estimated that, under this option the court martial system would likely be perceived as **more fair, transparent, and intelligible** than at present. First, as this option (combined with the common elements shared with Option 2 discussed above) would make the DMP responsible to the Minister of National Defence, a civilian political authority, and not the JAG, a senior military officer, there could be an increase in perceived **transparency** because it might alleviate any perceptions that the JAG or any other senior military authority might inappropriately influence the DMP. Further, as the DMP would have management of his or her own budget and management of the military prosecutors' careers, this could also increase **transparency** in respect of posting, promotion, honours and awards, and all other manner of decisions regarding the careers of military prosecutors that are currently influenced by legal officers from outside of the office of the military prosecution service. However, the DMP and the prosecution service could still be perceived by some individuals (both from the broader public and the CAF) as being **less fair** because there would continue to be a separate office of military prosecutions, composed of military officers and there are some who believe that it is impossible for someone in uniform to make decisions objectively and without bias about a fellow member of the profession of arms. It is also possible that this military presence within the prosecution service would result in a perceived lack of independence, regardless of whether the Director of Military Prosecution reports directly to the Minister of National Defence.³⁴

11.4 Option 2: Civilian DND Model – DND Civilian Director of Service Prosecutions and DND civilian prosecutors

Under option 2, there would continue to be a prosecution service, separate from the civilian prosecution authorities, to handle the prosecution of service offences. This service could be called the Service Prosecutions Office (SPO). Under this option, a civilian lawyer would be the Director of Service Prosecutions (the DSP).

Under this option, the DSP would be assisted by approximately 6 civilian service prosecutors³⁵ within the Service Prosecutions Office (SPO). These civilian service prosecutors would only handle and prosecute service prosecutions of military personnel under the *Code of Service Discipline*. Under this option, the civilian service prosecutors could not be currently enrolled in the CAF and the criteria for selecting civilian service prosecutors would include criminal and military law expertise, litigation and advocacy skills and experience as well as an interest in litigation work. Upon joining the SPO, civilian service prosecutors would be provided with training and familiarization in relation to the CAF.³⁶ Further, under this option, the DSP would be authorized to hire contract lawyers or agents as prosecutors, in specific cases.

³⁴ See above, Chapter 5 (Comparative) at sections 5.2.2 (Australia), 5.2.5 (United Kingdom), 5.2.6 (Norway), 5.2.7 (Denmark) and 5.2.10 (The Netherlands). See also Major Bas van Hoek, "Military Criminal Justice in the Netherlands: The 'Civil Swing' of the Military Judicial Order" in Alison Duxbury and Matthew Groves, eds, *Military Justice in the Modern Age* (Cambridge: Cambridge UP, 2016) at 218-237 (regarding The Netherlands): "the Committee opined that the appointment of a service member on active duty as public prosecutor would contravene the requirement of independence."

³⁵ See assessment of the appropriate number of prosecutors in a separate prosecution service under Common Elements of Options 1 and 2 of this Chapter. It is estimated that one less civilian prosecutor would be required under Option 2 as there would be no requirement for civilian service prosecutors to complete military training, contrary to military prosecutors in Option 1.

³⁶ See above, Chapter 5 (Comparative) at sections 5.2.8 (Finland) and 5.2.9 (France).

Although the civilian service prosecutors would be a part of DND, their conditions of employment would include the requirement to deploy if and when needed. The service prosecutors would be paid at the same rate as has been negotiated by federal prosecutors within the Public Prosecution Service of Canada.³⁷

Under this option, the civilian service prosecutors would need to take into account CAF-specific considerations when deciding to proceed with a charge,³⁸ including:

- the effect of a particular offence on the maintenance of the CAF's operational readiness; and,
- the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence.

Prosecutors would be required to provide written reasons to charge layers in any case where they decide not to proceed with a charge on the sole basis that the matter is too trivial, if military authorities have recommended that a prosecution proceed.³⁹

In order to ensure that civilian service prosecutors have access to military expertise to inform their decisions, Option 2 would also provide for the embedding of military experts within the office in a manner that is similar to the Dutch "Centre of Military Legal Expertise". This Centre would be staffed with a civilian lawyer, a CAF member from the National Investigation Service who is a senior investigator as the Police Liaison Officer, and a currently serving military officer at the rank of Major to act as the CAF Liaison Officer between the CAF and the SPO. The hiring criteria for the civilian lawyer in the Centre would include a requirement for recent experience, expertise and interest in, and sensitivity to, military law.⁴⁰ The CAF and NIS Liaison Officers would assist the civilian service prosecutors on matters of military organisation, operating procedures and the specific military rules and regulations that may be directly relevant to the civilian service prosecutors.⁴¹ The Centre would be co-located in the National Capital Region with the DSP, ideally in National Defence Headquarters, and would leverage the DSP's administrative support resources.

11.4.1 Assessment of Option 2

It is assessed that relative to the current prosecution system, implementation of this option would significantly increase the efficiency and effectiveness of the current court martial system based on a likely increase in timely outcomes, and in the generation of accurate / correct outcomes. Implementation of this option could also increase the legitimacy of the court martial system based on a slight increase transparency, fairness, and intelligibility.

³⁷ The civilian service prosecutors would be paid the core rate of PPSC pay (i.e. not the Toronto rate).

³⁸ See above, Chapter 5 (Comparative) at section 5.2.8 (Finland).

³⁹ *Ibid.*

⁴⁰ See, for instance, *Canadian Human Rights Act*, RSC 1985, c H-6, s 48.1(2) [CHRA]: "Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights."

⁴¹ See above, Chapter 5 (Comparative) at section 5.2.10 (The Netherlands).

It is assessed that Option 2 would significantly improve the **proportionality of financial and human resources costs** of the current court martial system.

Similar to Option 1, on **financial costs**, this option would provide for a reduction in the number of service prosecutors by approximately one half (as a maximum level of staffing). This should represent a significant decrease in the expenditures of the current military prosecution service, down from approximately \$3 million⁴² to an estimated \$2 million – assuming that a reduction in the number of prosecutors would also lead to some reduction in civilian support staff and operating and maintenance costs of the prosecution service, but not necessarily a reduction in travel costs). As a result of this decrease, there would be a corresponding decrease in the cost of prosecution services per court martial from approximately \$48,000 to \$32,000, assuming the same number of court martial trials.⁴³ These decreases represent the potential for significant savings and a decrease in the **financial costs** of the system.

As part of this option would include the creation of the Centre for Military Legal Expertise, there would be a cost associated with the salary of the civilian lawyer hired for this Centre. The salaries of the CAF liaison officer and the NIS senior investigator would not be a part of the DSP's budget. Additionally, the provision for a CAF liaison officer and an NIS senior investigator contribute to lowering the human resource costs of the current court martial system as the military expertise would be resident in the Centre and accessible as required by the civilian service prosecutors.

It is possible that, under this option, there may be a high rate of turnover if the civilian service prosecutors do not see any possibility for future career advancement given the lack of internal hierarchy in which to advance,⁴⁴ which could pose a **human resources** challenge.

It is estimated that Option 2 would increase the **generation of accurate / correct outcomes** through the increase in expertise of the prosecutors and with the creation of the Centre of Military Legal Expertise, Option 2 would continue to preserve the military expertise of the prosecution service.

It is assessed that, under this option, the court martial system would likely be perceived as **more fair**⁴⁵ as the Director and the prosecutors would be civilian. It is estimated that placing civilians in these roles would likely be perceived as **more fair** by both the broader public and the CAF as civilians could be perceived as being more objective when making decisions about CAF members than other CAF members making those decisions would be under the same circumstances.

⁴² Annex EE, ADM (RS) – Overall Comparison. The average expenditure for DMP is \$3,038,107.10. Half of this cost is \$1,519,053.55.

⁴³ *Ibid.* The average cost of DMP per CM is \$48,966.42. Half of this cost is \$24,035.66.

⁴⁴ See DDCCS Report 1997, *supra* note 13, at 61-62 regarding defence counsel: "Defence counsel may see this as a learning position only or as a dead end job considering the small size of the organization and the very limited possibility of advancement. This may well result in a high turnover rate with the accompanying reduction in counsel experience."

⁴⁵ See above, Chapter 4 (Consultation) at sections 4.4.5 (LCol (ret'd) Perron), 4.4.6 (LCdr (ret'd) Levesque), 4.4.7 (President of the ISMLLW) and Chapter 5 (Comparative) at sections 5.2.5 (United Kingdom), 5.2.6 (Norway), 5.2.7 (Denmark) and 5.2.8 (Finland). See also, Annex C, Discussion Board of the CMCR's Public Consultation. In particular, see submission from Martin Gagnon, 26 October 2016.

It is assessed that, under Option 2, **transparency** of the court martial system would be improved. First, as Option 2 would make the DSP responsible to the Minister of National Defence, a civilian political authority, and not the JAG, a senior military officer, there could be an increase in **transparency** since it would be less possible for military authorities to improperly exert influence on the civilian DSP.

Additionally, this option may result in the system being perceived as **more intelligible** as, under this option, it would be prosecutors from outside of the CAF organization making decisions about whether to prosecute, which is familiar and defensible when compared with what is done in many civilian jurisdictions, where outside prosecutors are often relied upon when an accused person comes from within the same Ministry or Department as the normal prosecutors.

11.5 Option 3: Specialized PPSC Prosecutions – PPSC Deputy Director of Service Prosecutions, and specialized PPSC prosecutors

Under Option 3, there would no longer be a separate prosecution service outside of the civilian federal prosecution service. Instead, under this option, a position for a specialized Deputy Director of Public Prosecutions – Service Prosecutions (DDP SP) would be created within the Public Prosecution Service of Canada (PPSC). The DDP SP would report to the Director of Public Prosecutions. The DDP SP would be required to be a lawyer with at least ten years in good standing at the bar, and could not currently be enrolled in the CAF (even in the reserve force). Ideally, the competition for this position would seek an individual with experience, expertise and interest in, and sensitivity to, military law.⁴⁶

Under this option, the DDP SP would be supported by a specialized cadre of civilian service prosecutors, the minimum number for which could be established in statute. Under this option, these specialized PPSC prosecutors could be identified from PPSC offices across Canada,⁴⁷ or centralized in the National Capital Region, and they would deal with military cases as needed, in addition to dealing with civilian cases at all other times. Under this option, there would be statutory requirement for military cases to be dealt with as a matter of priority by the specialized PPSC prosecutors. The specialized PPSC prosecutors could not be currently enrolled in the CAF. Under this option, one of the conditions of employment within this specialized section of PPSC prosecutors would be the requirement to deploy, if and when needed. Further, the DDP SP would have authority to use or appoint contractors or agents to act as specialized prosecutors in specific cases.

Under this option, the civilian service prosecutors would need to take into account CAF-specific considerations when deciding to proceed with a charge,⁴⁸ including:

- the effect of a particular offence on the maintenance of the CAF's operational readiness; and,

⁴⁶ See, for instance, CHRA, *supra* note 40, s 48.1(2): "Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights."

⁴⁷ This is what was recommended in the Bronson Report (DMP), *supra* note 1 at 73-74.

⁴⁸ See above, Chapter 5 (Comparative) at section 5.2.8 (Finland).

- the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence.

Prosecutors would be required to provide written reasons to charge-layers in any case where they decide not to proceed with a charge on the sole basis that the matter is too trivial, if military authorities have recommended that a prosecution proceed.

In order to ensure that the specialized PPSC prosecutors have access to military expertise for the purposes of informing their decisions, Option 3 would also establish a Centre of Military Legal Expertise within the DDP SP's office. This Centre would be staffed with a civilian expert in military law, a CAF member from the National Investigation Service who is a senior investigator as the Police Liaison Officer, and a currently serving military officer at the rank of Major to act as the CAF Liaison Officer between the CAF and the DDP SP. The hiring criteria for the civilian expert in military law in the Centre would include a requirement for recent experience, expertise and interest in, and sensitivity to, military law. The CAF and NIS Liaison Officers would assist the civilian service prosecutors on matters of military organisation, operating procedures and the specific military rules and regulations that may be directly relevant to the civilian service prosecutors.⁴⁹ The CAF Liaison Officer would also facilitate training about and exposure to CAF matters for the select PPSC specialized prosecutors that would be located across Canada. The Centre would be co-located in the National Capital Region with the DDP SP, and would leverage his or her administrative support.

11.5.1 Assessment of Option 3

The CMCRT assesses that relative to the current court martial system, this option could significantly increase the efficiency and effectiveness of the court martial system based on a likely increase in the **proportionality of financial and human resources costs**, and **timely outcomes**. This option could increase the system's ability to **generate accurate / correct outcomes**, but it would involve a loss of military expertise relative to the status quo, which could be problematic. This option may slightly increase the legitimacy of the court martial system based on increases in **fairness, transparency, and intelligibility**.

In the paragraphs that follow, an assessment of Option 3's anticipated impact on each relevant feature that a court martial system needs (in order to support the three core principles of effectiveness, efficiency and legitimacy) is provided. Only those features that would likely be affected by Option 3 are discussed.

It is estimated that by eliminating the military prosecution service and transferring its work to a section within PPSC, substantial **financial and human resource costs** savings could be achieved. First, approximately \$3 million⁵⁰ in savings for the CAF would be achieved within the current court martial system. As court martial files would be distributed amongst specialized PPSC lawyers already within that prosecution service, it is likely that only a small portion of this \$3 million savings would need to be transferred to the PPSC. Given the typical PPSC caseload,

⁴⁹ See above, Chapter 5 (Comparative) at section 5.2.10 (The Netherlands).

⁵⁰ Annex EE, ADM (RS) – Overall Comparison. The average expenditure for DMP is \$3,038,107.10.

approximately two full-time equivalent PPSC prosecutors would likely be needed to handle the typical volume of cases within the court martial system, so this option would likely need to provide for a 2-prosecutor increase to PPSC's national complement of prosecutors in order to offset the increase in (military) cases for which PPSC would be responsible. Funds would also be needed to create a new section within PPSC, and the position of Deputy Director of Prosecutions – Service Prosecutions. Funding would also be needed to establish the Centre for Military Expertise, as with Option 2. The CAF and NIS Liaison Officer positions could be established from within existing CAF resources.

As this discussion suggests, Option 3 is quite similar to Option 2 in many ways, except for three main differences. First, under Option 3, PPSC would bear the costs of prosecuting military cases instead of the CAF bearing this cost. Second, less civilian prosecutorial resources would be needed under Option 3 because so much existing PPSC expertise and infrastructure could be used under this option. For instance, there is already a regionalized structure for PPSC offices that could be leveraged by the DDP SP, and the workload resulting from the approximately 157 files⁵¹ in the current court martial system would be shared among the offices. Additional significant gains would be made, under this option, given the significant criminal law expertise of the specialized PPSC prosecutors who would continue to maintain a similar criminal law caseload in addition to their military files. This will have a correspondingly positive impact on efficiency, because with greater specialization in criminal and over time in military matters, the more efficiently the PPSC prosecutors would be able to complete file reviews and court preparations.⁵² And, third, prosecutions would be conducted on behalf of the Attorney General, rather than the Minister of National Defence.⁵³

Overall, it is assessed that Option 3 has a very high possibility of achieving proportionate financial and human resources costs.

It is estimated that Option 3 would likely result in **more accurate / correct** and **timely outcomes** due to the high degree of criminal law expertise and criminal trial experience of the specialized PPSC prosecutors. It is assessed that, from a prosecution perspective, this option would provide for throughput that is at least as fast as within the civilian criminal justice system, and likely a small amount faster because of a statutory requirement to deal with military cases as a matter of priority. Indications from both the Bronson Report – Prosecutions and the DPP's most recent annual report suggest that this option could therefore reduce the extent of prosecutorial time spent on any given file from several weeks or months, down to a matter of days or even hours.⁵⁴ The

⁵¹ Canada, Department of National Defence, *Director of Military Prosecutions Annual Report 2015-2016* (Ottawa: Office of the Judge Advocate General, 2016).

⁵² See also, Bronson Report (DMP), *supra* note 1 at 25: "in New Brunswick, Ontario and Nunavut, civilian prosecutors have much greater case loads than do their RMP counterparts. They do not have the time to conduct lengthy pre and post-charges reviews."

⁵³ It would appear that this change would not have a significant impact on the ability of the Minister of National Defence to communicate his views in respect of a particular matter, although further study could be required.

⁵⁴ Bronson Report (DMP), *supra* note 1 at 45:

In Ontario and Nunavut, the post-charge reviews are done by prosecutors based on briefs submitted by the police. For most cases, the reviews take a matter of minutes to complete. Often, one prosecutor will be assigned the responsibility of doing post-charge reviews of a large number of cases, sometimes as many as 20 a day. The prosecutors rely on the summary of the facts provided by the police, a summary of the

creation of a Centre of Military Legal Expertise and CAF familiarization training and exposure would continue to ensure that military expertise is available to the specialized PPSC prosecutors. Additionally, as this option would continue the regionalization of the prosecution offices, specialized PPSC prosecutors would remain located in the jurisdiction where offences are committed and would continue to be aware of local conditions and problems, thereby enabling civilian service prosecutors to incorporate these factors into their analysis and carriage of any given case.⁵⁵

It is estimated that, under Option 3, the court martial system would likely be perceived as **more fair**,⁵⁶ **transparent**, and **intelligible** because the court martial system would be brought to parity with the civilian justice system by using essentially identical resources and expertise as that which is used within the civilian justice system. Additionally, as under this option, the DDP SP would be responsible to the DPP (and through her to the Attorney General), a civilian authority, and not to the JAG, a senior military officer, there would be an increase in **transparency** since it would be less possible for anyone to perceive that military authorities may improperly exert influence on the civilian DDP SP. The creation of a specialized section of PPSC prosecutors is a model that is familiar, comprehensible and defensible to the broader and CAF public.

statements of the witnesses and a copy of the Information containing the charges that have been laid by the police. It would be unusual for prosecutors to view video-tapes of witness statements.
PPSC Annual Report 2015-2016, *supra* note 18:

Each file handled by the PPSC is assigned a complexity rating. Low-complexity files are generally defined as routine cases involving the application of well-established legal principles to relatively straightforward facts. Medium-complexity files generally involve more complex factual situations or legal issues. High-complexity files are comprised of cases involving highly complex factual elements; cases involving complex or multiple legal issues requiring significant preparation time; or cases raising complex or multiple policy issues requiring significant preparation time, including cases where the law is new or not clearly established. A high-complexity rating can only be assigned in consultation with a PPSC manager or their delegate.

⁵⁵ Bronson Report (DMP), *supra* note 1 at 73:

There are, however, advantages to regionalization. The RMP's are located in the jurisdiction where the offence was committed. The RMP is aware of the local conditions and problems. The RMP is closer to the Military Police or NIS office to be able to give advice. The Court Martial will likely be held in the region where the offence was committed. The RMPs may have to travel less frequently. Of all those interviewed for the preparation of this report, only one RMP recommended that the RMP's be centralized.

⁵⁶ See above, Chapter 4 (Consultation), at sections 4.3.1 (Summary of results) and 4.5.5.2 (HMCS OTTAWA Crew).

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Chapter 12 - Status and Institutional Structure of a Defence Counsel Service

12.1 Introduction

It was made clear to the CMCRT in Chapter 4 that CAF leaders think that – because of the extra liability to do dangerous and difficult work that is taken on by CAF members – the state should fully fund legal counsel for military accused persons where the charges arise out of military duties that the individuals have been required to perform, but not where the charges are far removed from what the accused person was expected to do under the circumstances as a military member.¹ It was also made clear to the CMCRT that CAF leaders are generally satisfied with the way in which defence counsel services are provided in the CAF.

However, as discussed in Chapter 7, there are some concerns with the **proportionality of financial and human resources, fairness, and intelligibility** of the way defence counsel services are delivered within the court martial system. To address these concerns, this chapter discusses three representative options to improve how defence counsel services contribute to the effectiveness, efficiency and legitimacy of the court martial system overall. These options include maintaining a form of the current military model, the creation of a CAF legal aid scheme, and abolition of the provision of defence counsel services for military personnel accused of misconduct. This chapter also discusses, where the CAF is involved in the payment of defence fees, the implementation of a tariff should set time limits on the amount of preparation time a lawyer should be spending on a file.

12.2 Overarching Considerations Relating to Defence Counsel Services

As noted in Chapter 7 many countries do not employ a full-time, fully-funded, military defence counsel model. When providing state-supported legal counsel to a military accused person, most nations employ some combination of means-testing, financial contribution, part-time counsel and/or certificates, tariffs, and/or judicial or quasi-judicial review of defence counsel hours and fees.² Where the CAF is involved in the funding of defence counsel services, the CMCRT assesses that some mechanism to control the extent of public expenditures might be desirable. This chapter will first discuss potential approaches to these issues, before discussing other options relating to the provision of defence counsel services.

12.2.1 Contribution by Accused Persons

Of all options considered, the current full-time, fully-funded model has the least **proportionate financial cost** and is the least **intelligible**. If it is determined that the CAF should remain involved in the funding of defence counsel services, then the current defence counsel service model (and

¹ See Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of Defence Counsel Services*, (Ottawa: Bronson Consulting Group, 2009), at 29 [Bronson Report (DDCS)]: “because of these more stringent requirements of members of the military, in our view, it is appropriate for the services of DCS to be available to all members.”

² See above Chapter 5 (Comparative) at sections 5.2.3 (New Zealand), 5.2.4 (Ireland), 5.2.5 (United Kingdom) and 5.2.7 (Denmark).

Options 1 and 2, discussed below) could be adapted to provide that accused persons' contribute to the cost of defence counsel services, based on the accused person's ability to pay.³ This approach could involve an application process, with means-tested thresholds. Accused persons whose disposable income falls between the high- and low-income thresholds may qualify for funded legal services.⁴ However, accused persons would be obliged to make meaningful contributions towards the actual cost of their defence, based upon their gross income.

This approach would increase the **proportionality of financial costs** associated with the provision of defence counsel services by transferring a meaningful portion of the costs to the accused person. The approach would likely increase the **intelligibility** of the system by linking publicly funded counsel to the income of accused persons in a way that is familiar, relative to all other Canadian civilian legal aid systems and many other court martial systems.

12.2.2 Tariffs Governing the Extent of Legal Services to be Provided

Similarly, within the current model (and Options 1 and 2, discussed below), defence counsel services could be governed by a tariff, which would set time limits on the amount of preparation time that a lawyer should be spending on a file.⁶ As was noted in the Bronson Report 2009

³ This option was examined in Canada, Department of National Defence, *Provision of Defence Counsel Services in the Canadian Forces*, Report of the Defence Counsel Study Team (Ottawa: Office of the Judge Advocate General, 1997) [DDCS Report 1997], but it was ultimately rejected, mostly for contextual reasons specific to the 1990s. See *ibid* at 35:

Another possible addition to this system would be the concept of a contribution by the member toward the cost of the defence. This is currently used by all Canadian legal aid systems as well as the British and New Zealand military legal aid organizations. The contribution would be based on the member's ability to pay considering both income and expenses. ... If this concept is accepted and a contribution will be required, there will obviously be some reduction in the cost of the system. However, as the contribution benefit would not be great and would probably be outweighed by the loss of morale, it is recommended that there be no contribution demanded of the member."

See also *ibid* at 34:

In this era of pay freezes, restricted promotions, loss of esteem, downsizing, and questions of leadership, any attempt by the Forces to divest itself of this role would likely be seen by the members as one more indication that the Forces no longer care about their welfare. Cohesion and loyalty are two of the cornerstones of an effective military and these traits are being sorely tested in the CF at this time. Therefore, on the basis of fundamental principles of military leadership, no action should be taken that will further alienate members without exceptional justification. Eliminating legal support for members in Canada would be just such an action.

⁴ Persons whose disposable income fall below a certain threshold may qualify for fully funded legal services without the obligation to make a contribution towards the cost of the defense. Persons whose disposable income fall above a certain threshold may not qualify for fully funded legal services at all.

⁵ See Chapter 5 (Comparative) at sections 5.2.4 (Ireland), and 5.2.5 (United Kingdom). For a different type of contribution model, section 5.2.3 (New Zealand), wherein the accused is ordinarily required to contribute towards the cost of legal aid. For instance, if the appellant is a member of the regular forces, he or she will be requested to pay 3% of his or her gross taxable pay for the 12 months immediately before the commencement of the relevant proceedings in the Court Martial.

⁶ For a tariff model, see *Legal Aid Ontario Tariff and Billing Handbook*: <http://www.legalaid.on.ca/en/info/manuals/Tariff%20Manual.pdf>; see also above Chapter 5 (Comparative) at sections 5.2.3 (New Zealand), 5.2.5 (United Kingdom) and 5.2.7 (Denmark).

(DDCS):

While we agree that our military deserves the best, there must be reasonable limits. If a client does not dispute the allegations giving rise to a charge and the punishment is going to be a relatively minor, it makes no sense to spend thousands of dollars in time and travel. It might be appropriate to be guided by the question “Would a member of the Canadian Forces of this rank expend these funds if he/she had to pay for the services himself/herself?”⁷

If adopted, the tariff’s maximum might depend on the seriousness of the case, on the type of charges, on the progress of the case, and any other relevant factors. As noted in the DDCS Report, a scale for payment of agents acting as prosecutors would provide a good baseline:

In developing a fee schedule for this system, the Department of Justice scale for payment of agents acting as prosecutors provides a good baseline. There is also a ceiling of 10 billable hours a day under that tariff. A similar procedure might be applied for this option, with the [approving authority] having authority to authorize fees within the normal range.⁸

For extremely unusual cases, defence counsel could request additional compensation on application to judicial or quasi-judicial authorities.⁹ However, at all times, accused persons would be permitted to pay additional defence fees themselves. It is estimated that the implementation a requirement for accused persons to contribute to their defence and a tariff could increase the **proportionality of financial and human resource costs**.

12.2.3 Regionalization

Similar to the discussion in Chapter 11, relating to the structure of the prosecution service, in each of the options described below, it would be possible to structure the relevant prosecution on either a regionalized or a centralized basis. On the one hand, regionalization may offer benefits in terms of reducing travel costs of prosecutors that would contribute to the achievement of **proportionate financial and human resource costs**. On the other hand, however, the extra administrative support overhead costs that might be associated with regionalization (such as maintaining multiple office sites across Canada, and some staff to support prosecutors at each site) may exceed the costs of travel that would otherwise be incurred in a centralized model. It is not immediately apparent whether a regionalized or a centralized prosecution service would be more capable of promoting **proportionate financial and human resource costs**, so each option below could be adapted into both regionalized and centralized variants.

12.3 Common Elements to Options 1 and 2

Under each of Options 1 and 2, there would continue to be a Director of Defence Counsel Services. Options 1 and 2 discuss the possibility of a military or a civilian Director, respectively. Under both options, the qualifications of the Director would remain similar to those within the current

⁷ Bronson Report (DDCS), *supra* note 1 at 30.

⁸ DDCS Report 1997, *supra* note 3 at 58.

⁹ *Ibid*: “For criminal cases, the Department of Justice normally has less than 20 such requests per year on a volume of approximately 15,000 cases handled by standing agents.” See also similar models above at Chapter 5 (Comparative), sections 5.2.2 (Australia, where the DDCS is the approving authority); 5.2.3 (New Zealand, where the Court martial Registrar is the approving authority), and 5.2.4 (Ireland, where the military judge is the approving authority).

scheme: the Director would continue to be an officer who is a barrister or advocate with at least ten years standing at the bar of a province.¹⁰ Under this option, the nomination, tenure and term of the Director would mirror those of the Director of the prosecution service discussed in Options 1 and 2 in Chapter 11. The Director would be appointed by the Governor in Council, on the recommendation of the Minister of National Defence and would be appointed for a term of not more than seven years.¹¹ These options would provide for a selection committee that would assess candidates for the position and make recommendations to the Minister.¹² The Director would hold office, during good behaviour, for the duration of his/her term, but may be removed by the Governor in Council at any time for cause, with the support of a resolution of the House of Commons to that effect. The Director would not be eligible to be reappointed for a further term of office.¹³

Further, under these options, the Director could be responsible to the Minister of National Defence but would be completely independent of the Minister and the Department in the performance of his or her duties (in much the same way as the Chief Military Judge currently is).¹⁴ The Director would have his/her own budget as a separate line item within the Department of National Defence budget. This budget would include funds for the administrative costs of the military defence counsel service, payment of the costs of witnesses for the defence, and any other costs associated with the defence of cases.¹⁵ Under this option, the DDCS would be accountable for the time and expenses expended under this budget.¹⁶

It is assessed that implementation of changes to the reporting structure of the Director, and the budget of the Director, could improve **transparency**.¹⁷ As the Director would be responsible to the Minister of National Defence, a civilian political authority, and not the JAG, a senior military officer, there could be an increase in **transparency** as it would be less possible for the JAG or any other senior military authority to be perceived as being able to inappropriately influence the Director. Additionally, the administrative independence that these options would permit the Director to more directly control the selection or hiring of defence counsel, when compared to extent of the Director's control over these matters within the current system – all of which could assist defence counsel services in contributing to the **generation of accurate / correct outcomes** through expertise and to **timely outcomes** and **proportionate human resource costs** as defence counsel would be able to fulfill their roles more efficiently (due to a greater level of experience

¹⁰ *National Defence Act*, RSC 1985, c N-5, s 249.18 [NDA].

¹¹ See the *Act respecting the office of the Director of Public Prosecutions*, SC 2006, c 9, s 121, s 5.

¹² A selection committee assesses candidates and make recommendations to the Minister. See *ibid*, s 4.

¹³ *Ibid*, s 5.

¹⁴ For another option, see Michel W Drapeau & Gilles Létourneau, *Behind the times: Modernization of Canadian Military Criminal Justice*, (2017) at 63: “As is the case with legal aid in Ontario, Quebec and other Canadian Provinces, the Defence Services should be independent and be a separate statutory legal entity falling under the supervision of the Attorney General.”

¹⁵ See DDCS Report 1997, *supra* note 3 at 37: the DDCS “should have its own budget as a separate line item in the National Defence budget. This budget would include funds for the administrative costs of the Office, payment of the costs of witnesses for the defence, and any other costs associated with providing defence counsel services.”

¹⁶ See Bronson Report (DDCS), *supra* at note 1 at 32: “While independence is absolutely required in order for Canadian Forces members to be properly represented, in our opinion, it has led to a lack of accountability in the offices of the DCS.” See also *ibid* at 30: “We recommend that the DCS purchase and employ time management software such as Amicus in order to appropriately track their time on a file.”

¹⁷ See Chapter 4 (Consultation) at sections 4.4.5 (LCol (ret'd) Perron) and 4.4.6 (LCdr (ret'd) Levesque).

acquired over time). However, because this proposed reporting structure does not mirror provincial legal aid accountability schemes, aspects of these options may be perceived as remaining **less intelligible** than some civilian comparators.

12.4 Option 1: Military Model – Military officer as Director of Defence Counsel services and Military defence lawyers

Under Option 1, there would continue to be a military defence counsel service separate from the civilian legal aid authorities. This military defence counsel service would be led by a military officer appointed as Director of Defence Counsel Services (the DDCS), similar to the current system.

Under this option, the DDCS would continue to be assisted by military defence counsel, including reserve force legal officers.¹⁸ However, Option 1 would reduce the number of defence counsel in the military defence counsel service who assist the DDCS. As discussed in Chapter 7, there are currently approximately 10 full-time defence counsel in the military defence counsel service who handle 83.5 files.¹⁹ This results in approximately 10.5 files per military defence counsel per year.²⁰ This caseload can be compared with the caseloads typical of defence counsel working in legal aid offices or at the private defence bar, of 70-100 (or more) files per year.²¹ Even acknowledging that there may be differences in the complexity of the files considered, and the amount of travel required, these numbers seem to suggest that a significant reduction in the number of full-time equivalent defence counsel should be possible.²² In order to implement modest change incrementally and to account for the civilian work placements of military defence counsel (discussed in the paragraphs below), the travel time required to appear at courts martial, and to provide for unforeseen circumstances (such as prolonged periods of illness or maternity / paternity leave), this option would reduce the number of military defence counsel in the defence counsel service to an initial level of no more than 60% of the current staffing levels.²³

¹⁸ NDA, *supra* note 10, s 249.21; See also DDCS Report 1997, *supra* note 3 at 44:

The head of the Office of Military Defence Counsel would be a full time job. It could be filled by either a regular force or a reserve force officer with the necessary qualifications. ... There should also be a regular force legal officer to provide assistance to the head of the Office and to act as a coordinator in National Defence Headquarters for defence counsel requirements. This officer would also provide a backup in cases where no reserve force officer was readily available to perform defence counsel duties in an urgent situation.

¹⁹ See Annex DD, ADM (RS) Spreadsheet – Defence Counsel Services. There were 9.9 full-time-equivalent military defence counsel who handled 83.5 files.

²⁰ “Files” refer to “request for assistance”.

²¹ Bronson Report (DDCS), *supra* note 1 at 16-17.

²² See Chapter 4 (Consultation) at section 4.5.4.2.2 (RHFC); the CO of this unit, who is also the civilian Crown Attorney for Waterloo region in the context of commenting on the appropriate skills and experience required for military judicial appointments: “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.”

²³ See DDCS Report 1997, *supra* note 3 at 37 (where it was suggested that the DCS should be staffed with five regular force officers).

Under Option 1, a sub-occupation of “Military Defence Counsel”²⁴ would be created within the “Legal Officer” occupation, and the functional/managing authority for this sub-occupation would be the DDCS. The DDCS would have the sole authority to select military defence counsel from within the legal officer occupation, – ideally from among those who are interested and have shown proficiency in criminal law.²⁵ Under this option, a career litigation track for military defence counsel would be intended,²⁶ with some possibility for military defence counsel to return from this career track at their request. Further, military defence counsel would be required to work in placements with a provincial legal aid staff lawyer system for at least six to twelve months upon being selected into the “Military Defence Counsel” sub-occupation, and at least three continuous months per year after that.²⁷ The DDCS would also continue to be able to contract out defence counsel services, as needed.²⁸

Under this option, the DDCS and military defence counsel would – as a matter of policy, and in a

²⁴ *Ibid* at 29: “The perception of independence is, however, a greater problem. The Special Advisory Group heard from members of the CC that the defence counsel were not seen as being sufficiently independent of the rest of the JAG organization. This concern has also been expressed in several of the representations made to this Study Team and in most of the ones coming from Non Commissioned Members (NCMs).” See also Bronson Report (DDCS), *supra* note 1 at 39:

We heard from almost all interviewees, including lawyers that worked for the prosecution at some point in their career, that there was a negative attitude toward the DCS within the JAG branch. We heard from some interviewees that working at the DCS was considered to be a “dead end job” or even a “career ender” if one stayed in it too long. More than one lawyer was warned by even very senior officers to be careful about what he/she did while at DCS because it would reflect on him/her when he/she returned to the branch. (emphasis added)

²⁵ See Annex Y, Submission from the Director of Defence Counsel Services to ADM(RS), 13 February 2017, at 6: “both last year and the year before, I was effectively shut out of knowing which legal offices had expressed a desire to come to DCS. ... It has the potential to severely influence the competence level within the organization as other unilaterally select who will come. Further, it is disappointing for young officers who tell me that they had wished to be posted to DCS to hear that their desires were never passed on to me.” See also, Bronson Report (DDCS), *supra* note 1 at 32: “We recommend that the primary criterion for selecting a lawyer to work at the DCS be litigation and advocacy skills and experience as well as a desire to do litigation work.”

²⁶ Bronson Report (DDCS), *ibid* at 26: “We recommend that the Judge Advocate General create a litigation career path where lawyers could be posted to long term positions in either the CMPS or the CMPS. [...] A surprisingly high number of interviewees indicated that they would consider defence work as a career if changes to the DCS offices and to the system were made.”

²⁷ *Ibid* at 32:

We recommend that inexperienced lawyers be sent on secondments to work with either reservists, private counsel or criminal law staff legal aid offices, for a minimum of six months in order to learn how to properly conduct criminal defence work. The volume in those offices is high and would present a lawyer with a great learning opportunity. Upon his/her return to the office that lawyer should junior on at least one court martial before conducting one on his/her own.

See also *ibid* at 30: “The Director [of Defence Counsel Services] himself acknowledged that most lawyers that come to work for defence are inexperienced. He also acknowledged that there is a lack of training”; See also Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence, by The Honourable Patrick J. LeSage* (Ottawa: Department of National Defence, 2011) at 49: “I also encourage lawyers in both offices be given secondments to local legal aid offices and/or to local attorneys-general offices.”

²⁸ NDA, *supra* note 10, s 249.21(2)

manner similar to investigators from the National Investigation Service – wear civilian clothing as their day-to-day dress.²⁹ Additionally, rather than wearing a uniform for trial, military defence counsel would robe in the same way that counsel robe for appearance in Superior Court within Canada’s civilian justice system.³⁰ Military defence counsel would also be accountable for their time and expenses.³¹

12.4.1 Assessment of Option 1

The CMCRT assesses that relative to the current court martial system, implementation of this option would significantly increase the efficiency and effectiveness of the current court martial system based on a likely increase in **timely and accurate / correct outcomes**. Implementation of this option could increase the legitimacy of the court martial system based on an increase in **transparency and intelligibility**, and a corresponding potential decrease in **fairness**. It is also assessed that Option 1 would significantly improve the **proportionality of financial and human resources costs** of the current court martial system.

First, as Option 1 would provide for a reduction in the number of military defence counsel from 10 to 6 (as a maximum initial level of staffing). This should represent a significant decrease in the expenditure of the current military defence counsel service, down from approximately \$1.7 million³² to an estimated \$1.1 million – assuming a reduction in military salary costs, but not necessarily a corresponding reduction in travel or operating and maintenance costs. As a result of this decrease, there would be a corresponding decrease in the cost of defence counsel services per court martial from approximately \$28,500 to \$18,500.³³ These decreases represent the potential for significant savings.

Additionally, as Option 1 would create a military defence counsel sub-occupation and career litigation track, the level of criminal law expertise should correspondingly increase, thereby increasing the military defence counsel service’s ability to work more efficiently. This is primarily due to the fact that with more specialization among the military defence counsel, less time should be required per file, which should allow military defence counsel to take on more files per individual defence counsel, and to potentially contribute to **more timely outcomes**.³⁴ Further, by maintaining military defence counsel, military expertise would be retained within this aspect of the court martial system.³⁵

²⁹ See above, Chapter 5 (Comparative) at section 5.2.7 (Denmark).

³⁰ This is what was recommended in the DDCS Report 1997, *supra* note 3 at 41.

³¹ See Bronson Report (DDCS), *supra* note 1 at 32: “While independence is absolutely required in order for Canadian Forces members to be properly represented, in our opinion, it has led to a lack of accountability in the offices of the DCS.” See also *ibid* at 30: “We recommend that the DCS purchase and employ time management software such as Amicus in order to appropriately track their time on a file.”

³² See Annex DD, ADM (RS) Spreadsheet – Defence Counsel Services: Average expenditure for DDCS is \$1,665,485.

³³ *Ibid*: Average cost of DDCS per CM is \$28,485.

³⁴ On this point, see Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, (Ottawa: Bronson Consulting Group, 2008) at 75: “We believe that, generally, the problem in the CMPS that contributes to delay is the lack of senior experienced litigators as opposed to overall shortage of prosecutors. In fact, we consider that the total complement of prosecutors is sufficient, given the relatively small caseload.” This same observation should apply equally to defence counsel.

³⁵ DDCS Report 1997, *supra* note 3 at 40: “The knowledge of the military justice system would normally be greater among officers in this system than among civilian counsel.”

From a **human resources** perspective, it is also possible that the creation of a sub-occupation within the legal officer occupation could be perceived as career-limiting for those legal officers interested in a broader career with the Office of the JAG, which could limit the number of legal officers interested in military defence counsel services.³⁶ However, as Option 1 would also create a career litigation track within the sub-occupation that would be solely managed by the DDCS, the various career opportunities within the military defence counsel service could be of specific interest to those legal officers with a special interest in litigation work. Furthermore, as Option 1 would create a career litigation track and provide for mandatory civilian work placements, this option could decrease the military expertise of defence counsel, as the military defence counsel on the career litigation track would not be exposed to the broader CAF to the same extent as other legal officers within the Office of the JAG who provide advice to military actors on a wide range of CAF issues. This may have an impact on the **generation of accurate / correct outcomes**.

It is estimated that, under this option, the court martial system could be perceived as **more fair** than at present, since the existing basis for perceiving possible conflicts of interest on the part of military defence counsel would be eliminated, but could still be perceived by some individuals (both from the broader public and the CAF) as being unfair because there would continue to be a separate office of military defence counsel, composed of military officers. Because there are some who believe that it is impossible for someone in uniform to make decisions objectively and without bias about a fellow member of the profession of arms, this option would fail to maximize perceived fairness.³⁷ It is possible that this military presence within the defence counsel services would result in a perceived lack of independence, regardless of whether the Director of Defence Counsel Services reports to the Minister of National Defence.³⁸

³⁶ See Annex Z, Submission of the Director of Military Prosecutions to ADM(RS), 23 January 2017 at 31:

I also recognize, however, the challenges that this recommendation presents. For instance, given its small size, career progression opportunities uniquely within the CMPS would be more limited than within the broader OJAG from whence prosecutors come. This could act as an obstacle to attracting interesting and interested candidates. Also, being exposed, as legal advisor, to various facets of the CAF's "business" enhances the quality of military prosecutors.

See also, DDCS Report 1997, *supra* note 3 at 61-62 (discussing CF Legal Aid Service Using Staff Lawyers): "Defence counsel may see this as a learning position only or as a dead end job considering the small size of the organization and the very limited possibility of advancement. This may well result in a high turnover rate with the accompanying reduction in counsel experience."

³⁷ See DDCS Report 1997, *ibid* at 41:

The continuing status of defence counsel as officers does not resolve the perception problem expressed by some NCMs of defence counsel being loyal to the officer corps and the system rather than the individual member. This perception problem may be reduced somewhat by having defence counsel robe for trial rather than wearing a uniform. However, as the participants in the trial would still know the ranks of the prosecutor and defence counsel, this change would be a cosmetic at best.

³⁸ See Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, presented to the Minister of National Defence on March 14, 1997, by the Right Honourable Brian Dickson, Lieutenant-General Charles Belzile, and Bud Bird* (Ottawa: Department of National Defence, 1997) at 31 : "[W]e heard from several members of the CF who believe that the defence counsel provided

12.5 Option 2: CAF Legal Aid Scheme – Civilian Director of CAF Legal Aid and civilian defence lawyers

Under Option 2, there would be a military legal aid scheme, separate from the civilian legal aid authorities, to handle defence counsel services in the court martial system. This service could be called the CAF Legal Aid Scheme (CAF-LAS). Under this option, a civilian lawyer would be the Executive Director of the CAF-LAS (the Director). The Director could not currently be enrolled in the CAF (including within the reserve force)³⁹ and the hiring criteria for the Director could include a requirement for administrative experience and, preferably, some military background.⁴⁰

Under this option, the Director would be tasked with administering the CAF-LAS. More specifically, the Director would be in charge of maintaining a list of lawyers who have criminal law expertise and who are willing to assist persons accused of a service offence inside and outside of Canada, of assigning defence counsel to each case, and of securing witnesses and documents required by accused at trials. Under this option, there would be no full-time staff except for the Director.

The list of lawyers participating in the CAF-LAS would be broken down on a regional basis.⁴¹ The accused person's right to select counsel of his/her choice would be restricted to those defence lawyers who are based relatively proximate to where the accused is resident or the region where the court martial will take place. However, the Director would retain discretion to authorize the retention of counsel outside these areas in exceptional circumstances.⁴²

Lawyers defending accused persons under the *Code of Service Discipline* would be paid at the same rate as agents who are paid by the Department of Justice when acting as prosecutors. This

by JAG are not sufficiently independent.” See also *Draft Principles Governing the Administration of Justice through Military Tribunals*, 62nd Sess, UN Doc E/CN.4/2006/58 (2006), at para 53:

The provision of legal assistance by military lawyers, particularly when they are officially appointed, has been challenged as inconsistent with respect for the rights of the defence. Simply in the light of the adage that “justice should not only be done but should be seen to be done”, the presence of military lawyers damages the credibility of these jurisdictions. Yet experience shows that the trend towards the strict independence of military lawyers - if it proves to be genuine despite the fundamental ambiguity in the title - helps to guarantee to accused persons an effective defence that is adapted to the functional constraints involved in military justice, particularly when it is applied extraterritorially. Nevertheless, the principle of free choice of defence counsel should be maintained, and accused persons should be able to call on lawyers of their own choosing if they do not wish to avail themselves of the assistance of a military lawyer. For this reason, rather than advocating the simple abolition of the post of military lawyer, it seemed preferable to note the current trend, subject to two conditions: that the principle of free choice of defence counsel by the accused is safeguarded, and that the strict independence of the military lawyer is guaranteed.

³⁹ DDCS Report 1997, *supra* note 3 at 54: “To maintain the fact and perception of an independent system, the Executive Director should be a civilian with administrative experience and, preferably, some legal and military background.”

⁴⁰ *Ibid* at 54: “To maintain the fact and perception of an independent system, the Executive Director should be a civilian with administrative experience and, preferably, some legal and military background.”

⁴¹ This was recommended in the DDCS Report 1997, *ibid* at 53.

⁴² This was recommended *ibid* at 54.

currently ranges between \$97 and \$136/hour.⁴³ As noted in the DDCS report 1997, “[t]his would provide a uniform standard of compensation as well as equating the importance of the prosecutor and defence counsel in the system.”⁴⁴

Under this option, similar to how provincial legal aid plans (and how DCS in the current court martial system) are run, the Director would only be in charge of running the CAF-LAS – decisions on individual cases would be solely within purview of the accused person’s lawyer.⁴⁵

For duties outside of Canada, accused persons would also have the option of requesting a legal officer, potentially a reserve force legal officer, from the Office of the JAG who is available, able, and willing to take the case. This representation would be provided free of charge.

Under this option, military assisting officers would now also be provided at court martial.⁴⁶ The role of the assisting officer, who would be selected by the accused person, would be to assist the defence counsel, to the extent that the accused desires, in the preparation and presentation of his/her case. The assisting officer would provide military knowledge to the defence counsel and would facilitate and assist in the collection of all relevant information for the purposes of a defence. In order to protect the information received by an assisting officer, provision for a privilege or confidentiality would likely be required to facilitate a frank and honest relationship between the accused person, his/her lawyer, and the assisting officer.

12.5.1 Assessment of Option 2

The CMCRT assesses that relative to the current court martial system, implementation of this option would significantly increase the efficiency and effectiveness of the current court martial system based on a likely increase in **proportionate financial and human resources costs, timely outcomes**, and in the **generation of accurate / correct outcomes**. Implementation of this option would also modestly increase the legitimacy of the court martial system based on a slight increase **transparency, fairness, and intelligibility**.

It is assessed that Option 2 would significantly improve the **proportionate financial and human resources costs** of the current court martial system as this option would provide for the disbursement of fees only when required for the defence of an accused person. Defence counsel under this option would be paid at the same rate as agents are paid by the Department of Justice when acting as prosecutors, and only for those times when they are working on a file (which would exclude periods of leave or other absences). Furthermore, the employment of civilians as defence counsel would provide for savings on salaries and benefits.

Under this option, defence counsel would be normally located proximate to either the region where the accused is resident or the region where the court martial will take place. This would likely reduce the period of time that defence counsel spend travelling to where a court martial occurs,

⁴³ For information regarding Public Prosecution Service of Canada rates for agents, see online: <http://www.ppsc-sppc.gc.ca/eng/aaf-man/iaa-iam.html#part_1_3> Potentially higher rates may be used in other contexts where federal government agents are used – see online: <<http://www.justice.gc.ca/eng/abt-apd/la-man/index.html>>.

⁴⁴ DDCS Report 1997, *supra* note 3 at 55.

⁴⁵ This is what was recommended, *ibid*.

⁴⁶ *Queens Regulations and Orders for the Canadian Forces*, art 108.14 [QR&O].

thereby reducing travelling time and fees and potentially leading to both **more timely outcomes**, as military defence counsel could have more time to spend on court-related activities, and **more proportionate financial and human resource costs**.

Additionally, the criminal law expertise of civilian defence counsel would be higher than within the current court martial system, since this option would provide that, to be put on the lawyers' list to represent accused persons at court martial, lawyers would need to demonstrate that they have criminal law expertise. Given civilian defence counsel usually carry higher caseloads (70-100 cases/year),⁴⁷ this option is more likely to be capable of generating the necessary litigation proficiency required to meaningfully reduce delays and **generate accurate / correct outcomes**. Some aspects of this option could increase delay in the court martial system. For instance, this option could create delays due to the difficulties in scheduling trials involving civilian defence counsel in the event of conflict between their military caseload and the obligations in their civilian practices.⁴⁸

Some aspects of this option could appear to reduce the **generation of accurate/correct outcomes**. Option 2 would not preserve military expertise in the same way as it does under the current scheme as there would no longer be specialized military defence counsel involved in the defence of accused persons under the CSD.⁴⁹ However, under the current scheme, DDCCS is already hiring civilian counsel⁵⁰ and this does not appear to pose any significant challenges with respect to military law and service knowledge.⁵¹ Under this option, some form of military expertise would be preserved with the addition of the assisting officer at court martial who could provide military knowledge to the defence counsel and ensure that all relevant information would be provided to him/her and could provide an expertise specific to the issues arising from a particular case.

Further, other aspects of this option could increase the **generation of accurate / correct outcomes** in the court martial system. Accused persons under this option could be represented by a lawyer with a significant degree of expertise and trial experience in criminal law.

It is assessed that, under Option 2, the court martial system would likely be perceived as **more fair** and **intelligible**. It is also possible that having civilians act as defence counsel could be perceived as **more fair** by both the broader public and the CAF because civilians could be perceived as being more objective when making decisions about CAF members than other CAF members making

⁴⁷ Bronson Report (DDCCS), *supra* note 1 at 17.

⁴⁸ DDCCS Report 1997, *supra* note 3 at 40.

⁴⁹ *Ibid* at 57: "Private counsel will not normally be as familiar with the functioning of the CF and the procedures for accomplishing tasks effectively in the military environment as would lawyers with current or prior military service."

⁵⁰ *Ibid* at 29: "This examination showed that civilian counsel were hired for defence purposes on average 21.4% of the time." See also, Canada, Department of National Defence, *Director of Defence Counsel Services Annual Report 2016-2017* (Ottawa: Office of the Judge Advocate General, 2017) at 7: "During this reporting period civilian counsel were hired by the director to represent accused persons in seven cases." See also, Canada, Department of National Defence, *Director Defence Counsel Services Annual Report 2015-2016* (Ottawa: Office of the Judge Advocate General, 2016) at 4 "During this reporting period, civilian counsels were hired by the DDCCS to represent accused persons in five cases."

⁵¹ See DDCCS Report 1997, *supra* note 3 at 15 (discussing the UK Model): "According to the administrator, the use of civilian counsel has not resulted in any problems of competence with respect to military law and procedures."

those decisions would be under the same circumstances.⁵² Additionally, under Option 2, there could be an improvement in **intelligibility** as a separate legal aid scheme run by civilian lawyers is likely more familiar and comprehensible than the current system involving CAF lawyers.

12.6 Option 3: Application of other frameworks – No CAF involvement in the provision of defence counsel services

Under Option 3, there would not be a defence counsel service or a CAF legal aid scheme. The CAF would completely divest itself of the defence counsel role. This option would not provide representation of accused persons or funding of defence counsel services.⁵³

Under this option three alternatives to CAF-funded defence counsel services would be open to accused persons: 1) they could retain defence counsel at their own cost, 2) they could self-represent or, 3) they may qualify for provincial legal aid services.⁵⁴

For duties outside of Canada, and if accused persons were unable to secure defence counsel services, they could have the option of requesting a legal officer from the OJAG who is available, able, and willing to take the case. This representation would be provided free of charge.

Under this option, and similar to Option 2, assisting officers would now also be provided at court martial.⁵⁵ The role of the assisting officer, who would be selected by the accused person, would be assigned to assist the defence counsel or the self-represented accused person, to the extent that the accused desires, in the preparation and presentation of his/her case. The assisting officer would provide military knowledge to the defence counsel and would ensure that all relevant information would be provided to him/her. In order to protect the information received by an assisting officer, provision for a protection of confidentiality would likely be required to facilitate a frank and honest relationship between the accused person, his/her lawyer, and the assisting officer.

12.6.1 Assessment of Option 3

It is assessed that relative to the current court martial system, implementation of this option could increase the efficiency and effectiveness of the court martial system based on a likely increase in the **proportionality of financial and human resources costs**, and **timely outcomes**. This option could increase the system's ability to **generate accurate / correct outcomes**, but it would involve a loss of military expertise. Implementation of this option may increase the legitimacy of the court martial system based on increases in **fairness, transparency, and intelligibility**.

It is assessed that this option could generate significant **financial and human resource** savings. As the burden to defend accused persons under the CSD would be entirely transferred from the

⁵² *Ibid* at 56: "This system will probably be seen by members as more independent than those using military counsel." See also *ibid* at 57: "There is no rank differential at trial that may impact on the perception of the fairness of the process."

⁵³ See preliminary remarks, above, regarding contribution and tariff. This option would not be compatible with any contribution or tariff.

⁵⁴ The *Treasury Board Policy on Legal Assistance and Indemnification* is also available. However, it is assessed that this policy would rarely, if ever, apply to accused persons under the CSD. See online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13937>>.

⁵⁵ QR&O, *supra* note 46, article 108.14.

current DDCCS to individual accused persons, approximately \$1.8 million⁵⁶ in savings would be achieved within the current court martial system.

Assessing whether this option could promote **timely** or **accurate / correct outcomes** presents unique challenges as it is impossible to predict how many accused persons would retain the services of outside defence counsel, qualify under legal aid, or represent themselves. Each one of these possibilities has the potential to have an impact on the assessment of this option. It is estimated that some aspects of this option could increase delay in the court martial system due to the difficulties in scheduling trials involving civilian defence counsel as a result of their obligations in their civilian practices.⁵⁷

It is also possible that a higher proportion of accused persons would represent themselves under this option⁵⁸ as compared to the current system, where the overwhelming majority of accused persons are represented by defence counsel from DDCCS at no cost.⁵⁹ This would likely increase delay and could decrease the **generation of accurate / correct outcomes**. As recognized by the Canadian Judicial Council, self-represented litigants are less likely to participate actively and effectively in their own defence:

Self-represented persons are generally uninformed about their rights and about the consequences of choosing the options available to them; they may find court procedures complex, confusing and intimidating; and they may not have the knowledge or skills to participate actively and effectively in their own litigation.⁶⁰

However, other aspects of this option could reduce delay in the court martial system. It is possible that a vast proportion of accused persons under this option would be represented by a local lawyer who has at least some experience in criminal law. This could potentially result in **more** timely and **accurate / correct outcomes** due to their degree of criminal law experience. Further, given civilian defence counsels' usual caseloads (70-100 cases/year),⁶¹ this option could be capable of

⁵⁶ See Annex DD, ADM (RS) Spreadsheet – Defence Counsel Services: Average expenditure for DDCCS is \$1,770 953.10.

⁵⁷ DDCCS Report 1997, *supra* note 3 at 40.

⁵⁸ Statement of Principles on Self-represented Litigants and Accused Persons, Canadian Judicial Council (endorsed by the Supreme Court in *Pinte v. Johns*, 2017 SCC 23), available online: <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf>, p.3: "Informed opinion and research suggests that the numbers of self-represented persons in the courts are increasing."

⁵⁹ Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2015 to 31 March 2016* (Ottawa: Office of the Judge Advocate General, 2016), at chapter 3, online: <<http://jag.mil.ca/publications/office-cabinet/annrep-rappann-15-16-eng.pdf>>.

⁶⁰ Statement of Principles on Self-represented Litigants and Accused Persons, National Judicial Council (endorsed by the Supreme Court in *Pinte v. Johns*, 2017 SCC 23) at 6, online: https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf ("Given these factors, it is important that judges, court administrators and others facilitate, to the extent possible, access to justice for self-represented persons. Providing the required services for self-represented persons is also necessary to enhance the courts' ability to function in a timely and efficient manner." See also, *ibid* at 4: "Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented person. When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard.")

⁶¹ Bronson Report (DDCCS), *supra* note 1 at 17.

generating the necessary litigation proficiency required to meaningfully reduce delays. Retaining local counsel could also reduce the delays attributable to travelling and could improve the speed at which defence counsel could communicate with their clients.⁶²

As accused persons would generally have to pay for their defence counsel, it is assessed that there would be an increase in **timely outcomes**, since the mandate given to defence counsel in any particular case by his or her client would probably be more limited than under the current scheme. Given that the average cost of DCS per court martial currently amounts to \$28,485.30, that reprimand, severe reprimand, and/or fine made up approximately 67% all of sentences and that over the last five years, the average fine imposed was \$1505,⁶³ it is assessed as highly unlikely that “members of the Canadian Forces of this rank [would] expend these funds if he/she had to pay for the services himself/ herself.”⁶⁴

Further, option 3 would not preserve military expertise in the same way it does under the current scheme, since there would no longer be specialized military defence counsel involved in the defence of accused persons under the CSD,⁶⁵ which could pose challenges to the **generation of accurate / correct outcomes**. Nonetheless, under this option, some form of military expertise would be preserved with the addition of the assisting officer at court martial who would provide military knowledge to the defence counsel and ensure that all relevant information would be provided to him/her.

It is estimated that, under Option 3, the court martial system would likely be perceived by most as **more fair** and **intelligible** because the court martial system would be brought to near parity with the civilian justice system by using essentially identical resources, rules, and expertise. However, others could perceive this option as **less fair** since it would disregard the “moral obligation” to pay defence counsel fees of CAF members as they are held to a more stringent standard of conduct than the rest of society in some cases.⁶⁶ Option 3 would increase the **intelligibility** of the system by creating a model that is familiar, comprehensible and defensible to the broader public and the CAF as it would create almost exact parity with the civilian criminal justice system, where accused persons under the CSD would have the choice, like any other accused person, to be self-represented, hire defence counsel, or qualify for legal aid.

⁶² DDCS Report 1997, *supra* note 3 at 58: “Local counsel would be available ... improving the speed with which counsel could communicate with the accused in person.”

⁶³ The CMCRT compiled these statistics from a review of court martial decisions over a five-year period.

⁶⁴ Bronson Report (DDCS), *supra* note 1 at 30.

⁶⁵ DDCS Report 1997, *supra* note 3 at 57: “Private counsel will not normally be as familiar with the functioning of the CF and the procedures for accomplishing tasks effectively in the military environment as would lawyers with current or prior military service.”

⁶⁶ See for instance, Bronson Report (DDCS), *supra* note 1 at 29: “Because of these more stringent requirements of members of the military, in our view, it is appropriate for the services of DCS to be available to all members.”

Chapter 13 – Options: Offences

13.1 Introduction

The constitutionality of the current substantive body of service offences within the court martial system cannot be disputed and is not seriously in questions having been recently unanimously affirmed by the Supreme Court of Canada in *Moriarity*.¹ As discussed in Chapter 7, the substantive body of service offences is effective in achieving the purposes of the court martial system. However, the current body of service offences is assessed as inefficient because it permits ordinary civilian offences to be tried in a system that is 30 times more costly than a suitable alternative. This aspect of the current body of service offences is currently resulting in **disproportionate financial and human resource costs** in as many as 25 court martial trials per year.² Relating to military offences, the current body of service offences is assessed as efficient as there is no alternative to the existence of this jurisdiction without permitting a total failure to achieve the court martial system's purposes through impunity for uniquely military offences. Additionally, concerns were raised relating to the **fairness, transparency, and intelligibility** of the substantive body of service offences, particularly related to the current system's jurisdiction over ordinary criminal offences. Overall, there are some legitimate concerns relating to the existence of jurisdiction to deal with ordinary criminal offences within the current body of service offences, but no such concerns relating to the existence of jurisdiction to deal with uniquely military offences.

This chapter describes three representative options to change the body of service offences over which a court martial system has jurisdiction.

As a preliminary consideration, given **Assumption # 1**, all of these options could include the removal from the NDA of all service offences where the targeted misconduct is not likely to be criminal in nature or deserving of a penal sanction.³ Examples of offences that could be repealed include drunkenness (section 97), quarrels and disturbances (section 86), and false statement in respect of leave (section 91).

¹ *R v Moriarity*, 2015 SCC 55.

² See Annex EE, ADM (RS) CM Review Presentation, slide 13. It should be noted that some of these charges may be in respect of ordinary civilian criminal offences that are laid under section 130(1)(b) of the *National Defence Act*, RSC 1985, c N-5, as offences that take place outside of Canada, and over which Canadian civilian courts tend not to have jurisdiction. It is for this reason that the CMCRT suggests disproportionate financial and human resource costs are currently being incurred in as many as 25 court martial trials per year based on exercises of court martial jurisdiction over offences that could potentially otherwise be tried by Canadian civilian criminal courts. It is also worth noting that Canadian civilian courts do have extraterritorial jurisdiction in respect of many ordinary civilian criminal offences that take place outside of Canada, including all offences listed under section 7 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] and all offences under the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, among others.

³ This is consistent with Assumption #1 discussed in Chapter 1 (Introduction), above, and with the observations of the CMCRT taken from internal and comparative consultation discussed in Chapter 4 (Consultation) and 5 (Comparative) respectively.

13.2 Option 1: Jurisdiction in Canada over uniquely military offences, and civilian offences only where there is a clear military nexus and with civilian prosecutor's consent; jurisdiction outside of Canada over all offences.

Under Option 2, courts martial would have jurisdiction in Canada over uniquely military offences, and civilian offences only where there is a clear military nexus (established either through a clearly articulated test or a specifically enumerated list of offences) and where civilian prosecution authorities have consented to the charges being prosecuted at a court martial. Outside of Canada, courts martial would have jurisdiction over all offences committed by military personnel.

Under this option, where misconduct takes place in Canada that may be characterized both as a civilian criminal offence and as a service offence with a nexus to the military, the consent of the civilian prosecution authorities would be required to deal with the matter in the court martial system.⁴ The civilian prosecution authorities would be required to consider the views of the victim (as to which system the victim wishes charges to proceed within) prior to granting consent for an offence to proceed within the court martial system. If consent is not granted, then civilian prosecution authorities would still have the responsibility to determine whether to prosecute the case in the civilian criminal justice system, or to not prosecute the offence at all.

13.2.1 Assessment of Option 1

It is assessed that relative to the current court martial system, this option could increase the **generation of accurate / correct outcomes, transparency, and intelligibility**. However, it is also estimated that this option, like the current court martial system – by providing for military jurisdiction to deal with offences that could otherwise be dealt with in the civilian criminal justice system – would require **disproportionate financial and human resource costs** and could be perceived by some as not **fair**.

It is estimated that, under this option, the substantive body of service offences would continue to provide for **disproportionate financial and human resource costs** as Option 1 would continue to permit a significant number of (civilian criminal) offences to be dealt within the court martial system that could otherwise be dealt with in the larger and more localized civilian justice system. For each court martial that takes place instead of a civilian criminal trial, military personnel would be required to fill certain positions associated with the administration of the court martial (e.g.: officer of the court; escorts for the accused; etc.) – as is the case with the current court martial system.

It is assessed that Option 1 could increase the **generation of accurate / correct outcomes**. First, as a result of requiring case-specific routing of charges, by virtue of both a nexus test and the requirement for civilian prosecutorial consent to proceed with civilian offences within the court martial system, the appropriate degree of military or criminal expertise will be brought to bear in every given case. However, where civilian criminal offences would be capable of being dealt with by courts martial under this option, there is a possibility that less accurate / correct outcomes on civilian criminal charges will be reached in the court martial system than in the civilian criminal justice system. Furthermore, military judges' adjudication expertise under this option would

⁴ See above, Chapter 5 (Comparative), at sections 5.2.2 (Australia) and 5.2.5 (United Kingdom).

remain lower than that of judges in the civilian criminal justice system due to the significantly lower volume of cases that each military judge would deal with in the court martial system.

It is assessed that, under Option 1, the court martial system could be perceived by some individuals as being **unfair**, since not all accused persons would be dealt with through the same criminal procedure in respect of certain ordinary civilian criminal offences.⁵ This situation would likely increase the perception that military personnel are not regarded as equal before the law.

Unlike in the current system (where concurrent jurisdiction can create confusion over when and how court martial jurisdiction will be exercised), **transparency** and **intelligibility** could be improved under Option 1 because there would be a clearly articulated nexus-test or a specifically enumerated list of offences over which courts martial could exercise jurisdiction to determine when offences will be handled by the court martial system. Transparency could suffer under this option if civilian prosecution authorities frequently and without publicly articulated reasons withhold consent to prosecute in the court martial system, since this situation would make jurisdictional decisions obscure to the public. It should be noted that during oral arguments before the Supreme Court of Canada in *R v Moriarity*⁶ the Director of Military Prosecutions explained to how issues of concurrent jurisdiction over ordinary civilian criminal offences are resolved, informally, through discussions with his civilian counterparts. In its unanimous judgement in *Moriarity* the Court did not identify any concerns relating to this particular aspect of concurrent jurisdiction.

However, as Option 1 would clearly articulate a rule on how to deal with concurrent jurisdiction, it is assessed that Option 1 could increase **transparency**. Additionally, **intelligibility** could be increased as, under this option, there would be a manifestly rational connection between the offence and the form of trial, and civilian control and oversight, would likely be more familiar to the broad public. Additionally, the requirements for a nexus and for civilian prosecutors to consent to military jurisdiction over ordinary civilian criminal offences are easy for the public to understand in a society that values democratic control over the armed forces and supremacy of the civilian law.

13.3 Option 2: Jurisdiction only over uniquely military offences inside of Canada; jurisdiction over all offences outside of Canada

Under Option 2, courts martial would have jurisdiction over uniquely military offences regardless of whether they are committed inside or outside of Canada by military personnel. However, courts martial would not have jurisdiction over any ordinary civilian criminal offences that are committed in Canada. Courts martial would continue to have jurisdiction over all civilian criminal offences that are committed outside of Canada by military personnel. There would be no requirement for the consent of civilian prosecution authorities to proceed with a military prosecution in any case.

13.3.1 Assessment of Option 2

⁵ See above, generally, Chapter 3 (Past Studies) at section 3.4.3 (Popular media); Chapter 4 (Consultation) at section 4.5.5.2 (HMCS OTTAWA Crew) and Chapter 5 (Comparative) at sections 5.2.2 (Australia) and 5.2.5 (United Kingdom).

⁶ 3 SCR 485.

It is assessed that relative to the current court martial system, implementation of Option 2 would increase the legitimacy of the court martial system based on a likely increase in **fairness, transparency, and intelligibility**. However, it is also assessed that this option – by providing for military jurisdiction to deal with such a small set of civilian offences within a system that cannot easily achieve an economy of scale – would not likely support proportionate financial and human resource costs.

It is estimated that this option could increase the **proportionality of financial and human resource costs** of the current court martial system. As Option 3 would generally ensure that in cases where an ordinary civilian criminal offence can be dealt with through the larger, more localized civilian criminal justice system, then the offence would be dealt with in that system at far less cost. Option 3 would permit some civilian offences (that take place outside of Canada to be dealt with in the more expensive court martial system, but it is assessed that this would generally be a very low number of cases. This option would continue to result in the court martial system dealing with far fewer cases than the civilian criminal justice system, which means that it would be difficult for the court martial system to achieve an economy of scale that optimizes economic efficiency. However, by ensuring that only a relatively small number of uniquely military and extra-territorial civilian offences are dealt with in the more expensive court martial system, this option could reduce the total number of cases that are likely to be tried in the more expensive court martial system. Option 3 could improve the **proportionality of financial and human resource costs** by prohibiting most cases that could be tried in the civilian criminal justice system from being tried in the court martial system.

It is assessed that this option could create a potential for a decrease in the **generation of accurate / correct outcomes**, mostly in the case of ordinary civilian offences that take place outside of Canada and that are tried in the court martial system. Given the low volume of anticipated cases of civilian offences committed outside of Canada, there would likely be minimal development of adjudicating and criminal law expertise for military judges, prosecutors, and defence counsel. Specifically, for military judges who are members of the CAF, this option has the potential to inhibit the development of criminal law expertise, as the judges would deal almost exclusively with military cases, and may struggle to deal with cases involving civilian offences committed outside of Canada when these cases materialize from time to time. This option – by reducing the overall caseload of military judges within the court martial system – could also decrease their adjudication expertise.

It is estimated that this option would increase perceptions of **fairness, transparency, and intelligibility** as jurisdiction would mostly be limited to uniquely military offences, and all military personnel accused of committing civilian offences in Canada would be treated equally under the law through processes that take place in the civilian criminal justice system. In cases where military personnel who commit civilian offences outside of Canada are tried within the court martial system, it is assessed that this situation would not generally be perceived as **unfair**, since an obvious alternative would be for the individuals to be tried under (often less favourable) foreign law, by foreign courts. Because there would need to be a direct military connection between the offence and the court martial system's jurisdiction, or a foreign dimension to the offence that would put it outside of the normal jurisdictional reach of Canadian civilian courts, this option would likely be comprehensible to the broad public.

13.4 Option 3: Jurisdiction only over uniquely military offences, both inside and outside of Canada; civilian criminal justice system has extra-territorial jurisdiction.

Under Option 3, the court martial system would only have jurisdiction over uniquely military offences committed by military personnel, both inside and outside of Canada. The civilian criminal justice system would be provided with extra-territorial jurisdiction in respect of civilian offences committed outside of Canada by military personnel.⁷

If required, this option could include authority for civilian courts to sit outside of Canada.⁸ This option would also provide for a robust civilian deployable investigative capacity – for instance, from the RCMP – with proficiency in conducting ordinary (civilian) criminal investigations.

13.4.1 Assessment of Option 3

It is assessed that relative to the current court martial system, implementation of Option 3 would increase the legitimacy of the court martial system based on a likely increase in **fairness, transparency, and intelligibility**. - However, the CMCRT also assesses that this option – by providing for military jurisdiction to deal with such a small set of offences within a system that cannot easily achieve an economy of scale – would not likely support proportionate financial and human resource costs.

It is estimated that, under this option, the court martial system could improve the **proportionality of financial and human resources costs**. First, Option 4 would always ensure that ordinary civilian criminal offences are dealt with through the larger, more localized civilian criminal justice system, at far less cost than if they were to be dealt with in the court martial system. This option would continue to result in the court martial system dealing with far fewer cases than the civilian criminal justice system, which means that it would be difficult for the court martial system to achieve an economy of scale that optimizes economic efficiency. However, by ensuring that no civilian offences can ever be dealt with in the more expensive court martial system, this option – while potentially leading to greater costs-per-case inside of the court martial system than the status quo – would ultimately be more economically efficient than the other options because it would prevent any civilian offence from being tried in the more expensive court martial system. Option 3 would improve the court martial system's proportionate use of **human and financial resource costs** by prohibiting all cases that could be tried in the civilian criminal justice system from ever being tried in the court martial system.

It is assessed that this option could lead to a decrease in the **generation of accurate / correct outcomes** for military offences (tried by courts martial), but a potentially larger increase in the

⁷ Similar language to what is in s 7(4.1) of the *Criminal Code*, *supra* note 2, would be used:

Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

⁸ See above, Chapter 5 (Comparative) at section 5.2.7 (Denmark) regarding Danish prosecutors.

generation of accurate / correct outcomes for civilian offences (tried by civilian courts). This option – by significantly reducing the overall caseload of military judges within the court martial system to only cases involving uniquely military offences – would likely decrease their adjudication expertise. However, as civilian offences would be dealt with by the civilian justice system, it is assessed that, for these offences, there would be an increase in the generation of accurate / correct outcomes as the offences would be dealt with by judges with very high levels of criminal law and adjudicative expertise.

It is estimated that this option could increase perceptions of **fairness, transparency, and intelligibility** of the court martial system all military personnel accused of having committed a civilian offence, inside or outside of Canada, would be dealt with in the civilian criminal justice system, in a manner similar to all other civilian accused persons. Unlike the current system where concurrent jurisdiction can create confusion over when and how court martial jurisdiction will be exercised, under this option it would be very clear that courts martial have exclusive jurisdiction over uniquely military offences, and that civilian criminal courts have exclusive jurisdiction over civilian offences committed both inside and outside of Canada, thereby increasing **transparency**. Requiring all civilian offences committed by military personnel to be dealt with in the civilian justice system, it is estimated that this option would make the court martial system more familiar and comprehensible to the broad public. Further, it is estimated that the public would find it comprehensible to have a specialized court martial system if that system dealt only with uniquely military offences

However, it is estimated that this option could lead to a reduction in the system's ability to be operable across the full spectrum of operations, as under this option it would be the civilian justice system that would have jurisdiction over all offences abroad, likely reducing the **universality** of the system. Because this option could require civilian courts to preside in dangerous, hostile, or austere environments outside of Canada, and because it is not completely clear that civilian courts would actually preside in such places, this option could result in a higher likelihood of impunity or jurisdictional voids for civilian crimes committed outside of Canada by military personnel.

Chapter 14 – Punishments, Sanctions and Sentencing laws

14.1 Introduction

As discussed in Chapter 7, there are several aspects of the current system governing punishments, sanctions, and sentences that detract from the overall effectiveness and legitimacy of the court martial system overall. For example, on effectiveness, while it is accepted that the current system achieves a measure of **protection of the public from military personnel who engage in misconduct**, the CMCRT noted perceptions among those consulted that the current system may not adequately **express community condemnation of misconduct by military personnel**, and may often not have value in **rehabilitating military personnel who engage in misconduct**. In terms of legitimacy, the CMCRT noted perceptions that the current system's lack of parity of sentencing options when compared with the civilian system can appear to be not **fair**, and that the results of sentencing decisions that are generated in the absence of sentencing guidelines, recommendations from the chain of command, and (usually) mandatory minimum punishments can challenge both **transparency** and the system's ability to produce **accurate / correct sentencing outcomes**.

This chapter will describe three representative options to potentially change the punishments that a court martial has jurisdiction to impose.

As a preliminary consideration, the CMCRT notes that several changes could be made to the current system independently of any of the larger options that are discussed in more detail, below.

First, to increase the military expertise within the sentencing process, all options could provide for a mechanism requiring judicial consideration of military impact statements submitted by the chain of command of the accused person.¹ Such a change would promote the **generation of accurate / correct outcomes** that are informed by CAF perspectives.

Second, all options could provide for judicially adopted sentencing guidelines made in consultation with CAF leaders² to ensure **more transparency** in sentencing and to facilitate the **generation of accurate and correct sentencing outcomes**. These guidelines could indicate the relevant “starting point” for sentencing in various classes of offences, and highlight the types of considerations that should tend to increase or decrease the appropriate sentence.³

¹ This appears to have been intended within Bill C-71, *The Victims Rights in the Military Justice System Act*, 2nd Sess, 41st Parl, 2015 (died on the order of paper), where the proposed legislation would allow for the submission of military impact statements by the Chain of command of the accused.

² Such a change would be similar to the UK model, wherein the Court Martial judiciary have promulgated publicly-available sentencing guidelines. See United Kingdom, *Guidance on Sentencing in the Court Martial*, vers 4 (London: Judge Advocate General, 2013), online: <<https://www.judiciary.gov.uk/wp-content/uploads/2015/05/guidance-sentencing-court-martial.pdf>>. This change would also be similar to the New Zealand model, where sentencing guidelines are developed and published jointly by the Defence Force's senior military officer and senior judge (see above, Chapter 5 (Comparative), at section 5.2.3 (New Zealand)).

³ For an explanation of how such “starting point sentencing” could work in Canada, see Paul Moreau, “In Defence of Starting Point Sentencing” (2016) 63 Crim L Q 346.

Third, all options could abolish the scale of punishments⁴ and replace it with a menu-approach to selecting punishments. Abolishing the scale of punishments in the current court martial system would likely provide more flexibility to judges – possibly leading to punishments that are (and are perceived to be) consistent with purposes and principles of sentencing – thereby likely **generating more accurate sentencing outcomes**, that are more comprehensible and, therefore, **more intelligible**.

The current hierarchy has proven somewhat limiting in certain cases. For instance, in *R v Balint*,⁵ the most appropriate punishment that was agreed upon in a joint submission by counsel for the prosecution and the accused person caused difficulty for the presiding judge. The judge ultimately acknowledged that the recommended sentence – a minor punishment of 12 days confinement to barracks – was “genuinely crafted to fit the offence and the particular circumstances of the offender. It will promote the objectives of denunciation, specific deterrence, and rehabilitation sought by counsel.”⁶ However, the judge only arrived at this conclusion after calling a witness on the court martial’s own motion to hear additional evidence that satisfied the judge that this sentence was appropriate for the offending Officer Cadet, when a lower-ranking non-commissioned member had received a small fine (which was higher on the NDA’s scale of punishments) for a similar offence. Abolishing the hierarchy of punishments would likely eliminate judicial concerns such as this one, by permitting sentencing judges the latitude to impose the most appropriate punishment in each case.

Fourth, with respect to intermittent sentences, all options could provide for intermittent sentences in a way that would mirror the existing *Criminal Code* regime and make this kind of sentence available if its length does not exceed 90 days.⁷ Such a change that parallels the civilian law would likely make the sentencing regime within the court martial system more familiar, and therefore **more intelligible**. It would also support the **generation of accurate and correct outcomes** by allowing sentencing judges to determine in case-specific ways how a sentence of incarceration ought to be served to achieve the purposes and principles of sentencing.

Fifth, all options could also incorporate two other sentencing options currently available in the civilian criminal justice system: prohibition orders⁸ and pre-sentence reports.⁹ Prohibition orders could be provided for in a scheme that mirrors the scheme provided for in the *Criminal Code*.¹⁰

⁴ *National Defence Act*, RSC 1985, c N-5, s 139 [NDA]: “each of those punishments is a punishment less than every punishment preceding it.” In support of this idea, see above at section 4.5.4.1.1.

⁵ *R v Balint*, 2011 CM 1012.

⁶ *Ibid* at para 22.

⁷ *Criminal Code*, RSC 1985, c C-46, s 723 [*Criminal Code*]; NDA, *supra* note 4, s 148. See also Michel W Drapeau, *Restorative justice for CAF members. An absolute and urgent necessity*, online: <<http://mdlo.ca/news/restorative-justice-for-cf-members-an-absolute-necessity/>> [Drapeau].

⁸ This was recommended in Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence*, by The Honourable Patrick J. LeSage (Ottawa: Department of National Defence, 2011), at 46-47 [LeSage Report].

⁹ This was recommended in Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, (Ottawa: Bronson Consulting Group, 2008) at 66 [Bronson Report (DMP)]. In *R v Larouche*, 2012 CM 302, Military Judge d’Auteuil lamented the fact that he could not obtain pre-sentencing reports (paras 46-47).

¹⁰ Judges can currently issue prohibition orders in very limited circumstances under the NDA (s 147.1); see also sections 109ff of the *Criminal Code*, *supra* note 7, for prohibition orders.

Similarly, under this option, pre-sentence reports could be provided for in a scheme that mirrors the *Criminal Code* provisions.¹¹ CAF social work officers could be trained to draft pre-sentence reports, or the existing resources within the civilian criminal justice system could be leveraged to implement pre-sentencing reports in the court martial system. Implementing these aspects of the civilian sentencing regime into the court martial system would likely, in the case of prohibition orders, more effectively **protect the public from military personnel who engage in dangerous misconduct**, and in the case of pre-sentence reports, would likely assist in the **generation of accurate / correct outcomes**.¹² The time that would be needed to prepare pre-sentence reports would, however, likely lead to a small decrease in the system's ability to produce **timely outcomes**.

Sixth, all options could provide for the use of VTC during sentencing submissions in order to resolve matters as quickly as possible.¹³ Such a change should contribute to the production of

¹¹ See *Criminal Code*, *supra* note 7, s 721 for pre-sentencing.

¹² Canada, Department of National Defence, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.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 (Ottawa: Department of National Defence, 2003), at 66 [Lamer Report]: "the sentencing provisions under the NDA require extensive reform. The current powers of punishment are not adequate." See also Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Special Study on the provisions and operation of An Act to amend the National Defence Act (Court Martial) and to make a consequential amendment to another Act*, SC 2008, c 29, 25-27 (May 2009) at 25-27 (Chair: The Honourable Joan Fraser), [Senate Report 2009] online: <http://publications.gc.ca/collections/collection_2011/sen/yc24-0/YC24-0-402-5-eng.pdf>.

The Committee is concerned with the current lack of flexibility in the range of punishments and sanctions for accused under the Code of Service Discipline ... However, we are of the view that adding some of the sentencing options available in the Criminal Code to the NDA would improve the military justice system... the Committee endorses the Lamer Report's finding that because the military justice system has jurisdiction over members of the regular force, the reserve force and in certain cases, civilians, the range of punishments and sentences must be appropriate for all of these groups.

See also *R v Larouche*, 2012 CM 3023, paras 46-47: "I can but regret that the Court Martial does not have the authority to ask a probation officer to make a written report relating to the accused for the purpose of assisting the court in imposing a sentence, as provided by section 721 of the Criminal Code... The lack of such a tool limits the evidence that can be obtained to assist the military judge in determining a fair and appropriate sentence, particularly in the exercise of concurrent criminal jurisdiction."

¹³ See Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (June 2017) at 7 (Chair: The Honourable Bob Runciman), online: <https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court_Delays_Final_Report_e.pdf>. The Final report of the Standing Senate Committee on Legal and Constitutional Affairs (Senate Report 2017) recommended better use of technology in the civilian criminal justice system at 7:

The committee finds that many common practices in the criminal justice system are inefficient and should be replaced by those based on technological solutions. Most procedural matters are still dealt with in front of a judge, such as the setting of dates and rescheduling of court appearances ... Similar efficiencies could be achieved by making videoconferencing technology available to avoid unnecessary in-person appearances and to facilitate communications among various participants in the justice system.

See also *Queen's Regulations and Orders for the Canadian Forces*, art 112.64; 112.65; See also above, Chapter 4 (Consultation) at section 4.4.5 (LCol (Ret'd) Perron): "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."; This was recommended in

timely outcomes, and **more proportionate financial and human resource costs** (by eliminating travel associated with some sentencing matters).

14.2 Option 1: Abolition of leadership-related punishments

Under this option, all leadership-related punishments from the scale of punishments available at courts martial would be abolished.

For the purposes of this option, the CMCRT would define “leadership-related punishments” to mean those punishments that have close conceptual parallels within the domain of military administrative law where they are imposed non-judicially as a function of CAF leadership and administration, as opposed to punitively by a tribunal as a matter of public order and welfare. These punishments include the following:

- dismissal with disgrace and dismissal (analogous to release for misconduct under item 1 of the Table to QR&O 15.01);
- reduction in rank (analogous to reversion upon conviction by a civil authority under QR&O 11.11),
- forfeiture of seniority (analogous to adjustments to seniority following reversions in rank under QR&O 3.09);
- severe reprimand and reprimand (analogous to remedial measures of counselling and probation and recorded warning, under Defence Administrative Order and Directive (DAOD) 5019-4); and,
- minor punishments of stoppage of leave under QR&O 104.13(2)(c) (analogous to a leave approval authority’s power to withhold leave when there is a military requirement under QR&O 16.01(1)) and caution (analogous to a commander’s prerogative to communicate dissatisfaction with a subordinate’s performance or conduct to that subordinate).

The remaining court martial system punishments that are provided for at section 139 of the NDA and in QR&O chapter 104 would remain in effect.

14.2.1 Assessment of Option 1

It is assessed that Option 1 would have a positive impact on features that support effectiveness and legitimacy.

Under this option, the **generation of accurate / correct outcomes** would likely be supported by ensuring that appropriate punishments are available to the tribunal, without creating any disciplinary role confusion or permitting any perceptions that the leadership functions of the offender’s chain of command could be undermined (where a tribunal determines not to impose a

the Bronson Report (DMP), *supra* note 9 at 17 : “We feel that more efficient use, aided by technology, could be made of the Gatineau facility where all of the Judges are located.”

leadership-related punishment that the chain of command feels should be imposed).¹⁴

Under this option, it is assessed that the court martial system could be perceived as **more intelligible**, as the removal of leadership-related punishments would render the sentencing regime more comprehensible and familiar (particularly because no such leadership-related punishments exist within the civilian criminal justice system). It is also assessed that, under this option, the court martial system may be perceived as **more fair** by both the CAF and the broader public, since any leadership-related measures taken in respect of a CAF member who is alleged to have committed, or who is found to have committed, a service offence could only be taken by non-judicial military authorities exercising their leadership and administrative roles, rather than by judicial tribunals who are arguably less well-situated to make decisions in respect of CAF leadership and administrative matters.

14.3 Option 2: Mirror the sentencing options available in the civilian criminal justice system

Like Option 1, this option would also abolish leadership-related punishments. This option would also provide that all the relevant sentencing options that are available in the civilian criminal justice system be available in the court martial system.¹⁵ Specifically, this option would provide for the following sentencing options at court martial: conditional sentences,¹⁶ probation,¹⁷ and conditional discharges.¹⁸

Under this option, a similar scheme to the one that exists under the *Criminal Code* for conditional sentences of imprisonment would be mirrored in the court martial system.¹⁹ It would provide that if a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to certain conditions.²⁰ Under this option, the chain of command of the offender would be responsible for

¹⁴ See above, Chapter 4 (Consultation), at sections 4.5.3 (CANSOFCOM) and 4.5.4.2.1 (4 CDSG & 2 CMBG), for different perspectives on how such situations can occur within the current system. See also one of the key observations from consultation relating to this point, above Chapter 4 (Consultation) at section 4.6.

¹⁵ This option assumes that the new sentencing options provided for under Bill C-15, *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24, will enter into force. See Legislative Summary of Bill C-15: Canada, Department of National Defence, *Legislative Summary of Bill C-15: An Act to amend the National Defence Act and to make consequential amendments to other Acts* (Ottawa: Department of National Defence, 2013), online : <https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c15&Parl=41&Ses=1&Language=E#a38>.

See also the Lamer Report, *supra* note 12 at 66: "It is clear that there is a need for more flexible sentencing powers in the military justice system, including some of the sentencing options that are available in the civilian criminal justice system"; see also See also, Lamer Report, *ibid* at 65: "As was made clear in my discussions with various members of the Canadian Forces, including the court martial judges and presiding officers, and as highlighted in the CBA Submission and the JAG Report, the sentencing provisions under the NDA require extensive reform. The current powers of punishment are not adequate."

¹⁶ This was recommended in the Lamer Report, *ibid* at 65-66.

¹⁷ This was recommended in the Lesage Report, *supra* note 8 at 46 and the Senate Report 2009, *supra* note 12 at 29-30.

¹⁸ This was recommended in the Senate Report 2009, *supra* note 12 at 29-30 and by Drapeau, *supra* note 7.

¹⁹ *Criminal Code*, *supra* note 7, ss 742-742.7.

²⁰ *Ibid*, s 742.1.

supervising the application of the conditional sentence.

Under this option, a similar scheme to the one that exists under the *Criminal Code* for probation orders would be enacted in the court martial system.²¹ Under this scheme, a court could either order that a sentence be suspended and the offender be placed on a period of probation, or, direct that, in addition to a fine or a sentence of imprisonment for a term not exceeding two years, an offender comply with the conditions prescribed in a probation order.²² Under this option, the chain of command of the offender would be responsible for supervising the application of the probation order.

Under this option, a similar scheme to the one that exists under the *Criminal Code* for conditional discharges would be provided for in the court martial system.²³ Under this scheme, instead of convicting an accused person after making a finding of guilt, a court could direct that the accused be discharged on the conditions prescribed in the relevant order. Under this option, the chain of command of the offender would be responsible for supervising the application of the conditions of the discharge.

Under this option, in exceptional circumstances and for operational reasons only, the CDS could lift the application of a probation order, a conditional sentence or a conditional discharge.²⁴

Under this option, if a member who is subject to any conditions in one of the orders described above is released from the CAF, then responsibility for supervising the application of the order would be transferred to the relevant civilian authorities in the jurisdiction where the member is located upon release.²⁵

14.3.1 Assessment of Option 2

It is assessed that Option 2 would likely result in an increase in the features that support effectiveness and legitimacy in all the same ways as for Option 1, but would also likely result in some additional gains in respect of these two principles.

Under this option, with the inclusion of conditional discharges, conditional sentences, and probation orders, it is assessed that there would be an increase in the **generation of accurate / correct sentencing outcomes** and in the system's ability to **protect the public from military personnel who engage in misconduct**,²⁶ since more case-specific options would be available to

²¹ *Ibid*, s 731-733.1.

²² *Ibid*, s 731.

²³ *Ibid*, s 730.

²⁴ Similar to s 227 of the NDA regarding orders to comply with the *Sex Offender Information Registration Act*, SC 2004, c 10.

²⁵ The concept of transferring responsibility over an offender to civilian authorities already exists under the NDA with respect to persons found unfit to stand trial or not criminally responsible (who then fall within the jurisdiction of provincially-constituted civilian Review Boards under Part III, Division 7 of the NDA). This concept also appears to exist within the UK's court martial system, where service community orders can be imposed at the Court Martial, but only apply once a sentenced offender is dismissed from military service – at which point the person would be supervised by civilian authorities: see above, Chapter 5 (Comparative) at section 5.2.5 (United Kingdom).

²⁶ Lamer Report, *supra* note 12 at 66: “the sentencing provisions under the NDA require extensive reform. The current powers of punishment are not adequate.” See also Senate Report 2009, *supra* note 12 at 25-27:

the tribunal in situations where forms of incarceration would be excessive, but where some control over an offender or a person who has been found guilty is nonetheless necessary. In this sense, this option would provide sentencing tools that could permit tribunals to more precisely tailor a sentence depending on the extent of state control that should be exercised over a person as a result of a tribunal's determination that the person committed an offence.

It is assessed that, under this option, the provision for probation orders and conditional sentences would likely increase the system's ability to **rehabilitate military personnel who engage in misconduct**.²⁷

Under this option, it is assessed that the court martial system would be perceived as **more intelligible** and **fair**, since all offenders would be liable to the same types of punishments regardless of whether they are dealt within the civilian justice system or the court martial system.²⁸

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The Committee is concerned with the current lack of flexibility in the range of punishments and sanctions for accused under the Code of Service Discipline ... However, we are of the view that adding some of the sentencing options available in the Criminal Code to the NDA would improve the military justice system... the Committee endorses the Lamer Report's finding that because the military justice system has jurisdiction over members of the regular force, the reserve force and in certain cases, civilians, the range of punishments and sentences must be appropriate for all of these groups.

²⁷ *R v Proulx*, [2000] 1 SCR 61, para 23: "While a suspended sentence with probation is primarily a rehabilitative sentencing tool, the evidence suggests that Parliament intended a conditional sentence to address both punitive and rehabilitative objectives." See also paras 22-37.

²⁸ See Drapeau, *supra* note 7:

Fourth, persons prosecuted before military tribunals do not benefit from the wide range of sentencing options available to those convicted by a civilian court. They are not entitled to a suspended sentence, a conditional discharge, a probationary order and a sentence of imprisonment to be served in the community or within their unit. Nor are they given equality of treatment with respect to intermittent sentences. While section 732 of the Criminal Code fixes at 90 days the maximum length of imprisonment for the availability of an intermittent sentence, the 2013 amendments to the NDA makes this kind of sentence available only if its length does not exceed 14 days.

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Chapter 15 – The Laws of Evidence

15.1 Introduction

As discussed in Chapter 7, the laws of evidence applicable to the court martial system are only somewhat effective and somewhat efficient, primarily as they can be an obstacle to the **generation of accurate / correct outcomes** or promote **timely outcomes**. The military laws of evidence are also different from the ordinary criminal rules of evidence in ways that can affect the legitimacy of the system, due to a perceived lack of **fairness** and **intelligibility**.¹

This chapter will describe two representative options to update the laws of evidences applicable within the court martial system that would increase the effectiveness and efficiency of this aspect of the court martial system.

15.2 Option 1: Update the Military Rules of Evidence

This option would provide for the continued use of codified Military Rules of Evidence but commence a process to amend them to ensure that the relevant common law and statutory laws of evidence are incorporated into the MRE where appropriate and, where necessary, new MRE would be created to account for contemporary military and societal realities (for instance, the reality that electronically signed documents may be authentic and reliable in ways that should make them admissible, even if no “original” of such a document can be easily identified).²

The CMCRT was not mandated to conduct an exhaustive review of the MRE but notes that implementation of this option would require a detailed comparison of the current MRE provisions and the common law and statutory laws of evidence that need to be paralleled, in addition to a thorough analysis of how changes in evidence law should be drafted and reflected in the MRE. The CMCRT notes that the most recent changes to the MRE were made after extensive analysis conducted by contracted experts.

15.2.1 Assessment of Option 1

It is assessed that, relative to the current court martial system, implementation of this option would increase the effectiveness and efficiency of the court martial system by improving how the rules of evidence support the **generation of accurate / correct outcomes** and by promote **timely outcomes**.

¹ For example, *Military Rules of Evidence*, CRC, c 1049 [MRE] provisions on the inadmissibility of hearsay evidence, and on the exceptions to this general rule (Rules 26-35) do not reflect the common law of evidence as articulated most recently by the Supreme Court of Canada in *R v Khelawon*, 2006 SCC 57. Furthermore, provisions on spousal competence to testify in the MRE (Rule 74) are out of date and do not reflect the current state of the law in civilian criminal courts as provided for at section 4 of the *Canada Evidence Act*, RSC 1985, c C-5, that were last amended in 2015 as part of a law reform package intended to better address the needs and circumstances of victims in the criminal justice system (see *Victims Bill of Rights Act*, SC 2015, c 13).

² This was recommended in Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service*, (Ottawa: Bronson Consulting Group, 2008), at 17: “we recommend that a review be conducted of the Military Evidence Act (Military Rules of Evidence) with the view to simplifying the methods for proving certain elements of offences without unduly infringing on the fundamental rights of accused persons.”

It is assessed that, under this option, updating the MRE would increase the **generation of accurate / correct outcomes** for several reasons. First, the common law of evidence is constantly evolving and results in **more accurate / correct outcomes** in the civilian criminal justice system by permitting or prohibiting reliance on evidence during a criminal trial. As the common law has developed significantly and continuously since the MRE were last updated,³ there is a disconnect between the common law and the MRE. Under Option 1, the MRE would be updated and more aligned with the common law rules.⁴ Currently, although prosecutors, defence counsel and judges must be familiar with the common law and statutory rules, however, the MRE prevent them from using this existing criminal law knowledge. Thus, under this option, the MRE would promote an increase the overall criminal law expertise of the judges, prosecutors, and defence counsel in the court martial system as the MRE would mirror the common law and statutory laws of evidence applicable in the civilian criminal justice system. However, it is assessed that unless the MRE are constantly and frequently updated, this option may have a neutral impact on the **generation of accurate / correct outcomes** in the long term, if the MRE continue to be inconsistent with the constantly evolving civilian rules of evidence.⁵

Similarly, it is assessed that, in the short term, this option could improve perceptions of **fairness** and **intelligibility** regarding the court martial system. Since the MRE would be aligned with the civilian law of evidence, this option would provide for an accused person to be dealt with in a similar manner, that is likely more familiar and comprehensible, regardless of the justice system (military or civilian) in which he/she is being tried. However, in the long term, the court martial system may still be perceived as not **fair** or **intelligible** by some if, over time, the MRE were not updated to be aligned with civilian law; this situation would lead differences and unfamiliarity in the applicable laws of evidence depending on whether an accused person is being dealt within the civilian justice system or the court martial system.

15.3 Option 2: Abolish the MRE and Use Statutory Amendments to Address Specialized Issues

This option would abolish the MRE and would use statutory amendments to incorporate specific military rules. These statutory amendments could be achieved through an amendment to the *Canada Evidence Act* or by directly amending the NDA. In particular, this option would provide for a small number of rules to address unique military aspects of evidence such as a rule that would permit a court martial tribunal to take judicial notice of matters of general service knowledge, and for a rule that would permit the efficient proving of a military document.⁶

This option would also provide that the rules of evidence at courts martial, regardless of the location of trial either inside of outside of Canada, shall be the common law rules of evidence in a set Canadian location⁷ and the CEA.

15.3.1 Assessment of Option 2

³ MRE were last updated in 2001, see above, Chapter 2 (Historical Background).

⁴ *Supra*, note 1.

⁵ See above, Chapter 4 (Consultation), at section 4.5.4.2.2 (RHFC). As was remarked during public consultations, the common law “grows and expands to face new challenges, whereas the MRE are overly stilted, inflexible, and out of date.”

⁶ Given the frequencies of postings and releases from the CAF it may not always be practical or possible for the individual who created or witnessed a document to be called as a witness to testify as to the document’s authenticity.

⁷ Potentially, Ottawa, as this is the jurisdiction currently used in the MRE.

It is assessed that, relative to the current court martial system, implementation of this option would increase the effectiveness, efficiency, and legitimacy of the court martial system.

It is assessed that, under this option, abolishing the MRE and amending the CEA would increase the **generation of accurate / correct outcomes** for many reasons. First, the common law and CEA have developed significantly and continuously since the MRE were last updated⁸ and the abolishment of the MRE would permit the common law or CEA to apply instead of outdated rules. Additionally, under this option, abolishment of the MRE would increase the overall criminal expertise of the judges, prosecutors, and defence counsel in the court martial system as they would become more familiar with the common law and statutory laws of evidence applicable in the civilian criminal justice system.

Similarly, it is estimated that this option could increase the proportionate use of **financial and human resources** as prosecutors, defence counsel, and judges would only be required to learn a single set of evidentiary rules, thereby reducing the requirement for training and time associated with learning and maintaining knowledge of two sets of rules.

Additionally, it is assessed that this option could improve perceptions of **fairness** and **intelligibility** regarding the court martial system. Since there would no longer be a distinct body of evidence law applicable to the court martial system, and only the civilian law of evidence would apply (with special provision for a very small number of military rules), this option would provide for an accused person to be dealt with in almost an identical manner, that is likely more familiar and comprehensible, regardless of the justice system (military or civilian) in which he/she is being tried. As the abolishment of the MRE would be permanent, there would be no requirement to constantly and frequently update them, so the improvements in **fairness** and **intelligibility** within the court martial system would be long-term improvements.

15.4 Conclusion

This chapter has canvassed two options to update the military laws of evidence. The implementation of either of these options would increase the effectiveness and legitimacy of this aspect of the court martial system.

⁸ MRE were last updated in 2001, see Chapter 2 (Historical Background).

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Chapter 16 – Appeals

16.1 Introduction

As discussed in Chapter 7, the appeal mechanisms and system within the court martial system is, and is generally perceived to be, efficient, mostly effective, and mostly legitimate. However, as noted in that chapter, some aspects of the current system might nonetheless benefit from considerations for improvement.

This chapter will discuss several possible changes that could improve various features of the court martial appeals system related to appeals in terms of effectiveness, efficiency and legitimacy. The representative options described below would focus particularly on the features of **generating accurate / correct outcomes, timely outcomes, and intelligibility**.

As a preliminary consideration, there are several changes that could be made to how appeals are dealt with in the court martial system that would be common to both of the options discussed below.

First, a coordinated approach to facilitate familiarization training and exposure to the CAF could be provided for appellate judges.¹ Such training and exposure could promote military knowledge of civilian judges who may have no military training or experience, and would likely increase the **generation of accurate / correct outcomes** in the court martial system.

Second, the scope of the Minister's rights of appeal (exercised through the military prosecution service) could be modified to mirror the rights of appeal that civilian prosecutors have within the civilian criminal justice system.² Currently, the Minister can appeal a finding of not guilty on a question of law alone or of mixed law and fact,³ whereas civilian prosecution services can only appeal a finding of not guilty on a question of law alone.⁴ Aligning the Minister's right of appeal with that of civilian prosecution services would likely increase the **intelligibility** of the court martial system.

Similarly, the scope of an offender's right of appeal could be modified to align the appeals of a finding of guilty on a question of fact and to mirror an offender's rights of appeal in the civilian

¹ For instance, through the National Judicial Institute. See also above, Chapter 4 (Consultation) at section 4.4.5 (LCol (Ret'd) Perron).

² This was recommended by Michel W Drapeau & Gilles Létourneau, *Behind the times: Modernization of Canadian Military Criminal Justice*, (2017), at 63-64 [Drapeau & Létourneau] :

Under section 230.1 of the NDA the prosecution can appeal to the CMAC against the legality of a finding of not guilty.... The prosecution in military trials can appeal on a question of mixed law and fact. In a criminal trial before a civilian tribunal no such power exists for the prosecution. The prosecution's appeal is limited to a pure question of law.... Thus the military prosecution possesses a broader right of appeal which puts an accused at greater jeopardy than that of a civilian facing criminal prosecution before a civilian tribunal.

³ *National Defence Act*, RSC 1985, c N-5, s 230.1(b) [NDA].

⁴ *Criminal Code*, RSC 1985, c C-46, s 676(1)(a).

justice system.⁵ This change could likely increase the **intelligibility** of the court martial system.

16.2 Option 1: Incremental change – Minor changes to existing court and appeal structures

Under this option, the existing appeal court and structures would remain intact and the Court Martial Appeal Court of Canada (CMAC) would continue to have jurisdiction to hear appeals of decisions from courts martial.⁶ This option would provide that the judges of the CMAC would be cross-appointed solely from the provincial Superior Courts and Courts of Appeal. This option would provide that a Federal Court / Federal Court of Appeal judge would serve as Chief Justice of the CMAC.

The judges of the CMAC (including the Chief Justice) would continue to be designated by Governor in Council and there would be no set limit on the number of judges who could be appointed to the CMAC.

16.2.1 Assessment of Option 1

It is assessed that this option may promote **more timely outcomes** and an increase in the generation of **accurate / correct outcomes**, since it would ensure that all CMAC judges have criminal law and appellate expertise.⁷ Both Superior Court judges and judges of the provincial Courts of Appeal preside over criminal appeals – the former as Summary Conviction Appeal Courts hearing appeals in criminal matters from inferior provincial courts in respect of summary conviction offences, and the latter hearing criminal appeals in respect of indictable offences.

It is assessed that this option might also increase the **intelligibility** of the court martial system by ensuring that appellate judges, who regularly preside over criminal appeals, would preside over court martial appeals, instead of federal court judges who do not necessarily have equivalent criminal appeal expertise.

16.3 Option 2: Abolish the CMAC – Appeals from courts martial are made to the provincial Courts of Appeal

⁵ This was recommended by Létourneau & Drapeau, *supra* note 2 at 64 :

Also, an accused's right of appeal against a military finding of guilt is narrower than an accused's right against a similar finding made by a civilian criminal court. As a matter of fact subparagraph 675(1)(a)(ii) of the *Criminal Code* allows a person convicted by a civilian criminal court to appeal against the finding of guilt on a question of fact with leave of the Court of Appeal or a certificate of the trial judge that the case is a proper case for appeal. An accused tried by a military tribunal is not given that right by the NDA.

See also above, Chapter 4 (Consultation), at section 4.5.4.1.1 (2 Can Div Pers Svcs – CO): “Lastly, the CO suggested that offenders and the prosecution service in the court martial system should have the same rights of appeal as exist in the Canadian criminal justice system.”

⁶ NDA, *supra* note 3, s 234(1).

⁷ For instance, in Ontario, on average, half of the cases that the Court of Appeal hears are criminal matters. See online: <<http://www.ontariocourts.ca/coa/en/ps/annualreport/2013.htm#stat>>. In British Columbia, on average a third of the cases that the Court of Appeal hears are criminal matters. See online: <http://www.courts.gov.bc.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2016_CA_Annual_Report.pdf>.

Under this option, the existing court and appeal structures would be abolished. This option would provide for any appeals from courts martial to be made to the Court of Appeal of the province in which the court martial occurred.⁸

16.3.1 Assessment of Option 2

It is assessed that, under this option, there could be an increase in **timely outcomes** and in the **generation of accurate / correct outcomes** as it would ensure that the appellate judges would have significant criminal and appellate expertise. However, under this option, it is also possible that – as military appeals would become part of the broader civilian justice system – there would be a decrease in **timely outcomes**⁹ as any court martial appeal would be heard in the ordinary course of appeals within the civilian justice system instead of as a matter of priority.

It is assessed that, under this option, there would be a decrease in the **scalability** of the court martial system as this option would not have a mechanism within the court martial system that permits the system to rapidly adapt to large changes in the volume of cases that may proceed within the system. As the number of provincial appellate judges is fixed in statutes, it would be difficult for there to be an augmentation of appellate judges, should the need arise. However, it should be noted that there was an average of 5.6 appellate decisions each year at the CMAC in the last 5 years.

It is assessed that, under this option, there may be an increase in the **intelligibility** of the court martial system as all appeals related to offences committed by military personnel would be dealt with by the civilian justice system which may be more familiar and comprehensible to the CAF and broader public. While the details regarding appellate structures and processes in both the current court martial system and the civilian justice system are perhaps not well understood by the general public, this option could be explained very simply as providing identical treatment to military personnel as any civilian in the same circumstances in that province would receive.

⁸ This option would effectively implement the model that is currently used in Ireland, where the Irish Court of Appeal is the court that hears appeals from court martial decisions. See above, Chapter 5 (Comparative), at section 5.2.4 (Ireland).

⁹ For instance, in Ontario and British Columbia, it takes more than a year from the date of the filing of the appeal to the date of the hearing. See *supra*, note 7.

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Chapter 17 – Vulnerable Groups

17.1 Introduction

As discussed in Chapter 7, the court martial system's effectiveness, efficiency, and legitimacy are challenged by how it responds to the needs of victims, aboriginal offenders, and young persons. This chapter will outline several possible initiatives aimed at addressing the special needs of these three particular groups who may interact with the court martial system: victims, young persons, and aboriginal offenders. Unlike previous chapters, this chapter will discuss certain proposals affecting these groups that could be implemented across the court martial system, and could improve the effectiveness, efficiency, and legitimacy of the system.

17.2 Victims' rights and services comparable to the civilian system

Limited victim-related provisions currently exist within the NDA. Many processes and procedures for the benefit and protection of victims that have existed in statutory form within the civilian criminal justice system for years do not currently exist in statutory form within the court martial system. For instance, the power to order a publication ban exists under the *Criminal Code* in relation to many situations and offences,¹ but is not expressly provided for under the NDA. In the absence of specific authority under the NDA, military judges have resorted to section 179(1)(d) of the NDA as authority to issue publication under the common law.²

Similarly, matters such as "rape shield" protections and disclosure of victim records held by third parties must be addressed by the application of common law as the NDA does not include provisions similar to those in the *Criminal Code* found at section 276 (and following). Furthermore, section 278.1 (and following) of the *Criminal Code* sets out a detailed process for the protection of third-party records (i.e.: records that are not in the possession of or under the control of the Crown) that are sought by an accused person, such as medical or psychiatric records relating to a complainant in a sexual assault case. This statutory scheme was enacted in response to the SCC's decision in *R v O'Connor*,³ and provides for a two-step process that is somewhat different than the process that the SCC set out in *O'Connor*. No equivalent scheme exists under the NDA, which means that a military judge who applies the common law (as established by the SCC in *O'Connor*) at a court martial will follow a different process than the one that Parliament determined was more appropriate within the civilian criminal justice system when it enacted section 278.1 (and following) of the *Criminal Code*. The differences between these processes – that typically apply for the benefit and protection of victims and complainants – could create perceptions that the court martial system is **less fair** and **less intelligible** than the civilian criminal justice system.

A number of provisions in Bill C-15, when brought into force, will provide victims of service

¹ See, for instance, *Criminal Code*, RSC 1985, c C-46, ss 486.4 and 486.5, (sexual offences and proper administration of justice); s 517 (judicial interim release hearings); s 631(6) (jury selection); and ss 672.51 and 672.501 (Mental Disorder / Review Board hearings) [*Criminal Code*].

² See, for instance, *R v Rivas*, 2011 CM 2012; see also *Canadian Broadcasting Corp v Boland*, [1995] 1 FCR 323.

³ *R v O'Connor*, 4 SCR 411.

offences with specific procedural rights. Victim impact statements will permit individual victims of offences, particularly those who have experienced significant, financial and emotional harm, to have a voice in the sentencing process. Restitution orders will allow the court martial to impose a restitution order on an offender in situations involving damage or loss of property, or bodily or psychological harm. This provision will permit restitution to victims of service offences without the need to resort to actions in civil court.

In spite of the positive changes that the implementation Bill C-15 will make for the benefit and protection of victims, the court martial system would still not provide the same extent of victim-centred processes and procedures as exist within the civilian criminal justice system.

It is assessed that the **effectiveness** and **legitimacy** of the court martial system would increase if victims of military offences had rights at least equal to, and access to resources at least as favourable as, those available in the civilian criminal justice system in Canada.⁴

The CMCRT notes that victims' rights in the court martial system would mirror those offered to victims in the civilian criminal justice system if a bill such as Bill C-71 (see Assumption #1, in Chapter 1) were to be enacted. A bill like this would create a "Declaration of Victims Rights" granting victims of service offences the rights to information, protection, participation, and to seek restitution in respect of service offences within the court martial system. The bill would also provide for military judges to make orders for the protection of victims, such as no-contact orders, publication bans, orders permitting a witness to have a support person present while testifying, and orders prohibiting an accused person from personally cross-examining a witness, that would mirror the substantive rights offered to victims of certain criminal offences in the civilian justice system. It is estimated that implementation of victims' rights in the court martial system, in a fashion similar to what Bill C-71 would have achieved, would increase the perceived **fairness** of the court martial system.

Additionally, implementation of two other aspects of Bill C-71 (or a similar initiative) could increase the **effectiveness** and perceived **fairness** and **transparency** of the court martial system for victims. First, in order to help ensure that victims are properly informed of and positioned to access their rights, the bill would provide for a Victim Liaison Officer, at the request of the victim,

⁴ See above, Chapter 4 (Consultation), at section 4.3.1 (Summary of results):

Several contributors made submissions concerning the victims of service offences, and their rights within the military justice system. All those who submitted on this topic felt that in a court martial system, victims should have rights at least equal to, and access to resources at least as good as, those available in the civilian criminal justice system in Canada. Some contributors recommended that victims' resources in the court martial system could be made even better than most civilian systems – for example, by providing victims with free legal representation in certain circumstances.

See also, above, Chapter 4 (Consultation) at section 4.4.1 (Federal Ombudsman for Victims of Crime). The Federal Ombudsman for Victims of Crime's first recommendation was as follows: "Bring victims' rights under the *National Defence Act* in line with those under the *Canadian Victims Bill of Rights*." See also, above, Chapter 4 (Consultation) at section 4.5.4.2.2 (RHFC) : "[v]ulnerable victims should be afforded the protections envisioned in the *Criminal Code*, including publication bans, and the potential for the use of testimonial aides, including [closed circuit television] and support persons." See above, Chapter 4 (Consultation) at section 4.3.1 (Summary of results): "Finally, whenever the needs of specific groups in the court martial system were discussed, the CMCRT was not surprised that contributors unanimously indicated that the court martial system ought to grant victims at least the same rights and services as are available in the civilian criminal justice system."

who would assist the victim to understand how service offences are charged, tried, and dealt with under the Code of Service Discipline. The Victim Liaison Officer would also assist the victim to obtain information that the victim requests and to which the victim has a right. This would be a role unique to the court martial system and could have a positive impact on how **fair** and **transparent** victims perceive the system to be.

Second, the bill would provide for the submission of a military impact statement at the time of sentencing of an offender, so that members of the CAF chain of command could describe the harm done to the discipline, efficiency, or morale of the CAF as a result of an offence. Military impact statements would be distinct from community impact statements, which would also be available but would focus on the harm or loss suffered by a community as a result of an offence, having a negligible impact on timeliness while providing significant effectiveness and legitimacy benefits.

It is possible that the inclusion of victim impact statements, military impact statements, community impact statements, and the various orders, could initially decrease **timely outcomes**. However, it is assessed that, in the long term, these statements and orders would become familiar and routine to the actors within the court martial system.

Additionally, it is assessed that the inclusion of these tools could increase the **generation of accurate / correct outcomes** and allow the court martial system to appropriately express **community condemnation of misconduct by military personnel** as a broader range of perspectives would be expressed to the presiding judge at the sentencing stage. Furthermore, the additional support provided to victims (through the Victim Liaison Officer) would prepare victims more effectively for the often-daunting task of testifying in a criminal trial, thereby helping the judge to make informed decisions.

Furthermore, the CMCRT notes that relevant changes were proposed by the CAF Strategic Response Team – Sexual Misconduct, the External Review Authority, and the CAF Sexual Misconduct Response Centre regarding the development of a Victim Liaison Assistance Program to ensure that victims have continued and consistent support of specifically trained personnel as their cases progress through civilian or military health care and police systems as well as judicial processes.⁵ Should a Victim Liaison Assistance Program be developed, it is possible that

⁵ See Canada, Department of National Defence, *Canadian Armed Forces Third Progress Report on Addressing Inappropriate Sexual Behaviour* (Ottawa: Department of National Defence, 2017), at 6, online: <http://www.forces.gc.ca/assets/FORCES_Internet/docs/en/caf-community-support-services/third-progress-report.pdf> [SMRC].

The assignment of subject matter experts at all stages of victim support, including the responsibility for advocacy on behalf of victims in the complaint and investigation processes was one of the recommendations from the External Review Authority (ERA). The development of a Victim Liaison Assistance Program would ensure that victims of sexual misconduct have the option of being supported by specifically trained personnel as their case progresses through civilian or military health care and police systems as well as judicial processes. Victims of sexual assault in the CAF are currently required to primarily self-navigate through complex medical and justice systems whilst also processing the trauma they experienced as there is no single, comprehensive, system wide CAF victim advocacy and assistance programs to assist with or throughout the processes that follow reporting. A CAF enabled Victim Liaison Assistance Program would build upon the current range of support services for victims of sexual assault through the CFNIS and Director Military Prosecutions as well as IC2M. This type of program has been shown to provide significant positive

integrating the Victim Liaison Officer into this Program would be an efficient use of **human resources** and could facilitate victims' understanding of the court martial system and provide a more streamlined interaction with the system, thereby improving the perceived **transparency** and **intelligibility** of the system. Further, it is possible that, by integrating the Victim Liaison Officer into the Program, this would facilitate the communication between prosecutors and victims which should result in greater perceptions of **fairness** on behalf of the victims and result in **more accurate / correct outcomes**.⁶

Additionally, the CMCRT notes that, although the reporting and investigation of complaints is outside of the scope of the current review, expanding the reporting options of victims to include concepts such as "restricted and unrestricted reporting,"⁷ could increase the **intelligibility** of the overall military justice system. This increase in intelligibility could result because "restricted and unrestricted reporting" would offer victims the opportunity to have evidence collected anonymously, without necessarily triggering a police investigation, while the victims reserve the right to file formal complaints. Finally, it is assessed that the establishment of a peer support network as proposed by the above-mentioned stakeholder groups, that specifically offers a safe

impact on outcomes for those impacted by HISB, thus further enhancing victim support and assistance and meeting one of the recommendations of the External Review Authority.

See also above, Chapter 4 (Consultation), at section 4.4.3 (SMRC):

The SMRC provided a detailed submission concerning victims' advocacy in the court martial system. It noted that recommendation nine in the External Review Authority's Report included assigning "the responsibility for advocating on behalf of victims in the complaint and investigation processes" to an agency external to the CAF. In the SMRC's view, in the court martial system, victims of sexual offences are disadvantaged compared to the majority of Canadian society, "where most victims have access to advocacy services in the form of sexual assault crisis centres." The Centre pointed out recent reforms that have taken place in the Australian and the American military justice systems, and described for the CMCRT the potential roles and functions of victims' advocates, as well as the potential benefits of such services:

Advocacy services can assist in reducing barriers in several ways; navigating complex medical and criminal justice systems, avoiding re-traumatization and re-victimization, providing comfort, reassurance and information. Advocates also provide an important role in reducing the stigma and barriers to disclosure such as shame, guilt and self-blame.

Research [...] indicates that advocacy can lead to increased levels of satisfaction with both the medical and criminal justice system. It has also been shown to reduce levels of re-traumatization and thus reduce the likelihood of the long term use of medical and mental health services.

Advocacy offers a wide range of support services available for victims of sexual assault. By enhancing victim support, it could have significant impact on the CAF by helping increase trust in the Chain of Command and Military Justice System, reducing re-traumatization resulting in better retention of CAF victims as well as restoring operational effectiveness more quickly.

⁶ See above, Chapter 5 (Comparative) at section 5.2.2 (Australia). In Australia, SeMPRO works closely with the Australian Defence Force Investigative Service and DMP to ensure that victims are provided seamless support as their case moves through the system.

⁷ See SMRC, *supra* note 5. See also Canada, Department of National Defence, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, by Marie Deschamps C.C., Ad.E (Ottawa: Department of National Defence, 2015) recommendation 4, at 36: "Allow members to report incidents of sexual harassment and sexual assault to the center for accountability for sexual assault and harassment, or simply to request support services without the obligation to trigger a formal complaint process."

environment for victims wherein they can seek support from others who have had similar experiences while in the CAF,⁸ would provide for services that are similar to those available in the civilian criminal justice system and would therefore make the court martial system more familiar and comprehensible.

It should be noted that under current regulations, members of the CAF have a duty to report any breaches of the law by persons who are subject to the CSD.⁹ This regulation is likely a barrier to implementing “restricted” and “unrestricted” reporting. To address this barrier and in order to respect victims’ confidentiality, a statutory rule of privilege for those who support victims could be created so that individuals involved in peer support could not be compelled to report, testify or provide any information regarding communications to these individuals by victims, unless there is an overriding public interest to do so.

Most of the above initiatives could also encourage reporting which would allow the court martial system the opportunity to address acts of violence and crime. As stated by the Federal Ombudsman for Victims of Crime,

If victims’ experiences in the military justice system are such that victims feel marginalized or less protected than even the average Canadian, they may be more reluctant to come forward. This reluctance may contribute to a culture of unreported crime and ongoing victimization. Providing a system that is fair and respectful of victims’ needs and concerns can help to encourage reporting and, therefore, assist the CAF in becoming aware of – and having the opportunity to address – acts of violence and crime within its organization.¹⁰

Most of the above initiatives could improve the **transparency** and **intelligibility** of the court martial system, as there would be clear rules to support victims, instead of *ad hoc* attempts by judges using implied powers. This could cause the court martial system to be perceived as more familiar, comprehensible, and defensible to the broader public and the CAF.

Although it was suggested to the CMCRT that victims should be supported by counsel,¹¹ and although the CMCRT notes that such an initiative has been implemented within the American court martial system,¹² the CMCRT assesses that this initiative, which would be novel and unique in Canadian law and could, indeed, change the very nature of the criminal trial, would potentially inhibit the generation of **timely outcomes**, and could challenge the **fairness** and **legitimacy** of the adversarial trial process.¹³

⁸ See SMRC, *supra* note 5 at 5-6.

⁹ See *Queen’s Regulations and Orders for the Canadian Forces*, art 4.02 and 5.01.

¹⁰ See above, Chapter 4 (Consultation), at section 4.4.1 (Federal Ombudsman for Victims of Crime).

¹¹ See above, Chapter 4 (Consultation), at section 4.4.4 (IJ700).

¹² See above, Chapter 5 (Comparative) at section 5.2.1 (United States).

¹³ See, for instance, the assessment by then-Minister of Justice, the Honourable Peter MacKay, during a live interview on 14 August 2013 (from 3:55 to 4:55), indicating that provision of victims’ counsel could cause delay that leads to cases being stayed, online: <http://globalnews.ca/video/779670/justice-minister-peter-mackay-on-the-victims-bill-of-rights>.

17.3 Enact sentencing consideration for aboriginal offenders equivalent to that in the Criminal Code

Currently no provisions exist within the NDA regarding aboriginal offenders. Although Bill C-15 provides for the fundamental purposes of sentencing,¹⁴ and the principles and objectives of sentencing that parallel in many ways equivalent provisions of the *Criminal Code*, it does not incorporate the language of section 718.2(e) of the *Criminal Code* which provides that a court is required to take into account all reasonable alternatives to incarceration, with particular attention to Aboriginal offenders.¹⁵

It is assessed that implementing a sentencing consideration for aboriginal offenders in the court martial system that is at least equal to the consideration available in the civilian criminal justice system in Canada¹⁶ would increase the **effectiveness** and **legitimacy** of the court martial system.

¹⁴ *National Defence Act*, RSC 1985, c N-5, s 203.1 [NDA]: discipline, efficiency, morale, and just, peaceful, safe society.

¹⁵ NDA, *ibid*, s 203.3.

A service tribunal that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and aggravating circumstances include, but are not restricted to, evidence establishing that

(i) the offender, in committing the offence, abused their rank or other position of trust or authority,

(ii) the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability or sexual orientation, or any other similar factor,

(iii) the offender, in committing the offence, abused their spouse or common-law partner,

(iv) the offender, in committing the offence, abused a person under the age of 18 years,

(v) the commission of the offence resulted in substantial harm to the conduct of a military operation,

(vi) the offence was committed in a theatre of hostilities,

(vii) the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(viii) the offence was a terrorism offence;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances;

(d) a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and

(e) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

See also *Criminal Code*, *supra* note 1, s 718.3:

A court that imposes a sentence shall also take into consideration the following principle: ... (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

¹⁶ See above, Chapter 4 (Consultation), at section 4.3.1 (Summary of results):

Several contributors made submissions concerning the victims of service offences, and their rights within the military justice system. All those who submitted on this topic felt that in a court martial system, victims should have rights at least equal to, and access to resources at least as good as, those available in the civilian criminal justice system in Canada. Some contributors recommended that victims' resources in the court martial system could be made even better than most civilian systems – for example, by providing victims with free legal representation in certain circumstances.

The effect of section 718.2(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) directs judges to consider the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.¹⁷

Through the application of section 179(1)(d) of the NDA, the underlying principles of section 718.2(e) have been relied upon at a court martial. In *R v Levi-Gould*, where the military judge order a pre-sentence *Gladue* report, it was held that “denying examination of aboriginal status would be denying what has been recognized by courts as an essential requirement for the imposition of just sanctions which do not operate in a discriminatory manner.”¹⁸

It is assessed that providing for a consideration similar to that which is found in section 718.2(e) of the *Criminal Code* in the court martial system would improve the **generation of accurate / correct sentencing outcomes** when sentencing aboriginal military personnel by mandating that a judge consider the circumstances specific to aboriginal offenders.

The Supreme Court noted the importance of section 718.2(e) of the *Criminal Code* in the sentencing process in its *Gladue* decision.

Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. [...] the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing.¹⁹

Additionally, it is also estimated that implementing a consideration like that within section 718.2(e) would increase the potential for **rehabilitation of aboriginal military personnel who engage in misconduct**. As stated by the Supreme Court in *Gladue*, the provision is focused on “the restorative goals of repairing the harms suffered by individual victims and by the community

See also, Chapter 4 (Consultation), at section 4.4.1 (Federal Ombudsman for Victims of Crime): “The first recommendation was: “Bring victims’ rights under the *National Defence Act* in line with those under the *Canadian Victims Bill of Rights*.” See also, above, Chapter 4 (Consultation), at section 4.5.4.2.2 (RHFC): “[v]ulnerable victims should be afforded the protections envisioned in the *Criminal Code*, including publication bans, and the potential for the use of testimonial aides, including [closed circuit television] and support persons.”. See also above, Chapter 4 (Consultation), at section 4.3.1 (Summary of results): “Finally, whenever the needs of specific groups in the court martial system were discussed, the CMCRT was not surprised that contributors unanimously indicated that the court martial system ought to grant victims at least the same rights and services as are available in the civilian criminal justice system.”

¹⁷ *R v Gladue*, [1999] 1 SCR 688, paras 75; 93 [Gladue].

¹⁸ *R v Levi-Gould*, 2016 CM 4003, paras 12-14.

¹⁹ *Gladue*, *supra* note 17 at para 81.

as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender.”²⁰

Further, it is assessed that provision for such a consideration would bring the court martial system more in line with the civilian criminal justice system, thereby increasing the perceived **fairness** and **intelligibility** of the court martial system. As aboriginal military offenders would have consideration at least equal to that which is available in the civilian criminal justice system, this change would likely increase the perceived and actual **fairness** of the system. Further, by mirroring a familiar and comprehensible scheme in the civilian criminal justice system, the court martial system would also be more defensible, ultimately contributing to a likely increase in **intelligibility**.

Lastly, implementation of consideration like that within section 718.2(e) could improve the **transparency** of the system, as there would be clear rules in the court martial system, instead of *ad hoc* acknowledgements of the scheme, as was seen in the application of the *Gladue* principles in the *Levi-Gould* case.

17.4 For ordinary civilian offences, young persons should be dealt with by civilian courts, under the *Youth Criminal Justice Act*²¹

Currently, no specific provisions exist within the NDA regarding young offenders. The *Code of Service Discipline* applies to young persons when they are subject to the CSD,²² meaning that they can be dealt with by courts martial like any other adult accused person or offender. This process is distinct from how young persons are dealt with in the civilian system, where the *Youth Criminal Justice Act* (YCJA) governs the treatment of offences committed, in Canada, by persons aged between 12 and 17 years old.

Specifically, the YCJA provides for a separate justice system for young offenders, on the understanding that “the criminal justice system for young persons must be separate from that of adults, [and] must be based on the principle of diminished moral blameworthiness or culpability.”²³

The YCJA recognizes that there are concerns particular to youth and the criminal justice system and that Canada is a party to the *United Nations Convention on the Rights of the Child*,²⁴ which provides for special guarantees for the rights and freedoms of children.²⁵ The YCJA’s provisions indicate that the legislation is intended to

- (i) Prevent crime by addressing the circumstances underlying a young person’s offending behavior;
- (ii) Rehabilitate young persons who commit offenses and reintegrate them into society; and,
- (iii) Ensure that a young person is subject to meaningful consequences for his or her offence

²⁰ *Ibid* at para 43.

²¹ SC 2002, c 1 [YCJA].

²² For example, reservists who are not yet 18 would be subject to the CSD or Officer Cadets at the Royal Military College of Canada would also be subject to the CSD.

²³ YCJA, *supra* note 21, s 3(1)(b).

²⁴ *UN Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²⁵ YCJA, *supra* note 21, Preamble.

in order to promote the long-term protection of the public.²⁶

In recognition of these particular needs, the YCJA provides for various measures that are not available in the court martial system. For instance, extrajudicial measures such as warnings and referrals allow for the diversion of certain types of misconduct out of the civilian justice system. Additionally, if a young offender is to be sentenced under the YCJA, then there are restrictions on when custody can be ordered²⁷ and alternatives to custody must be specifically considered.²⁸

It is assessed that, given the special considerations for young persons, the court martial system would be enhanced by provide that, for civilian offences committed, outside or inside of Canada, by young persons, the civilian criminal justice system will exercise jurisdiction unless urgent operational considerations require the use of the court martial system. This would permit the YCJA to apply to young offenders.

Providing for young offenders to be dealt with under the YCJA could increase the **rehabilitation of military personnel who are young persons and who have engaged in misconduct**, and appropriately allow for **community condemnation of misconduct committed by military personnel who are young persons**, since it would divert certain types of misconduct out of the court martial system, would allow for the imposition of other types of sentences currently not provided for in the CSD on young offenders, and would recognize the special considerations associated with young offenders and youth crime.

For the same reasons, permitting for the civilian criminal justice system to exercise jurisdiction would likely increase the **generation of accurate / correct outcomes**. Further, as the YCJA has resulted in the establishment of special youth courts that have developed an expertise in the application of the YCJA and the associated services and programs that are provided, providing for young persons who are subject to the CSD to access to this expertise would increase the **generation of accurate / correct outcomes**.

Lastly, providing for young persons subject to the CSD to be dealt under the YCJA framework would likely increase the perceived **fairness, transparency, and intelligibility** of the court martial system. First, this jurisdiction would provide for young persons subject to the CSD to have access to the same procedures and resources of all young persons under the YCJA. Additionally, explicitly providing for this jurisdiction could increase **transparency**, as there would be a clear, articulable rule instead of an assessment on a case-by-case basis as to which system should exercise jurisdiction over a young person as between the court martial system and the civilian criminal justice system. Lastly, providing for the existing YCJA framework to apply to young persons subject to the CSD would be more familiar, comprehensible, and defensible to the broader public and the CAF than the status quo in the court martial system.

²⁶ *Ibid*, s 3(1)(a).

²⁷ *Ibid*, s 38.

²⁸ *Ibid*, s 39.

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Chapter 18 – Conclusion

This report responds to the JAG's direction to provide a broad policy-based analysis and discussion of Canada's court martial system that is focused on assessing the effectiveness, efficiency, and legitimacy of the current system, and a range of representative options for enhancing it.

Consistent with the CMCR Terms of Reference (Annex A), as amended (Annex B), the comprehensive review has been informed by consultation with the public, other government departments, foreign subject matter experts, and senior CAF leaders. The review has also been informed by consultation with targeted experts from both inside and outside of Canada. The input that was received by the CMCRT through these consultations has offered the team extremely valuable insights from a wide variety of stakeholders who represent different and important perspectives. The CMCRT gratefully acknowledges the significant time and energy that was taken by everyone who contributed to the consultation process. Without the input that was provided by these contributors, it would have been impossible to produce this report.

This report has attempted to situate the CMCRT's contemporary assessment of the current court martial system within the larger historical and comparative context within which the system now exists, while considering other critical perspectives on the system, all of the input received during the consultations, and the CMCRT's theoretical model for the court martial system.

Ultimately, as reflected within Chapter 7, the CMCRT has undertaken a detailed assessment of the current court martial system that includes specific discussion of each subject area within the system that has been considered as part of the comprehensive review. The assessment concludes that the current court martial system is somewhat effective (mostly in terms of its ability to achieve a public order and welfare purpose), appears to have considerable room for improvements in efficiency, and, as a result, faces challenges to its legitimacy.

In light of this assessment, the CMCRT has also discussed a wide range of representative options within Chapters 9-17 that all appear to offer the potential for improvements to the system across the combined principles of effectiveness, efficiency, and legitimacy. Any option or combination of options could be developed in more detail, or adapted in different ways, in order to generate any enhancements to the court martial system that future decision-makers might feel are necessary.

Ultimately, the CMCRT is hopeful that this report – in addition to offering the assessments of effectiveness, efficiency, and legitimacy that were directed by the JAG – may serve as a basis for future discussions and responsible development of the court martial system to ensure that it continues to meet the needs of the Canadians and reflects Canadian values.

Court Martial Comprehensive Review Team
21 July 2017

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