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Legal Ethics and Canada's Military Lawyers

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LEGAL ETHICS AND CANADA'S MILITARY LAWYERS

Andrew Flavelle Martin*

Military lawyers—lawyers who are legal officers in the Canadian Forces—are virtually ignored in the Canadian legal literature. This article assesses what appear to be the most striking potential legal ethics issues facing military lawyers. Several of these issues arise because military lawyers are both lawyers and military officers at the same time, and therefore face two sets of obligations that interact in complex ways. Some issues, however, arise because of the special practice contexts of military lawyers, for example, advising military commanders on the law of armed conflict. As context for this discussion, the article examines the relationship and tension between the Judge Advocate General and the Minister of Justice. It concludes with recommendations for amendments to the rules of professional conduct and the legislation governing the Canadian Forces to resolve these ethical issues. The article also proposes legislative amendments to clarify the relationship, and reduce the tension, between the Judge Advocate General and the Minister of Justice.

Les avocats militaires, c'est-à-dire les avocats qui sont des officiers juridiques dans les Forces canadiennes, sont rarement mentionnés dans la doctrine canadienne. L'auteur analyse les questions de déontologie juridique les plus saillantes auxquelles les avocats militaires seraient potentiellement exposés. Plusieurs de ces questions se présentent parce que les avocats militaires, étant à la fois avocats et officiers militaires, sont ainsi confrontés à deux ensembles d'obligations qui interagissent de façon complexe. Toutefois, certaines difficultés se posent aussi en raison du contexte particulier de la pratique des avocats militaires qui pourraient, par exemple, être appelés à conseiller les commandants militaires sur le droit des conflits armés. Pour mettre cette discussion en contexte, l'auteur examine la relation entre le juge-avocat général et le ministère de la Justice ainsi que la tension qui la sous-tend. Il conclut en recommandant que les règles de déontologie et la législation régissant les Forces canadiennes soient modifiées dans le but de résoudre ces questions d'ordre

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éthique. Il propose par ailleurs des modifications législatives visant à clarifier la relation et à réduire la tension qui existe entre le juge-avocat général et le ministère de la Justice.

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1. Introduction

Government lawyers were largely overlooked in the Canadian legal ethics literature until about a decade ago.[1] However, military lawyers—lawyers who are legal officers in the Canadian Forces—remain virtually ignored.[2] In this article, I argue that military lawyers face special ethical obligations that are worthy of attention. I do so from the perspective of an outsider to the military. My primary argument is that military lawyers are like government

[1] Before 2008, see Deborah MacNair, "In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?" (2005) 84:3 Can Bar Rev 501; Deborah MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective" (2003) 24:2 Stat L Rev 125; Deborah MacNair, "The Role of the Federal Public Sector Lawyer: From Polyester to Silk" (2001) 50 UNBLJ 125 [MacNair, "Polyester"].

[2] Deborah MacNair mentions military lawyers in passing in her description of public sector lawyers: MacNair, "Polyester", *supra* note 1 at 130. One substantive exception is the work of David McNairn on the independence of defence counsel, which I will discuss below: David McNairn, "The Canadian Forces' Criminal Law Firm: A Blueprint for Independence" (2003) 8:2 Can Crim L Rev 237 [McNairn I]; David McNairn, "The Canadian Forces' Criminal Law Firm: A Blueprint for Independence (Part 2)" (2004) 8:3 Can Crim L Rev 329 [McNairn II]. For the purposes of this article, I do not consider as military lawyers those members of the Canadian Forces who are lawyers but who are non-practising.

lawyers in one key respect. Government lawyers simultaneously have dual sets of obligations, as both government employees and lawyers: "[t]hey are both lawyers and public servants at the same time."[3] These dual sets of obligations often interact in messy and complex ways.[4] In a similar manner, military lawyers are both lawyers and military officers at the same time. As lawyers, they are subject to regulation by their respective law societies and the courts.[5] But they are also subject to the law governing military officers. It is the interaction of these dual regimes that generates many key ethical issues. Military lawyers also face some ethical issues coming from their special practice contexts, which I will also discuss. For example, military lawyers, not civilian lawyers, advise military commanders on the law of armed conflict, and particular ethical issues arise in that context.

While military lawyers are virtually ignored in the Canadian legal ethics literature, some commentators have flagged the need for study of these dual sets of obligations. David McNairn, writing in 2003 about the independence of military defence counsel, observed that "[t]he delicate issue of reconciling the obligations of officership and the obligations of membership in a bar has not been addressed in a substantive way."[6] Similarly and more recently, Stuart Hendin in 2010 noted that "a very serious issue arises as to whether a (uniformed) military legal officer owes his first obligation to his military superiors as a commissioned officer, or to the broader application of law as an officer of the court."[7]

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3 Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1 at 6 [Dodek].

4 See e.g. Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers" (2017) 49:2 Ottawa L Rev 263 on issues around political activity. As indicated at 269, n 7, the other issues typically discussed in the literature are (1) confidentiality and whistleblowing and (2) conflicts of interest. I address confidentiality below: see notes 100 to 104 and accompanying text.

5 See e.g. Colonel Allan Fenske, Deputy Judge Advocate General, Advisory and Legislation, specifically discussing defence counsel: "Each of our counsel has the same obligations to his professional bar, his provincial bar, as does any other defence counsel ... These officers are lawyers. Their job is to act as lawyers. In order to do that job, they must be members of the provincial bar … For the purposes of the conduct of legal duties, the Canadian Bar Association Code applies to our people uniformly."; Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 41 (5 November 1998) at 41:15–16 (Colonel Allan Fenske).

6 McNairn I, *supra* note 2 at 271.

7 Stuart Hendin, "Extraterritorial Application of Human Rights: The Differing Decisions of Canadian and UK Courts" (2010) 28:1 Windsor Rev Legal Soc Issues 57 at 64, n 44. See also Chris Madsen, who characterizes this "duality" as one that can be "blend[ed]": "Legal officers … blend the demands of being, first, serving soldiers in uniform, and equally, with membership in the legal profession within Canada and internationally, practicing lawyers"; Chris Madsen, *Military Law and Operations* (Toronto: Thomson Reuters Canada, 2017) (loose-leaf updated 2018, release 21), vol 1, ch 2 at 2:20, 2-18 [Madsen].

In contrast, the American legal literature suggests that military lawyers' obligations as lawyers are seldom, if ever, contrary to their obligations as military officers. For example, Lieutenant Colonel Robert Chadwick writes that, in the context of lawyers appearing before courts martial:

> In theory, there is no basic conflict between the duties of the advocate as an officer of the service and as a military lawyer. As a military officer, he offers his oath and his allegiance to the Constitution of the United States and agrees to discharge well and faithfully the duties of his office. As a lawyer, he has sworn to support the Constitutions of the United States and his state and his client. The two oaths and obligations are not inconsistent.[8]

Similarly, Colonel Dennis Coupe argues that only in "rare circumstance[s]" will the two sets of obligations conflict.[9] In this article, I focus on the Canadian context.

These Canadian observations are not limited to the academic literature. In 1998, Colonel Bruno Champagne, then the Deputy Judge Advocate General/Chief of Staff, described the situation to a Senate committee as follows:

> The interesting aspect of being a legal officer, of being a lawyer in uniform, is that you almost need a dual personality and a dual role in life in the military forces … What comes first? Does the uniform come first or does my legal career come first? What am I?
>
> To me, we are both. It is intrinsically intertwined. You must progress in everything you do, taking into account that you are an officer. You are representing the Crown or Her Majesty, serving the Government of Canada … You have a duty to act

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8 Lieutenant Colonel Robert J Chadwick, "The Canons, The Code, and Counsel: The Ethics of Advocates Before Courts-Martial" (1967) 38 Mil L Rev 1 at 15 [footnotes omitted]. See also Elizabeth L Hillman, "Mission Creep in Military Lawyering" (2011) 43:3 Case W Res J Intl L 565: "[w]hen judge advocates face criticism of their professional independence, they often mention, with no small amount of pride, their conviction that a commitment to the rule of law is the same as a commitment to winning wars, since the United States only wins if the rule of law is upheld" at 576 [Hillman].

9 Colonel Dennis F Coupe, "Commanders, Staff Judge Advocates, and the Army Client" [1989]:11 Army Lawyer 4 at 5: "As commissioned military officers, uniformed lawyers have additional obligations to their oaths of office and to their military supervisors. This role is compatible with a lawyer's role, except in the rare circumstances where a conflict occurs between the military obligations and a lawyer's duties." Coupe does not specify or elaborate on these circumstances.

> legally and ethically and to provide the best advice. Sometimes there are conflicts. You must resolve those conflicts.[10]

Champagne's remarks should be read in light of the solider-first component of the "universality of service" principle, under which military lawyers "are soldiers first and foremost" and lawyers second.[11] The issues or conflicts arising from these dual sets of obligations are worthy of attention.

As in the literature, military lawyers are virtually ignored in the case law. There is only one reported law society disciplinary decision concerning a lawyer who, at the time of the conduct at issue, was a military lawyer. However, that decision raises no issues unique to military lawyers. The lawyer in *Law Society of Upper Canada v Hainsworth*,[12] defence counsel at a court martial, essentially attempted to bribe the complainant to change his evidence.[13] This would clearly be unethical for any lawyer.[14] The only reported court decision involving legal ethics for military lawyers is *Sharpe v Sharpe*,[15] in which the Court of Queen's Bench of Manitoba held that two military lawyers practicing in the same building could give sufficiently independent legal advice to two spouses for their separation agreement to be valid.[16]

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10 Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 38 (28 October 1998) at 38:26–27 (Colonel Champagne).

11 Thanks to David McNairn for this suggestion. See e.g. *Canada (AG) v Irvine*, 2003 FCT 660 at para 15, 234 FTR 285: "Universality of service is the term given to a set of principles which govern employment of members of the CAF. The three essential principles are: 1) whatever their trade or profession might be, members of the CAF are soldiers first and foremost; 2) the duty of soldier is to be ready to serve at all times in any place and in any conditions; 3) the duty is universal in that it applies to all members of the CAF." See also *Price v Canada (AG)*, 2003 FCT 764 at para 20, 2003 CFPI 764 referring to a military judge at para 20: "[t]he respondents dispute the applicant's allegation that his self-worth and dignity are tied to his position as a military judge. According to the respondents, the applicant is first and foremost a soldier and officer within the Canadian forces and it is reasonable to expect that his self-worth and dignity would be defined by his substantive position rather than by a fixed-term appointment".

12 *Law Society of Upper Canada v Hainsworth*, [1995] LSDD No 22, 1995 CanLII 1768 (Ont LST) (*sub nom Hainsworth*, *Re*) [*Hainsworth*].

13 I say "essentially" because it was a complex scheme in which the witness would claim his injuries were caused not by an assault but by a slip and fall, allowing him to sue the federal government for up to $100,000, of which the lawyer "for [his] trouble for uncovering all this information and the amount of time that he had spent on this case" would be given a percentage: *Ibid*.

14 Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2009, r 5.4-2 [*FLSC Model Code*]: "A lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive".

15 *Sharpe v Sharpe* (1996), 20 RFL (4th) 184, 106 Man R (2d) 181 (QB) [*Sharpe*].

16 *Ibid*.

In order to address these gaps in the literature and case law, this article will examine some potential legal ethics issues facing military lawyers. In Parts I and II, I provide the context for my analysis. Part I considers the institutional context: who the client of the military lawyer is, to whom the military lawyer reports, the independence of prosecutors and defence counsel, and the purposes of the military justice system. Part II assesses the relationship between the Judge Advocate General and the Minister of Justice.[17] Parts III and IV address ethical dilemmas facing military lawyers, with Part III focusing on dilemmas arising from military lawyers' dual status as military officers and lawyers, and Part IV focusing on a dilemma arising from one special practice context—advising military commanders on the law of armed conflict. I then conclude with recommendations for legislative amendments and some reflections on military lawyers and how they compare to government lawyers.

My goal in this article is not to provide a comprehensive analysis of all of the legal ethics issues facing military lawyers. Indeed, the anemic state of the literature and case law, combined with my status as an outsider who has never served in the military, would make such an attempt unwise. Instead, my goal is to provide a starting point and foundation for further discussion in the literature and to connect the military lawyer community with the legal ethics community. The ethical issues I have chosen to discuss are those that seem most visible, most striking, and most important from my external perspective.

Military lawyers practice in a range of substantive areas, but little information is available publicly about the nature of their different practices.[18] In addition to prosecutors and defence counsel, military lawyers provide legal services across five divisions:

1. Military Justice Division: "assists … in superintending the administration of military justice and ensuring its responsible development within the Canadian justice system."[19]

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17 In this article, I mostly follow federal Canadian usage by referring to the Attorney General and Minister of Justice by the latter title. See e.g. *Department of Justice Act*, RSC 1985, c J-2 [*DOJA*], s 2(2): "[t]he Minister [of Justice] is *ex officio* Her Majesty's Attorney General of Canada, holds office during pleasure and has the management and direction of the Department".

18 But see e.g. Canada, *2016–2017 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2016 to 31 March 2017* (Ottawa: Department of National Defence, 2017) online (pdf): *The Department of National Defence and the Canadian Armed Forces* <www.forces.gc.ca/assets/FORCES_Internet/docs/en/jag/jag-annual-report-16-17.pdf> [*Annual Report*].

19 *Ibid* at 5.

2. Administrative Law Division: "provides legal services on matters pertaining to the administration of the CAF [Canadian Armed Forces] such as military personnel policies, administrative investigations, compensation, benefits, pensions and estates as well as on matters that pertain to the governance, organization and command structure of the CAF and the operation of the military grievance system."[20]

3. Operational and International Law Division: "the provision of legal support for all domestic and international operations … [and] oversees all legal officers deployed on operations … [who] provide legal support to deployed CAF elements in all aspects of military law, including the military justice system."[21]

4. Regional Services Division: "delivers legal services principally to CAF commanders in Canada, Europe and the United States."[22]

5. Chief of Staff Division: "responsible for providing internal support and administrative services."[23]

In this article, I make some general claims about military lawyers as a class, but I focus on three groups in particular: prosecutors, defence counsel, and lawyers advising in operational contexts. I do so because these roles are the least difficult to understand from my external perspective and based on publicly available information.

I acknowledge that many of the core ethical issues for military lawyers are the same or similar as those facing other lawyers, particularly in-house counsel. These ethical issues stem from obligations including competence, candour, and the particular ethical obligations of prosecutors and of criminal defence counsel. However, consider the amplified role tension when advising on the law of armed conflict, as described by David Luban (referring to military lawyers by the US term of JAGs):

> JAGs' double role as military officers and lawyers amplifies the tension. Both roles are quintessentially partisan: they demand loyalty to *us*, to our side. It is hard enough for a civilian lawyer with a civilian client to comply with the ethical requirement of candid, independent advice. How much harder, then, for a military lawyer to veto a tactic or a targeting choice that a superior would like to use. And

20 *Ibid*.
21 *Ibid* at 6.
22 *Ibid* at 7.
23 *Ibid* at 7.

> yet, sometimes, that is the JAG's job. To be sure, good institutional structures can make it easier … But the tension inherent in the role never goes away.[24]

My focus in this article is instead on what makes military lawyers different from other lawyers. But this underlying role tension, which appears similar to that of in-house counsel, provides a crucial backdrop.

2. Part I: Institutional Context

In this part, I begin to establish the context for my analysis of particular ethical issues facing military lawyers: who is the client, to whom does the military lawyer report, the independence of prosecutors and defence counsel, and the purposes of the military justice system.

For military lawyers other than prosecutors and defence counsel, the effective client is usually a chain of command within the Canadian Forces—that is, the client is the Canadian Forces via a chain of command.[25] As delegates of the Judge Advocate General, who is essentially the chief legal officer for the Canadian Forces and is herself a lawyer,[26] military lawyers provide legal services to one of four clients set out in the *National Defence Act*[27]: "the Governor General, the Minister [of National Defence], the Department [of National Defence] and the Canadian Forces."[28] Military lawyers are most often assigned to advise a particular chain of command within the Canadian Forces.[29] Consistent with the rules of professional conduct, the client is the organization itself, i.e. the Canadian Forces, and not the person from whom the lawyer receives instructions.[30] Importantly, the lawyer reports to and is ultimately responsible to the Judge Advocate General, and not the chain of command or the person from whom the lawyer receives instructions. While all officers must "obey lawful

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24 David Luban, "Military Necessity and the Cultures of Military Law" (2013) 26:2 Leiden J Intl L 315 at 321 [emphasis in original].

25 Lieutenant Commander Mike McCarthy, "Ethics, Professional Responsibility and the Practice of Law: Advising Clients in Challenging Circumstances - Examples and Perspectives on Legal Ethics and Professionalism from a Military Legal Officer with General Lessons for the Bar" (Lecture delivered at Newfoundland & Labrador Continuing Legal Education, St John's, NL, 22 August 2016) slide 10 [McCarthy].

26 *National Defence Act*, RSC 1985, c N-5 [*NDA*], s 9(1): "a barrister or advocate with at least ten years standing at the bar of a province"; s 9.1: "[t]he 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".

27 *Ibid*.

28 *Ibid*, s 9.1. Thanks to Rory Fowler for helping me understand this point.

29 McCarthy, *supra* note 25 at slide 10.

30 See e.g. *FLSC Model Code*, *supra* note 14, rr 1.1 (commentary 2 and 3 to "client"), 3.2-3; McCarthy, *supra* note 25 at slides 8–9.

commands and orders of a superior officer,"[31] the *Queen's Regulations and Orders* are explicit that legal officers are under the command of the Judge Advocate General, and not the chain of command they advise, and cannot in legal matters be subject to orders by anyone other than a legal officer:

> (1) Every legal officer whose duty is the provision of legal services to the Canadian Forces shall be posted to a position established within the office of the Office [sic] of the Judge Advocate General.
>
> (2) The Judge Advocate General has command over all officers and non-commissioned members posted to a position established within the Office of the Judge Advocate General. …
>
> (4) The duties of a legal officer posted to a position established within the Office of the Judge Advocate General are determined by or under the authority of the Judge Advocate General and, *in respect of the performance of those duties*, *a legal officer is not subject to the command of an officer who is not a legal officer*.[32]

This reporting structure parallels the context of government lawyers, in which the client is the Crown or a ministry of the Crown but the lawyers report to the Attorney General not to the client Minister.[33]

The situation is somewhat different for prosecutors and defence counsel. While prosecutors are also nominally or ostensibly lawyers for the Canadian Forces as an organization, they—like their Crown prosecutor civilian counterparts—lack a client *per se* in the classic sense[34] and are expected to exercise their powers, particularly those comprising prosecutorial discretion, in the public interest "to see that justice is done".[35] Similarly, defence counsel are employed by the Canadian Forces but their

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31 *Queen's Regulations and Orders*, art 19.015 [*QR&O*].

32 *Ibid* at art 4.081 [emphasis added]; McCarthy, *supra* note 25 at slides 10, 12. (subsection (3) provides for a substitute in the absence or incapacity of the Judge Advocate General).

33 See e.g. Malliha Wilson, Taia Wong & Kevin Hille, "Professionalism and the Public Interest" (2011) 38:1 Adv Q 1 at 7.

34 See e.g. Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2nd ed (Toronto: LexisNexis, 2016) at paras 9.2, 9.7, 9.22 [Woolley].

35 *FLSC Model Code*, *supra* note 14 at r 5.1-3, commentary 1: "When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits." See also e.g. Woolley, *supra* note 34 at para 9.8; Director of Military Prosecutions, "DMP Policy Directive 010/00, Subject: Accountability, Independence and Consultation" (15 December 2017), online (pdf): *The Department of National Defence and the Canadian Armed Forces* <www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/about-policies-standards-legal/dmp-policy-directive-010-00-accountability-independence-and-consultation.pdf>.

clients are the individuals who they represent. Both prosecutors and defence counsel ultimately report to the Judge Advocate General, but in a mediated or attenuated way.

The *National Defence Act* provides some degree of independence from the Judge Advocate General for prosecutors and defence counsel.[36] The Director of Military Prosecutions, who "is responsible for the preferring of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial,"[37] is appointed by the Minister of National Defence for a four-year renewable term, during which she is removable only "for cause on the recommendation of an inquiry committee."[38] While the Director "acts under the general supervision of the Judge Advocate General," and the Judge Advocate General can issue general or case-specific instructions or guidelines to her, these must be made public, with an exception for case-specific instructions where the Director of Military Prosecutions determines that publication "would not be in the best interests of the administration of military justice."[39]

As the Director of Military Prosecutions is roughly the military equivalent of the federal Director of Public Prosecutions, it is worthwhile to compare the relative independence of the two positions. The Director of Military Prosecutions has somewhat less independence from the Judge Advocate General than the federal Director of Public Prosecutions has from the Minister of Justice.[40] The Director of Public Prosecutions is appointed by the Governor in Council on the recommendation of the Minister of Justice, based on the recommendation of a selection committee, to a longer but non-renewable term of seven years.[41] She too is removable, but only "by the Governor in Council … for cause with the support of a resolution of the House of Commons to that effect."[42] While directives from the Attorney General must be made public, the publication of case-specific directives can be delayed—but not prohibited—by the Attorney General or the Director "in the interests of the administration of justice".[43] During the parliamentary debates on the *National Defence Amendment Act* of 1998, which established the position of Director of Military Prosecutions, one opposition legislator suggested that, for greater independence, the Director of Military Prosecutions should report to the

36 *NDA*, *supra* note 26.

37 *Ibid*, s 165.11.

38 *Ibid*, s 165.1 (quotation is from 165.1(2)).

39 *Ibid*, s 165.17 (quotation is from 165.17(5)).

40 *Director of Public Prosecutions Act*, enacted by s 121 of *Federal Accountability Act*, SC 2006, c 9 [*DPPA*].

41 *Ibid*, ss 3(1), 4, 5(1).

42 *Ibid*, s 5(1).

43 *Ibid*, s 11(1).

Attorney General instead of the Judge Advocate General.[44] Such a change would make the Director of Military Prosecutions more like the Director of Public Prosecutions.

The military Director of Defence Counsel Services—who "provides, and supervises and directs the provision of, legal services prescribed in regulations made by the Governor in Council to persons who are liable to be charged, dealt with and tried under the Code of Service Discipline"—has a similar degree of independence from the Judge Advocate General as the Director of Military Prosecutions.[45] The Director of Defence Counsel Services is also appointed for a renewable four-year term, and is removable only "on the recommendation of an inquiry committee established under regulations made by the Governor in Council."[46] She also "acts under the general supervision of the Judge Advocate General," but the Judge Advocate General can issue only general, not case-specific, guidelines and instructions to her, and they must be made public without exception.[47]

However, the independence provided by the removal safeguards came not in the 1998 amendments to the *National Defence Act* (as did the independence of the Director of Military Prosecutions) but only in the 2013 *Strengthening Military Justice in the Defence of Canada Act*.[48] The sufficiency of this independence, and how it compares with the independence of the Director of Military Prosecutions, was a key issue during parliamentary hearings on the *National Defence Amendment Act* of 1998.[49] In its report on the bill, the Standing Committee on Legal and Constitutional Affairs noted that the difference between the independence

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44 Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts", 2nd reading, House of Commons Debates, 36-1, No 77 (19 March 1998) at 5120 (Mr John Richardson); *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35 [*Act to amend the National Defence Act* 1998]; House of Commons, Standing Committee on National Defence and Veterans Affairs, *Evidence*, 36-1, No 49 (22 April 1998) (Leon Benoit): "The prosecution should answer to the Attorney General. That does give some independence. It gives a separation, and frankly, I think it will give a justice system far closer to a justice system that the men and women will have confidence is not a two-tier system" [Benoit].

45 *NDA*, *supra* note 26, s 249.19.

46 *Ibid*, s 249.18(2).

47 *Ibid*, ss 249.2(1)–(3).

48 *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24, s 71.

49 *Act to amend the National Defence Act* 1998, *supra* note 44. See Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 35 (7 October 1998) at 35:26–27; Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 39 (29 October 1998) at 39:24–26; Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 40 (4 November 1998) at 40:12 (Colonel Allan Fenske); Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 41 (5 November 1998) at 41:13–16.

of the Director of Military Prosecutions and that of the Director of Defence Counsel Services:

> [I]s of concern in light of the Director of Defence Counsel Services' responsibility for the representation of accused persons who would then be in an adversarial relationship with the chain of command - a chain of command which includes the Minister of National Defence, the person responsible for the Director's appointment, re-appointment and possible removal from office.[50]

Thus these safeguards are important but relatively recent.

As the system of services overseen by the Director of Defence Counsel Services is essentially a public-defender system,[51] there is no ready Canadian position for comparison. While this system was described as a legal aid system during the committee hearings on the *National Defence Amendment Act* of 1998,[52] David McNairn argues that legal aid systems and defence counsel within them operate with much more separation and independence from the government than in the *National Defence Act*, public-defender-type model.[53] McNairn also argues that the Director of Defence Counsel Services requires greater independence than the Director of Military Prosecutions,[54] because "[m]ilitary defence counsel must defend their clients against the prosecutorial powers of the state in circumstances where their clients, their actions and their causes may be unpopular or objectionable."[55] Among other things, McNairn argues that the Director of Defence Counsel Services should report to the Minister of Justice.[56] In addition to the independence of the Director of Defence Counsel Services, McNairn also emphasizes the importance of

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50 Senate, Standing Committee on Legal and Constitutional Affairs, *Fifteenth Report of the Committee*, 36-1, No 43 (25 November 1998) at 43:6–7 (Lorna Milne).

51 McNairn I, *supra* note 2 at 250.

52 See e.g. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 33 (1 October 1998) at 33:16 (Colonel Allan Fenske): "This individual [the Director of Defence Counsel Services] will supervise that function the way a legal aid director does. They will have counsel working for them." See also Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 35 (7 October 1998) at 35:27 (Lieutenant Colonel Alex Weatherston): "the Director of Defence Counsel Services … is more akin to a legal aid director".

53 McNairn I, *supra* note 2 at 277. See also McNairn II, *supra* note 2 at 332–333, 344.

54 McNairn I, *supra* note 2 at 248; McNairn II, *supra* note 2 at 336–60.

55 McNairn II, *supra* note 2 at 341.

56 *Ibid* at 339 (McNairn at 341 also argued that the Director of Defence Counsel Services "must be removable only for cause on the recommendation of an inquiry committee").

the independence of the individual defence counsel who report to her, particularly their security of tenure and their pay.[57]

These independence considerations provide important context for my discussion below and preview the concerns about disincentives to resolute advocacy among military lawyers. The concern for both prosecutors and defence counsel is that their decisions and conduct—particularly the exercise of prosecutorial discretion, for prosecutors, and resolute advocacy, for defence counsel—will affect their career progression within the military, and so their independence will be impeded.[58] While I acknowledge that the risk for defence counsel seems greater than the risk for prosecutors, the likely concern for prosecutors—whether accurate or not—would be that military authorities may be more interested in convictions than in seeing that justice be done.[59]

A final element of institutional context is the nature of the military justice system within which prosecutors and defence counsel practice. As recently re-affirmed by the Supreme Court of Canada, "Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military."[60] Among these three goals, discipline arguably predominates as "a means to an end as one component of … operational effectiveness."[61] This goal is reflected in the twin fundamental purposes of sentencing in the *Code of Service Discipline*. While one is "to contribute to respect for the law and the maintenance of a just, peaceful and safe society"[62]—virtually identical language to the *Criminal Code*,[63] the other is "to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale."[64] Pursuant to this purpose, the *Code of Service Discipline* recognizes several objectives of sentencing that are absent from the *Criminal Code*:

> (a) to promote a habit of obedience to lawful commands and orders;

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57 *Ibid*.

58 See e.g. McNairn I, *supra* note 2 at 272.

59 See *FLSC Model Code*, *supra* note 14, r 5.1-3, commentary 1.

60 *R v Moriarity*, 2015 SCC 55 at para 46, [2015] 3 SCR 485.

61 Michael R Gibson, "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity" (2008) 4:1 J Intl L Intl Relations 1 at 10. Now Justice Gibson of the Superior Court of Justice [Gibson]. Thanks to Colonel MacGregor for bringing this article to my attention.

62 *NDA*, *supra* note 26, s 203.1(1)(b).

63 *Criminal Code*, RSC 1985, c C-46, s 718 [*Criminal Code*]: "The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society".

64 *NDA*, *supra* note 26, s 203.1(1)(a).

(b) to maintain public trust in the Canadian Forces as a disciplined armed force; …

(f) to assist in reintegrating offenders into military service.[65]

Lieutenant-Colonel Michael Gibson (as he then was) refers to this as "a synthesis of the classic criminal law sentencing objectives of denunciation, general and specific deterrence, and rehabilitation and restitution, with those targeted at specifically military objectives."[66] Gibson argues that this "synthesis" gives the military justice system "a more positive purpose than the general criminal law in seeking to mould and modify behaviour to the specific requirements of military service."[67] These purposes inform the duties of prosecutors and defence counsel. For example, one of the criteria for whether a prosecution is in the public interest is "the effect on the maintenance of good order and discipline in the [Canadian Forces], including the likely impact, if any, on military operations."[68]

3. Part II: The Relationship between the Judge Advocate General and the Minister of Justice

As discussed in Part I, military lawyers report to the Judge Advocate General in a way that parallels how government lawyers report to the Minister of Justice. To better understand the role of military lawyers, and how that role compares and contrasts with the roles of government lawyers, it is helpful to assess the relationship between the Judge Advocate General and the Minister of Justice—a relationship that is not considered in the Canadian literature on the Attorney General.[69] As I will demonstrate, there is significant overlap—or at least the appearance of significant overlap—between the legislated roles of the Judge Advocate General and the legislated roles of the Minister of Justice, and this overlap appears to create significant tensions between them. I propose ways to resolve this tension, of which the most appropriate would be requiring the Judge Advocate General to report, for some purposes, not only to the Minister of Defence but also to the Minister of Justice. I will also discuss ways to harness this

65 *Ibid*, s 203.1(2).

66 Gibson, *supra* note 61 at 12.

67 *Ibid*.

68 Director of Military Prosecutions, "Post-Charge Review, DMP Policy Directive 003/00" (1 September 2018) at para 40(a), online (pdf): *The Department of National Defence and the Canadian Armed Forces* <www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/about-policies-standards-legal/dmp-dpm-policy-directive-003-00-post-charge-review-revision-post-accusation.pdf>.

69 See the list in Andrew Flavelle Martin, "The Immunity of the Attorney General to Law Society Discipline" (2016) 94:2 Can Bar Rev 413 at 432, n 94; see also Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18:1 Leg Ethics 73.

separation between the Judge Advocate General and the Minister of Justice to increase the independence of military prosecutors or defence counsel.

A) Two Roles: The Legal Advisor Role and the Superintendence Role

The *National Defence Act* sets out two main duties of the Judge Advocate General, which I will refer to as the "legal advisor role" and the "superintendence role":

> 9.1 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.
>
> …
>
> 9.2 (1) The Judge Advocate General has the superintendence of the administration of military justice in the Canadian Forces.[70]

On their face, these roles appear to overlap with, and even intrude on, the functions of the Minister of Justice and Attorney General as set out in the *Department of Justice Act*:

> 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;
>
> …
>
> 5. The Attorney General of Canada …
>
> (b) *shall advise the heads of the several departments of the Government on all matters of law connected with such departments*; …
>
> (d) *shall have the regulation and conduct of all litigation for or against the Crown or any department*, in respect of any subject within the authority or jurisdiction of Canada.[71]

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70 *NDA*, *supra* note 26, ss 9.1, 9.2(1). See also Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 33 (1 October 1998) at 33:12 (Colonel Allan Fenske): "[t]he client of the JAG is the Crown".

71 *DOJA*, *supra* note 17, ss 4, 5 [emphasis added].

In *Canada's Military Lawyers*—essentially the official history of the Judge Advocate General in Canada—R. Arthur McDonald traces this tension back to 1918 and states that it "continued to the end of the century."[72]

I acknowledge here that neither the *National Defence Act* nor the *Department of Justice Act* define "military law" or "military justice", or "superintendence".[73] While the *Criminal Code* states that "'military law' includes all laws, regulations or orders relating to the Canadian Forces," its use in section 9.1 of the *NDA* is presumably broader.[74] Then-Judge Advocate General Blaise Cathcart stated in 2010 that "'military law' captures all international and domestic law relating to the Canadian Forces, including its governance, administration, and activities. This includes operational law, which is the domestic and international law applicable to the conduct of CF operations both at home and abroad."[75] The narrower phrase "military justice" appears to mean justice under the *Code of Service Discipline*[76] (as a counterpart to the civilian system of "criminal justice").[77] This view is implied in Cathcart's 2015 remarks that "[t]he *Code of Service Discipline* … establishes *a separate military justice system*. The system operates in parallel with the civilian criminal justice system."[78] However, Lieutenant-Colonel (retired) Rory Fowler has argued

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72 R Arthur McDonald, *Canada's Military Lawyers* (Ottawa: Minister of Public Works and Government Services Canada, 2002) at 27 [McDonald]. It is unclear whether McDonald, writing in 2002, meant that the tension was resolved at the end of the century or that it continued past the end of the century. But see below note 85 and accompanying text.

73 *NDA*, *supra* note 26; *DOJA*, *supra* note 17.

74 *Criminal Code*, *supra* note 63, s 2. I note that the Court Martial Appeal Court in *R v Beaudry*, 2018 CMAC 4, 2018 CarswellNat 5344 quotes approvingly from (majority, Ouellette JA at para 34) and adopts (dissent, Bell CJ at para 100) a narrower definition of military law in interpreting subsection 11(f) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11: it is "the law relating to and administered by the Military courts and concerns itself with the trial and punishment of offences committed by officers, soldiers, and other persons … who are, from circumstances, subjected, for the time being, to the same law as soldiers." The abovementioned quote is an excerpt from: Major J Pennington MacPherson, *A Catechism on Military Law as Applicable to the Militia of Canada* (Montreal: John Lovell & Son, 1886) at 7. Under this definition, "military law" is closely related to "military justice".

75 House of Commons, Standing Committee on National Defence, *Evidence*, 40-3, No 20 (10 June 2010) at 1 (BGen Bernard Blaise Cathcart), quoted in Madsen, *supra* note 7, vol 1, ch 2 at 2:20, 2-15.

76 *NDA, supra* note 26, Part III: *Code of Service Discipline*.

77 *Ibid*.

78 Major-General BB Cathcart, "Military Law Conference–Conférence sur le droit militaire" (Speaking notes for conference presentation, Ottawa, 13 November 2015) online

for a broader meaning that includes, for example, grievances under Part II of the *National Defence Act*.[79] For my purposes, it is sufficient to understand military justice as including, but not necessarily being limited to, justice under the *Code of Service Discipline*. Cathcart described "superintendence" as follows: "my superintendence responsibility obligates me to ensure that the military justice system is appropriately resourced, and that it operates efficiently, effectively, and in accordance with the rule of law."[80] This view of "superintendence" thus prioritizes, and perhaps limits itself to, the military justice system under the *Code of Service Discipline*.

This similarity between the language of the *National Defence Act* and the *Department of Justice Act* was intentional, although it is unclear whether the resulting tension was also intentional. During the 1998 Senate hearings on the bill that added sections 9.1 and 9.2 to the *National Defence Act*, the Deputy Judge Advocate General for Advisory and Legislation stated that "[w]e believe the Canadian JAG should look, and does look, in the proposed statute, like a military deputy attorney general,"[81] and that "[i]f you were to look at the JAG's new duties in the act, you would find that he superintends the administration of military justice … much like a provincial Attorney General or their deputy Attorney General."[82]

The *National Defence Act* acknowledges and seems to attempt to defuse this tension in section 10.1, which provides that "[f]or greater certainty, section 9.1 is not in derogation of the authority of the Minister of Justice and Attorney General of Canada under the *Department of Justice Act*."[83] Section 10.1 and the relationship between the Judge Advocate General and the Minister of Justice were not mentioned in the Parliamentary debates on the bill that added sections 9.1 and 10.1 to the *National Defence Act*.[84] However, McDonald describes the purpose of section 10.1 as being "[t]o ensure that the Minister of Justice and Attorney General were still able to carry out their legal responsibilities in relation to the Department of National Defence and the Canadian Forces."[85] Oddly,

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(pdf): <www.forces.gc.ca/assets/FORCES_Internet/docs/en/jag/jag-remarks-military-law-conference-2015.pdf> at 2 [emphasis added] [Cathcart].

79 Lieutenant-Colonel (ret'd) Rory Fowler, "What, Precisely, is 'Military Justice'?" (22 August 2017), online (pdf): *Cunningham Swan Lawyers* <cswan.com/wp-content/uploads/Blog-110-Rory-Fowler-Aug-22-2017.pdf> at 4–5.

80 Cathcart, *supra* note 78 at 4.

81 Bill C-25, *supra* note 44; Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 39 (29 October 1998) at 39:17 (Colonel Allan Fenske).

82 Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 33 (1 October 1998) at 33:31 (Colonel Allan Fenske).

83 *NDA*, *supra* note 26, s 10.1.

84 Bill C-25, *supra* note 44.

85 McDonald, *supra* note 72 at 185.

section 10.1 refers only to section 9.1—the legal advisor role—and not 9.2, the superintendence role.

B) The Legal Advisor Role

It is unclear how the legal advisor role in section 9.1 of the *National Defence Act* fits with the role of the Minister of Justice in section 4 of the *Department of Justice Act*. The Minister of Justice is "the official legal adviser of the Governor General" (and as Attorney General under section 5 advises ministers "on all matters of law"), yet "[t]he Judge Advocate General acts as legal adviser to Governor General, the Minister [of National Defence] [and others] … in matters relating to military law."[86] If indeed the latter "is not in derogation" of the *authority* of the former, then it would appear that Parliament has delegated or transferred the advisory function of the Minister of Justice, but not her advisory *authority*, in matters of military law to the Judge Advocate General. If so, one might expect that the Judge Advocate General reports to the Minister of Justice. However, the *National Defence Act* provides that the Judge Advocate General is responsible not to the Minister of Justice, but to the Minister of National Defence alone.[87]

In the alternative, the legal advisor role in section 9.1 of the *National Defence Act* can be reconciled with section 4 of the *Department of Justice Act* if the Minister of Justice and the Judge Advocate General are merely two separate sources of legal advice on military law.[88] Section 9.1 is arguably vague on this point, stating as it does "as legal adviser to" instead of "as *a* legal advisor to" or "as *the* legal advisor to".[89] Indeed, the stance of the Judge Advocate General in 1918, as expressed by McDonald, was that "while the *Department of Justice Act* placed a duty on the Minister of Justice to provide such legal advice, it did not exclude other possible sources of advice."[90] However, there is no indication—at least in legislation—of how

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86 *NDA*, *supra* note 26, s 9.1.

87 *Ibid*, ss 10.1, 9.3(1).

88 I note that under the current model, there is a separate and parallel legal advisory structure, the Department of National Defence/Canadian Forces Legal Advisor, that provides legal advice to the Department of National Defence and the Canadian Forces in areas other than military law, and reports like other legal services branches to the Deputy Minister of Justice. See e.g. Halsbury's Laws of Canada (online), *Military* at HMI-33 "Department of National Defence/Canadian Forces Legal Advisor".

89 *NDA*, *supra* note 26, s 9.1 The French version of s 9.1 of *NDA*, *supra* note 26 is similarly vague: "Le juge-avocat général agit à titre de conseiller juridique du".

90 McDonald, *supra* note 72. Indeed, the Report of the Somalia Commission details an instance where the Minister of National Defence, after receiving advice from the JAG, sought "an alternative opinion from the Deputy Attorney General on the matter": Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the*

the Governor in Council is to reconcile or choose between conflicting advice from the Judge Advocate General and the Minister of Justice. Indeed, tension in the advice provided by military lawyers and civilian lawyers has been a key feature of the post-9/11 US landscape, with some arguing that "to the extent these uniformed lawyers offered opinions inconsistent with the Administration's views, the lawyers were violating the fundamental principle of civilian control over the military."[91] Thus, while section 10.1 of the *National Defence Act* purports to solve the problem of tension between the legal advisory roles of the Judge Advocate General and the Minister of Justice, the mechanics of the solution remain a mystery.

C) The Superintendence Role

The superintendence role in section 9.2 of the *National Defence Act* creates additional apparent tension between the Minister of Justice and the Judge Advocate General, tension that the Act does not acknowledge much less attempt to solve. Cathcart portrayed the Judge Advocate General's responsibility for superintendence of the administration of military justice as parallel to that of the Minister of Justice:

> The *National Defence Act* provides that I have superintendence of the administration of military justice in the Canadian Forces, in much the same terms that the Minister of Justice, by virtue of the *Department of Justice Act*, is responsible within the civilian system for "superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces."[92]

Deployment of Canadian Forces to Somalia (Ottawa: Minister of Public Works and Government Services Canada, 1997) vol 5 at 1429. (This incident preceded the addition of ss 9.1 and 10.1 to the *National Defence Act*).

[91] Victor Hansen, "Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations" (2009) 50:6 S Tex L Rev 617 at 619, characterizing and critiquing Glenn Sulmasy & John Yoo, "Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror" (2007) 54:6 UCLA L Rev 1815. See also David Luban, "Lawfare and Legal Ethics in Guantanamo" (2008) 60:6 Stan L Rev 1981 at 2001–02 [Luban, "Lawfare and Legal Ethics"]. See also Hillman, *supra* note 8 at 568: "Military lawyers have been celebrated of late in both American popular culture and legal scholarship because of their role in upholding humanity in warfare amidst the ethical failures of other government attorneys".

[92] Cathcart, *supra* note 78 at 4, quoting *DOJA*, *supra* note 17 at s 4(b). Indeed, this similarity in roles is not coincidental. See e.g. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 33 (1 October 1998) at 33:9 (Colonel Allan Fenske): "the act will now provide that the Judge Advocate General… has the clear duty to superintend the administration of the military justice system. Some of you will recognize these words out of the role of the Attorney General. It is that kind of function." See also 33:10: "that attorney general-like role".

Under Cathcart's approach, the language of the *Department of Justice Act* is seemingly read down so that "the administration of justice in Canada" becomes merely the administration of *civilian* justice in Canada.

In contrast, Tim Dunne has argued that the superintendence role in section 9.2 of the *NDA* constitutes an inappropriate delegation of the responsibilities of the Minister of Justice to the Judge Advocate General: despite the Minister of Justice's supervisory role in section 4(b) of the *Department of Justice Act*, the Minister "has surrendered absolute power over military law to one military officer, the Judge Advocate General." [93] Under this Dunne approach, military justice is a subset of, not a parallel to, "the administration of justice in Canada". Dunne argues that placing the responsibility on the Judge Advocate General is insufficient because, among other things, she is not responsible to the House of Commons as is the Minister of Justice.[94] With respect to Dunne, since the Judge Advocate General is responsible to the Minister of National Defence, who is in turn responsible to the House, political accountability appears not to have disappeared but instead merely shifted from one minister to another. Like Dunne, Colonel (retired) Michel Drapeau and Joshua Juneau have argued that "Canada's Minister of Justice is also 'absent in office' on the military justice file" and that the superintendence role requires the Minister of Justice to provide more active oversight of the military justice system.[95]

D) Resolving the Tension and Harnessing the Separation

One way to resolve this tension in the legal advisor role and the superintendence role would be to require the Judge Advocate General to report to the Minister of Justice in addition to, or even instead of, the Minister of National Defence. However, it is unclear how meaningful such a requirement would be in practice, at least for the legal advisor role. In particular, the Minister of Justice—along with the Deputy Minister of Justice and the Department of Justice itself—would appear not to have

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93 Tim Dunne, "Canada's Broken Military Justice", *Chronicle Herald* (13 May 2017), online: *Chronicle Herald* <thechronicleherald.ca> [Dunne, "Military Justice"]. See also Tim Dunne, "JAG v. Minister of Justice: Who Comes First in Parliamentary Accountability?", *The Lawyers Daily* (7 July 2017), online: *The Lawyer's Daily* <www.thelawyersdaily.ca/articles/4049/jag-v-minister-of-justice-who-comes-first-in-parliamentary-accountability-tim-dunne> [Dunne, "Parliamentary Accountability"].

94 Dunne, "Parliamentary Accountability", *supra* note 93.

95 Michel W Drapeau & Joshua M Juneau, "Calling the House to Order! After 70 Years of Peace, its [sic] Time for Greater Civilian Control Over the Canadian Military Criminal Justice System" (Paper delivered at the 30th Annual Conference of the International Society for the Reform of Criminal Law, San Francisco, 9–13 July 2017) [unpublished] at 7, 65, online (pdf): *Michel Drapeau Law Office* <mdlo.ca/wp-content/uploads/2013/05/2017-06-14-Drapeau-Juneau-article-San-Fran-FINAL-3.6.pdf>.

relevant expertise for the oversight of advice on military law. Building and maintaining a meaningful military law expertise within the Department of Justice would be resource-intensive and largely redundant. While one could argue that such subject-matter expertise is irrelevant, in its absence any oversight would be pro forma only and possibly counterproductive. However, the superintendence role arguably requires little if any substantive expertise in military law. Additional oversight of the military justice system by the Minister of Justice would promote public confidence in the administration of justice.

Given the incongruity of requiring military officials to report solely to a Minister other than the Minister of National Defence, or solely to the civilian bureaucracy, a dual reporting structure would make more sense. Under this structure the Judge Advocate General would report primarily to the Minister of National Defence but also report, in some respects, to the Minister of Justice.

In the alternative, the separation between the Judge Advocate General and the Minister of Justice may be harnessed to create greater independence for military prosecutors and defence counsel from the Judge Advocate General. Recall, as mentioned above, suggestions that the Director of Military Prosecutions and the Director of Defence Counsel Services should report not to the Judge Advocate General but to the Minister of Justice.[96] Presumably, if the goal is to separate the reporting structure for the Director of Military Prosecutions and the Director of Defence Counsel Services, that purpose would be defeated if both, instead of merely one, reported to the Minister of Justice.[97] Given the particular need for independence of defence counsel from the military hierarchy, it would seem better for the Director of Defence Counsel Services to report to the Minister of Justice. I acknowledge that, on the other hand, the Minister of Justice has existing expertise in supervising prosecutors, not defence counsel.

From a legal ethics perspective, the relationship—if there is any—between the Minister of Justice and the Judge Advocate General is particularly important because it determines whether Canadian Forces lawyers are delegates of the Minister of Justice. In turn, this determines whether they share her positive obligation to "see that the administration of public affairs is in accordance with law."[98] Indeed, it is the status as delegates of the Attorney General that Dodek considers one of the defining

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96 Benoit, *supra* note 44; McNairn II, *supra* note 2 and accompanying text.

97 See Benoit, *supra* note 44.

98 *DOJA*, *supra* note 17 at s 4(a), as discussed e.g. in Dodek, *supra* note 3.

characteristics of government lawyers.[99] At present, military lawyers are not delegates of the Minister of Justice. There is no indication that the Judge Advocate General shares this positive obligation, and so military lawyers as her delegates do not share it either.

4. Part III: Particular Ethical Issues: Conflicting Obligations

Having established the institutional context in Part I and the relationship between the Judge Advocate General and the Minister of Justice in Part II, I now proceed to assess some of the striking ethical issues facing military lawyers. In this Part, I consider the potential for conflicts between military lawyers' obligations as military officers and their professional obligations as lawyers. I begin with an obstacle to confidentiality, and then move on to a cluster of issues regarding criticism of higher-ranking officers.

Military lawyers face an apparent conflict around confidentiality. On the one hand, as lawyers, they have an obligation of confidentiality to their clients.[100] On the other hand, as military officers, they have a duty to report "infringement[s]" of the law.[101] The resolution of this apparent conflict is different for military lawyers in different circumstances. For defence counsel, there is an exception for communications while providing legal services.[102] As discussed above, prosecutors lack a client per se to whom they would owe an obligation of confidentiality.[103] For other military lawyers, there is no actual conflict because of the identity of the client. As the client is the Canadian Forces itself, and not the person from whom the lawyer receives instructions, reporting does not violate confidentiality.[104] Thus, this apparent conflict around confidentiality is resolved.

A more problematic cluster of potential ethical issues arise around criticism of higher-ranking officers: the duty to report up, resolute advocacy, the duty to encourage respect for the administration of justice, statements to the media, and the duty to report a fellow lawyer to the

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99 Dodek, *supra* note 3 at 18, 21–22.

100 *FLSC Model Code*, *supra* note 14 at r 3.3-1.

101 *QR&O*, *supra* note 31 at art 4.02(1)(e): "An officer shall: ... (e) report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline when the officer cannot deal adequately with the matter."; McCarthy, *supra* note 25, slide 11.

102 *QR&O*, *supra* note 31 at art 4.02(2); McCarthy, *supra* note 25 at slide 11. McNairn identified the need for this exception before it was enacted: McNairn II, *supra* note 2 at 371–72.

103 *Ibid*; Woolley, *supra* note 34.

104 *FLSC Model Code*, *supra* note 14, r 3.2-3.

law society. Even where this criticism does not constitute an offence,[105] it remains contrary to the expectations of military officers. As McNairn puts it, "[t]he defining characteristic of military service is the chain of command. The CF [Canadian Forces] is a hierarchical organization. By tradition, custom of the service and law military members are obliged to obey all lawful commands of superiors and comply with military law."[106]

Like all lawyers for an organization, military lawyers (other than prosecutors and defence counsel) must report up any dishonest or fraudulent conduct.[107] This obligation appears largely consistent with the obligation, discussed above, for military officers to report infringements of the law,[108] although dishonesty may cover a wider scope of conduct. Thus, this apparent conflict seems manageable or relatively minor.

A much more serious and irreconcilable conflict comes in litigation settings, as prosecutors and defence counsel have a duty of resolute advocacy that will sometimes involve criticism of higher-ranking officers as witnesses or as the judge, or otherwise questioning the conduct of higher-ranking officers involved.[109] Here the obligations as military officers will likely dovetail with lawyers' duty of civility. However, no matter how politely worded and properly supported, this criticism remains inherently problematic for the military lawyer as military officer. As David Luban has put it for defence counsel at Guantanamo Bay, "[t]he questions this [Broughamian] ideal [of absolute resolute advocacy] raises for JAGs should be obvious, however: How can a military officer separate the duty of a patriot from that of an advocate? How can a military officer follow a duty that risks throwing his country into confusion?"[110]

The biggest issue comes with public statements. As with all lawyers, military lawyers have a duty to encourage respect for the administration of justice.[111] This duty is intertwined with the rule of professional conduct

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105 See e.g. *NDA*, *supra* note 26, s 129(1) ("Any act, conduct, disorder or neglect to the prejudice of good order and discipline"), and less likely ss 85(insubordination), 92("scandalous" conduct), 93("cruel or disgraceful" conduct).

106 McNairn II, *supra* note 2 at 334.

107 *FLSC Model Code*, *supra* note 14, r 3.2-8; McCarthy, *supra* note 25, slides 15–17. See *QR&O*, *supra* note 31 regarding whether prosecutors are properly considered lawyers for the Canadian Forces itself as an organization.

108 *NDA*, *supra* note 26.

109 *FLSC Model Code*, *supra* note 14 at r 5.1-1: "When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect".

110 Luban, "Lawfare and Legal Ethics", *supra* note 91 at 2004.

111 *FLSC Model Code*, *supra* note 14 at r 5.6-1: "A lawyer must encourage public respect for and try to improve the administration of justice".

on communication with the public and the media.[112] This duty might involve public criticism of a higher-ranking judge, or publicly defending a judge against criticism by a superior officer or conceivably even by the Prime Minister or Minister of National Defence.[113] However, the *Queen's Regulations and Orders* prohibit any member of the Canadian Forces from publicly expressing opinions or answering questions on "any military subject" without the permission of the Chief of the Defence Staff or her designate.[114] This prohibition appears to impede military lawyers' professional duties as lawyers. Likewise, resolute advocacy may sometimes involve public criticism of the military justice system.[115] Indeed, US Marine lawyer Major Dan Mori was threatened with charges under article 88 of the *Uniform Code of Military Justice* for public criticism of the military commissions of Guantanamo Bay, criticism intended to benefit his Australian client by increasing public pressure on the Australian government.[116] In both situations—public statements in pursuit of respect for the administration of justice and resolute advocacy—compliance with the rule of professional conduct on public appearances and public statements will mitigate but not eliminate potential problems:

> Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals … The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.[117]

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112 *Ibid* at r 7.5-1 and commentary.

113 *Ibid* at r 5.6-1, commentary 3: "when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system".

114 *QR&O*, *supra* note 31, arts 19.36(2)(c)–(d). See also (f): ("publish the member's opinions on any military question that is under consideration by superior authorities") and (g): ("take part in public in a discussion relating to orders, regulations or instructions issued by the member's superiors").

115 This has been a serious issue for military counsel involved in the military commissions at Guantanamo Bay. See e.g. Luban, "Lawfare and Legal Ethics", *supra* note 91 at 2004–05, 2014–17; Michael J Lebowitz, "Anti-War & Anti-Gitmo: Military Expression and the Dilemma of Licensed Professionals in Uniform" (2011) 43:3 Case W Res J Intl L 579 at 593–95.

116 Luban, "Lawfare and Legal Ethics", *supra* note 91 at 2015; *Uniform Code of Military Justice*, art 88 (1950): "Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defence, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct".

117 *FLSC Model Code*, *supra* note 14 at r 7.5-1, commentary 1.

Indeed, prosecutors are specifically required by policy to "comply with any rules and regulations made by their provincial law societies with respect to the making of public statements."[118] I acknowledge that for most military lawyers, these restrictions on public statements parallel those applicable to government lawyers—albeit with quasi-criminal sanctions, not merely employment consequences, for breach. But for military defence counsel and military prosecutors, these restrictions are greater than those on their civilian counterparts and may significantly interfere with their professional obligations as lawyers.

While official policy allows prosecutors "to assist and represent the [Director of Military Prosecutions] by responding to media enquiries,"[119] and in some circumstances to contact the media,[120] they remain constrained, as I have described, in what comments they can make. Similarly, media relations directives applicable to defence counsel emphasize the consent and best interests of the client, but do not address these issues I have described around the boundaries on resolute advocacy for the client.[121]

Likewise, the duty to report a fellow lawyer to the law society presents a special challenge for the military lawyer, especially where that fellow lawyer is a higher-ranking officer. The *Model Code* of the Federation of Law Societies of Canada, and similar provisions in the codes of each provincial and territorial law society, require a lawyer to report a fellow lawyer for, among other things, "conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer," "conduct that raises a substantial question about the lawyer's capacity to provide professional services," and "any situation in which a lawyer's clients are likely to be materially prejudiced."[122] These rules are problematic for any lawyer who has to report a colleague in the same firm,[123] but pose a

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118 Director of Military Prosecutions, "Media Relations", DMP Policy Directive 014/03 (last modified 15 December 2017) at 2, online (pdf): *National Defence and the Canadian Armed Forces* <www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/about-policies-standards-legal/dmp-policy-directive-014-00-media-relations.pdf> [DMP Policy Directive 014/03].

119 *Ibid* at 2.

120 *Ibid* at 4.

121 "Annex B: Directorate of Defence Counsel Services Directives" (5 March 2015) at Directives 14–17, online: *The Department of National Defence and the Canadian Armed Forces* <www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/defence-counsel-services-manual/annex-b-directorate-of-defence-counsel-services-directives.html>.

122 *FLSC Model Code*, *supra* note 14 at r 7.1-3(d), (e), (f).

123 See e.g. John Chapman, "Am I My Partner's Keeper? The Duty to Report a Colleague" (2013) 92:3 Can Bar Rev 611.

greater dilemma for military lawyers—particularly when the lawyer being reported is a higher-ranking officer.[124]

In most of these situations, the military lawyer is left to choose: does she honour her obligations as a military officer or her obligations as a lawyer? There is little guidance available to make that choice, and little authority by which to judge one choice "better" or more lawful than the other. I emphasize, however, that in such circumstances, consultation with others, whether colleagues, mentors, or the law society, will always be advisable.[125]

5. Part IV: Particular Ethical Issues: Special Practice Contexts

Other ethical issues arise because of the special practice contexts of military lawyers. The most important concerns confidentiality, and specifically the application of the future harm exception, when advising military commanders on the law of armed conflict.[126] This is a role that civilian lawyers conceivably could perform, but do not. Thus, the ethical issue arises for military lawyers not because they are military officers, but because they and not civilian lawyers happen to practice in this context.

Rule 3.3 of the *FLSC Model Code* provides a discretionary exception to confidentiality "when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm."[127] In New Brunswick, Manitoba, and Saskatchewan, however, this is a mandatory not discretionary exception to confidentiality—and there is no proviso that the disclosure be made only if not otherwise prohibited by law.[128] In almost all practice contexts,

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124 If reporting would actually be unlawful, the rule would not apply. See *FLSC Model Code*, *supra* note 14, r 7.1-3 [emphasis added]: "*Unless to do so would be unlawful* or would involve a breach of solicitor-client privilege".

125 See e.g. *FLSC Model Code*, *supra* note 14, preface at 6: "Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction. In such cases, lawyers should consult with the Law Society, senior practitioners or the courts for guidance".

126 Thanks to Lieutenant Commander McCarthy for helping me understand this context.

127 *FLSC Model Code*, *supra* note 14, r 3.3-3: "A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm." While there is no proviso that the disclosure be made only if not otherwise prohibited by law, the discretionary nature of the duty suggests that the disclosure be made only in those circumstances.

128 Law Society of New Brunswick, *Law Society of New Brunswick Code of Professional Conduct*, 2017, r 3.3-3A: "A lawyer must disclose confidential information, but must not disclose more information than is required, when the lawyer believes on

death and serious bodily harm are unlawful and inherently problematic results.[129] However, where a military lawyer is advising on the use of force in the law of armed conflict, harm and death are the lawful and legitimately desired outcome of the client's intended actions, and warning targets or civilians or a non-governmental organization of that harm would be illegal, whether for a military lawyer or for a civilian lawyer retained by the military.[130] Lawyers licensed outside of New Brunswick and Manitoba and Saskatchewan can comply with their obligations by declining to exercise their discretion, but a lawyer licensed in New Brunswick or Manitoba or Saskatchewan faces a problem.

The situation becomes more problematic where there is an acceptable/proportionate risk of civilian harm under the law of armed conflict, and even more so where there is an unacceptable/disproportionate risk of civilian harm.[131] Consider for example a military lawyer who advises her chain of command that a proposed action violates the law of armed conflict, but the chain of command proceeds despite her advice. That

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reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm." The Law Society of Saskatchewan, *Code of Professional Conduct*, 2016, r 2.03 (3): "A lawyer must disclose confidential information, but only to the extent necessary if the lawyer has reasonable grounds for believing that an identifiable person or group is in imminent danger of death or serious bodily harm and believes disclosure is necessary to prevent the death or harm."; The Law Society of Manitoba, *Code of Professional Conduct*, 2010, r 3.3-3A: "A lawyer must disclose confidential information, but only to the extent necessary: (a) if the lawyer has reasonable grounds for believing that an identifiable person or group is in imminent danger of death or serious bodily harm and believes disclosure is necessary to prevent the death or harm." Both Saskatchewan, in commentary 5, and Manitoba, in r 3.3-3A(b), provide an exception where disclosure would endanger the lawyer or her family. Manitoba in commentary 3, and Saskatchewan in identical language in commentary 4, provides that "Mandatory disclosure of imminent danger of death or bodily harm is not conditional on a crime occurring. Accordingly, this rule could apply in circumstances such as a threatened suicide or self-mutilation".

129 As for lawful harm, in addition to the Manitoba and Saskatchewan examples of suicide or self-mutilation, I can imagine a lawyer arguing that a client's participation in physician-assisted dying triggers this confidentiality exception. For example, a lawyer for the patient might inform the patient's friends or family in an effort to change the patient's mind. Similarly, a lawyer for the physician or nurse may inform the client's co-workers or superiors. Assuming the requirements of federal law and provincial law (if any) are met, there is no unlawfulness at issue.

130 See e.g. *Security of Information Act*, RSC 1985, c O-5, s 4.

131 See e.g. Madsen, *supra* note 7, vol 1, ch 7 at 7:10.20, 7-4–7-5: "The use of force through military action must always bear some relation to the legitimate military objective sought … The object is to limit unnecessary suffering to innocents if and when military action occurs … The killing of civilians and unanticipated destruction through otherwise lawful attack must be proportionate or bear some measurable relation to the military gains anticipated and, according to Canadian interpretation, not be considered excessive".

situation seems to fit the letter and spirit of the confidentiality exception, as it is an unlawful act that will likely cause unlawful serious bodily harm or death. However, the military lawyer exercising this discretion (or for New Brunswick or Manitoba or Saskatchewan licensees, obligation) will still be violating the law.

Unlike the situations discussed in the previous part, this situation seems to be one in which the drafting of the rule has simply overlooked the special practice context of military lawyers.

6. Conclusion

In this article, I have canvassed some of the particular ethical issues that face military lawyers. These issues arise primarily from the tension between military lawyers' simultaneous obligations as military officers and as lawyers. The most important concern public comment and resolute advocacy critical of higher-ranking officers, the military justice system itself, or the government. Some ethical issues also arise from the special contexts in which military lawyers practice. One is how the future harm exception to confidentiality applies when advising on the law of armed conflict.

The *Queen's Regulations and Orders*, or preferably the *National Defence Act*, should be amended to explicitly recognize that resolute advocacy will sometimes involve public criticism of the Canadian Forces, superior officers, and the military justice system itself, including public statements in the media, and that prosecutors and defence counsel are required to favour resolute advocacy in those situations. One model is the language in the US Army's *Rules of Professional Conduct for Lawyers*,[132] which provides:

> Notwithstanding a Judge Advocate's status as a commissioned officer subject, generally, to the authority of superiors, a Judge Advocate detailed or assigned to represent an individual member or employee of the Department of the Army is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.[133]

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[132] US Army, *Rules of Professional Conduct for Lawyers*, Washington, DC: Department of the Army, 2018.

[133] *Ibid*, r 5.4(a). The previous language was arguably better because it explicitly required the loyalty and independence be "to the same extent as required by a lawyer in private practice." US Army, *Rules of Professional Conduct for Lawyers*, Washington, DC: Department of the Army, 1992, r 5.4(e): "Notwithstanding a lawyer's status as a commissioned officer or Department of the Army civilian, a lawyer detailed or assigned to represent an individual soldier or employee of the Army is expected to exercise unfettered

Alternately, some form of McNairn's recommended language for the *National Defence Act* could be used: "[t]he obligation of a military defence counsel to provide defence counsel services independently and in accordance with applicable professional and ethical standards shall not be infringed, abridged or curtailed."[134]

The *Queen's Regulations and Orders* should also be amended to specify that a military lawyer's duties to her law society, namely the duty to report a fellow lawyer, override her obligations as a military officer. The *Model Code of Professional Conduct* and the corresponding provincial and territorial codes, and especially those in New Brunswick, Manitoba, and Saskatchewan, should be amended to recognize that the future harm exception to confidentiality applies only if the disclosure is not otherwise prohibited by law.[135]

The *National Defence Act* and the *Department of Justice Act* should also be amended to clarify whether the Minister of Justice has a role in the superintendence of the military justice system, and to clarify whether the Minister of Justice has an equal or supervisory role to the Judge Advocate General's advisory function on matters of military law. While a role in the advisory function provides little if any apparent benefit, a role in the superintendence of the military justice system would promote public confidence in the administration of justice.

I have argued that military lawyers are like government lawyers in one key respect: a defining characteristic for military lawyers is the tension between their obligations as military officers and their obligations as lawyers, in the same way that a defining characteristic of government lawyers is the tension between their obligations as government employees and their obligations as lawyers. However, despite this one similarity, military lawyers are best understood as a group parallel to, as opposed to a subset of, government lawyers. This understanding recognizes that while government lawyers are delegates of the Attorney General, military lawyers are delegates of the Judge Advocate General—and given the relationship between the Judge Advocate General and the Minister of Justice, military lawyers are not delegates of the Minister of Justice. This understanding also best reflects military lawyers' special practice contexts and their unique status as military personnel.

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loyalty and professional independence during the representation consistent with these Rules *and to the same extent as required by a lawyer in private practice*" [emphasis added].

134 McNairn II, *supra* note 2 at 333.

135 See e.g. *FLSC Model Code*, *supra* note 14 at r 7.1-3 [emphasis added]: "*Unless to do so would be unlawful* or would involve a breach of solicitor-client privilege, a lawyer must report to the Society".