What, precisely, is 'Military Justice'?

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Section 9.2 of the *National Defence Act* (*NDA*)[1] states:

> (1) The Judge Advocate General has the superintendence of the administration of military justice in the Canadian Forces.
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> (2) The Judge Advocate General shall conduct, or cause to be conducted, regular reviews of the administration of military justice.

But what is actually meant by "superintendence of military justice"? In light of the upcoming 100th anniversary of the establishment of the Office of the Judge Advocate General (JAG) of the Canadian Forces (CF), and the appointment of a new JAG, perhaps this is an appropriate time to reflect on what is meant by this expression and what, precisely, is the nature of the function assigned to the JAG.

In her inaugural address, the new JAG, Commodore Bernatchez, emphasized the importance that the Office of the JAG maintain and strengthen its relevance in the Canadian Forces (CF). In light of the significant actions that are being taken by CF leadership in relation to Op HONOUR, the JAG's superintendence of military justice and the relevance of the role of the Office of the JAG take on significant proportions.

The current received wisdom in the Office of the JAG appears to be that 'military justice' equates, roughly, to the Code of Service Discipline. The Deputy Judge Advocate General-Military Justice (DJAG MJ) is generally tasked with providing research, analysis, and positional advice regarding various aspects of the application of the Code of Service Discipline, military justice at the summary trial level, courts martial, and similar issues. However, is it accurate or proper to draw this rough approximation?

This article proposes that equating 'military justice' to the 'Code of Service Discipline' is incorrect and artificially narrows the JAG's responsibilities, to the detriment of the true application of military justice. While an expansive examination of the division of

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[1] RSC 1985, c N-5.

responsibilities within the Office of the JAG lies beyond the scope of this blog article, it does suggest that, perhaps, a re-evaluation of the JAG's role might ensure that 'justice prevails' in the broader administration of the affairs of the Canadian Forces, thereby rejuvenating the relevance of the Office of the JAG.

This article suggests that 'superintendence of military justice' actually empowers the JAG to ensure that the rule of law is observed in the broader administration of the affairs of the CF, including the Code of Service Discipline, but also extending beyond this subject. The current application of policies under Op HONOUR provides a useful litmus test to establish whether the JAG is truly superintending military justice in this broader sense. If the JAG, and the Office of the JAG, does not step up to this role, other National Defence actors might fill that capability gap.

Background

The position of the JAG dates back to 1911[2], from that point, throughout most of the First World War, there was no Office of the JAG, which was created in the closing months of that global armed conflict[3]. Today, the Office of the JAG exists as an 'other element' of the Canadian Forces[4]. It is not precisely a unit; nor is it a Formation or a Command (although the JAG has been granted the powers of an Officer Commanding a Command)[5]. All legal officers whose duty it is to provide legal advice are – and must be – posted to the Office of the JAG.[6] Make no mistake: notwithstanding their sand-coloured berets, even the legal officers who advise the various units of CANSOFCOM and the Command itself are posted to the Office of the JAG, and not to their supported Command. It is something that distinguishes Canadian Legal Officers from American Staff Judge Advocates – the chain of command for legal advisors of the Canadian Forces is through the Office of the JAG. It is not a 'Tech Net'. It is their actual chain of command.

The 'modern' *NDA* was enacted in 1950[7]. This Act combined a variety of distinct legislation concerning the administration of the affairs of the CF, including the diverse disciplinary regimes applying to, what were then, the distinct services that comprised the CF. Note what the Act said of the appointment of, and the exercise of powers by, the JAG:

> 10. (1) The Governor in Council may appoint a barrister or advocate of not less than ten years standing to be the Judge Advocate General of the Canadian Forces.

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[2] R. Arthur McDonald, *The story of Canada's military lawyers* (Ottawa: Office of the Judge Advocate General, 2002).
[3] *Ibid*.
[4] Ministerial Organization Order 96-082 Re: Office of the Judge Advocate General, dated 1 August 1996.
[5] *Ibid*.
[6] QR&O 4.081.
[7] SC 1950, 14 Geo VI, c 43.

> (2) The powers, duties and functions of the Judge Advocate General may be exercised by such other person as the Minister may authorize to act for the Judge Advocate general for that purpose.[8]

Subsection 10(1) of the 1950 *NDA* is largely the same as subsection 9(1) of the current *NDA* (save for the inclusion of "… of a province or territory…" qualifying the standing of the barrister or advocate). Subsection 10(2) is reflected in section 10 of the current *NDA*.

The "superintendence of military justice" was introduced in the 1998 amendments[9] to the *NDA*, as were other provisions relating to the JAG. Here's what the legislative summary, prepared by the staff of the Parliamentary Research Branch[10], for Bill C-25 states concerning the amendments to the provisions relating to the JAG:

> Clause 2 [of Bill C-25] would amend sections 9 and 10 of the Act in order to clarify the qualifications and responsibilities of the Judge Advocate General of the Canadian Forces and to strengthen the office's independence from the chain of command by providing for some security of tenure for the post.
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> The amended section 9 would specify that the Judge Advocate General designate would have to be an officer in the Canadian Forces (this is not currently specified in the Act, although it is the practice); the Judge Advocate General would also have to be a lawyer qualified in Canada for at least 10 years; and the appointment would be for renewable terms of up to four years each (currently, no period is specified for the appointment). However, the Judge Advocate General would continue to serve "during pleasure," meaning that an incumbent could be removed or replaced by the authority that had made the appointment – in this case, the Governor in Council. Under a new section 9.3(1), the Judge Advocate General would be responsible to the Minister of National Defence in the performance of the duties of the position. A new section 9.4 would stipulate that the Judge Advocate General would have to hold at least the rank of brigadier-general, consistent with current practice. Clause 2 would also amend section 10 of the Act to require any officer authorized to act as a substitute of the Judge Advocate General to have the same minimum professional qualifications as the Judge Advocate General.
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> Clause 2 would also set out in the Act the general duties of the Judge Advocate General to be legal adviser on matters of military law to the Governor General, the

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[8] *Ibid*, s 10.
[9] Bill C-25, *An Act to Amend the National Defence Act to make consequential amendments to other Acts*, SC 1998, c 35.
[10] The summary was prepared by the staff of the Parliamentary Research Branch to provide Canadian Parliamentarians with plain language background and analysis of proposed government legislation. They are not government documents; they have no official legal status; and they do not constitute legal advice or opinion. They are nevertheless informative.

> Minister of National Defence, the Department of National Defence and the Canadian Forces; and to perform general oversight of the administration of military justice in the Canadian Forces. More specifically, the Judge Advocate General would regularly have to review and report on the administration of military justice and would be responsible for the preparation of an annual report on this subject to the Minister of National Defence, who would, in turn, be required to table the report in Parliament.[11]

Bill C-25 enacted three significant changes to the administration of the affairs of the CF, and to what I suggest constitute elements of military justice. First, it made significant changes to the jurisdiction and practical application of the Code of Service Discipline. Second, it made significant changes to the statutory grievance process. Finally, it introduced statutory provisions relating to the governance of military police. These statutory changes were followed closely by regulatory amendments intended to implement the statutory changes. Although there were further statutory and regulatory amendments to all three subject areas over the past 19 years, most of these could be characterized as adjustments arising from either lessons learned or judgments of appellate or reviewing courts. The nature and scope of the changes introduced in 1998 have direct bearing on determining what 'military justice' really means.

Military Justice[12]

The term 'military justice' is not defined at section 2 of the *NDA*. Nor is it expressly defined anywhere else in the *NDA*. The Code of Service Discipline is also not defined at section 2 of the *NDA*. However, Part II of the *NDA* is entitled 'Code of Service Discipline' and it is likely not controversial to suggest that the Code of Service Discipline encompasses offences (as well as the incorporation of offences under other Acts of Parliament), summary trials, and courts martial, and is defined as the disciplinary code of the CF under Part III of the *NDA* and Volume III of the QR&O.

It is also likely uncontroversial to suggest that the Code of Service Discipline does not encompass grievances (which are subject to legislative provisions under Part II of the *NDA* and Volume 1 of the QR&O) or the governance of military policing (Part IV of the *NDA*, and Volume I of the QR&O as well as some provisions in Volume IV of the QR&O).

The seeming received wisdom that 'military justice' is roughly equivalent to the Code of Service Discipline is problematic. While neither term is defined in section 2 of the *NDA*, both terms are used as terms of art under the *NDA* and can be defined inferentially. Since Parliament uses both terms in the *NDA*, there is a presumption that Parliament intended

[11] Library of Parliament, LS-311E, online: <http://publications.gc.ca/Collection-R/LoPBdP/LS/361/c25-e.htm>.
[12] I feel compelled to acknowledge that the analysis concerning 'military justice' in this article is not as comprehensive as the analysis that will be provided in a forthcoming publication by a colleague of mine, M[e] Pascal Levesque, PhD. However, until that treatise is published, I offer this meagre substitute.

separate meanings for the terms[13]. Conceptually, there are three potential relationships between these two concepts: (i) they are not connected; (ii) military justice is a component part of the Code of Service Discipline; or, (iii) the Code of Service Discipline is a component part of military justice. The first two possibilities are not consistent with the structure of the *NDA*; only the third makes logical sense.

It would be difficult to suggest that the Code of Service Discipline is not connected, in some way, to military justice, regardless of how the latter term is defined. The Code of Service Discipline has been characterized as an internal 'criminal code' for the CF. While crude, such a characterization is not far off the mark. More recently, the Chief Justice of the CMAC has characterized the Code of Service Discipline as a parallel system to the criminal justice system – neither superior, nor subordinate, to the civilian system.[14]

It would be equally difficult to suggest that the intended meaning of military justice was that it was a component part of the Code of Service Discipline. Several provisions under Part III of the *NDA* ("The Code of Service Discipline") make mention of the "…administration of military justice…" in the context of the exercise of powers. The manner in which the term is used throughout – and not exclusively in – Part III of the *NDA* appears to imply that the Code of Service Discipline is a component part of 'military justice'.

The same amendments that introduced the JAG's 'superintendence of military justice' introduced significant changes to the Code of Service Discipline, the statutory grievance process, and the governance of Military Police. This was not a mere coincidence. These amendments were precipitated by a variety of inquiries and examinations in the 1990s, including the Somalia Inquiry[15], the Doshen Report[16], and the Dickson Report[17]. I have suggested previously that the CF grievance process exists within a broader, comprehensive system intended to deliver timely and effective justice to CF personnel.[18] Ultimately, the Code of Service Discipline, the CF grievance process, and the statutory Military Police complaints process are all means of ensuring that the rule of law is applied in the administration of the affairs of the CF.

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[13] The presumption of consistent expression: *Agraira v Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, para 81, per Lebel J; see also R Sullivan, Sullivan on the Construction of Statutes, 5th ed (Markham: LexisNexis, 2008) at 214.
[14] *R v Déry*, 2017 CMAC 2, per Bell CJ.
[15] Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Dishonoured Legacy: The Lessons of the Somalia Affair, (Ottawa: Public Works and Government Services Canada, 1997).
[16] L.T. Doshen, Report on the Study of Mechanisms of Voice/Complaint Resolution in the Canadian Forces (Vista Knowledge Services, 30 November 1995).
[17] Report of the Special Advisory Group on Military Justice and Military Police Investigation Services (Ottawa: Ministry of National Defence, 1997).
[18] Fowler, "The Canadian Forces Grievance Process: How Adequate an Alternative Remedy Is It?" (2014), 27 CJALP 277, 281.

Finally, it would not be a conceptual stretch to suggest that military justice is to the military what justice is to the broader society. Compare section 9.2 of the *NDA* to paragraph 4(b) of the *Department of Justice Act*[19]:

> 4 The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall
> …
> (b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;

The Minister of Justice (and Attorney General) superintends not just criminal justice, but the administration of justice in Canada. While it may be a crude comparator, the JAG acts in the same regard to military justice. While the JAG's duties, powers and functions do not represent a "… derogation of the authority of the Minister of Justice and Attorney General of Canada under the *Department of Justice Act*…", the JAG's duties, powers and functions may also be interpreted in light of that other Act of Parliament.

Superintendence

There is a compelling argument that the JAG's 'superintendence' function encapsulates broader considerations of military justice, such as grievances and the governance of military police. But what does 'superintendence' entail? As with 'military justice' and 'Code of Service Discipline', this term is not defined at section 2 of the *NDA*. As indicated above, a parallel can be drawn between the JAG's role under the *NDA* with the Minister of Justice's (Attorney General's) role under the *Department of Justice Act*. This is not a new concept for the Minister of Justice, who has had this role since Confederation[20]. It was indubitably an inspiration for redefining the JAG's role in 1998.

The Oxford English Dictionary defines 'superintendence' as the act of being "…responsible for the management or arrangement of (an activity, etc.); supervise and inspect… ". While the 'chain of command' (a term that is not defined under the *NDA* but which is used extensively by those who administer the affairs of the CF) will generally be responsible for decision-making relating to military justice, the JAG's role appears to be that of an inspector of legal validity. Such a role is consistent with the JAG's advisory role, defined at section 9.1 of the *NDA*: "The Judge Advocate General acts as legal adviser to the Governor General, the Minister, the Department and the Canadian Forces in matters relating to military law." Military justice, presumably, is a product of the application of military law.

[19] RSC 1985, c J-2.
[20] See, for example, *R v Hauser*, [1979] 1 SCR 984, 1031.

'Superintendence of military justice' clearly was not intended to give the JAG exclusive or dominant jurisdiction over 'military justice' broadly, or the Code of Service Discipline specifically. The *NDA* describes definite duties, powers and functions for a variety of statutory actors within the Code of Service Discipline, the grievance process, Military Police complaints and other processes in the administration of the affairs of the CF. For example, a commanding officer (CO) has well-defined roles under the Code of Service Discipline and the CF grievance process. These duties, powers and functions are amplified under the QR&O. These processes remain tools within the authority of the 'chain of command'. The application of discipline under the Code of Service Discipline, the redress of grievances under the CF grievance process, and the resolution of other complaints, all clearly fall within the exercise of duties, powers and functions of those charged with the leadership of the CF, whether at the unit, Formation, Command, or national level.

However, such exercise of command is not conducted in a vacuum. Ultimately, whether a CF decision-maker is applying the Code of Service Discipline, resolving a grievance or other complaint, or exercising myriad powers or functions, that decision-maker is exercising statutory powers or functions. These powers and functions have statutory (read: legal) parameters. In some cases, the decision-maker is obliged to seek legal advice from a legal advisor from the Office of the JAG. In such cases, the decision-maker is not obliged to follow that advice, but there are consequences for failing to do so.

Even when a decision-maker is not obliged by legislation to seek legal advice, where decisions involve legal considerations, decision-makers will typically seek the advice of their unit legal advisor. For example:

- How many CF decision-makers would avoid seeking the advice of their legal advisor when conducting targeting determinations or making other similar significant decisions in the application of lethal (or even non-lethal) force?
- Where a CF member brings a claim against the Crown, or threatens to do so, are CF decision-makers inclined to consult their legal advisor?
- When faced with resolving complex or difficult complaints, would a CO or other decision-maker typically turn to his or her legal advisor?
- When developing significant personnel policies, are legal advisors to CMP involved?

Superintendence does not give the JAG ultimate jurisdiction over the decisions made. Even if one takes the position that 'military justice' somehow equates solely to the Code of Service Discipline, there is no indication that the current or previous JAGs have taken the position that she or he exercises (or exercised) the final decision-making authority for matters under the Code of Service Discipline. 'Superintendence' as it is used at section 9.2 of the *NDA* appears to equate to the providing legal guidance and review. Essentially, the JAG's role is to ensure that statutory decision-makers respect the rule of law and are informed of the consequences if they do not. I note, tangentially, that the JAG's role does not supplant that of constitutionally independent judiciary, who can also potentially play a role when statutory decision-makers fail to respect the rule of law.

Why should the definition of 'Military Justice' concern members of the CF?

A previous blog article by this author concerning potential pitfalls of Op HONOUR-related rhetoric[21], postulated the risk of increasingly using administrative measures as disciplinary punishments and in using Op HONOUR as a justification for derogating from basic principles of fairness and reasonableness in statutory decision-making. These are questions about the extent to which the rule of law will inform CF decision-making.

Recently, the Globe and Mail reported on the consequences of the Canadian government relying on the public marginalization and vilification of a subject of governmental decision-making in order to justify derogation from the rule of law[22]. There are anecdotal indications that, in certain instances under the auspices of Op HONOUR, CF decision-makers are rushing to judgment regarding some complaints and taking action in a manner that is neither reasonable nor procedurally fair. While this mistreatment may not rise to the level of the mistreatment allegedly suffered by Omar Khadr, the distinction is principally a question of the quantum of damage.

Granted: this is a bold assertion on my part. It arises from anecdotal observations. By way of examples: (i) a soldier is accused of sexual harassment, but in lieu of recourse to the existing Harassment Prevention and Resolution Policy at DAOD 5012-0, the soldier's chain of command pursues a disciplinary investigation which, after over 7 months, is still not resolved, while the soldier remains in a disciplinary limbo; (ii) during a course, one soldier asks another soldier a question of a sexual nature about the second soldier's evening with his girlfriend. A course NCO overhears the questions, informs the two soldiers that they'll both 'be done for violating Op HONOUR' and within 72 hours both soldiers are brought before a Performance Review Board (PRB) and are 're-coursed' to a later course.

Anecdotal evidence has its limitations. One of those limitations also relates to any purported 'statistical analysis': each contentious matter must be determined on its own particular facts. However, what some anecdotes tend to highlight is that the data gathered under Op HONOUR (or, at least, the data publicized in the Progress Reports) appears to be selectively based upon those results that support the CDS' desire to demonstrate that 'something is being done'. The data does not appear to track any abuse of authority or abuse of process relating to the implementation of Op HONOUR.

The Third Progress Report on Addressing Inappropriate Sexual Behaviour[23], delivered at the end of April 2017, stated:

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[21] Fowler, "The Potential Pitfalls of Op HONOUR-related Administration", online: < http://cswan.com/wp-content/uploads/The-Potential-Pitfalls-of-Op-HONOUR-related-Administration-Blog-96-Rory-Fowler.pdf >, first posted February 8, 2017.
[22] Clark, "'Odious' Khadr payout is the penalty for being lax on the rule of law", Globe and Mail, July 5, 2017.
[23] Canadian Armed Forces Third Progress Report on Addressing Inappropriate Sexual Behaviour, online: < http://www.forces.gc.ca/en/caf-community-support-services/third-progress-report.page >, April 28, 2017.

> Until April 2016, the CAF did not have a single method to collect information on incidents and fully assess the scope of the problem of HISB (harmful incidents of sexual behaviour) in the CAF because no standardized reporting or tracking system was in place. Since April 2016, we have adopted a monthly tracking pro forma that enables the organization to track the occurrence of HISB incidents and analyze the progress of Operation HONOUR. This system will soon be replaced with an automated information management system, CAF HISB Tracking & Analysis System.
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> In the interim, we continue to update and improve our capacity to capture and track data related to incidents, reporting, administrative and disciplinary action. The following table is a summary of HISB related metrics for the past fiscal year 1 April 2016 – 31 March 2017

However, these so-called 'metrics' – which appear to presume the guilt of a respondent, even where a determination has yet to be made – focus on select outcomes. For example:

- Reports to the military police of a potential offence of a sexual nature: 288
- Reports of offences of a sexual nature deemed Founded by military police: 267
- Number of charges laid thus far: 64
- Number of Summary Trials/Courts Martial: 30
- Number of guilty verdicts: 27
- Number of HISB related incidents reported at unit level through monthly reports (including potential offence of a sexual nature): 504

Breakdown of the 504 Incidents

- HISB (jokes, belittling language, images): 281
- Sexual Harassment: 74
- Sexual Misconduct (no further delineation): 66
- Sexual Assault: 47
- Voyeurism: 7
- Sexual Interference: 7
- Indecent Exposure: 6
- Sexual Exploitation: 5
- Abuse of Authority: 4[24]
- Child Pornography: 3

- Number of the 504 HISB related incidents referred to another authority for further investigation beyond unit level: 221
- Number of individuals issued Administrative Actions[25] by the unit thus far: 180

[24] Presumably this data refers to abuse of authority of a sexual nature, and not abuse of authority on the part of the chain of command concerning its implementation or application of Op HONOUR policies.

- Number of Notices of Intent to Recommend Release issued thus far: 117
- Number of personnel released from the CAF for sexual misconduct thus far: 24

The report is significant both in what it says and what it does not say.

First, the report is clearly intended to signal the effect of the 'decisive' action taken by the CF's leadership. It is intended to impress from the weight of the numbers: "Look at all that we have done." It tends to call into question what sort of 'analysis' is actually being done.

The numbers also tell a more subtle story. Of the 504 'incidents', only 64 charges have been laid (acknowledging the ominous "…thus far…"). Only 30 summary trials or courts martial have been held, with a 90% conviction rate ((however, see below for a summary of the results of the courts martial). Presumably, the high percentage of convictions is intended to reassure the public that "something is being done". I note that there is no information offered about the severity of the alleged offences, the significance of the 'sexual component' of each offence, the sentences imposed, or even a correlation between matters that proceed under summary trial and those that proceed by court martial.

What I find to be particularly interesting is that there are nearly three times as many 'administrative actions' arising from these complaints compared to disciplinary processes. Notwithstanding the footnote in the report assuring the reader that administrative actions are not punishments under the Code of Service Discipline, the tone of the report echoes previous indications by the CDS: where pre-judged malfeasants cannot be punished under the Code of Service Discipline (and, presumably, where the chain of command does not wish to subject their processes to the scrutiny of a military judge), they will be dealt with by administrative means.

It also appears that, in 65% of the matters in which CF leadership have taken administrative action as a result of these complaints, the action constituted what is arguably the most severe action available within the administration of the affairs of the CF: compulsory release (or, at least, a Notice of Intent to recommend release). It is not a conceptual stretch to assume that all, or nearly all, of these notices will result in actual release.

What is not explained is why charges were not laid in a larger number of incidents. Is it because the misconduct that was reported did not constitute an offence under the Code of Service Discipline but still merited 'administrative action'? Or is it because the chain of command, up to and including the CDS, believes that proving such misconduct under the Code of Service Discipline bears a more exigeant burden of proof than the chain of command wishes to meet and that review of the chain of command's evidence by a

[25] The report indicates that 'administrative actions' captures a very broad scope of remedial action ranging from low level action such as 'initial counselling' up to and including compulsory release from the CF. The report highlights that such action is not punishment under the Code of Service Discipline.

constitutionally independent court is much more time-consuming and searching in a Code of Service Discipline proceeding than in an administrative process?

I suspect that it is the latter. After all, a contravention of CF policies, which are publicly and notoriously promulgated to CF personnel, constitutes an offence under section 129 of the *NDA*. If the contravention of the policy was so significant that it warrants compulsory release, presumably it is sufficiently serious that action under the Code of Service Discipline would be warranted.

Consider the differences in the administrative and disciplinary processes. While the burden of proof in the former is lower than in the latter, I have previously explained that significant administrative action, such as compulsory release, would still require proof that is clear, convincing, and cogent.[26] I suspect that it is not simply a question of the evidentiary burden, but, more importantly, the extent to which a constitutionally independent court of competent jurisdiction will review the actions by the chain of command, as well as the timing of such a review.

I also explained in the same previous article[27] that a compulsory release due to contravention of Op HONOUR or related policies must first be grieved by the affected CF member under the purportedly adequate alternative remedy that is the CF grievance process. The compulsory release could be implemented as quickly as 30 days after the decision is made by Director Military Career Administration (DMCA). The grievance might be adjudicated by the initial authority (IA) within 4 months[28]. If it is not, or if the grievor is not satisfied with the IA's determination, the grievor can then seek determination by the final authority (FA): the CDS (or his delegate). There is no limitation period on when the FA must consider and determine the grievance.

But how likely is it that the CDS (or one of his delegates) will criticize the substance or implementation of his own operation order? If the grievor is lucky, he will have a determination by the FA within a year. It is only at this point that the grievor may seek review of the determination by a constitutionally independent court of competent jurisdiction. Of course, he will already be a civilian by then, and the 2013 statutory amendment to the *NDA* that would permit the CDS to reinstate someone who was 'improperly released' administratively[29], has not yet come into force[30].

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[26] Fowler, n 21; *F.H. v McDougall*, [2008] 3 SCR 41.
[27] Fowler, n 21.
[28] QR&O art 7.15.
[29] *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24, s 13. I note, tangentially, that an Act intended to 'strengthen military justice' included an amendment of an administrative power intended to permit the CDS to reinstate former CF personnel who were released from the CF for reasons other than under the Code of Service Discipline; such nomenclature tends to support the contention that 'military justice' is not limited to the Code of Service Discipline.
[30] The provision will only come into force once regulations are enacted implementing the provision. There is no indication when this might occur, or if it is currently part of the government's legislative agenda.

The data being gathered by the CF concerning Op HONOUR does not appear to extend to:

- Allegations that are eventually determined not to have been founded[31];
- Actions taken by the chain of command against a respondent to an Op HONOUR-related complaint which have subsequently been reversed or over-turned; or
- Actions taken by the chain of command under Op HONOUR that are determined to have infringed a CF member's *Charter* rights (e.g. unlawful or unwarranted arrest, unlawful search and seizure) or the member's rights under administrative law.

Of course, such data does not fit within the narrative that the CDS appears to be pursuing with Op HONOUR. The 'Third Progress Report' concludes with:

> However, it is time to take stock of our work on Operation HONOUR, evaluate our actions and initiatives and ensure that we have not only the programs, policies, research and initiatives, but the institutional regulatory framework to ensure the desired cultural change permeates and engages the entire institution and the Profession of Arms. In order to do this we will move beyond using "orders" and broaden the work of Operation HONOUR, and the desired culture change, through a more comprehensive strategic plan that provides an all-encompassing institutional framework and long range vision. This will begin with the reconfiguration and realignment of the CAF Strategic Response Team on Sexual Misconduct to ensure an enduring function and permanent organization within the CAF. Concurrently, work will begin on the development of a more deliberate approach to sustain culture change beyond just the elimination of sexual misconduct to one that refreshes and reinforces the foundational principles of Duty with Honour and incorporates all of our other initiatives on diversity, inclusivity, health and wellness to ensure we have a culture of respect and dignity, that values our people, and supports and cares for them.

It **is** time to take stock of the effect of Op HONOUR. However, the data being collected by the CDS only tells part of the story. It is clear that the CF will continue to rely principally upon administrative sanctions against those members of the CF who are accused of sexual misconduct, rather than the Code of Service Discipline. This marked preference appears to echo a similar trend over 20 years ago when the chain of command appeared to have partially abandoned reliance on the Code of Service Discipline in favour of more expedient 'administrative punishments'[32]. It appears that we have come full circle to the point in time that precipitated the 'military justice' amendments to the *NDA*.

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[31] Admittedly, the Third Progress Report does offer a brief comment comparing data on matters investigated by the Military Police, in which the Military Police concluded that the allegations were unfounded. However, that does not represent the full scope of how a matter might be determined to be unfounded, and there is no mention of specific results or conclusions arising from disciplinary and administrative processes.
[32] Dickson Report, n 17.

A brief review of the results of courts martial concerning allegations of sexual assault, held over the past 18 months, offers some illumination about the possible motivations of CF leadership in relying upon 'administrative sanctions'. Sexual assault cannot be tried by summary trial[33]. Courts martial are presided over by constitutionally independent judiciary. And the judges produce public reasons for their findings and sentences. In some cases, Director Military Prosecutions (DMP) has not been successful in securing convictions of the accused, and most convictions are for alternate charges:

- *R v Whitehead*, 2016 CM 3007: The accused was found not guilty of two separate charges of sexual assault based upon complaints from two separate complainants;
- *R v Chapman*, 2016 CM 4019: The accused pled guilty to disgraceful conduct (a military offence under s. 93 of the *NDA*) and the charge of sexual assault was stayed, as part of a plea agreement;
- *R v Christensen*, 2016 CM 1026: The accused pled guilty to the alternate charge of disgraceful conduct and the charge of sexual assault was stayed, as part of a plea agreement;
- *R c Laferrière*, 2016 CM 3016: the accused was charged with sexual assault, abuse of (ill-treating) a subordinate (under s. 95 of the *NDA*) and drunkenness (under s. 97 of the *NDA*). Regarding the first charge, he was found guilty of the lesser, included offence of assault. He was also found guilty of the two military offences.
- *R c Beaudry*, 2016 CM 4010: The accused was charged with sexual assault causing bodily harm and overcoming resistance to the commission of an offence. He was found guilty of the former, and acquitted of the latter.
- *R c St-Pierre*, 2016 CM 1020: The accused pled guilty to three alternate counts of disgraceful conduct, and three charges of sexual assault were stayed;
- *R v Jackson*, 2017 CM 3001: The accused was found not guilty of both the charge of sexual assault and the alternate charge of disgraceful conduct;
- *R v Wilks*, 2017 CM 1008: The accused, now released from the CF, was found guilty of sexual assault;
- *R v Brunelle*, 2017 CM 4001: The accused pled guilty to the substituted charge of disgraceful conduct (in sentencing, the presiding military judge noted that, in the context of the circumstances, a reasonable person would be aware that the plea agreement was predicated on the substitution of the different charge, but, nevertheless, a reasonable person would expect the accused to be sentenced for that charge, and not for sexual assault); and
- *R v Cadieux*, 2017 CM 3008: the accused was found not guilty of charges of sexual assault and drunkenness.

It would likely be illuminating to discover if any of the accused, who were subsequently acquitted, were (or will be) subject to compulsory release for the reasons alleged at the court

[33] It is not included under QR&O 108.07 as a *Criminal Code* offence over which a summary trial presiding officer has jurisdiction.

martial. Certainly, the OCdt Whitehead case was the subject of extensive reporting in the media, which noted that, while his accusers were permitted to graduate, he was not.[34] Administrative career decisions will not normally be made public, as compulsory release determinations in an administrative context constitutes personal information under the *Privacy Act*[35], and cannot normally be made public.

Based upon the statistics in the CDS' Third Progress Report, there are presumably dozens of CF members who have been, or will be, released for sexual misconduct. The circumstances for such action will only be subject to the scrutiny by constitutionally independent courts (and the public) if the subjects of those releases exhaust the CF grievance process and subsequently have the means and wherewithal to seek judicial review, before the Federal Court, of the determination by the final authority (the CDS).

The implementation of Op HONOUR is unmistakably a central issue in the administration of justice within the CF – or, perhaps more accurately, the administration of military justice. The fact that the actions by the chain of command focus predominantly on administrative, not disciplinary, actions does not alter this undeniable reality.

The question is whether the new JAG will recognize her functions in such superintendence.

If not the JAG, then who?

If the JAG chooses to focus solely, or predominantly, on the Code of Service Discipline when performing the functions assigned under section 9.1 of the *NDA*, then there will continue to be a gap in the superintendence of military justice. That gap will not be filled by the chain of command. First, superintendence of military justice already recognizes that the chain of command will continue to perform a decision-making role, both under the narrower Code of Service Discipline, and in the broader context of the administration of the affairs of the CF. Not only discipline, but administration, is a function of command[36]. The purpose of the JAG's superintendence of military justice is to perform a limited check on the excesses of statutory decision-making within the CF, and thereby ensure that the rule of law is respected by the statutory decision-makers who lead the CF. If the JAG chooses not to embrace the broader superintendence of military justice, there are other CF-related offices that could. Op HONOUR provides a tangible example of what could arise.

The Office of the DND/CF Ombudsman was created out of a similar crisis. The incidents that prompted General (retired) Rick Hillier to describe the 1990's as a 'Dark Decade' for the CF gave rise not only to the aforementioned 1998 amendments to the *NDA*, but also the concurrent development of a DND/CF Ombudsman.

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[34] Sue Yanagisawa, "Ex-cadet found not guilty of sex assaults", http://www.thewhig.com/2016/04/29/ex-cadet-found-not-guilty-of-sex-assaults, Kingston Whig-Standard, April 29, 2016.
[35] RSC 1985, c P-21.
[36] B-GG-005-027/AF-011 Military Justice at the Summary Trial level, v 2.2, updated January 12, 2011, c 1.

Unlike the JAG (and the CDS and other actors within the military justice sphere) the Ombudsman is not a product of legislation, but was created by ministerial fiat. In that manner, he is distinct from statutory tribunals such as the Military Grievance External Review Committee and the Military Police Complaints Commission, which were created by Parliament to assist statutory decision-makers in the determination of grievances and military policing complaints[37]. The functions of the DND/CF Ombudsman are detailed principally in a Defence Administrative Order and Directive (DAOD): DAOD 5047-1.

Contrary to some rhetoric surrounding the Ombudsman, his office is not truly independent. He is technically an extension of the Minister's authority. He is clearly part of the executive. He has the power only to recommend. However, this seeming weakness – that he cannot actually make determinations – has been relied upon by past Ombudsmen as a strength. The limitation that the Ombudsman may only make recommendations permits the Ombudsman to politicize issues. He is not limited in the same way as a statutory decision-maker for the principal reason that he does not make decisions. In effect, the power of the Ombudsman is to 'name and shame'. Arguably, this was used rather effectively by the first incumbent, Andre Marin. The vigour of his successors has varied.

Of particular note, in Mr. Marin's final report as the outgoing DND/CF Ombudsman (which he characterized as a 'White Paper'), entitled "Overhauling Oversight", the friction that had regularly surfaced between the Ombudsman and the JAG of the day was put on display. Mr. Marin pointedly referred to his difference of perspective with the JAG concerning the Ombudsman's role:

> … [The resistance to the creation of an Ombudsman] had been made plain when the Canadian Forces rejected the Doshen recommendation for an organizational ombudsman because of concerns that even this kind of watered down oversight would undermine the authority of the chain of command. It was confirmed when the Judge Advocate General informed my Office that "the field was occupied" with respect to military justice. I was asked to negotiate with people who did not want an ombudsman. I was asked to have my authority and powers agreed to by the very people I should be overseeing.[38] [emphasis added]

Objectively, Mr. Marin's 2005 'White Paper' could be criticized as an attempt by an outgoing Ombudsman, frustrated by a lack of statutory standing, to build an 'empire'. Certainly, his 'White Paper' suggested that the Ombudsman should not only be entrenched

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[37] Notwithstanding assertions by members of these tribunals, their role is not truly 'oversight'. Both make non-binding recommendations to decision-makers before the decision-makers make their determinations under the relevant statutory regimes.

[38] Marin, "Overhauling Oversight: Ombudsman White Paper", online: <http://www.ombudsman.forces.gc.ca/en/ombudsman-reports-stats-investigations-oversight/index-oo.page>, March 30, 2005, pp. 27-28.

in the *NDA*, but that he should also be given responsibility for overseeing the Military Police complaints process as well as having parallel power to investigate complaints and grievances, thereby (in his words) complementing the CF grievance process. His view was clear: he should be the oversight for decision-makers in the CF.

The comment regarding the 'occupation of the field' is significant. Put in context, the JAG of the day appears to have asserted his statutory role regarding superintendence of military justice as it was understood at the time – i.e. roughly equivalent to superintendence of the Code of Service Discipline. If that perspective continues to prevail, and the JAG does not see a need to more fully superintend broader aspects of military justice as described above, the current DND/CF Ombudsman might choose to occupy that deserted portion of the field.

Such action by the Ombudsman is not a certainty. Most of Mr. Marin's successors have not pursued their mandate as aggressively as had he. Moreover, many of the subjects of Ombudsman investigations and reports have generally been subjects that are socially and politically palatable: e.g. medically released CF members[39]; families of fallen CF members[40]; members of the Reserve Force who are subject to different treatment than members of the Regular Force[41]. The emotive nature of the titles of those reports speaks volumes: while the Ombudsman does not have the statutory power to compel results, he can exert public and politicized pressure to achieve a desired end-state. It helps if the subject-matter is one that tends to evoke sympathy.

This poses a challenge for those CF members who are subject to abuses of authority by CF leadership in the name of Op HONOUR. They have already been stigmatized as sexual malfeasants by their status as respondents to what appear to be largely administrative, not criminal, complaints. While the DND/CF Ombudsman is prepared to 'spend his powder' on socially and politically palatable subjects, it would be much more challenging for him to conduct an inquiry into the implementation of a program that is ostensibly designed to protect victims from sexual predators.

Op HONOUR is driven, in part, by rhetoric that marginalizes and demonizes the respondents to complaints. Thus, a non-statutory actor such as the DND/CF Ombudsman, who, himself, relies on rhetoric to drive change, would face an equally rhetoric-charged atmosphere. Such a challenge might be too daunting for most non-statutory actors. It might be too daunting for the incumbent DND/CF Ombudsman.

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[39] Walbourne, "Report: Part-Time Soldiers with Full-Time Injuries", May 2016, online: <http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/osi_report_en_june14.pdf>.
[40] Walbourne, "Support to Bereaved Military Families", March 2017, online: <http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/support-to-bereaved-military-families-2017/final_supporttobereavedmilitaryfamilies_v14_april-17-2017.pdf>.
[41] Walbourne, "Simplifying the Service Delivery Model for Medically Releasing Members of the Canadian Armed Forces", September 2016, online: <http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/nsdm_en.pdf>.

However, a bold Ombudsman, driven by a belief in the importance of the rule of law, and that a procedurally fair and reasonable process is as important to complainants as it is to respondents, might choose to investigate those aspects of Op HONOUR that the CDS has either chosen not to investigate or to discuss publicly.

The DND/CF Ombudsman is precluded from investigating the Code of Service Discipline or Military Police misconduct. However, as described above, those are not the subjects with the greatest potential for abuse. Decisions made under the Code of Service Discipline are not reviewed under the CF grievance process and will much more quickly be brought before constitutionally independent courts. It is the administrative matters that bear a more urgent call for inquiry. While individual complaints, concerning specific individual decisions, would need to proceed through the cumbersome CF grievance process, the DND/CF Ombudsman is not precluded from conducting an inquiry into the seemingly broad use of administrative measures relating to Op HONOUR. Among the possible lines of inquiry, the DND/CF Ombudsman could examine:

- The extent to which administrative measures are seemingly used as 'alternative punishments';
- The timeliness of (administrative) investigations into allegations of sexual harassment;
- The procedural fairness that has been afforded to both complainants and respondents in such investigations;
- The reasonableness of actions of CF decision-makers when complaints are made.

Conclusion

There is a compelling argument that 'military justice', as it is used at section 9.1 of the *NDA*, is much broader than simply the Code of Service Discipline. Rather, military justice relates to the administration of justice – both administrative and disciplinary – within the CF. The JAG's superintendence of military justice is a statutory recognition of the need for an independent legal advisor to counsel CF leadership on the requirement to respect the rule of law. Failure to respect the rule of law can, and likely will, result in constitutionally independent courts sanctioning the CF and the federal executive for such failure.

Such risk can be mitigated if the JAG embraces an expansive role in superintending military justice, and if the CF leadership recognizes the importance of that role. This will maintain and strengthen the relevance of the Office of the JAG. Failure to do so will leave the field unoccupied, which could lead to another CF actor, or even reviewing courts, filling this capability gap. Maladministration under Op HONOUR provides a tangible and practical context in which the JAG can seek to revitalize her statutory role in superintending military justice.