

## Canada's military summary trials are frozen in time

Military summary trials are ancient, outdated, and unfair—and they are insulated from judicial scrutiny.

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**OTTAWA**—Military summary trials are ancient, outdated, and unfair—and they are insulated from judicial scrutiny. Immediate reform is necessary to this system of “justice,” not only to strengthen our military justice system, but to bring it in line with traditional Charter-protected rights and values, and to catch up to the modernizations that have already swept across Europe and beyond.

### Summary trials are mostly unchanged in 327 years

In the United Kingdom, the control of English feudal armies was exercised under courts of chivalry, *curia militaris*, which were brought to England by William the Conqueror in 1066. Over the next centuries Articles of War came of age authorizing military courts to apply discipline in deployed operations in a prompt and efficient manner. The requirement for “summary proceedings”—which later came to be known in the United Kingdom and Canada as ‘summary trials’—was formally recognized by the British Parliament with the passage of the Mutiny Act in 1689.

Two centuries later, summary trials were still in existence under British military law when the Canadian Parliament passed An Act Respecting the Militia and Defence of the Dominion of Canada, S.C. 1868, c. 40 [The Militia Act, 1868] to govern Canada’s Armed Forces.

Also in 1868, the Department of Justice Act was passed by Parliament. Ironically, the new Department of Justice had only seven staff, two barristers-at-law (including the deputy minister), a shorthand writer, a copy clerk, an articling clerk, and two messengers.

Today, the Department of Justice has blossomed into a department of more than 5,000 employees, and roughly one-half are lawyers supporting the minister to ensure that Canada is a just and law-abiding society with an accessible, efficient, and fair system of justice.

Paradoxically, however, military law and, in particular, summary trials have more or less remained frozen in time. An anachronism of a bygone era, which remains incongruous and

discordant with the important reforms in Canadian law brought upon by the enactment of the Canadian Bill of Rights, 1960; the Canadian Human Rights Act, 1997; the Charter of Rights and Freedoms, 1982; and the Canadian Victims Bill of Rights, 2015.

### **More than 29 summary trials per week**

In 1950, Parliament enacted a comprehensive National Defence Act which included in a single statute all legislation related to the Department of National Defence, the Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force.

Importantly, the act outlines a uniformed process for administering military justice in the three services. It also sanctioned the existence of a two-tier system of summary trials and courts martial in Canadian military law.

Today, summary trials continue to be the dominant form of military justice in the Canadian military. Over the past decade, there has been an average of 1,500 summary trials and 63 courts martial per year. Surprisingly, the conviction rate for summary trials that have taken place over the past decade is greater than 90 per cent.

### **An absence of rights**

A summary trial is typically presided over by an accused's commanding officer (CO) who is already hierarchically connected as he exercises command over all of his subordinates, including the accused. Prior to the commencement of the summary trial, the CO, through the normal reporting of incidents up the chain of command, is also generally fully cognizant of the circumstances surrounding the alleged offence(s). This is in sharp contrast with a civil court where the judge must always be independent and unaffiliated with the accused and, therefore, relies on legal counsel and calling of witnesses to present evidence.

Furthermore, in a summary trial an accused has no right to counsel and the trial process is not governed by any rules of evidence. Consequently, there is full reliance on hearsay and opinion evidence. In addition, the rules against self-incrimination, the rule against drawing adverse inference from the accused's silence, and spousal privilege rules do not apply at summary trial. Further, at summary trial, an accused may not raise Charter arguments or ask for the recusal of the presiding officer. There are no transcripts of proceedings for summary trials. Finally, there is no right to appeal a verdict or a sentence which may not only deprive the accused of his liberty but reduce him in rank with the consequential impact on his professional standing and reputation, as well as his salary and his retirement annuity.

In recent years, the European Convention of Human Rights (ECHR) and various rulings on its applicability to summary trials have caused some countries, for example the United Kingdom and Ireland, to completely overhaul the summary trials process. These judicial rulings have brought the summary trial process into compliance with the ECHR which held that no one may be deprived of his liberty, except by a competent and impartial tribunal, and that the accused may, on a criminal charge, declare his right to a fair and public hearing by an independent and impartial tribunal as established by law.

Since our Charter of Rights and Freedoms is analogous in values and terms to the ECHR, we know of only one reason why similar reforms could not have already been incorporated in Canada's military justice system: continuing military recalcitrance to democratic reforms and its tacit acceptance by the political class.

### **No justice for an accused**

The constitutional validity of military summary trials has been debated for years. In 2003, Antonio Lamer, in his first independent review of the National Defence Act, criticized the military summary trial system and recommended significant reforms.

In 2012, the Standing Committee on National Defence heard several days of testimony on this issue during which the antiquated and much unfair summary trial system came under heavy criticism. In 2013 and 2014 articles published in *The Hill Times* refer to the Canadian summary trials system as "Victorian." As will be shown, to refer to military summary trials as "Victorian" may be too kind considering that, year in and year out, up to one out of every 44 soldiers is subject to this form of military "justice," the evidentiary and procedural rules for which violate almost every basic individual rights of an accused in Canada.

In 2015, Anne London-Weinstein, a criminal lawyer and member of the National Association of Criminal Defence Lawyers, published an article denouncing summary trials as unconstitutional. This can be found in the Proceedings of the International Military Law Conference, which took place at the University of Ottawa on Nov. 13, 2015.

To our dismay, despite such repeated sound and public objections to the fairness of summary trials, nothing has been done to remedy the known and existing injustices.

### **Crying for modernization**

A conviction at summary trial can result in a deprivation of liberty and a criminal record—which follows soldiers after they leave the military. For these reasons, London-Weinstein, describes summary trials as lacking in constitutional protections and questions the independence of such tribunals. We agree fully.

It is unthinkable that a period of detention up to 30 days could be imposed by a person with no formal legal training whatsoever, particularly so when an accused has no right to be represented by legal counsel and that there are no rules of evidence and no appeal to a judicial tribunal

Though no legal counsel is made available to an accused, an assisting officer (AO) may be appointed. This AO is generally a junior officer appointed by the same commanding officer who, in turn, presides at the summary trial. Of note, the AO also has no legal training. He has no knowledge of the law, no experience with legal matters and application of the rule of law. Moreover, he is often a member of the accused soldier's parent unit and he is very much beholden and fully loyal to his CO both before and after the trial.

### **Summary trials are simply inadvisable**

In our legal practice, never once have we recommended that a soldier subject himself or herself to this one-sided “justice” system, despite the assurances from their military superiors that they will be treated fairly. To place such blind faith in a disciplinary mechanism that is so obviously deficient would be irresponsible.

Military summary trials have been assessed by the European Court of Human Rights as being problematic and outdated. In light of the glaring lack of procedural rights and safeguards, the European Court has imposed conditions for the validity of such trials. In France, Germany, and in many other European countries, summary trials have now been abolished. In the U.K., the summary trial system has been substantially reformed and appeal rights have been granted.

This leaves Canada simply in the dust and well behind international norms. For a country like Canada, that was once a leader in (civilian) justice reform issues and who prides itself on its beloved Charter of Rights and Freedoms, one institution remains totally insulated from scrutiny: the Canadian Armed Forces. This needs to change.

### **Connection to recruitment failures?**

Recently, the Department of National Defence’s plans and priorities report highlighted major recruiting and retention issues with the Canadian Forces Reserves, who are running at 19 per cent below authorized strength. Perhaps this isn’t surprising. To attract and keep young Canadians to its ranks, whether in the regular force or the reserves force, the Canadian Armed Forces needs to project a genuine and true image of being an “employer of choice”—one that actually cares for its people and respects their rights to the fullest extent possible.

Yet, over the past years we have seen media reports replete with stories about the senior leadership failure within the Canadian Armed Forces, a high incidence of suicides among serving members, a persistent level of PTSD sufferers who are unable to rely upon promised support from their employer, numerous instances of sexual assault and harassment with corresponding marked indifference from the senior leadership, a much broken military grievance system, and an antiquated and unfair military justice system—including the outdated and possibly unconstitutional summary trials system as it stands.

We have our doubts that the military is willing or capable of changing on its own and, regrettably, we hold the firm belief that it is up to Parliament to proceed to contemporize and improve the military justice system.

### **Political intervention required**

With the new government being elected on promises of change, Canada should follow the example of many of our NATO Allies and modernize summary trials by making them fair and compliant with the constitutional and Charter requirements.

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