RESPONSE SYSTEMS PANEL TO ADULT SEXUAL ASSAULT CRIMES PANEL
Under section 920 of Title 10 & S.C. (Article 120), Uniform Code of Service Discipline

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THE CANADIAN MILITARY JUSTICE SYSTEM: MARKING TIME?
By
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FOR PRESENTATION TO THE ACADEMIC PANEL DISCUSSION
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I am proud and honored to share my expertise in Canadian military Justice with this Committee. I have followed with much interest the discussions which took place in the US regarding sexual assaults committed by members subject to the US Uniform Code of Service Discipline.

Let me briefly introduce myself. I spent 34 years in the Canadian Army (Regular Force) and retired in 1993 in the rank of Colonel. During my military service, I served as a combat logistician and twice commander a combat service support unit. During the last decade of my service, I served in a variety of high-level staff positions at National Defence Headquarters including Secretary, National Defence Headquarters; Secretary, Armed Forces Council; and Special Assistant to the Vice Chief of the Defence Staff. Soon after retirement, I undertook a 4-year programme of study to obtain both a licentiate and baccalaureate degrees in law. I articled at the Federal Court of Appeal of Canada. I was called to the Bar of Ontario in 2002. Since my call to the Bar, I have been active in the practice of law.

Appointed adjunct Professor of Law by the University of Ottawa in 2009, I teach, inter alia, a course at the graduate and undergraduate levels on Canadian military law. I have appeared on a number of occasions before Canadian parliamentary committees with regards to proposed amendment to the National Defence Act. [NDA] I regularly write articles pertaining to the urgent need, in my opinion, for a fundamental wall-to-wall review of the NDA. A review which has to be conducted outside the control of the Department of National Defence so that Parliament can be provided with a legislative proposal which not only address the wishes of the military leadership but, first and foremost, the expectations of our civil society which demands that our sons and daughters who serve in uniform be afforded rights equal to those provided for in the

1 National Defence Act, Revised Statutes of Canada (R.S.C.), chapter N-5, [NDA]
civilian penal system in Canada and other militaries abroad. This is currently not the case. I am also the co-author of two encyclopedic legal texts on Canadian Military Law.  

INTRODUCTION

Military tribunals are tribunals of exception, that is to say tribunals that derogate from the penal system usually in place for the prosecution of civilian offenders charged with Criminal Code of Canada or statutory offences. The military justice system entails a differential treatment for members of the Canadian Forces.

The scope of the jurisdiction of military tribunals has expanded in recent years. Previously, there was clearly a requirement that there be a military nexus before the military courts could acquire and exercise their jurisdiction. Now the issue is in doubt.

BACKGROUND

Our system of military justice is deeply rooted in the English tradition. In Canada, the Code of Service Discipline, embedded in the NDA lists offences unique to military service, such as misconduct in the presence of the enemy, disobedience of an order and desertion, and the respective punishments. The Code of Service Discipline also incorporates all offences under the Criminal Code as well as all federal statutes and, in certain circumstances, foreign laws.

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2 Justice Gilles Létourneau and Professor Michel W. Drapeau, Military Justice In Action; Annotated National Defence Legislation, [2011] Carswell. [Copy will be provided to the Committee] and, Justice Gilles Létourneau and Professor Michel W. Drapeau, Canadian Military Law Annotated, [2005] Carswell.

3 Criminal Code, R.S.C. 1985, chapter C-46

4 Given Canada’s historic experiences and status as a former British colony, this is not surprising. The Canadian Forces’ Code of Service Discipline has clearly defined English roots. The proposition is not without some merit given the pre-eminent role played by Britain in the defence of Canada in the period immediately prior to the Confederation of provinces, which, in 1867, gave birth to the modern Canadian nation state. In fact, until 1868 British forces comprised the only regular forces in the Dominion of Canada. Canada’s Militia Act of 1868 organized the Canadian Army as the country’s first military force and essentially adopted the British Army model for a Code of Discipline. This was a sine qua non given the presence of British regular forces in Canada during the colonial period and the then prevailing philosophy that the Canadian Army should be trained and organized to support British forces. The Militia Act of 1868 introduced a two-tier system of summary trials and courts martial. Although much has changed, Canada’s two-tier service tribunal structure has endured.

5 The Code of Service Discipline, which is currently embodied in Part III of the National Defence Act [NDA], is the statutory basis for Canada’s military justice system and sets out its main components. Further amplification is contained in the Queen’s Regulations and Orders [QR&Os] for the Canadian Forces, which are regulations made by the Governor in Council (the Canadian Cabinet) and the Minister of National Defence, as well as in orders issued by the Chief of the Defence Staff [CDS].

6 The Code of Service Discipline also structures the military tribunal system, which contains two types of service tribunals and an appellate court, the Court Martial Appeal Court (CMAC). The majority of charges under the Code of Service Discipline can be tried either by summary trial or court martial. Summary trials are formal disciplinary hearings convened as necessary by the chain of command to hear and adjudicate minor service offences, which may take place inside or outside Canada.
In recent years, the United Kingdom has made substantial changes to its military justice system to bring it more in line with contemporary human rights values and, as importantly, to bring it in sync with their civilian criminal justice system. Canada has yet to contemplate similar changes. I know of no legal or operational reasons as to why similar changes should not be incorporated in Canada’s military system of justice, since our Charter of Rights and Freedoms (Charter)\(^7\) is, in most respects, analogous in values to the European Convention for the Protection of Human Rights.\(^8\)

Truth be told, the core features of our own NDA have been static for decades. Any attempts to modernize it and bring it more in line with our own civilian penal system have been successfully resisted by our own military. Be that as it may, several reforms have been made as a result of pressures from outside, not within, the Department of National Defence. Three examples of such external pressures should suffice.

1998

1. **Royal Commission of Inquiry.** The 2 ½ years Royal Commission of Inquiry presided over by the Honorable Justice Gilles Létourneau into the actions of Canadian Airborne Regiment during its deployment to Somalia in 1993\(^9\) resulted in an awakening of the political class and the national media to such an extent that the NDA underwent major reforms.\(^10\) The principal reforms enacted via Bill C-25 in 1998\(^11\) included, *inter alia*, the following:

a. Abolition of the death penalty;

b. Some strengthening of the independence of military judges relating to their appointment, powers and tenure. For example, appointments are now to be made by the Governor in Council (versus the Minister), a judge holds office during good

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\(^10\) Bill C-25 – *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, *Statute of Canada* 1998, c. 35.

behaviour for a term of five years, removal is for cause under recommendation of an Inquiry Committee, etc. (ss. 165.21 to 166 of the NDA.)

c. Clarification and limitation of the functions of the Minister of National Defence:

  o The power to appoint military judges has been transferred from the Minister to the Governor in Council (Cabinet)

  o The power that the Minister approve certain sentences has been removed;

  o The power that the Minister suspend punishments of imprisonment or detention or to appoint officials to do so has been removed;

  o The ministerial authority to review or alter convictions in the case of summary trials has been transferred to the CDS;

  o The ministerial discretion to dispense with any retrial ordered by the Court Martial Appeal Court [CMAC] or the Supreme Court of Canada has been repealed.

d. Creation of new positions within the military justice system

  o Chief Military Judge;

  o Director of Military Prosecution;

  o Director of Defence Counsel Services; and

  thus segregating the functions of investigation, prosecution and defence of accused persons;

e. The role and functions of the various actors, i.e. investigators, administrators, prosecutors, defence counsel and judges, were clearly delineated and separated. The positions of Court Martial Administrator, Director of Military Prosecutions and Director of Defence Counsel Services were created (s. 165.18, 165.1 and 249.18);

f. The military tribunals also acquired jurisdiction over sexual assault offences committed in Canada. These offences were previously within the exclusive jurisdiction of the civilian justice system. Section 22 of the bill achieved that result by amending s. 70 of the NDA;

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12 Before the amendments brought by Bill C-25, the Minister enjoyed, under the NDA, numerous powers of a quasi-judicial nature. For example, the Minister could entertain petitions for release from pre-trial custody, order courts martial or designate other persons who would have this power, suspend punishments of imprisonment or detention, approve certain sentences, review or alter convictions in the case of a summary trial, etc. His power to appoint military judges has been transferred to the Governor in Council.
g. A reduction in the powers granted to a Commanding Officer presiding over summary trials. Prior to the amendments, the Commanding Officer possessed an unfettered discretion regarding the prosecution of offences by way of summary trials. His decision not to prosecute, even for serious crimes, was not subject to review. In addition, he had no legal knowledge and very little training, if any, in the holding of summary trials;  

h. The three-year limitation period for the prosecution of service offences was abolished, thereby potentially increasing the workload of the military tribunals (s. 21 of the Bill amended s. 69 of the NDA);

i. Establishment of the Military Police Complaints Commission, to provide independent oversight of complaints about the conduct of the military police and allegations of interference in investigations conducted by the military police;

j. Application of common law provisions concerning ineligibility for conditional release; and

k. Creation of the Canadian Forces Grievance Board, an independent body responsible for the impartial disposition of [some] grievances in the Canadian Forces.

13 Constitutional concerns that were grounded on the Charter and related to procedural fairness prompted a number of corrective measures. Among these was a guarantee that the Commanding Officer who carries out or supervises the investigation of an offence, who issues a search warrant in relation to that offence, or who lays the charge or causes it to be laid, cannot then preside over the summary trial (ss. 163(2) of the NDA).

There was also a reduction of the maximum period of detention that the Commanding Officer can impose from 90 to 30 days (ss. 163(3)) of the NDA, a limitation on the type of offences that he can try (s. 163) of the NDA and a referral procedure to an officer authorized to refer charges to the Director of Military Prosecutions when the Commanding Officer decides not to prosecute (ss. 163.1(2), (3) and s. 164.2 of the NDA).

Pursuant to the reform, mandatory training on procedural fairness and the conduct of summary trials was administratively organized for Commanding Officers.

Moreover, the Commanding Officer’s power to order a reduction in rank is now limited to a reduction of one rank below the rank held before the trial (paragraph 163(3)(b) of the NDA).

In order to facilitate subsequent review by higher authorities, evidence at summary trial is now taken under oath or solemn affirmation.
2. Lamer Report.\textsuperscript{14}

Clause 96 of Bill C-25 required that the Minister undertake an independent review of the \textit{NDA} every five years following the bill's coming into force. Accordingly, former (retired) Chief Justice of the Supreme Court, the Right Honourable Antonio Lamer began the first review in March 2003.

His report was tabled in Parliament on November 2003.\textsuperscript{15}

His eighty-eight (88) recommendations were primarily designed to provide better guarantees of the independence of key players, in particular military judges and the Director of Defence Counsel Services, and to improve the grievance and military police complaints process. Some of his recommendations remain unaddressed.

3. The Supreme Court of Canada

\textit{MacKay v. The Queen, [1980] 2SCR}

In an obiter from \textit{MacKay v. The Queen, [1980] 2 SCR} at 408-409, McIntyre J. commented on the relationship of military law to the ordinary civil law and more specifically whether a trial by court martial under military law deprives one of equality under the law:

In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend to prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts . . . It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent. The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code which differs in some particulars from the civil law, to differing rules of evidence, and to a different and more limited appellate procedure. His right to rely upon the special pleas of "autrefois convict" or "autrefois acquit" is altered for, while if convicted of an offence in a civil court he may not be tried again for the same offence in a military court, his conviction in a military court does not bar a second prosecution in a civil court. His right to apply for bail is virtually eliminated. While such differences may be acceptable on the basis of military need in some cases, they cannot be permitted universal effect in respect of the criminal law of Canada as far as it relates to members of the armed services serving in Canada. [\textit{My emphasis}.]

\textsuperscript{14} 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 which was submitted to the Minister of National Defence on September 3, 2003.

\textsuperscript{15} The independent review related solely to the provisions and operation of Bill C-25, and did not encompass the \textit{NDA} as a whole.
In other words, the military offence had to be so connected with the service in its nature and in the circumstances of its commission that it would tend to affect the general standard of discipline and efficiency of the service: id., p. 410. However, doubts have been cast on this requirement and the jurisdiction of the military courts increased pursuant to Bill C-25 which amended the NDA in 1998 (R. v. Reddick (1996), 5 CMAR 485, at pp. 498 to 506; but see contra R. v. Brown (1995), 5 CMAR 280). This notion of ‘military nexus’ has no place when the issue is one of division of constitutional powers. It merely distracts from that issue and it is misleading (ibidem). In a decision, R. v. Nylstrom, 2005 CMAC 7, at paragraph 67, the CMAC narrowed the scope of the ruling in the Reddick case and left for another time the determination of the need for a military nexus. For a comparative analysis of the military nexus requirement, see Justice Gilles Létourneau, Introduction to Military Justice, (Montréal, Wilson and Lafleur Ltd., 2013) at pp. 13 ff. [Copy provided to the Committee]


The Supreme Court of Canada (SCC), in R. v. Généreux, [1992] 1 S.C.R. 259, recognized the constitutional validity of the penal military justice system. A parallel system of courts for the military that exists alongside the ordinary criminal courts is not by its very nature inconsistent with paragraph 11(d) of the Charter. At p. 293, writing for a majority of the Court, Lamer, Chief Justice, wrote the following in support of a system of military tribunals:

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

Obviously, the constitutionality of the system as a whole does not necessarily entail that every military tribunal is constitutional or that provisions of the Act relating to the penal military justice system are immune from successful constitutional attacks. In Généreux

As an aside, in Re Colonel Aird; Ex Parte Alpert, 209 Austl. L. Rep. 311. [2004] HCA 44 the court addressed whether there was court-martial jurisdiction over a rape committed overseas while the accused was on recreational leave. Kirby J. (dissenting) concluded that the jurisdiction of the service tribunal was only available under the Constitution for the limited purpose of maintaining or enforcing service discipline, properly so called. In the context of the exceptional character of service tribunals, the crime of rape allegedly committed by the prosecutor, whilst a tourist off duty, in the circumstances described in the special case, was one to which service discipline applied. The present is not a time to expand the jurisdiction and powers of military tribunals in Australia. It is at times like the present that this Court must adhere steadfastly to the protection of basic civil rights in Australia’s constitutional arrangements.

In stating that, he is in fact asserting the need for a military nexus.
itself, the SCC found that the structure and constitution of the General Court Martial were in breach of paragraph 11(d) of the Charter because they did not meet the essential conditions of judicial independence: the judges lacked sufficient security of tenure, there was insufficient protection against discretionary or arbitrary interference by the executive and, therefore, a lack of objective guarantee that the career of a military judge would not be affected by decisions tending to favour an accused rather than the prosecution.

A similar finding was made by the CMAC in Lauzon v. The Queen (1998), CMAC 415 with respect to the Standing Court Martial (see also Bergeron v. Her Majesty the Queen (1999), CMAC-417). At par. 32 and 33 of its decision, the Court wrote:

In short, if one wanted to apply the existing principles for Courts martial to the judges of the civil jurisdictions, the judges of the Court of Quebec, for example, would have to be appointed by the Minister of Justice, the positions of these judges would have to be assigned to and located within the litigation section of the department, to hear the department's cases, argued by counsel for the department, on behalf of the Minister of Justice and the Executive, over and above the fact that the appointments of these judges would have to be for short terms only and that the power to reappoint them would lie with the Minister of Justice, and that his or her Deputy Minister would have an influential role at certain crucial stages of the process. This is a completely unacceptable situation in the civil context. The acknowledged need for military discipline and for special courts to enforce it is not sufficient to justify such a significant and fundamental infringement of the principle of the separation of powers, especially because military personnel who face charges based on the Criminal Code have the right to essentially the same guarantees offered by criminal and constitutional law as ordinary citizens (except the right to a trial by jury, s. 11(f) of the Charter).

The organizational and institutional relationship among the Minister, the Judge Advocate General and the members of his or her Office who represent the Executive, and the military trial judges who hear the Department's cases does not, in our view, afford sufficient guarantees of institutional impartiality and independence. A reasonable person who became aware of the prevailing state of the law and the embarrassingly close relationship which exists between the Executive and the judiciary could only conclude, or at least would be justified in perceiving and believing, that the Presidents of the Standing Courts Martial are not free from pressure by the Executive at the institutional level. In other words, such a person could reasonably conclude that the military trial judges act through the Executive, with the Executive and for the Executive.

[My emphasis.]

4. The Court Martial Appeal Court of Canada. The CMAC has declared as unconstitutional several provisions of the National Defence Act:

a. R v. Reddick. (1997) CMAC 393. The court unanimously issued a reminder as to the need to remove the useless disparities between the civil penal system and the military penal system so as to ensure, within the military system, the best possible compliance with guarantees and rights enshrined in the Charter.

b. R v. Lauzon (1998) CMAC 415. Once again, the courts martial were declared unconstitutional. See discussion above under Supreme Court of Canada.
c. *R v. Gauthier.* [1998] CMAC 414. The court held that the *Charter* places limits, similar to those which apply under the *Criminal Code*, on the discretion to arrest without a warrant conferred in ss. 154 to 156 of the NDA.

d. *R. v. Nyström,* (2004) CMAC 483. The court alerted the military to the unfair and unconstitutional provision giving the Director of Military Prosecution rather than the accused the right to choose the type of court martial. Yet, noting was done to correct this, which led to the decision in *R v. Trépanier*.

e. *R. v. Trépanier,* (2008) CMAC 3 the Court declared unconstitutional the provisions enabling the Director of Military Prosecutions to choose the type of court martial for a given accused (s. 165.14 of the NDA).

f. *R v. Leblanc,* (2011) CMAC 2 declared courts martial unconstitutional because judges were appointed on terms. Bill C-15 was introduced into the House of Commons on the same day as Bill C-16, the *Security of Tenure of Military Judges Act*, which provides security of tenure for military judges until a fixed age of 60 years, subject only to removal for cause on the recommendation of an Inquiry Committee. Bill C-16 received Royal Assent on November 29, 2011.

g. *O’Toole v. The Queen,* [2012] CMAC 5 the Court offered the comment that in enacting the current provisions governing military justice, introduced by Bill C-25, the intent was to bring military justice into alignment with the civilian justice system noting that:

> [32] ... The military justice should therefore resemble the civilian justice system insofar as there is no military rationale for adopting a different approach.

Recently, Parliament enacted Bill C-15\(^{18}\) to amend the *NDA*. This provided Canada with yet a new opportunity to bring our military justice on par with civilian society standards and to ensure that it more closely reflect the provisions of our own *Charter of Rights and Freedoms*. However, despite a considerable amount of debate both in the House of Commons and the Senate clamoring for reforms as well as significant number of witnesses appearing before various parliamentary committees voicing their support for such reforms, at the end of the day no changes at all were made to either modernize the *NDA* or bring it in line with a global move to reduce, if not eliminate, the derogations between the military justice system and the civilian penal system.

As a result, there has been no attempt on the part of the current government to review and modernize the following “Victorian” notions of military justice.

\(^{18}\) Bill C-15 was enacted on June 19, 2013. See Statutes of Canada 2013, c. 24
a. **Judge Advocate General.** The term “Judge Advocate General” is inherited from the British military justice system where it is still in use. However, whether it is in Canada or in Britain, the term is misleading.

- In the United Kingdom, the role of the JAG has been redefined quite some time ago. The U.K. JAG is a judge performing a judicial and adjudicative function. He is a judicial officer, not an Advocate.

- In Canada, the JAG is not a judge.\(^{19}\) He is an advocate, a lawyer. He is not a judicial officer and he performs no judicial functions. His function is advisory, and his role is one of legal advisor. It is unfortunate that, in its reform process, the Canadian Parliament did not seize the opportunity to dissipate this unnecessary ambiguity.

b. **Summary trials.** There are close to 2,000 such trials each year in Canada. These trials have an average conviction rate of 97%. Although they are by law part of a “criminal process”, these trials are heard not by a judge, but by a member of the Chain of Command whose powers of punishments includes detention up to 30 days (in a military detention barracks) and reduction in rank. Yet, an accused before a Summary Trial has **no right to appeal** either the verdict or the sentence and this despite the fact that the verdict and sentence are imposed without any regard to minimum standards of procedural rights in criminal proceedings such as: i) a **right to counsel**; ii) the presence of **rules of evidence**; and, iii) a **right to appeal**. The fact that a criminal record will result from some of the convictions at summary trial, despite that little procedural safeguards are available to an accused, may also be unconstitutional. In my opinion, this aspect of the Summary Trial process is in need of urgent reform. We believe that Canadian society at large has an interest in knowing that fundamental rights, freedoms and protections of our soldiers are recognized and protected by military trials.\(^{20}\)

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\(^{19}\) Since 1998, the Chief Military Judge, not the JAG, is the supreme judicial authority within the Canadian Forces. Why? All persons subject to the Code of Service Discipline, and this includes the Chief of the Defence Staff, the Vice Chief of the Defence Staff as well as the Judge Advocate General and the some 150 odd military lawyers, the Provost Marshall, the Director of Military Prosecution etc. as well all other CF officers and non-commissioned members, are subject to the judicial authority of the Chief Military Judge, if and when they were to appear before his court.

\(^{20}\) In Europe, the European Court of Human Rights has considered the question of constitutionality of Summary Trials, and have decided that their current system, which was identical to our system, was in clear and unequivocal contravention of the rights owed to serving service persons. In reaction, the UK immediately implemented reforms allowing for an appeal mechanism from summary trials, where a right to counsel and rules of evidence are available. The summary trial system in the UK has now been decriminalized, and there are mandatory referral to courts martial for matters where imprisonment (or detention) may be contemplated. Australia followed suit. Ireland followed suit. New Zealand followed suit. And in France and Germany, they have eliminated summary trials altogether. Now, a member serving in the military of these countries relies exclusively on civilian courts.
c. **Reviewing Authorities.** At present, s. 249 of the *NDA* [extract attached] continue to grant the following two reviewing authorities power to uphold, quashes, substitute in respect of findings of guilt and mitigate, commute or remit in respect of punishments imposed

- **the Governor in Council** for findings of guilty made and punishments imposed by courts martial; and

- **the Chief of the Defence Staff** for findings of guilty made and punishments imposed by summary trials.

**COMMENT.** The power bestowed by s. 249 is based on the premise that, at the end of a day, a military officer may interfere with the decision of a service tribunal in the exercise of its judicial power in the traditional sense. This runs against the fundamental and overriding notion of judicial independence and autonomy, as well as due process, providing for the trial and punishment of ordinary offences by courts of law. The existence of this power creates a military class potentially removed from the reach of ordinary (criminal) law and limits the extent to which someone subject to military law can be held accountable by a judicial authority for his offences.

d. **Suspending Authorities.** At present, ss. 215, 216, 217 and 218 of the *NDA* [Extracts attached] continue to grant the following suspending authorities the ability to suspend a punishment of imprisonment or detention imposed by a service tribunal. The suspending authorities are members of the military chain of command, not judges. At present there are no safeguards contained in the legislation to prevent potential abuse. However, Bill C-15 (which has yet to be in force) provides that a suspending authority may suspend a punishment only if there are “imperative reasons relating to military operations or the offender’s welfare.” (New s. 216(2) of the *NDA*.)

- **In respect of punishments imposed at court martial, the Chief of the Defence Staff and an officer commanding a command may act as suspending authorities.** (Article 114.02 QR&Os)

- **In respect to punishments imposed at summary trials, the Chief of the Defence Staff, an officer commanding a command, a commanding officer or an officer acting as a review authority under article 108.45 of the QR&Os.**

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21 The suspending authority must still review the suspension every three months. The suspending authority may, at the time of the review, remit the punishment, in accordance with regulations to be made by the Governor in Council, as provided by Clause 66. Bill C-15 does not alter the provisions of the *NDA* that provide for automatic remission of punishments and detention in certain circumstances. (Ss. 217(2) and 217(3) of the *NDA*.)
COMMENT. Ss. 216 to 218 give the administrative authorities the power to interfere not only with the decision of a service tribunal, but also with a decision of the Court Martial Appeal Court by suspending the execution of a sentence of imprisonment or detention or postponing a committal to imprisonment of detention. Such a power is an executive interference with a judicial decision. The continued existence of these provisions runs counter to the sage recommendation of Chief Justice Lamer who recommended that: "the National Defence Act be amended to provide that the authority to suspend a custodial sentence shall reside with a military judge or judge of the Court Martial Appeal Court . . . ."

CONCLUSION

Despite the fact that military justice around the world is going through a period of ferment by enacting major reforms - shrinking military jurisdictions in favor of increased civilian capacity - the Canadian military justice system pays precious little attention to these developments. These changes are taking place in countries with whom we share a common legal heritage, and values system. I maintain that the time has come to conduct a full-scale independent systemic review of our 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.

Our military justice system is in dire need of a major overhaul. In consonance with the long established ‘separation of powers’ that guides our democracy, the Canadian civil judiciary is free from the control of the executive. The time has come to recognize that the functioning of our military criminal justice system must also be untrammeled by the executive and the chain of command. Because a Canadian in uniform is a Canadian citizen first, decisions on questions of law and legal rights and responsibilities of our ‘citizens in uniform’ should be equal to those provided for in the civilian penal system and no longer be an attribute of the military mind and command. This is currently not the case.

OTTAWA, ONTARIO
August 2, 2013

[Signature]
posed as to increase the duration of any punishment involving a term of incarceration.
R.S., c. N-4, s. 177.

206. to 214. [Repealed, 1998, c. 35, s. 59]

Suspension of Imprisonment or Detention

215. Where an offender has been sentenced to imprisonment or detention, the carrying into effect of the punishment may be suspended by the service tribunal that imposed the punishment.
R.S., 1985, c. N-5, s. 215; 1998, c. 35, s. 60.

216. (1) In this section and sections 217 and 218, “suspending authority” means any authority prescribed to be a suspending authority by the Governor in Council in regulations.

(2) A suspending authority may suspend a punishment of imprisonment or detention, whether or not the offender has already been committed to undergo that punishment.

(3) Where an offender has been sentenced to imprisonment or detention and suspension of the punishment has been recommended, the authority empowered to commit the offender to a penitentiary, civil prison, service prison or detention barrack, as the case may be, may postpone committal until directions of a suspending authority have been obtained.

(4) A suspending authority shall suspend a punishment of detention in the circumstances prescribed by the Governor in Council in regulations.
R.S., 1985, c. N-5, s. 216, 1998, c. 35, s. 60.

216.1 (1) Where a punishment is suspended before committal to undergo the punishment, the offender shall, if in custody, be discharged from custody and the term of the punishment shall not commence until the offender has been ordered to be committed to undergo that punishment.

(2) Where a punishment is suspended after committal to undergo the punishment, the offender shall be discharged from the place in which the offender is incarcerated and the currency of the punishment shall be arrested after the day of that discharge until the offender is longer la durée d’une peine comportant une période d’incarcération.


Suspension de l’emprisonnement ou de la détention

215. Le tribunal militaire peut suspendre l’exécution de la peine d’emprisonnement ou de détention à laquelle il a condamné le contrevenant.

216. (1) Pour l’application du présent article et des articles 217 et 218, « autorité sursoyante » s’entend de toute autorité désignée à ce titre par règlement du gouverneur en conseil.

(2) L’autorité sursoyante peut, dans le cas d’un contrevenant condamné à une peine d’emprisonnement ou de détention, suspendre la peine, que le contrevenant ait ou non déjà commencé à la purger.

(3) Lorsqu’une suspension de peine a été recommandée, l’autorité habilitée à faire incarcerer le contrevenant dans un pénitencier, une prison civile, une prison militaire ou une caserne disciplinaire, selon le cas, peut différer l’incarcération jusqu’à la réception des instructions de l’autorité sursoyante.

(4) L’autorité sursoyante suspend une peine de détention dans les cas prévus par règlement du gouverneur en conseil.

216.1 (1) Lorsqu’une peine est suspendue avant qu’il ait commencé à la purger, le contrevenant, s’il est en détention, doit être libéré. Le cas échéant, la peine ne commence à courir qu’au moment où est donné l’ordre d’incarcération.

(2) Si la suspension intervient après son incarcération, le contrevenant doit être libéré de l’endroit où il a commencé à purger sa peine, laquelle cesse de courir de sa libération jusqu’à l’ordre de réincarcération.
1998, ch. 35, art. 60.
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again ordered to be committed to undergo that punishment.
1998, c. 35, s. 60.

217. (1) Where a punishment has been suspended, it may at any time, and shall at intervals of not more than three months, be reviewed by a suspending authority and if on the review it appears to the suspending authority that the conduct of the offender, since the punishment was suspended, has been such as to justify a remission of the punishment, the suspending authority shall remit it.

(2) A punishment, except a punishment referred to in subsection (3), that has been suspended shall be deemed to be wholly remitted on the expiration of a period, commencing on the day the suspension was ordered, equal to the term of the punishment less any time during which the offender has been incarcerated following pronouncement of the sentence, unless the punishment has been put into execution prior to the expiration of that period.

R.S., 1985, c. N-5, s. 217; 1998, c. 35, s. 61.

218. (1) A suspending authority may, at any time while a punishment is suspended, direct the authority empowered to do so to commit the offender and, after the date of the committal order, that punishment ceases to be suspended.

(2) Where a punishment that has been suspended under subsection 215(1) is put into execution, the term of the punishment shall be deemed to commence on the date on which it is put into execution, but there shall be deducted from the term any time during which the offender has been incarcerated following pronouncement of the sentence.

R.S., c. N-4, s. 186.

219. (1) The Minister may prescribe or appoint authorities for the purposes of this section and section 220 and, in this section and section 220, an authority prescribed or appointed under

Envoi en prison ou détention

219. (1) Toute autorité que le ministre peut désigner ou nommer pour l’application du présent article et de l’article 220 est appelée « autorité incarcérante » dans ceux-ci.
Grounds may be considered

(3) When hearing an appeal under this section, the Court Martial Appeal Court may, in all cases where an appeal has been filed, take into consideration the grounds of appeal.

Application of provisions

(4) The provisions of this Division apply, with such modifications as the circumstances require, to any appeal under this section.

R.S., 1985, c. 31 (1st Supp.), s. 57; 1998, c. 35, ss. 80, 92.

Surrender into custody

248.91 A person released pending appeal under this Division may surrender himself or herself into custody at any time to serve a sentence of detention or imprisonment imposed on the person.

1998, c. 35, s. 81.

DIVISION 11

REVIEW

Review Authorities

249. (1) The review authority in respect of findings of guilty made and punishments imposed by courts martial is the Governor in Council.

(2) The review of a finding of guilty made and any punishment imposed by a court martial must be on application of the person found guilty or the Chief of the Defence Staff.

(3) The review authorities in respect of findings of guilty made and punishments imposed by persons presiding at summary trials are the Chief of the Defence Staff and such other military authorities as are prescribed by the Governor in Council in regulations.

(4) A review authority in respect of any finding of guilty made and any punishment imposed by a person presiding at a summary trial may act on its own initiative or on application of the person found guilty made in accordance with regulations made by the Governor in Council.

R.S., 1985, c. N-5, s. 249; 1998, c. 35, s. 82.

Royal prerogative

249.1 Nothing in this Division in any manner limits or affects Her Majesty's royal prerogative of mercy.

1998, c. 35, s. 82.

National Defence — June 25, 2013

Prise en considération des motifs de l'appel

Dispositions applicables

Mise sous garde volontaire

SECTION 11

RÉVISIOn DU VErDICT ET DE LA pEINe

Autorités compétentes

249. (1) Le gouverneur en conseil est l'autorité compétente pour réviser les verdicts et peines prononcés par une cour martiale.

(2) Il ne peut procéder à la révision que sur demande de la personne déclarée coupable ou du chef d'état-major de la défense.

(3) Les autorités compétentes pour réviser les verdicts et peines prononcés par une personne présidant un procès sommaire sont le chef d'état-major de la défense ainsi que toute autre autorité désignée par règlement du gouverneur en conseil.

(4) L'autorité compétente peut procéder à la révision d'office ou sur demande — faite conformément aux règlements du gouverneur en conseil — de la personne déclarée coupable.


249.1 La présente section n'a pas pour effet de limiter, de quelque manière, la prérogative royale de clémence que possède Sa Majesté.

1998, ch. 35, art. 82.
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**General Provisions Respecting Imprisonment And Detention**

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**Amendment List:**

**History:**

**Section 1 – Suspension of Imprisonment and Detention**

**114.01 – APPLICATION**

This chapter applies in respect of punishments of imprisonment and detention imposed by service tribunals.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

**114.02 – AUTHORITY TO SUSPEND**

(1) Subsection 216(1) of the National Defence Act provides:

"216. (1) In this section and sections 217 and 218, "suspending authority" means any authority prescribed to be a suspending authority by the Governor in Council in regulations."

(2) In respect of punishments imposed at courts martial, the Chief of the Defence Staff and an officer commanding a command may act as suspending authorities for the purposes of sections 216, 217 and 218 of the National Defence Act.
(3) **In respect of punishments imposed at summary trial,** the following authorities may act as suspending authorities for the purposes of sections 216, 217 and 218 of the National Defence Act:

- the Chief of the Defence Staff;
- an officer commanding a command;
- an officer commanding a formation;
- subject to paragraph (4), a commanding officer; and

(4) A commanding officer may only act as a suspending authority in respect of detention that has been imposed at a summary trial when the offender is under the commanding officer's command.

**(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)**

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**Section 2 – Committal**

**114.03 – COMMITTING AUTHORITIES**

(1) Subsection 219(1) of the National Defence Act provides:

"219. (1) The Minister may prescribe or appoint authorities for the purposes of this section and section 220 and, in this section and section 220, an authority prescribed or appointed under this subsection is referred to as a "committing authority"."

(2) The following authorities may act as committing authorities for the purposes of sections 219 and 220 of the National Defence Act:

- the Minister;
- the Chief of the Defence Staff;
- an officer commanding a command;
- an officer commanding a formation;
- a commanding officer; and
- a military judge.

**(M) (1 September 1999)**

**114.04 – AUTHORITY FOR COMMITTAL AND CUSTODY PENDING COMMittal**

(1) Subsections 219(2) and (4) of the National Defence Act provide:

"219. (2) A committal order, in such form as is prescribed in regulations, made by a committing authority is a sufficient warrant for the committal of a service convict, service prisoner or service detainee to any lawful place of confinement. ...

(4) A service convict, service prisoner or service detainee, until delivered to the place where that convict, prisoner or detainee is to undergo punishment or while being transferred from one such place to another such place, may be held in any place, either in service custody or in civil custody, or at one time in service custody and at another time in civil custody, as occasion may require, and may be transferred from

QR&Os: Volume II - Chapter 116
Review Of Findings and Punishments

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The following document is available for downloading or viewing:

- (QR&Os) Volume II Chapter 116: Review Of Findings and Punishments, 12 September 2005, (PDF version, 95.05 KB) [doc/chapter-chapitre-116.pdf]

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Amendment List:

History:

116.01 – APPLICATION

This chapter applies in respect of the review of findings made and punishments imposed at summary trials and courts martial.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

116.02 – REVIEW AUTHORITIES – SUMMARY TRIALS

(1) Subsections 249(3) and (4) of the National Defence Act provide:

"249. (3) The review authorities in respect of findings of guilty made and punishments imposed by persons presiding at summary trials are the Chief of the Defence Staff and such other military authorities as are prescribed by the Governor in Council in regulations.

(4) A review authority in respect of any finding of guilty made and any punishment imposed by a person presiding at a summary trial may act on its own initiative or on application of the person found guilty made in accordance with regulations made by the Governor in Council."

(2) In addition to the Chief of the Defence Staff, the following officers may act as review authorities in respect of findings of guilty made and punishments imposed at summary trials:
a. an officer commanding a command;
b. an officer commanding a formation;
c. subject to paragraph (3), a commanding officer; and
d. an officer acting as a review authority under article 108.45 [(qro-orf/vol-02/chapter-chapitre-108-eng.asp#cha-108-45) (Review of Finding or Punishment of Summary Trial)].

(3) A commanding officer may only exercise the powers and jurisdiction of a review authority in respect of findings made or punishments imposed at a summary trial when:

a. the offender is under the commanding officer’s command; and
b. the finding was made or the punishment was imposed at a summary trial, other than a trial before a superior commander.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

NOTES

(A) The powers and limitations of review authorities are set out in the following provisions of the National Defence Act:

i. section 249.11 (Quashing of Findings),
ii. section 249.12 (Substitution of Findings),
iii. section 249.13 (Substitution of Punishments),
iv. section 249.14 (Mitigation, Commutation and Remission of Punishments), and
v. section 249.15 (Conditions Applicable to New Punishments).

(B) There are two processes established for the review of the findings made and punishments imposed at summary trials:

i. pursuant to article 108.45 [(qro-orf/vol-02/chapter-chapitre-108-eng.asp#cha-108-45) (Review of Finding or Punishment of Summary Trial)], a person found guilty at a summary trial may apply for review of any finding of guilty made or the sentence imposed, and
ii. pursuant to article 107.15 [(qro-orf/vol-02/chapter-chapitre-107-eng.asp#cha-107-15) (Forwarding and Review of Summary Trial Documentation)], Records of Disciplinary Proceedings are reviewed on a monthly basis by legal officers on behalf of command authorities for errors on the face of the record and non-compliance with procedural requirements.

While these processes are designed to deal with most review cases, review authorities may also act on their own initiative in individual cases.

(C) Mitigation is awarding a lesser amount of the same punishment, as, for example, by reducing the term of imprisonment to which an offender has been sentenced.

(D) Commutation is replacing a punishment by awarding another punishment lower in the scale of punishments.

(E) Remission is dispensing with the requirement to undergo the whole of a punishment or any part that remains. For example, in the case of a sentence of 30 days detention, where a member has served 10 days of the punishment of detention, a review authority could remit up to 20 days of the remaining period of detention.

(C) (1 September 1999)
116.03 – ADMINISTRATIVE ACTION REQUIRED – FINDING QUASHED, FINDING SUBSTITUTED OR SENTENCE ALTERED

(1) Where an officer referred to in subparagraphs (2)(a), (b) or (c) of article 116.02 (Review Authorities – Summary Trials) exercises the powers and jurisdiction of a review authority and quashes a finding of guilty, substitutes a new finding for any finding of guilty or alters a sentence in respect of an officer or non-commissioned member, the officer shall:

a. ensure that the member, the presiding officer and, where the review authority is not the member's commanding officer, the member's commanding officer are notified in writing of the decision as soon as practicable after it is made;

b. comply with paragraph (7) of article 107.14 [qro-orf/vol-02/chapter-chapitre-107-eng.asp#cha-107-14] (Maintenance of Unit Registry of Disciplinary Proceedings); and

c. cause the appropriate entries to be made to Part 7 of the original Record of Disciplinary Proceedings.

(2) When the member's commanding officer receives written notification of a review authority's decision to quash a finding of guilty, substitute a new finding for any finding of guilty or alter a sentence the commanding officer shall:

a. cause the appropriate entries to be made to the member's service records, including the conduct sheet (see DAOD 7006-0 [dao-doa/7000/7006-0-eng.asp], Conduct Sheets); and

b. take any other action necessary to give effect to the decision.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

116.04 – REVIEW AUTHORITY – COURTS MARTIAL

Subsections 249(1) and (2) of the National Defence Act provide:

"249. (1) The review authority in respect of findings of guilty made and punishments imposed by courts martial is the Governor in Council.

(2) The review of a finding of guilty made and any punishment imposed by a court martial must be on application of the person found guilty or the Chief of the Defence Staff."

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

NOTE

The powers of the Governor in Council to quash a finding of guilty, substitute a new finding for any finding of guilty and alter the sentence of a court martial, which are set out in Part III, Division 11 of the National Defence Act, draw their origins from the Crown Prerogative. These powers are discretionary and may be used to grant exceptional remedies under exceptional circumstances.

(C) (1 September 1999)

116.05 – EFFECT OF QUASHING OF FINDING

(1) After a finding of guilty has been quashed (see section 249.11 of the National Defence Act) and no other finding of guilty remains, any fine, forfeiture, deduction or other diminution of pay
and allowances, as well as any loss of rank, seniority or advantages accruing from service that have resulted from the sentence imposed, shall be restored to the person in respect of whom the finding was made.

(2) If a charge tried by summary trial has been quashed, a new trial shall not be conducted by the officer who conducted the initial summary trial unless it is not practical, having regard to all the circumstances, to have the case tried by another officer.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

NOTE

The quashing of a finding does not, in and of itself, affect the legality of the disciplinary proceedings in which the finding was made, the carrying out of any part of the sentence prior to the finding being quashed, or the legality of a release from the Canadian Forces resulting from the finding. After a finding is quashed and set aside, the person may be tried as if no previous trial of the charge had been held.

(C) (1 September 1999)

(116.06 TO 116.99 INCLUSIVE: NOT ALLOCATED)

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