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BAIL OR JAIL:
RELEASE OR RETENTION PENDING TRIAL UNDER MILITARY JUSTICE IN CANADA

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BAIL OR JAIL, RELEASE OR RETENTION PENDING TRIAL UNDER MILITARY JUSTICE IN CANADA

by/par

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ABSTRACT

In 1982, enshrining the *Charter of Rights and Freedoms* into the new Canadian Constitution created supreme law by imposing consistency and full judicial review upon all legislation across the country and recognizing military law as a distinct division of law. Since then, the military justice system has undergone a major evolution that is still underway to meet changes resulting from constitutional challenges under the *Charter*. Within military justice procedures, provisions for pre-trial custody and release considerations have recently been part of this evolution and reflect ongoing developments in the law of bail, driven primarily by criminal cases decided by the Supreme Court of Canada.

In examining the evolution of military bail, this paper provides an historical treatment of the law of bail in Canada as it pertains to the military justice system, explores the present legislative framework and finally compares the military and criminal justice systems in certain key areas. The long held quasi-judicial role of commissioned officers within the armed forces provides the foundation for the duties and responsibilities of Custody Review Officers (CRO) within the legislative framework of military bail. Has the military justice system kept pace with the criminal justice system in meeting the demands of the *Charter*, or is it lagging, thus risking a perception of inequality of justice for those in custody awaiting trial for service and civil offences tried before military courts? In actual fact, criminal law has a natural lead role in the evolution of the law of bail and military law is on a consistent course and keeping pace with it. The combined efforts of Parliament and the Department of National Defence through the Office of the Judge Advocate General, as well as through the

decisions of military judges, continue to ensure that Canada's military justice system is responsive to the demands of a free and democratic society.

TABLE OF CONTENTS

Abstract 1

Table of Contents 3

Introduction 4

Chapter 1 – Historical Overview 10

Chapter 2 - Present Legislative Framework 18

Chapter 3 – Comparison of Military and Criminal Justice 36

- Evolution of Military Bail and Custody Review Officers 36

- *R. v. Harris*, 2009 64

- Evidentiary Tests of Bail 70

- The Quasi-judicial Role of Commissioned Officers 75

Conclusion 84

Bibliography 87

Appendixes

Custody Review Officer's Checklist

Excepts from the *National Defence Act*

INTRODUCTION

> **11. Any person charged with an offence has the right**
>
> ***e*) not to be denied reasonable bail without just cause;**
>
> ***f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;**
>
> ***Canadian Charter of Rights and Freedoms***

While Canada has long held its military justice system separate and apart from the law pertaining to civil society, this concept only received formal recognition in 1982 through enshrining a *Charter of Rights and Freedoms* within the new *Constitution of Canada*, thereby becoming supreme law. Specifically, Section 11(f) of the *Charter* speaks to the existence of a separate division of law for the military, with its own powers of trial and punishment. Unlike criminal law that deals only with crimes against society, military law encompasses that aspect plus the maintenance of discipline within the armed forces, as well as upholding external requirements such as the international law of armed conflict. It must function in times of peace and war, upholding the interests of the institution ensuring loyalty and good service to the country. The Supreme Court of Canada upheld this distinction in two landmark cases, *R. v. MacKay* and *R. v. Genereux*.[1] Deprivation of an individual's liberty through any form of imprisonment is the harshest treatment that society can impose under law.[2] The provisions for pre-trial custody or release following arrest and awaiting trial, commonly known as bail in the civilian context, is an important factor in continuing

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[1] *R. v .Mackay* (1980), Volume 54 *Canadian Criminal Cases* (2nd Series), p. 129, and *R. v. Genereux* (1992) Volume 70 *Canadian Criminal Cases* (3rd Series), p. 56.

[2] Since 1998, death is no longer a statutory punishment available under military law, bringing it finally into line with criminal law.

evolution of military law in Canada. A person arrested under military law is guaranteed the same right to reasonable bail under the *Charter* as any person arrested under criminal law.[3] Comparison between military and criminal law demonstrates the inter-relationship of these two divisions of law, especially with respect to *Charter* challenges concerning pre-trial custody and release. Pre-*Charter* the courts had little recourse to interfere or intervene in military affairs or organization. Notwithstanding the continuing evolution of military law, has the military justice system kept pace with the criminal justice system in meeting the demands of the *Charter* in this regard, or is it lagging, thus risking a perception of inequality of justice for those in custody awaiting trial for service offences? Criminal law has a natural lead role in the evolution of the law of bail in Canada; military law is on a consistent path and keeping pace with it.

With the advent of the *Charter,* the various divisions of law in Canada could no longer remain disparate from each other.[4] The *Charter* weakened the power of the supremacy of parliament by empowering the courts with full judicial review on the constitutionality of law. Prior to 1982, the courts only had partial judicial review of statute law passed by the federal parliament or the provincial legislatures. This meant that most constitutional arguments heard by the courts were normally limited to jurisdictional disputes between the provinces and the federal government, caused by various interpretations of Canada's then constitution, the *British North America Act, 1867* (BNA).[5] The military and

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[3] The term bail (and the law governing it) has become more general in meaning in Canada since the *Charter*, s. 11(e) was enacted, and now encompasses all forms of pre-trial and appellate releases from custody. Previously, it more specifically dealt with sureties and security of the accused. See: Dukelow, Daphne A. *The Dictionary of Canadian Law*, 3rd ed. (Scarborough: Thompson Canada, 2004), p.105.

[4] e.g. administrative, civil, criminal, family, military, regulatory and crown prerogative.

[5] The *British North America Act*, 1867 was an act of the British Parliament and was "patriated" in 1982 under the government of Prime Minister Pierre Elliott Trudeau, becoming the *Constitution Act,* 1867. Prior to its

national defence was clearly a federal preserve. The *Charter* became supreme law and as such all legislation passed federally or provincially had to be consistent with its aims or risk being challenged and struck down as being unconstitutional. This change from partial to full judicial review made the Canadian system more akin to that of the United States[6] than to Great Britain, which still has an unwritten constitution of common law.

Canadian military law has steadily marched towards constitutional consistency with the other divisions of law, including its provisions for pre-trial custody or release. Since 1972, with the passage of the *Bail Reform* Act, bail became known as "judicial interim release" under the *Criminal Code of Canada* in an attempt to overcome the vagaries of the term. That being said, the *Charter* specifically uses the term bail in Section 11 (e), thereby rendering the term judicial interim release as a passing fad and returning to the more ancient and universally understood term in law.[7] Therefore for consistency with the *Charter* and resulting case law in this regard, the term bail will be used in exploring its application under military law.

"patriation" all amendments to the Canadian constitution had to pass first through the Canadian Parliament and then through the British Parliament, notwithstanding that Canada had received its independence from Britain under the *Statute of Westminster*, 1931. Since 1982, the Canadian Parliament has been fully independent from that of Great Britain, although the new Canadian Constitution is also still legislation of the British Parliament, where it is known as the *Canada Act*, 1982 (Eng.), c. 11. Section 2 of that statute proscribes that "No Act of the Parliament of the United kingdom passed after the Constitution Act, 1982, comes into force shall extend to Canada as part of its law", in Gerald L. Gall. *The Canadian Legal System.* Fourth Edition. (Toronto: Carswell, 1995), p. 61.

[6] i.e. with the judiciary providing one of the checks and balances over the executive branch of government.

[7] Trotter, Gary T. *The Law of Bail in Canada, 2nd ed.* (Toronto: Carswell, 1999), p. 1-2.

The *Charter* entrenched four demands upon determining whether arrested persons and accused of committing offences should be held in custody or released conditionally or unconditionally pending trial, namely:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **9.** Everyone has the right not to be arbitrarily detained or imprisoned.
>
> **10.** Everyone has the right on arrest or detention
>
> *c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.
>
> **11.** Any person charged with an offence has the right
>
> *e*) not to be denied reasonable bail without just cause;

Section 7 imposes that no person be deprived of their liberty except in the accordance with the principles of fundamental justice (i.e. the legal principles of procedural fairness and natural justice, more commonly referred to as due process of law). Section 9 prescribes that no person shall be subject to arbitrary detention or imprisonment and under Section 10 (c) to have the validity of any such arrest or detention justified under the age-old right of *habeas corpus*, which dates from 1305. Over the years, the principle of *habeas corpus* became codified into the bail procedures enacted in various statutes such as the *Criminal Code of Canada*, the Ontario *Provincial Offences Act* and the *National Defence Act*, which since 1982 must also reflect the requirements of Section 11(e).

When viewed in the context of its long history, military law has been adapting at a relatively rapid rate; however, it is encountering some difficulty in keeping pace with criminal law in respect to bail. Fortunately, the creation of Custody Review Officers (CRO), combined with the provisions for show-cause bail hearings before military judges, is a

substantial step towards keeping pace in meeting the case law resulting from challenges under Section 11(e) of the *Charter*. Timeliness of pre-trial custody determinations, either by police or the courts, has been a major factor in criminal law challenges. Unless released by police, an accused in custody must be brought before a justice within twenty-four hours of arrest,[8] and subsequently the justice cannot adjourn the matter for more than "three clear days"[9] without the consent of the accused. For example, a four-day long-weekend, such as Easter, requires that criminal bail courts sit at least once over that period. The *Criminal Code* only permits a period of three "clear days" for non-consensual adjournments resulting in custodial remands, and a four-day long-weekend exceeds this limit. This time restriction is for the benefit of the accused, preventing prosecutors from obtaining long, non-consensual adjournments, resulting in excessive periods of pre-bail custody. Similar time restrictions are now prescribed in military law as it relates to pre-trial custody and release.

In military law, the creation of Custody Review Officers and their appointment at the unit level resolved the systemic problem of timely access to independent judicial or quasi-judicial review of custody following arrest. Moreover, amendments to the *National Defence Act*, similar to those made to the *Criminal Code*, permit access to military judges for bail hearings by means of modern telecommunications. Prior to these amendments, accused persons and/or judicial officers were often required to travel great distances in order to conduct these types of proceedings in a face-to-face manner. While criminal law was

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[8] *Criminal* Code, s. 503(1) and Section 2 defines a "Justice" as being a Justice of the Peace or Provincial Court Judge.

[9] *Criminal* Code, s. 516, as defined by the *Interpretation Act*, s. 27(1), but which is not consistent with *R. v. Khabra* (1978). See Trotter, 2nd Ed, p. 200. Under the *Interpretation Act*, this calculation does not include the day on which the adjournment was requested nor the day on which matters recommenced, but considers the three clear days between these two events.

instrumental in making these changes to the law of bail to meet *Charter* challenges, military law followed closely behind.

Custody Review Officers will be discussed in detail later; however, at this point it is sufficient to know that these officials are commissioned officers appointed by their respective commanding officers, in a manner similar to those appointed as “delegated officers” empowered to preside over military summary trials. Such appointments are temporary in nature and relate specifically to the needs of a particular unit, and are not mutually exclusive. An officer may be appointed as both a delegated officer and as a Custody Review Officer; however, these duties cannot be exercised concurrently over the same matter, as this is perceived as being a conflict of interest. On the other hand, military judges are legally-trained judicial officers with qualifications similar to those of their civilian counterparts, becoming a fully-fledged military judiciary at the turn of the millennium. Depending upon the nature of the offence and at which point in the proceedings, military judges exercise jurisdiction over bail in a manner similar to either a justice of the peace or a superior court judge. In exploring the evolution of bail within military law, the roles and responsibilities of military judges and CRO’s figure prominently.

CHAPTER 1 – Historical Overview

Prior to enactment of the *Charter of Rights and Freedoms*, military law was its own entity with little commonality with the other divisions of Canadian jurisprudence. In fact, until 1950 with enactment of the *National Defence Act* (NDA), Canadian military law was really only British military law adopted by or supplanted into the Canadian military justice system. *King's Regulations and Orders for the Canadian Army 1939* and *Extracts from Manual of Military Law 1929, Reprinted for use in the Canadian Army 1941*[10] bear witness to this fact. This circumstance is not very surprising given that the law of Canada was that of Great Britain, stemming from the 1763 Treaty of Utrecht, which ended the French and Indian War and French governance in North America: "By virtue of the Royal Proclamation of October 7, 1763 the law of England, both civil and criminal, was imposed upon all the territories of what subsequently became Canada."[11] Following from this development, the legislative assembly of Upper Canada in 1800 adopted English criminal law on the statute books as of September 7, 1792.[12] British common law continued with Canada's Confederation in 1867 and has been evolving ever since as Canada has matured into an independent nation.[13]

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[10] Canada. *King's Regulations and Orders for the Canadian Army 1939* (with amendments No. 1 dated 1 Apr 1939 to No. 137 dated 10 Jan 1949). (Ottawa: Edmond Cloutier, CMG, BA, L Ph, King's Printer and Controller of Stationery, 1947), and Canada. *Extracts from Manual of Military Law 1929. Reprinted for use in the Canadian Army 1941*. (reprinted in Canada February 1941 by permission of the Controller, His Majesty's Stationery Office and amended with amendments Nos.1 to 12, Sep 1949). (Ottawa: Edmond Cloutier, Printer to the King's Most Excellent Majesty, 1943).

[11] Mewett, Allan W. *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario*. (Toronto, c. 1981), p. 2.

[12] *Ibid*., p. 3

[13] Canada has also maintained the duality of English Common in "English" Canada and the tradition of French civil code in Quebec. Regardless, the *Criminal Code of Canada* and *National Defence Act* are applied right across the country as federal statutes.

The concept of bail while awaiting trial is much older and in English common law dates from Richard I, the Lionheart. It appears that the advent of bail was not driven so much by concerns for the rights of the un-convicted prisoner, as for the liability of the jailer. As the King's representatives, English sheriffs were responsible to the Crown for the safekeeping of prisoners in their custody awaiting trial. If these prisoners died before their cases were heard (usually quarterly by travelling circuit judges, but often were exceedingly longer), the sheriff was financially liable by way of fines to the King. By delegating this responsibility to someone else known to the accused in order to ensure the accused's attendance at court, and at the peril of forfeiting money or land pledged as surety, the sheriff escaped the King's liability and the expense of another mouth to feed. The abuse of this process through corruption by the sheriffs eventually led to this responsibility being passed to the Justices of the Peace in 1275 under the *Statute of Westminster, I.*[14]

Justices of the Peace find their roots in the year 1195 under Richard I, who appointed local knights as Keepers of the Peace. During the reign of Edward III, Parliament codified this practice, in 1327.[15] By 1361, the Keepers of the Peace had become His Majesty's Justices of the Peace under the first *Justices of the Peace Act.*[16] In Canada, the office of Justice of the Peace continued from its British roots and today, like a Provincial Court Judge of the same court, is normally a provincial appointment by the Lieutenant Governor-in-

[14] Trotter., p. 2-6.
[15] Act 1, Edward III, Statute 2, Chapter 16. 1327, as cited in Eddy, J.P. *Justice of the Peace*. (London: Cassell and Company Ltd, 1963), p. 2.
[16] Eddy, J.P. *Justice of the Peace*. (London: Cassell and Company Ltd, 1963), p. 2.

Council, enjoying the status of being both a judicial officer and a peace officer under criminal law.[17]

> And we do hereby grant unto you full powers and authority to constitute and appoint… justices of the peace.
>
> Proclamation of Governor Murray
> November 4, 1763[18]

Over time, the principles of the presumption of innocence and the right of release (Section 11(d) and (e) of the *Charter*, respectively) have supplanted the concerns over the jailer's liability. In military law, Justices of Peace have jurisdiction over only a limited number of offences, and except in respect of these offences have no jurisdiction over military bail.[19] Consequently, this is where military judges, and since 1999 Custody Review Officers (CRO), come into play within the military justice system. CRO's are now the initial arbiter between the powers of the state and the rights of the individual with respect to determining pre-trial release, or retention in custody pending trial, and will be discussed in further depth in Chapter 3.

As with the law of bail, military justice in Canada finds its roots in Great Britain, with the *Mutiny Act*, 1689, credited "as the first permanent code of military law."[20] The *Mutiny Act* and the *Articles of War* (originating in 1672) formed the backbone of the military justice system well into the 19th century, such that the Canadian *Militia Act* (enacted the year after

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[17] Canada. *Criminal Code of Canada*, Revised Statutes of Canada 1985, Chapter C-46, Section 2, as repealed and amended to 2009, and Ontario. *Justice of the Peace Act*, Revised Statutes of Ontario, Chapter, J.4, as amended and repealed to 2009.
[18] Mewett., p. 2.
[19] *National Defence Act*. Part VII Offences Triable by Civil Courts, e.g. s. 289 False Answer on Enrolment and s. 294 Failure to Attend Parade (Reserve Force).
[20] Canada, Department of National Defence. Office of the Judge Advocate General. *Military Justice at the Summary Trial Level*. Version 2.1. (Ottawa: Department of National Defence, B-GG-05-027/AF-011. 15 February 2006), p. 2-2.

Confederation) reflected or incorporated much of this law. Eleven years later in 1879, the two original British statutes were amalgamated to form the *Army Discipline and Regulation Act*, which had a very short life of only two years before being superseded by the annually renewed *Army Act of 1881*. With the evolution of flight and military air power, the *Air Force Act* "was basically a re-wording of the *Army Act*" and governed discipline within the air force. On the other hand, the *Naval Discipline Act*, 1866 remained in force and applicable to Canadian forces until 1944, when replaced by the *Naval Services Act*, which came into full force and effect in 1945.[21]

Provisions for pre-trial release remained rather sketchy in early military regulations. Articles 464(a) and 449(b) of *King's Regulations and Orders for the Canadian Army 1939* simply prescribed:

> 464(a) When a soldier elects to be tried by a district court-martial, under the provisions of Section 46(8) of the Army Act, his commanding officer may, if he thinks the circumstances of the case warrant it, release the accused from arrest pending trial.

and

> 449(b) Under Section 21(1) of the Army Act, serious liability is incurred by an officer who causes any person to be detained in custody for an unnecessarily long period without investigating the case or taking steps to bring to trial, [22]

with no specific procedures and left to the discretion or whim of superior officers.

By the end of the Second World War, Canadian military law was still really that of Great Britain and this was not an entirely satisfactory arrangement. Consequently, the impetus for real change in military justice in Canada was the postwar outcries by Canadian

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[21] *Ibid.*, p. 2-3 – 2-6.

[22] *King's Regulations and Orders for the Canadian Army 1939.* Ottawa: The King's Printer and Controller of Stationery, 1947, as amended and repealed to 10 January 1949. also *Extracts from Manual of Military Law 1929. Reprinted for use in the Canadian Army* 1941. (reprinted in Canada February 1941 by permission of the Controller, His Majesty's Stationery Office and amended with amendments Nos.1 to 12, Sep 1949). Ottawa: Edmond Cloutier, Printer to the King's Most Excellent Majesty, 1943.

Second World War veterans over the shortcomings and injustices that they perceived or had persevered under British military law. This dissatisfaction with the *status quo* led to departmental and parliamentary activity resulting in Canada's own *National Defence Act* in 1950.[23] This new Canadian defence legislation was driven by the Minister of National Defence of the day, The Honourable Brooke Claxton, and paralleled concurrent developments in both the United Kingdom and the United States. Claxton had identified shortcomings of the British military justice system in the Canadian model before the war. Therefore, the post-war dissatisfaction with it reinforced his desire for legislative reforms. Three decades later, with the advent of the *Charter* as supreme law in Canada, both military and criminal law were compelled to become consistent with a common national legal basis of rights and freedoms, and as such, subject to full judicial review by the Supreme Court of Canada for the first time in Canadian history.[24]

In 1997, in response to the Somalia revelations and public concerns about the military justice system, the Minister of National Defence (MND) created a special advisory group to report to the Prime Minister on "Military Justice and Military Police Investigation Services."[25] Chaired by the former Chief Justice of Canada, the Right Honourable Brian Dickson a Second World War veteran and war amputee, the group had Lieutenant-General (Retired) Charles H. Belzile and Mr. J.W. Bud Bird as members.[26] The group's work was separate but contemporary with that of the Somalia Commission of Inquiry.[27] The Somalia

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[23] *Military Justice at the Summary Trial Level.*
[24] Madsen, Chris. *Another Kind of Justice, Canadian Military Law from Confederation to Somalia*. (Vancouver: UBC Press, 1999), Chapter 5.
[25] See. Department of National Defence. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*. Ottawa, 14 March 1997.
[26] The author submitted "Worst Case Scenario" as a brief to the Special Advisory Group and was requested to write a second paper concerning the concept of right to counsel at summary trial.
[27] See. Madsen. *Another Kind of Justice*., pp. 147 – 150.

Inquiry chaired by the Honourable Mr. Justice Gilles Letourneau of the Quebec Superior Court, with Colonel the Honourable Mr. Justice Robert C. Rutherford,[28] Supreme Court of Ontario and Professor Peter Desbarats, University of Western Ontario Dean of Journalism, as its members. The reports of these two bodies led to the first major changes to the NDA since 1950. The revisions to military bail and the creation of CRO have resulted from this extensive overhaul of the military justice system, following on from earlier concerns over military bail addressed during the 1980's. Prior to that time no allowance was made for bail in matters before courts martial.

The concept of bail in the post-*Charter* environment was unclear until the Supreme Court of Canada had the opportunity to decide a number of landmark cases. Initially, Section 11(e) was viewed in a light similar to the Eighth Amendment to the United States *Bill of Rights* and the *European Convention on Human Rights*; however, the Supreme Court of Canada took a different tact ten years after the Charter's enactment in *R. v. Pearson* (1992) and *R. v. Morales* (1992). The court viewed the US model with little interest as it did not specifically guarantee a right to bail, only that it not be excessive. On the other hand, the court viewed Section 11(e) as guaranteeing both the right to bail and its reasonableness. Since those decisions, Canadian courts have charted their own destiny with respect to the law of bail, with little interest in other jurisdictions.[29]

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[28] A Second World War armoured officer with The Grey and Simcoe Foresters and later the Governor General's Horse Guards who was invested as a Member of the Order of the British Empire (MBE) for his service.

[29] For a greater treatise on this point compare Trotter, 1st ed., 1992, p. 19-25 with Trotter, 2nd ed., 1999, p. 14. *Pearson* and *Morales* negated Trotter's discussion in his 1st Edition on the potential influence of the US 8th Amendment on interpreting Section 11(e) and he deleted it with comment in his 2nd Edition.

Prior to the *Charter*, the constitutional roots of the law of bail in Canada appeared in the *Canadian Bill of Rights* enacted in 1960 under the Diefenbaker government. This statute remains in force but did not have the constitutional effect that it was intended to have. Unlike the *Charter*, the *Bill of Rights* was not enshrined in the Constitution[30] as supreme law and did not confer the powers of full judicial review upon the courts. That being said, its influence on the *Charter* with respect to bail is quite evident:

> **2.** Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> **(f)** deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to the law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; [31]

It can be argued that the *Bail Reform Act* had a more lasting impact on the law of bail than the *Canadian Bill of Rights*, although it really only prescribed radically new criminal procedural approach to bail, as opposed to an overarching civil right in Canadian law. Therefore, it has had little direct historical impact on military law. On the other hand, a right to bail began to appear in military justice in the year of the *Charter's* enactment in *R. v. Gingras* (1982), heard by the Court Martial Appeal Court, where court determined its inherent jurisdiction to consider appellate bail applications. This case was followed by *Hinds v. R.* (1983) in the British Columbia Supreme Court, *R. v. Muise* (1984) in the Ontario High Court of Justice, and *Glowczeski v. Canada (Minister of National Defence)* (1989) in the Federal Court of Canada. These cases dealt with an inherent right to bail where the enabling legislation was silent on such provisions – in these cases bail pending appeal under the

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[30] Then the *British North America Act*, 1867.
[31] *Canadian Bill of Rights*, R.S.C. 1985, Appendix III.

National Defence Act.[32] Trotter comments in the *Gingras* case that "the extent to which the *Charter* was relied upon is unclear,"[33] leaving one to conclude that perhaps the *Canadian Bill of Rights* initially had more influence on the evolution of military bail than did the *Charter.* That being said, from a historical perspective the impact of the *Charter*, s. 11(e) on the evolution of military law has been far greater than that of the *Canadian Bill of Rights*, s. 2(f), or any other federal statute since Confederation.

Bail has only become an issue in military justice since the mid-1980's. While the *Charter* had some influence during that period, the military was already changing its procedures, regulations and in turn statutory provisions leading up to the major changes of 1998. Military bail has evolved through the actions of decisions of military courts expressing concerns over custody pending trial or appeal.

[32] These cases were more recently argued in *Romeo Phillion v. Her Majesty the Queen*. Memorandum of Argument. Ontario Superior Court of Justice, 18 June 2003, an application for *habeas corpus*. Internet: http://www.innocenceproject.ca/documents/phillionbail.pdf accessed 06 November 2009.
[33] Trotter, 2nd ed., p. 17, note, 113.

CHAPTER 2 – Legislative Framework

After the organization of troops, military discipline is the first matter that presents itself. It is the soul of armies. If it is not established with wisdom and maintained with unshakeable resolution you will have no soldiers. Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy…[34]

Maurice de Saxe, 1732

In terms of the military justice system and in particular pre-trial custody and release provisions, the legislative framework of this system of law is now straight forward and prescribed for the past decade by statute, regulation and order. From the top with supreme law and down through the succession of subordinate or related legislation, the framework is clear and relatively simple to follow. The statutory provisions and crown prerogatives that lead to the commissions of military officers demonstrate why commissioned officers are granted quasi-judicial powers in order to keep those under their authority in good order and discipline, and that the mechanism of appointment is similar to that of judicial officers. The importance of this authority and framework becomes clearer later with examination of the role of Custody Review Officers (CRO) in determining the initial stages of military bail. As The Honourable Mr. Justice MacIntyre of the Supreme Court of Canada stated in 1980: "From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function."[35]

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[34] Maurice de Saxe: *Mes Reveries*, xviii, 1973, R.D. Heinl, Jr. *Dictionary of Military and Naval Quotations.* (Annapolis: United States Naval Institute, 1966), p. 91., in Watkin, Kenneth W. "Canadian Military Justice: Summary Proceedings and the Charter". (Thesis Master of Laws). Queen's University at Kingston, 1990, and previously quoted in Fisher, John R. "Worst Case Scenario, a Brief to the Special Advisory Committee on Military Justice and Policing." Barrie, 1997, p. 4. An argument could be made that this very thing occurred when the Yugoslavian Army disintegrated and devolved into ethnic warring factions which Canadian soldiers faced during the Balkan Wars in the 1990's.

[35] MacIntyre, J. in *R. v .Mackay* (1980), Volume 54 *Canadian Criminal Cases* (2nd Series), p. 129, quoted in *R. v. Genereux* (1992) Volume 70 *Canadian Criminal Cases* (3rd Series), p. 56.

At the top with supreme law, the *Charter* provides every person in Canada with the following legal rights:

Legal Rights

7. Everyone has **the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice**.
8. Everyone has the right to be secure against unreasonable search or seizure.
9. Everyone has the right **not to be arbitrarily detained or imprisoned.**
10. Everyone has the right on arrest or detention
a) to be informed promptly of the reasons therefor;
b) to retain and instruct counsel without delay and to be informed of that right; and
c) **to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful**.
11. Any person charged with an offence has the right
a) to be informed without unreasonable delay of the specific offence;
b) to be tried within a reasonable time;
c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
d) **to be presumed innocent** until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
e) **not to be denied reasonable bail without just cause**;
f) except in the case of **an offence under military law tried before a military tribunal**, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Charter of Rights and Freedoms
(emphasis added)

These legal rights as citizens, which find their roots with *Magna Carta*,[36] have been binding on military law at least since 1982. Consequently, the common soldier, although subject to military authority, has not lost the legal rights enjoyed by fellow Canadian citizens and is now lawfully empowered to challenge the system. Since 1982, those persons accused of service offences have enjoyed these constitutionally enshrined rights in challenging perceived deficiencies in the military justice system. The impact of this right has been to provide a catalyst for reform in military summary trial and courts martial procedures, including pre-trial and appellate bail provisions. The system has become dynamic and subject to interpretation and change. Moreover, the Department of National Defence, through the auspices of the Office of the Judge Advocate General and in consultation with the Department of Justice, has exercised due diligence in a proactive approach to identifying potential deficiencies in the military justice system and moving to correct them before a policy review challenge is even raised. Thus, the military legal branch provides ongoing advice and opinion on whether potential *Charter* challenges stand a reasonable chance of success before the courts such that issues can be addressed beforehand.

The statutory authority for matters of defence in Canada is purely a federal responsibility, giving Parliament the power to make appropriate legislation and regulations, as prescribed by the *Constitution Act, 1867*:

> **POWERS OF THE PARLIAMENT**
> **Legislative Authority of Parliament of Canada**
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act

[36] See: Hindley, Geoffrey. *A Brief History of the Magna Carta, The Story of the Origins of Liberty*. London: Constable & Robinson Ltd., 2008.

> assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> 7. Militia, Military and Naval Service, and Defence.

Moreover, the *Constitution Act, 1867* further prescribes that as a constitutional monarchy, Canada's nominal Commander-in-Chief is The Queen, a function regularly exercised by the Governor General of Canada[37] on her behalf:

> 15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

From the *Constitution Act, 1867*, s. 15 and 91(7) flows the *National Defence Act*, which sets out the constitution of the Canadian Forces and the appointment of officers. As commented on by Mr. Justice MacIntyre, commissioned officers have long held a quasi-judicial function within the armed forces, especially in light of Maurice de Saxe's comments of 1732; therefore the statutory provisions for their appointment in Canada follow and may seem rather mundane in nature.

> **Commissioned Officers**
>
> 20. (1) Commissions of officers in the Canadian Forces shall be granted by Her Majesty during pleasure.

The *Criminal Code of Canada* defines that commissioned officers are and have the powers and responsibilities of public officers under criminal law:

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[37] "In 1947, the Letters Patent of King George VI transferred all the duties of Head of State of Canada to the Governor General and the new Commission of Appointment referred to the Office of Governor General and Commander-in-Chief in and over Canada. In 1968, following the unification of the three services, the Governor General became Commander-in-Chief of the Canadian Armed Forces (now, the Canadian Forces)." http://www.gg.ca/gg/rr/cc/hist_e.asp

2. "public officer" includes

(*b*) an officer of the Canadian Forces,

An officer's commission is a statutory instrument in law, prescribed in the *Statutory Instruments Act*:

"statutory instrument" (*a*) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, **commission,** warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament, (emphasis added)

Related to the *Statutory Instruments* Act is the *Public Officers Act*, which prescribes that:

COMMISSIONS
Regulations

3. The Governor in Council may make regulations declaring and determining what dignitaries, officers or classes of officers, or persons in the federal public administration, appointed under orders in council shall receive commissions under the Great Seal or under the Privy Seal, and what fee shall be paid thereon, and commissions may be issued under this section to the dignitaries, officers and persons who have not received and are declared to be entitled to receive them.

The provisions of the *Seals Act* further govern an officer's commission, given that it bears the Privy Seal:

Issue of royal instruments

3. Notwithstanding any law in force in Canada, any royal instrument may be issued by and with the authority of Her Majesty the Queen and passed under the Great Seal of Canada, or under any other royal seal approved by Her Majesty the Queen for the purpose.

Orders and regulations

4. Notwithstanding any law in force in Canada, the Governor in Council may, subject to the approval of Her Majesty the Queen, make orders and regulations relating to royal seals, the use thereof, royal instruments and documents under the sign-manual, and, without restricting the generality of the foregoing, in relation to the following matters:

(*a*) the specification of the instruments or classes of instruments that are to be passed under the royal seals;

(*b*) the authorization of royal seals, the naming of those seals and the specification of the purposes for which they are to be used;

(*c*) the custody of the royal seals;

(*d*) the procedure governing the use of the royal seals;

(*e*) counter-signature of royal instruments;

(*f*) the issuing and counter-signature of documents under the sign-manual;

(*g*) the procedure whereby the approval of Her Majesty the Queen and her authority for the issuing of royal instruments and documents under the sign-manual is to be given; and

(*h*) the authentication and proof of royal instruments and documents under the sign-manual, including the conditions under which certification by an official, or publication by the Queen's Printer, constitutes authentication and proof.

The *Interpretation Act* prescribes that:

Appointment, Retirement and Powers of Officers

23. (1) Every public officer appointed by or under the authority of an enactment or otherwise is deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment, commission or instrument of appointment.

Holding of office at the pleasure of Her Majesty means that the incumbent is dismissible at pleasure, "without the requirements of reasons or hearing" (*Hallyburton v. Markham (Town),* 1988, Ontario Court of Appeal.)[38] Fortunately, for commissioned officers dismissal is not as draconian as that, given that military law prescribes due process in order to reach such a determination for dismissal.[39] Although administrative reviews require due process, the actual decision and action may be very arbitrary. That being said, an officer's commission no longer enjoys pleasure upon retirement or resignation from the Canadian Forces, losing all lawful force and effect.

This legislative framework leads to subordinate legislation regarding officers' commissions in the form of regulations, and in this instance is the *Formal Documents Regulations*, which flow from both the *Seals Act* and the *Public Officers Act.* At this point, most appointments, including officers' commissions, may be classified as being crown

[38] *Dictionary of Canadian Law*, p. 359.
[39] *Defence Administrative Orders and Directives* 5019-2 "Administrative Review," 3 March 2006.

prerogative in nature. In addition to military officers, these regulations also include the lieutenant governors, cabinet ministers, judges, etc., and in particular to our purposes prescribe that:

> 5. Commissions under the Privy Seal shall issue to persons appointed to the following offices:
>
> | **Appointee** | **Signature** |
> |---|---|
> | Officers of the Canadian Forces | Governor General
Minister of National Defence |

An officer's commission scroll has remained relatively unchanged for centuries[40] as follows:

Elizabeth the Second, by the Grace of God of The United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith,

TO

John/Jane Smith

HEREBY appointed an Officer

In Her Majesty's Canadian Armed Forces

With Seniority of the day of 200

We reposing especial Trust and Confidence in your Loyalty, Courage and Integrity, do by these Presents Constitute and Appoint you to be an Officer in our Canadian Forces. You are therefore carefully and diligently to discharge your Duty as such in the rank of *Second Lieutenant* Or in such other rank as We may from time to time hereafter be pleased to promote or appoint you to, and you are, in such and on such occasions as may be prescribed by Us, to exercise and well discipline in arms, both the inferior officers and men serving under you and use your best endeavour to keep them in good Order and Discipline. And We do hereby Command them to Obey you as their superior Officer, and you to observe and follow such Orders and Directions as from time to time you shall receive from Us, or any your Superior Officer, according to Law, in pursuance of the Trust hereby reposed in you.

IN WITNESS Whereof Our Governor-General of Canada hath hereunto set her hand and Seal at our Government House in the

City of Ottawa this day of 200

in the Year of Our Lord Two Thousand

and in the

Year of Our Reign

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[40] Russell, E.C. *Customs and Traditions of the Canadian Forces.* (Ottawa: Deneau Publishing, 1980), p. 80-84.

BY COMMAND OF

HER EXCELLENCY THE GOVENOR GENERAL

MINISTER OF NATIONAL DEFENCE

The time-honoured wording of an officer's commission also implies that the named officer is subject to the military chain of command and is not acting independently, except where so provided. Written in the language of the "Royal We," the officer is compelled to obey the lawful orders of those superior in the chain of command, while those subordinate to the officer in the chain of command are similarly compelled to obey his or her lawful orders.

This hierarchy of federal legislation illustrates the federal nature of the appointment and commissioning of military officers and that they are not just simply employees of the Government of Canada, making them distinct from public servants. The legal status of commissioned officers is often muddied within the Canadian Forces in the egalitarian attempt to proletariatize the members of the recently minted "Defence Team," with "officer equivalents" in the DND public service, for example "AS" position classifications, and "Non-Commissioned Members" vice the traditional "Other Ranks" descriptor. This tends to debase the importance and significance of the commission, especially if not inculcated in junior officers as part of their socialization into the military. Regardless, these other classes of persons do not hold Her Majesty's Commission under the Privy Seal of Canada, nor do they have the lawful authority or responsibility that flows from that statutory instrument. Though, these other classes of persons are required to take an oath of allegiance to the Queen upon employment. In law, and therefore reality, the only equivalent to a commissioned officer is another commissioned officer of the same rank, classification and seniority.

Although military law might be defined in the *National Defence Act* or the *Interpretation Act*, it is the *Criminal Code of Canada*, which defines military law most clearly:

> 2. "military law" includes all laws, regulations or orders relating to the Canadian Forces;

As the primary statutory authority for the Canadian Forces, the *National Defence Act* is amplified through a series of subordinate legislation, regulations and orders, including but not limited to *Queen's Regulations and Orders for the Canadian Forces* (QR&O), *Canadian Forces Administrative* Orders (CFAO)[41] and *Defence Administrative Orders and Directives* (DAOD). QR&O prescribe the authority of the most senior military officer, the Chief of the Defence Staff:

> **1.23 – AUTHORITY OF THE CHIEF OF THE DEFENCE STAFF TO ISSUE ORDERS AND INSTRUCTIONS**
>
> Subject to paragraph (2), the Chief of the Defence Staff may issue orders and instructions not inconsistent with the *National Defence Act* or with any regulations made by the Governor in Council, the Treasury Board or the Minister:
>
> *(a)* in the discharge of his duties under the *National Defence Act*; or
>
> *(b)* in explanation or implementation of regulations.

The significance of this authority is paramount in understanding the function of the chain of command and lawful authority. While the military in a democratic society is under civilian control in Canada through the authority of Parliament, the members of the armed forces are solely accountable under the military chain of command. Lawful orders emanate from commissioned officers, beginning with the Chief of the Defence Staff and descending

[41] CFAOs are being replaced by DAODs as they are promulgated.

through the chain of command from the generals commanding commands, to formation and base commanders, to commanding officers of units – the latter of which have the greatest powers of trial and punishment within the chain of command (military judges of course are outside of and apart from this equation). In turn, the Chief of the Defence Staff is responsible to the Minister of National Defence, the political person at Cabinet responsible for the national defence portfolio, and the Prime Minister.

With respect to the military justice system, QR&O Volume II contains the *Code of Service Discipline*, which further codifies offences created under the *National Defence Act* and other federal statutes into the enforcement mechanism of the military justice system. It is under this legislative framework that summary trials and courts martial are convened and organized, including pre-trial considerations such as bail.

Specific to military bail are provisions codified in Division 3 of the NDA, and amplified in QR&O Chapter 105 "Arrest and Pre-Trial Custody." These provisions reflect procedures similar to those in the *Criminal Code of Canada*, such as release with or without conditions, crown onus and reverse onus offences. Military bail does not pertain until a decision is made (usually by the military police) to not release the accused, but retain them in custody. At this point, a commissioned officer holding a temporary appointment as a Custody Review Officer (CRO) assumes jurisdiction over the accused. The creation of CRO's is the result of relatively new amendments in the legislative framework of military bail, beginning in 1998.

The specific role of Custody Review Officers will be discussed later, but suffice to say that these officers exercise a quasi-judicial role, with powers lying somewhere between those of a police Officer-in-Charge and a Justice of the Peace under criminal law. As previously mentioned, timeliness is an important factor at this point in the proceedings, and a CRO must deal with the matter within 72 hours of the arrest, unless extenuating circumstances exist. This imposition of time is not unlike the aforementioned "three clear days" in criminal bail proceedings. The legislative framework found in the NDA, s. 153, and 158.1 through 158.5, prescribe that:

> **153.** The definitions in this section apply in this Division.
>
> "custody review officer", in respect of a person in custody, means
>
> (*a*) the officer who is the person's commanding officer, or an officer who is designated by that officer; or
>
> (*b*) if it is not practical for an officer referred to in paragraph (*a*) to act as the custody review officer, the officer who is the commanding officer of the unit or element where the person is in custody or an officer who is designated by that officer.
>
> Release from custody
>
> **158.1** (1) The officer or non-commissioned member into whose custody a person under arrest is committed shall, as soon as practicable, and in any case within twenty-four hours after the arrest of the person committed to custody, deliver a report of custody, in writing, to the custody review officer.
>
> ***Initial Review***
>
> Review of report of custody
>
> **158.2** (1) The custody review officer shall review the report of custody and the accompanying documents as soon as practicable after receiving them and in any case within forty-eight hours after the arrest of the person committed to custody.
>
> Duty to release
>
> (2) After reviewing the report of custody and the accompanying documents, the custody review officer shall direct that the person committed to custody be released immediately unless the officer believes on reasonable grounds that it is necessary that the person be retained in custody, having regard to all the circumstances, including those set out in subsection 158(1).
>
> Continuing duty to release
>
> **158.3** If, at any time after receiving the report of custody and before the person in custody is brought before a military judge, the custody review officer no longer believes that the grounds to retain the person in custody exist, the custody review officer shall direct that the person be released from custody.

> Duty to retain in custody if designated offence
>
> **158.4** Notwithstanding subsection 158.2(2) and section 158.3, if the person in custody is charged with having committed a designated offence, the custody review officer shall direct that the person be retained in custody.
>
> Duty to review where charge not laid
>
> **158.5** If a charge is not laid within seventy-two hours after the person in custody was arrested, the custody review officer shall determine why a charge has not been laid and reconsider whether it remains necessary to retain the person in custody.

Section 158.5 above brings out an interesting comparison between military and criminal law, especially with respect to bail. In criminal law no one, especially the judiciary, has any jurisdiction over the accused until the charge is laid, that is a sworn "Information in Form 2." Military law permits a person to be held in custody and under the jurisdiction of a CRO without a charge being formally laid, which means reducing the allegation to writing in the form of a Record of Disciplinary Proceedings (RDP). Given the substantial amount of case law concerning the validity or nullity of the criminal Information, especially with respect to the sufficiency of its jurat and the subsequent effect upon lawful jurisdiction over the accused, one might question whether or not the military provisions for the unsworn RDP are sufficient and constitutional?

A constitutional challenge might arise if a matter arises where a person is retained in custody beyond 72 hours without a charge being laid. A Custody Review Officer is only "required to determine why a charge has not been laid and consider whether it remains necessary to retain the person in custody."[42] The Court Martial Appeal Court addressed its concern over this shortcoming in *R. v. Larocque* (2001) with respect to the *Charter,* s. 7, with Justice Letourneau stating:

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[42] *Military Justice at the Summary Trial Level*, p. 7-6.

> In our system of criminal law… the arrest does not constitute the commencement of a police investigative but rather the outcome of that investigation. It means that the prosecution is reasonably satisfied that an offence was committed, that its perpetrator is identified, that it has sufficient evidence of the facts and that it is necessary to proceed with his arrest. The prosecution is therefore able at that point to lay a charge and must do so with diligence if it decides to use the power of arrest, even if it necessarily means conducting some additional investigation while the proceedings are going ahead.[43]

In 2003, The Right Honourable Antonio Lamer concluded that he could "find no justification as to why the military justice system should differ from the criminal justice system" regarding the requirement to lay charges within a reasonable time.[44] Consequently, he supported the Canadian Bar Association's submission to his review of the *National Defence Act* concluding:

> (33) I recommend that the *National Defence Act* be amended to provide that where a person is retained in custody or released on conditions of bail, that the person be charged with a service offence as soon as practicable.[45]

In 2009, the Standing Senate Committee on Legal and Constitutional Affairs stated that "greater consistency with the rules contained in the *Criminal Code* in relation to… preventative custody…", reflective of Justice Lamer's 2003 recommendations, would have been addressed in amendments to the *National Defence Act*, had Bills C-7 and C-45 not died on the Order Paper during the 1st and 2nd Sessions of the 39th Parliament, respectively.[46]

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[43] *R. v. Larocque*, [2001] C.M.AJ. No. 2 (QL CMAC) [Larocque] para 19, quoted in Canada, Department of National Defence. *The First independent review by the Right Honourable Antonio Lamer, P.C., C.C., C.D. of the provisions and operation of Bill C-25, An act to amend the National Defence Act and to make consequential amendments to others Acts, as required under section 96 of the Statutes of Canada 1998, c. 35*. (Ottawa: Minister of National Defence, 3 September 2003), p. 50.
[44] Lamer, p. 51.
[45] *Ibid.*
[46] Canada. Senate. *Equal Justice: Reforming Canada's System of Courts Martial, Final Report, A Special Study on the provisions and operation of An Act to amend the National Defence Act (Court Martial) and make a consequential amendment to another Act, S.C.2008, c.29*. The Honourable Joan Fraser, Chair and the The

Following on from the role of the Custody Review Officer is the function of military judges in determining pre-trial custody or release, where custody is contested or reserved in law for a judge to determine. The onus to satisfy continued retention or conditions of release normally lies with the Canadian Forces, in other words the crown, except for designated offences. For designated offences the onus is reversed and rests with the accused. Designated offences are those offences whose nature is deemed so serious as to invoke a stricter method of process and procedure.

> **153.** The definitions in this section apply in this Division.
>
> "designated offence" means
>
> (*a*) an offence that is punishable under section 130 that is
>
> (i) listed in section 469 of the *Criminal Code*,[47]

Honourable Claude Nolan, Deputy Chair. (Ottawa: Standing Senate Committee on Legal and Constitutional Affairs, May 2009), pp. 7-8.

[47] *Criminal Code of Canada*, s. 469. Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than
(*a*) an offence under any of the following sections:

(i) section 47 (treason),

(ii) section 49 (alarming Her Majesty),

(iii) section 51 (intimidating Parliament or a legislature),

(iv) section 53 (inciting to mutiny),

(v) section 61 (seditious offences),

(vi) section 74 (piracy),

(vii) section 75 (piratical acts), or

(viii) section 235 (murder);

(*b*) the offence of being an accessory after the fact to high treason or treason or murder (Accessories);
(*c*) an offence under section 119 (bribery) by the holder of a judicial office;
(*c.1*) an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act* (Crimes against humanity);

> (ii) contrary to subsection 5(3), 6(3) or 7(2) of the *Controlled Drugs and Substances Act* and punishable by imprisonment for life, or
>
> (iii) an offence of conspiring to commit an offence under any subsection referred to in subparagraph (ii);
>
> (*b*) an offence under this Act where the minimum punishment is imprisonment for life;
>
> (*c*) an offence under this Act for which a punishment higher in the scale of punishments than imprisonment for less than two years may be awarded that is alleged to have been committed while at large after having been released in respect of another offence pursuant to the provisions of this Division or Division 10;
>
> (*d*) an offence under this Act that is a criminal organization offence; or
>
> (*e*) an offence under this Act that is a terrorism offence.

The effect of designated offences upon an accused with respect to bail is that it automatically confers retention in custody unless the accused shows-cause to a military judge as to why continued retention is not justified. In the recent case of *Semrau v. R.* discussed later, the bail hearing was styled like an appeal:

> …because it's an application for bail in the first instance on a designated offence where the onus is on him. He's the one bringing the application for release from custody. It's the practice that the name of the party bringing the proceeding goes first in the "style of cause" (i.e. the title of the proceeding).[48]

Where a Custody Review Officer has determined that an accused is to be retained in custody, or a designated offence has been alleged, the CRO is responsible to cause that the accused be brought before a military judge for a show-cause bail hearing. The legislative framework for this is also contained in Division 3 of the NDA as follows:

(*d*) the offence of attempting to commit any offence mentioned in subparagraphs (*a*)(i) to (vii) (Attempts); or
(*e*) the offence of conspiring to commit any offence mentioned in paragraph (*a*) (Conspiracy).

[48] E-mail: Major John. J. Reilly, ACOS 2, Office of the Judge Advocate General, to the author, 14 July 2009. The author does not entirely agree with this reasoning given that hundreds of *Criminal Code*, s. 515(6) reverse onus bail hearings are heard daily in the Ontario Court of Justice and none is styled like an appeal, nor are bail reviews heard by the Ontario Superior Court of Justice, for example see *R. v. Bain* (2004). The accused is an applicant not an appellant in such matters. Internet: http://aboriginallegal.ca/docs/Bain.pdf accessed 07 November 2009.

Review by Military Judge

Hearing by military judge

159. (1) A custody review officer who does not direct the release of a person from custody shall, as soon as practicable, cause the person to be taken before a military judge for the purpose of a hearing to determine whether the person is to be retained in custody.

Applicable operational considerations

(2) In determining when it is practicable to cause the person to be taken before a military judge, the custody review officer may have regard to the constraints of military operations, including the location of the unit or element where the person is in custody and the circumstances under which it is deployed.

Onus on Canadian Forces

159.1 When the person retained in custody is taken before a military judge, the military judge shall direct that the person be released from custody unless counsel for the Canadian Forces, or in the absence of counsel a person appointed by the custody review officer, shows cause why the continued retention of the person in custody is justified or why any other direction under this Division should be made.

Justification for retention in custody

159.2 For the purposes of sections 159.1 and 159.3, the retention of a person in custody is only justified when one or more of the following grounds have been established to the satisfaction of the military judge:

(*a*) custody is necessary to ensure the person's attendance before a service tribunal or a civil court to be dealt with according to law;

(*b*) custody is necessary for the protection or the safety of the public, having regard to all the circumstances including any substantial likelihood that the person will, if released from custody, commit an offence or interfere with the administration of justice; and

(*c*) any other just cause has been shown, having regard to the circumstances including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Onus on person in custody

159.3 (1) Notwithstanding section 159.1, if the person in custody is charged with having committed a designated offence, the military judge shall direct that the person be retained in custody until dealt with according to law, unless the person shows cause why the person's retention in custody is not justified.

Release on undertaking

(2) If the person in custody shows cause why the person's retention in custody is not justified, the military judge shall direct that the person be released from custody on giving any undertaking to comply with any of the conditions referred to in section 158.6 that the military judge considers appropriate, unless the person in custody shows cause why the giving of an undertaking is not justified.

Release with or without undertaking

159.4 (1) The military judge may direct that the person be released without conditions or that the person be released on the giving of an undertaking to comply with any of the conditions referred to in section 158.6 that the military judge considers appropriate.

Reasons

159.7 The military judge shall include in the minutes of any proceedings under this Division the reasons for any direction.

Essentially, the jurisdiction of a military judge at bail is virtually identical to that of a justice of the peace under criminal law for "non-s. 469 offences" as prescribed in Section 515 of the *Criminal Code of Canada.* The only substantial differences to this jurisdiction are the variety of forms of release available in criminal bail and the fact that military judges on designated offences have jurisdiction more akin to that of superior court judges for "s. 469." The decision of a military judge is subject to review upon application by a judge of Court Martial Appeal Court under NDA, 159.9(1). This safeguard is similar to that provided in the *Criminal Code*, which provides for bail reviews by judges of a province's court of appeal pursuant to Section 680. The recent case of *Wilcox v. R.* as an application for bail pending court martial appeal is an example.

The evolving legislative framework of the military justice system, including the appointment of commissioned officers as Custody Review Officers to deal with military bail in the first instance, demonstrates that military law generally corresponds to related developments in criminal law and *Charter* challenges. Military and criminal bail procedures are similar in many respects; however, military law has not simply mimicked criminal bail provisions. Rather, military law has taken the essence of developments in criminal bail and tailored it to meet the special exigencies of military service. The distinct military justice system, as recognized by the *Charter*, has managed to continue to maintain its autonomy from other divisions of Canadian law, by ensuring that it has its own judicial and quasi-

judicial officers capable of dealing with determinations of pre-trial custody and release in a manner consistent with the demands of the *Charter* and criminal law. This consistency becomes all the more apparent by directly comparing the bail provisions of military and criminal justice systems.

Before leaving the topic of the legislative framework a short discussion on the functions and roles of military judges in pre-trial custody review hearings is warranted. Military judges conduct show-cause bail hearings for service offences, either in review of a Custody Review Officer's order for retention, or in the first instance for designated offences. These hearings are adversarial in nature with a military prosecutor and defence counsel making legal argument before the judge. Unlike the proceedings before a CRO, such hearings are heard in open court with legal counsel representing the accused and satisfy the legal principles of natural justice and procedural fairness. At bail the judge's role is to dispense preventative, not punitive, justice by either retaining the accused in custody or ordering release with or without conditions pending trial. The judge applies the evidence presented against the primary and secondary grounds of bail using well-established tests. The tertiary grounds of bail are presently inoperative due to a *Charter* challenge in *R. v. Hall.* The grounds of bail and the respective tests will be discussed in depth later.

CHAPTER 3 - Comparison of Military and Criminal Justice Systems

The Evolution of Military Bail and Custody Review Officers

The current evolution in military law has been striving to keep pace with related developments in criminal law. *Charter* challenges have been the driving force behind the evolution in both of these systems of justice since 1982. Pre-trial bail provisions under military law are now comparable with those of the criminal justice system. Deprivation of a person's freedom is the harshest punishment that Canadian society can impose on an offender. Loss of liberty can also occur prior to any finding of guilt and any resulting sentence of imprisonment through the denial of bail. Whether called retention, detention, incarceration or imprisonment, jail by any other name smells as bad.[49] While denial of bail is not a punishment, it is still a complete loss of freedom and probably feels as such to an accused person.[50] Aggravating pre-trial detention are those instances when the appropriate sentence after a finding of guilt is something other than some form of imprisonment, such as a fine. This type of circumstance is not unheard of in criminal proceedings, where for example an accused with a history of failing to attend court is detained in custody for a relatively minor offence, for which jail would not be an appropriate punishment on sentencing. Regardless, custody is justified in such instances to ensure attendance at trial. Consequently, the importance of the role and duties of Custody Review Officers (CRO) and military judges in determining pre-trial bail issues is paramount in ensuring that the military

[49] With apologies to William Shakespeare and *Romeo and Juliet.*
[50] In criminal law, a denial of bail places the un-convicted accused person into maximum security, without access to programs and other prison amenities enjoyed by convicted offenders serving custodial sentences. This is a systemic necessary, creating an ironic situation given the principle of the presumption of innocence.

justice system is not viewed as creating inequitable treatment of accused persons in comparison to the criminal justice system.

Criminal court judges often recognized the impact of pre-trial custody on accused persons by crediting time spent in pre-trial custody (colloquially known as "dead-time") as double towards any resulting custodial sentence. Parliament ended this two-for-one practice with *Bill C-25,* which received Royal Assent on 23 October 2009. This initiative was part of the Harper government's attempt to "get tough on crime." Upon taking force, this legislation will restrict credit for pre-trial custody to one-to-one in most circumstances, and to a maximum of 1.5 to 1 in exceptional circumstances and with reasons. Mr. Daniel Petit, Parliamentary Secretary to the Minister of Justice stated: "Canadians believe criminals must serve a sentence that reflects the severity of their crimes. This bill ensures that the courts will no longer be able to grant credit at a 2-to-1 ratio for pre-sentencing custody." [51] The motivation for this legislation may have been the practice of some defence counsel to have their clients consent to detention pending trial, when the case was strong and a custodial sentence was likely. By accumulating dead-time on a 2 to 1 ratio, accused would often plead guilty at the appropriate moment and then walk out of the courtroom for time served, negating any effect that specific deterrence in sentencing might have had.[52] The application of dead-time credit to military sentencing may be inconsequential. To truly achieve actual time in custody to sentences awarded, Parliament will also have to address the matter of eligibility for parole, if Canadians are to see that "criminals must serve a sentence that

[51] Internet: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32442.html accessed on 27 October 2009.
[52] Author's personal experience while on the Bench of the Ontario Court of Justice.

reflects the severity of their crimes." This is the other side of the sentencing coin and remains outside of the purview of the courts.

Military custody begins with arrest and retention much like the *Criminal Code* and its equivalents to the *National Defence Act*. In general, a person subject to military law may enter custody under a number of circumstances, when:

- formal arrest facing charges (arrest);
- denied release and ordered retained in custody by a Custody Review Officer pending trial (retention);
- denied release and ordered retained in custody by a military judge following a show-cause hearing in review from a Custody Review Officer's order for retention (retention);
- denied release and ordered retained in custody by a military judge following a show-cause hearing in review of a Custody Review Officer's order for release (retention);
- a finding of guilt is made at Summary Trial by a Delegated Officer or Commanding Officer and a sentence of confinement to barracks imposed (confinement);
- a finding of guilt is made at Summary Trial by a Commanding Officer and a sentence of detention imposed (detention);
- a finding of guilt is made at a Standing Court Martial and a sentence of detention imposed by a military judge (detention/imprisonment); or

- a finding of guilt is made at a General Court Martial by its panel and a sentence of detention imposed by a military judge (detention/imprisonment).

At this point, an important distinction must be made between military and criminal terminology. Military law uses the term **"retention in custody,"** whereas criminal law uses the term **"detention in custody"** for those accused denied release (bail) pending trial. The word "detention" in military terms is a form of punishment as a sentence upon a finding of guilt, and is a lesser form of imprisonment. Therefore, anyone comparing military and criminal justice provisions should carefully examine the terms retention and detention for the context in which they are used, as they are not synonymous.

In comparison, civil custody begins with arrest and detention. In general, any person may enter civil custody when:

- arrested and charged (arrest);
- denied release by a peace officer or officer-in-charge and brought before a justice of the peace (arrest pending bail);
- denied release and ordered detained in custody pending trial following a show-cause hearing by a justice of the peace or provincial court judge for non-s.469 offences (detention);
- denied release and ordered detained in custody by a superior court judge following a review of a justice of the peace or provincial court judge's order for release or detention (detention);

- denied release and ordered detained in custody by a superior court judge following a show-cause hearing for a s. 469 offence (detention);
- denied release and ordered detained in custody by a judge of the court of appeal following a review of a superior court judge's order for release or detention on a s. 469 offence (detention);
- a finding of guilt is made on summary conviction by a justice of the peace or provincial court judge and a jail sentence is imposed (imprisonment);
- a finding of guilt is made on an indictable offence by a provincial court judge and a jail sentence is imposed (imprisonment);
- a finding of guilt is made on indictment by a superior court judge alone and a jail sentence is imposed (imprisonment); or
- a finding of guilt is made on indictment by a jury and a jail sentence is imposed by superior court judge (imprisonment).

In terms of Custody Review Officers, commissioned officers have long held a quasi-judicial function within the armed forces, which flows directly from the Sovereign by way of her commission. The legislative framework of this authority is sound and quite straight forward as explained in the previous chapter. The primary CRO of any military unit is its Commanding Officer (CO); however, the CO may delegate this authority to other officers within the unit. From a practical perspective, it is best that the CO do this delegation, so that a conflict of interest does not later arise should the CO be required to preside at summary trial over the matter. The Supreme Court of Canada confirmed this quasi-judicial role of officers in two major decisions, *R. v. Mackay* (1980) and *R. v. Genereux* (1992). In addition

to being appointed as CRO's to deal with matters of military bail, commissioned officers preside at Summary Trial, sit on panels of General Courts Martial (similar in form, but not akin, to a civilian jury as determined by the Court Martial Appeal court in *R. v. Deneault*[53]). The role of CRO's is of primary interest in exploring pre-trial custody and release under military justice, as well as the related role of military judges in determining bail when release is contested.

Any understanding of the importance of a Custody Review Officer's role within the military justice system requires comparison to similar provisions in criminal law under the *Criminal Code of Canada*. Those familiar with criminal bail procedures, may find both notable differences and similarities in the military system. Like their criminal law counterparts, a CRO's role in determining release or retention is to dispense preventative, not punitive, justice by attempting to predict an accused person's behaviour while pending trial. This role is not to pre-judge the offences alleged and impose an unofficial punishment of incarceration; rather, it is to determine if a substantial likelihood exists that if released an accused person will fail to appear for trial, commit further offences, interfere with evidence or witnesses, or bring the administration of justice into disrepute. These factors are the grounds of bail in Canadian law, be it criminal, military and regulatory.[54] If no substantial likelihood is proven on a balance of probabilities to the satisfaction of a CRO that an accused person is a risk on any of these grounds, then it is their duty as prescribed in the NDA to release the accused with or without conditions.

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[53] *R. v. Deneault*, (1994) 5 C.M.A.R. 182

[54] Regulatory law such as that created by provincial legislation often has its own bail provisions, for example Ontario's *Provincial Offences Act* (POA). The POA deals only with ensuring attendance at court – the primary ground of bail – which occasionally creates an anomaly when public protection is in issue – the secondary ground of bail. See *R. v. Banka* discussed later.

Unlike a bail hearing before a justice of the peace or provincial court judge, a Custody Review Officer does not preside over an adversarial proceeding where *viva voce* evidence is presented. Rather, a CRO receives submissions in writing in the form of a Report of Custody and an Account in Writing from the person in whose custody the accused resides, and any representations made by the accused in writing or by other recorded means.[55] Prior to receiving these documents, the accused must first have had an opportunity to review the Report of Custody and Account in Writing in order to prepare any representations to be made to the CRO. This role appears to be more akin to that of a police officer-in-charge than that of a quasi-judicial officer. Given that the primary CRO of a unit is its Commanding Officer, a person who has the powers of trial and punishment and who is not part of the military police organization in any way, one must conclude that Parliament's intent was for a quasi-judicial not police function in creating the CRO role. In quasi-judicial function, a CO is not and must not be perceived as being part of the law enforcement system. If this happens, the credibility of fairness will be in jeopardy and subject to challenge.[56]

At face value, the Custody Review Officer bail procedure appears to be fraught with a few systemic problems that one might surmise would not survive the light of day in the criminal justice system. First, the right to legal counsel and an assisting officer in preparing representations to the CRO is not prescribed. Assisting Officers are normally appointed only after the charge has been laid, which could be well after the time limitation on submitting all

[55] NDA, s. 158.1.
[56] During the 1990's the Chief Judge of the Ontario Court of Justice endeavoured to end past abuses and a perceptions that justices of the peace considering bail were de facto servants of the police vice independent judicial officers. These lines and functions must not be crossed or confused, especially in the eyes of the public.

documentation to the CRO; notwithstanding, the accused does have access to defence counsel by telephone. Second, the accused's representations are given to the police/prosecution for delivery to the CRO. If this procedure was suggested for the criminal justice system, it most probably would be met by howls of laughter and derision from defence counsel. Third, a military judge does not become involved unless the CRO orders retention in custody. This provision in and by itself is a sound safety valve with respect to retention and the right to be heard in a full show-cause bail hearing, with all of the expected procedural safeguards of a formal hearing. However, review of orders for release made by a CRO, and any accompanying conditions, is made by the military chain of command, not by a military judge.

In criminal proceedings, review of the reasonableness of judicially imposed bail conditions is often brought before the superior courts of justice, which has created a considerable body of case law. The power to impose a condition of release to "comply with such other reasonable conditions" is reserved in criminal law for only judicial officers,[57] whereas in military law this authority is given to CRO's.[58] So far, these potential problems with military bail procedure have not caught the attention of the higher courts, meaning that either the system is working or that through ignorance and a lack of judicial oversight accused persons are abiding with conditions without complaint that might be considered inappropriate in comparable criminal proceedings. The Canadian Bar Association took issue

[57] CCC, s. 515(4)(f), although s. 499(2)(h) and s. 503(2.1)(h) now permits limited discretionary powers to officers-in-charge with respect to conditions designed to protect victims and witnesses. The conditions on such police Undertakings are subject to review and replacement by a justice of the peace or provincial court judge upon application by either the accused or the prosecutor s. 499(3) and (4) and s. 503(2.2) and (2.3), which trigger a s. 515 bail hearing.
[58] NDA, s. 158.6(1)(e).

with shortcomings in its submission to Justice Lamer, who agreed stating: "I see no compelling military justification as to why a military judge may not also review and/or vary any conditions relating to the release of a person from custody."[59] Similarly, Justice Lamer recommended that legal counsel appointed by the Director of Military Prosecutions be the "representative of the Canadian Forces" required at CRO reviews conducted by the chain of command, instead of members of the military police or the accused's unit.[60]

In English common law, the concept of preventative justice in determining bail is relatively new in its long history. Stemming back to the days of Richard I, the purpose of bail was solely directed at ensuring or securing the accused's attendance at court. Today in criminal law, this principle is commonly referred to as the "primary grounds" of bail. Dating from 1275 with the *Statute of Westminster, I*, the historical roots of this principle was "with a view to formalizing the pre-trial release process."[61] Even as late as the end of the 19th century this concept was almost sacrosanct, as stated in 1898 by Lord Russell, Chief Justice in the case of *R. v. Rose* (1898), (18 Cox C.C. 717 (C.C.R.)):

> I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not withheld as a punishment, but that requirements as to bail are merely to secure the attendance of the prisoner at trial.[62]

Shortly after Confederation, the principle of ensuring attendance at court would remain the purpose of bail when Canada enacted its first criminal legislation in 1869.[63] That being said, other factors began to be taken into account, such as the strength of the evidence against

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[59] Lamer., p. 52.
[60] *Ibid.*
[61] Trotter., p. 4.
[62] *Ibid*., cited p. 6.
[63] *Ibid.*, p. 7.

the accused, the seriousness of the offence alleged, and the character of the accused. It is debatable as to whether or not these were indeed other distinct factors to be considered or merely tests by way of determining the likelihood of attendance at court. In other words, it can be argued that the more serious the offence, the more severe the punishment may be, therefore the more likely the chance of flight. These considerations are then primary grounds to detain.

Preventative justice in the form of denying the accused an opportunity to commit further offences while on release and awaiting trial did not receive formal recognition until 1947 with the decision of the English Court of Appeal in respect of the matter of *R. v. Phillips*.[64] In *Phillips,* the court determined that:

> Some crimes are not at all likely to be repeated pending trial…but some are… and… will very probably be repeated if the prisoner is released on bail, especially in the case of a man who has a record… To turn such a man loose on society before he has received his punishment for an undoubted offence, an offence which was not in dispute, was in view of the Court, a very inadvisable step.[65]

With *Phillips* and subsequent cases, the principle of ensuring attendance at court began to lose its primacy as the sole consideration in determining bail in Great Britain. This new approach to bail received a slow start in Canada, as shown in the 1953 decision in the matter of *R. v. Samuelson* determined by the Supreme Court in Newfoundland. As discussed by Mr. Justice Trotter in his authority *The Law of Bail in Canada*, the crown had argued *Phillips* in support of denying bail in the *Samuelson* case. Both cases were quite similar in nature making *Phillips* relevant; however, the court responded by stating:

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[64] (1947) , 32 Cr. App. Rep. 47 (C.C.A.), as cited in Trotter., p. 8-10.
[65] *Ibid.* p. 8.

> What I find disturbing… in the Phillips case is that it strikes a new note and suggests a meaning and purpose in the whole process of arrest and bail which were not there before, or to be found in any previous authority – the purpose, that is, of prevention.[66]

The court was quite correct that this was indeed a new note in bail and contrary to its established principles, which had been upheld at that point for almost 680 years since the passage of the *Statute of Westminster, I.* A decade later, *Phillips* gained greater acceptance in Canadian jurisprudence, as reflected when the Manitoba Court of Queen's Bench determined in a case very similar in nature to both *Phillips* and *Samuelson* that:

> Bail is not punitive but to secure the attendance of the accused at trial. Yet courts must be concerned with protection of the general public as well as with the rights of individuals.[67]

A little over a decade later, the new principle of protection of the public as a consideration in determining bail, as credited to *Phillips*, would be formalized in Canada through the *Bail Reform Act*, 1972. A precursor to its enactment was the landmark empirical study into bail conducted during the early 1960's by Professor Martin Friedland, in observing the cases before the Magistrates' Court in Toronto.[68] Friedland's work was taken very seriously, and The Honourable Mr. Justice McRuer examined it in depth as part of his monumental four-volume *Royal Commission Inquiry into Civil Rights.*[69] McRuer's concerns on bail primarily aimed at procedures under the federal *Summary Convictions Act*, which then governed process related to offences created under provincial statutes in Ontario. His concerns echoed those of Friedland that too many persons languished in custody awaiting

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[66] (1953), 109 C.C.C. 253 (Nfld. T.D.), as cited in Trotter., p. 9.
[67] *Rodway v. R.* (1964), 44 C.R. 329 (Man. Q.b.), as cited in Trotter., p. 10.
[68] See. M.L. Friedland. *Detention Before Trial: A Study of Cases Tried in the Toronto Magistrates' Court* (Toronto: University of Toronto Press, 1965).
[69] Ontario. *Royal Commission Inquiry into Civil Rights (McRuer Report)*. Report No. 1, Volume 2, Chapter 48 Bail Procedure (Toronto: The Queen's Printer fopr Ontario, 1968), p. 743-754.

trial due to an arcane and indifferent justice system with respect to bail. At the federal level, the Ouimet Committee came to a similar conclusion, becoming the catalyst for the *Bail Reform Act*.[70]

> If ever there was a concept that pre-trial release was a privilege, it was discarded by the Bail Reform Act. The Bail Reform Act has put Canada at the forefront of those nations that value liberty of the individual and subscribe to the notion of the presumption of innocence.[71]

Since McRuer's report, the Province of Ontario enacted its own legislation in the form of the *Provincial Offences Act* (POA), to deal with regulatory offences under provincial legislation, for example speeding contrary to the *Highway Traffic Act.* Ironically, the bail provisions in Ontario's POA deal only with securing attendance at trial and not protection and safety of the public, unlike the comparable federal *Bail Reform Act*. This omission created either a legislative gap or absurdity in relation to determining release or detention for offences under which an accused is arrested in the first instance on grounds of public protection, but for which these factors cannot be considered at bail, for example breach of restraining orders under the *Family Law Act*.[72] In drafting the bail provisions under the *National Defence Act*, the *Criminal Code* served as the model, thereby ensuring that such an absurdity or gap did not occur in military law.

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[70] Delisle, Ronald Joseph and Don Stuart. *Learning Criminal Law*. Fifth Edition. (Toronto: Carswell, 1998), Chapter 2, Section 5, Bail: Judicial Iterim Release, pp. 253-278.

[71] De Villiers, Willem Petrus. "Problematic Aspects of the Right to Bail under South African Law: A Comparison with Canadian Law and Proposals for Reform." (Doctoral thesis, University of Pretoria, 2000), p. 207. Internet: http://upetd.up.ac.za/thesis/submitted/etd-03202006-154631/unrestricted/00front.pdf accessed 06 November 2009.

[72] The author attempted to force the issue during his time on the Bench of the Ontario Court of Justice in matter of *R. v. Banka*, 1999, by detaining the accused in custody on the basis of a legislative gap or absurdity, reflecting the considerations in *R. v. Phillips*. Unfortunately, no binding case law was made by an appellate court, given that the accused pled guilty to the substantive charge without appealing the detention order made at bail. During the early 2000's, the crown argued the bail decision of *R. v. Banka* in a similar case. *R. v. Banka* is now cited in The Honourable Rick Libman and Murray D. Segal. *The 2008 Annotated Ontario Provincial Offences Act*. (Toronto: Thompson Carswell, 2008), Case Law to s. 149 and 150, p. 519 and 526.

Fortunately, military bail provisions mirror those of the *Criminal Code*, reflecting the same grounds of bail and many of the principles in the *Bail Reform Act.* Under Section 515 (10)(b) of the *Criminal Code of Canada*, detention on the basis that it is "necessary for the protection and safety of the public" is commonly referred to as the secondary grounds of bail. Section 159.2 (b) of the NDA has the same meaning and in the same order as the *Criminal Code*, making retention necessary for the protection and safety of the public, the secondary grounds of military bail, as well.

The *Bail Reform Act* brought a fresh approach to criminal process with respect to ensuring the accused's attendance at court and preventative justice. Its premise was that too many persons were being unnecessarily arrested and detained pending trial, and that a better mechanism must be developed. The Act emphasised the desirability for the use of summons over warrants for arrest. More importantly, it introduced the concept of a "ladder of bail," with a series of increasingly restrictive forms of release available to fit the circumstances before detaining the accused in custody as a last resort. Concurrently, the criminal ladder of bail includes:

Judicial Bail

- Warrant of Committal in Form 8 (detention order)
- Recognizance of Bail given to a Judge or Justice in Form 32 with conditions and with sureties
- Recognizance of Bail given to a Judge or Justice in Form 32 with conditions but without sureties

- Recognizance of Bail given to a Judge or Justice in Form 32with conditions and with deposit of money or other valuable security
- Recognizance of Bail given to a Judge or Justice in Form 32 without conditions and with deposit of money or other valuable security
- Recognizance of Bail given to a Judge or Justice in Form 32 without conditions
- Undertaking given to a Judge or Justice in Form 12 with conditions
- Undertaking given to a Judge or Justice in Form 12 without conditions

Police Bail

- Recognizance of Bail given to an Officer-in-Charge in Form 11 with deposit of money or other valuable security and with an Undertaking in Form 11.1 with conditions
- Recognizance of Bail given to an Officer-in-Charge 11 in Form with deposit of money or other valuable security without conditions
- A Promise to Appear in Form 10 given to a Peace Officer with an Undertaking in Form 11.1 with conditions
- A Promise to Appear in Form 10 given to a Peace Officer
- Appearance Notice in Form 9

All forms of release under police bail are automatically subjected to judicial review pursuant to CCC, s. 508, upon the laying of the related Information[73] in Form 2 before a justice. In this *ex parte, in camera* hearing called a *pre-enquête*, the justice hears the evidence of the informant and witnesses in order to determine if the charge(s) is made out

[73] An "Information" is the sworn charging document alleging an offence(s) under the *Criminal Code of Canada*.

and should be answerable in court, and subsequently will confirm, cancel or replace the form of release or process. Section 508 creates a *post facto* hearing, as opposed to the traditional Section 507 *pre-enquête* where the informant first lays the Information before a justice and then presents evidence in support of the charge in order to satisfy the justice that judicial process should issue, by way of a summons or a warrant for arrest.

Ironically, in military law the equivalent of a criminal *Information in Form 2* is the *Record of Disciplinary Proceedings* (RDP), which replaced the earlier *Charge Report*, neither of which are sworn documents, requiring evidence under oath be given before an impartial judicial officer, in order to compel the appearance of the accused in court, along the lines of a *pre-enquête*. Given the increasing similarity of procedures between military and criminal law due to the *Charter*, why is there a difference between these two charge laying procedures? Further obscuring this question is the fact that NDA, s. 130 imports other federal offences into the *Code of Service Discipline*, including those contained in the *Criminal Code of Canada*. In other words, what must be done to institute criminal proceedings under criminal law, need not be done to institute criminal charges under military law. The question may be asked if criminal offences imported into military law take on an applied or inherent character of services offences or retain a civilian criminal character. The latter interpretation is suggested, given for example that the offence of murder is a crime against society not against military discipline, and only the mode of trial has a military context.

Given the substantial amount of case law concerning the legal requirements for Informations, the conduct of *pre-enquêtes* and the judicial consideration of process, it is surprising that the RDP itself has not been subject to a *Charter* challenge, due to its unsworn nature and lack of independent judicial or quasi-judicial consideration. If it is required to bring a criminal charge before a criminal court, why is it not required for bringing a criminal charge before a military court? Are members of the Canadian Forces being placed at a disadvantage given the non-judicial nature for instituting military proceedings in comparison to the safeguards provided by the *pre-enquête* and related remedies, such as *mandamus* and *certiorari*, in criminal justice? The corollary of this argument is why is there so much case law on the requirement for a sworn Information and evidence under oath at judicial *pre-enquête* to determine process, if something as simple as a RDP will do? If the RDP is legally sufficient as a charging document, then it seems to fly in the face of criminal law respecting Informations and the institution of proceedings. These criminal procedural safeguards are articulated in the very recent cases of *Gary William McHale v. Her Majesty the Queen* and *Jeffrey Parkinson v. Her Majesty the Queen* heard by the Ontario Superior Court of Justice [74]

While the military justice system is devoid of the safeguards provided by the *pre-enquête*, it is also lacking in the range of bail releases available to it. Surprisingly, the *Bail Reform Act*, 1972 and subsequent improvements on criminal bail procedure are not reflected

[74] See. *Gary William McHale v. Her Majesty the* Queen, Ontario Superior Court of Justice, 02 July 2009, Internet: http://voiceofcanada.files.wordpress.com/2009/07/090702-mchale-v-r.pdf accessed 27 October 2009 and *Jeffrey Parkinson v.Her Majesty the Queen*, Ontario Suprior Court of Justice, 11 December 2008, Internet: http://www.canlii.org/en/on/onsc/doc/2008/2008canlii68177/2008canlii68177.html accessed 27 October 2009 and Public Prosecution Services New Brunswick, "Private Prosecutions under 507.1 Criminal Code of Canada, DPP Guideline #40" 03 March 2008, Internet http://www.gnb.ca/0227/PPOM/PDF/DPP_PrivateProsecutions.pdf accessed 27 October 2009.

more in military bail. Unlike the ladder of bail in criminal law, a military judge only has three choices when determining bail:

- Retention in Custody
- Undertaking with conditions
- Undertaking without conditions

No provision exists for securing sureties to act as civil jailers for the accused while on release, so recognizances of bail are not available to military judges. The option of ordering the accused to enter into a Recognizance with or without sureties over an Undertaking is often the difference between detention and release in criminal law. Perhaps the reason for this is not an oversight; rather it is the simple fact that the first enumerated condition in military bail is to "remain under military authority."[75] The chain of command, lawful authority over subordinates, and command and control of the military may be viewed as being the best surety available under law.[76] Similarly is the lack of prescribed judicial orders and warrants, maintaining jurisdiction over the accused, such as warrants of committal and remand. One might assume the reason is simply the persuasive force of lawful authority in terms of verbal orders and commands under military law that negates the requirement for judicial warrants. The potential penalty for disobeying a lawful command should an accused disobey the order of a military judge is far beyond that which a criminal court can award for failing to comply with a criminal recognizance and constitutes a separate offence.

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[75] NDA., s. 158.6(a)

[76] Personal Note. With a home court of Barrie, Ontario, the author often presided over criminal bail hearings where the accused was a military member from neighbouring CFB Borden. The fact that the military Attending Officer was present in court, ensuring that the accused's commanding officer would be informed of the conditions of bail, would often sway the court to considering release on a recognizance without sureties. A member of the general public did not have the luxury of this type of lawful supervision to present as an option to the court.

> ***National Defence Act*, s. 83.** Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.
>
> ***Criminal Code of Canada*, s. 145** (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (*b*) an offence punishable on summary conviction.

This reasoning fails given that Parliament has created a specific service offence for failing to comply with a military *Undertaking* that essentially mirrors that prescribed in the *Criminal Code of Canada*, leaving the question concerning judicial warrants of committal and remands unanswered.

> ***National Defence Act*, s. 101.1** Every person who, without lawful excuse, fails to comply with a condition imposed under Division 3, or a condition of an undertaking given under Division 3 or 10, is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.[77]

Moreover, the question of maintaining jurisdiction over the accused with respect to bail conditions could be exacerbated if the accused is administratively released from the Canadian Forces prior to trial and is no longer directly subject to military authority.[78] This situation becomes problematic in its practical application, notwithstanding that:

> ***National Defence Act*, s. 60**(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1). [no longer a member of the Canadian Forces]

[77] NDA, s. 101.1
[78] *R. v. Tupper*, 2009 CMAC 5.

Exploring the grounds for retention in custody, one must be cognizant of the fact that since NDA, s. 159.2 was enacted, and at that time was virtually CCC, s. 515 (10) verbatim, the *Criminal Code* provision has been substantially revised in order to meet continuing *Charter* challenges to any vagaries perceived in the grounds of bail. Therefore, the NDA is outdated in this regard, and the question begs why Parliament in its wisdom did not amend both statutes at the same time through a form of housekeeping omnibus legislation. This point has not been missed by military judges as seen in the recent case of *Captain Semrau v. Her Majesty the Queen* with respect to the tertiary grounds of bail discussed later.

While the primary and secondary grounds of bail remain solid against the *Charter* the tertiary grounds of bail, initially referred to as public interest have been struck down due to vagueness, the most notable case being *R. v. Morales* in 1992. Although NDA, s. 159.2 (c) no longer mirrors CCC, s. 515 (10)(c), whether it is close enough to meet changing case law stemming from criminal matters remains a matter for future *Charter* challenges. Perhaps more important is that military judges keep abreast of criminal *Charter* challenges against the tertiary grounds of bail when deciding cases under NDA, s. 159.2. Without demeaning military judges, their annual case load is less than that of a month for many provincial court judges in Ontario. Likewise in terms of bail cases, a justice of the peace in Ontario can hear more reverse-onus show-cause bail hearings in a day than a military judge will hear in a year. Criminal case law develops at a feverous pace in comparison to that of military law. Therefore, military judges must diligently keep abreast of developments in criminal law that have application to military law.

In the 2002 case of *R. v. Hall* the Supreme Court of Canada struck down the previous wording of CCC, s. 515(10)(c) "on any other just cause being shown and, without restricting the generality of the foregoing" as offending sections 7 and 11(e) of the *Charter*.[79] NDA, s. 159.2(c) still reads:

> *(c)* any other just cause has been shown, having regard to the circumstances including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

This sub-section may just meet the requirements set out in *R. v. Hall*, which may explain why no amendment has occurred.[80] Regardless, detention/retention solely based on the tertiary grounds of bail appears to be problematic with respect to *Charter* challenges due to successive failed attempts to tighten the vagueness of its wording.[81] So far codifying the concept of public interest in a definitive manner for bail considerations has remained elusive for successive parliaments, and it is again inoperative under the *Charter*.

Among the most recent and visible decisions in military bail, one was made on 7 January 2009, in the matter of *Captain R.A. Semrau v. Her Majesty the Queen*, heard by military judge Lieutenant-Colonel L.V. D'Auteuil, on a charge of second-degree murder, stemming from armed conflict operations in Afghanistan. Accused of killing an unarmed and injured combatant who had surrendered, Captain Semrau's custody review hearing was held pursuant to NDA s. 159, and the CRO had no jurisdiction to consider release where a

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[79] *R. v. Hall*, [2002] 3 S.C.R. 309, 167 C.C.C. (3d) 449, 4 C.R. (6th) 197.
[80] c.f. *Captain Semrau v. Her Majesty The Queen* (7 January 2009) discussed further on.
[81] The author is suspicious that military bail could become a poor cousin to criminal bail, unless someone really cares. This is where defence counsel must be diligent to ensure that service members are not retained in custody or placed under inappropriate conditions of release on grounds that have been struck down under criminal law, and military judges must be current with developments in other divisions of Canadian law. Military law must reflect developments in criminal law in this respect.

designated offence of second-degree murder was alleged. The CRO had only the statutory obligation to order the Captain Semrau retained in custody and brought before a military judge for a reverse-onus show-cause bail hearing. This ministerial or administrative authority is similar to the jurisdiction of a justice of the peace or provincial court judge under CCC, s. 515(11), where murder and other offences listed in CCC, s. 469, statutorily compel the detention of the accused in custody.

The criminal bail model differs somewhat at this point, in that once the accused is detained in custody pursuant to CCC, s. 515(11), the onus is upon the accused to make application for bail before a Superior Court Judge under CCC, s. 522. Otherwise, the accused simply remains in custody and continues through arraignment, preliminary inquiry and trial on a series of custodial remands. From a military bail perspective, military judges exercise jurisdiction that would be either that of a justice of the peace or a superior court judge with respect to bail, depending upon the nature of the offence. Where this analogy suffers slightly is with respect to reviews/appeals. In criminal law, a superior court judge may on application review the decision of a justice of the peace or provincial court judge on matters of bail for non-469 offences, under CCC, s, 520 and 521. A court of appeal pursuant to CCC, s. 680, may review a decision by a superior court judge under CCC, s. 520, 521 or 522 upon application. In military law, the equivalent is a review of a military judge's decision at bail to the Court Martial Appeal Court under NDA, s. 159.9(1), which is an infrequent event. The application for bail pending court martial appeal in *Wilcox v. R* will be heard on 7 December 2009.

In respect to the *Semrau* case, the military judge addressed all three grounds of bail and set aside the tertiary ground as being inoperative given *R. v. Hall.* The judge gave a sound treatise as to why NDA, s. 159.2(c) is no longer an applicable consideration. Consequently, the evidence presented at bail was applied to only the primary and secondary grounds and the accused had satisfied the onus upon him and had shown cause why his retention was not justified. Accordingly, the accused was released from custody pending trial upon him giving an Undertaking with Conditions.[82] This case is an illustrative example of the operation of military bail. On one hand, Captain Semrau remains in limbo while on bail awaiting trial, in that he is relieved of positions responsibility and his standing within his unit is questionable. On the other hand, if he had been "taken downtown" it is very doubtful on the basis of practice and precedence that the Ontario Superior Court of Justice in Pembroke would have released him on a form of bail as low on the ladder of bail as an Undertaking with Conditions for a s. 469 offence, and regardless he would still be in military limbo.

Another important concept in the law of bail is that of onus, especially given the number of *Charter* challenges that it has created. In criminal law, most offences are Crown Onus, meaning that the crown must show-cause why anything more than an *Undertaking* with conditions is justified, and provide evidence in support of climbing the ladder of bail. The onus shifts to the accused in certain circumstances creating a Reverse Onus where the accused must show-cause why detention is not justified. The onus reverses if the accused is alleged to have committed an indictable offence while on release for another indictable offence, or for having allegedly breached a condition of release, or committed an offence that

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[82] *Captain R.A. Semrau v. Her Majesty The Queen*, Custody Review Hearing, 7 January 2009, Internet: http://www.jmc-cmj.forces.gc.ca/dec/2009/doc/Semrau%20Decision-CRH-eng.pdf accessed 27 October 2009.

automatically creates a reserve onus.[83] A similar situation occurs in military bail where the onus reverses if the charges are "designated offences" pursuant to NDA, s. 153.[84]

The *Semrau* case involving a military judge and a designated offence under NDA, 153[85] and listed in CCC, s. 469, illustrates a reverse onus in military bail. In this matter the CRO was statutorily bound to retain Captain Semrau in custody and cause him to be brought before a military judge for a reverse onus show-cause bail hearing. In fact, the CRO had no quasi-judicial decision to make with respect to bail. The onus was squarely on Captain Semrau to show-cause why his retention in custody was not justified and that he should be released on bail. He was successful with his argument that he was not at risk of flight or of committing further offences and was subsequently released. Bail in the first instance in *Semrau* was determined by a military judge due to the nature and onus created by the offence

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[83] CCC, s. 515(6)
[84] NDA., 159.3

[85] *NDA, s.* 153. "designated offence" means

(*a*) an offence that is punishable under section 130 that is

(i) listed in section 469 of the *Criminal Code,*

(ii) contrary to subsection 5(3), 6(3) or 7(2) of the *Controlled Drugs and Substances Act* and punishable by imprisonment for life, or

(iii) an offence of conspiring to commit an offence under any subsection referred to in subparagraph (ii);

(*b*) an offence under this Act where the minimum punishment is imprisonment for life;

(*c*) an offence under this Act for which a punishment higher in the scale of punishments than imprisonment for less than two years may be awarded that is alleged to have been committed while at large after having been released in respect of another offence pursuant to the provisions of this Division or Division 10;

(*d*) an offence under this Act that is a criminal organization offence; or

(*e*) an offence under this Act that is a terrorism offence.

alleged; however, the role of CRO's in military bail where the onus not is reversed nor the offences designated requires further examination.

Given that a Custody Review Officer's function is quasi-judicial in nature, a commissioned officer exercising this authority either must be a Commanding Officer (CO) or be appointed in writing by a CO, in order to have jurisdiction over the accused. In some instances, a CO may act as the CRO personally, although this should be only in instances where there is no possibility that the CO will later be presiding over the subsequent summary trial. Moreover, the CO should not be involved if in anyway he/she participated in arresting the accused, laying the charge or directing that the charge be laid. A CRO's function is to determine pre-trial release or retention in custody in the first instance, following arrests made pursuant to the *Code of Service Discipline* (CSD). As mentioned, this role is a hybrid between that of a police officer-in-charge under s. 499(2) and 503(2.1), and a justice of the peace under s. 515(1) and 515(2)(a) of the *Criminal Code of Canada*. This comparison between criminal and military law gives some appreciation of how important this duty as a CRO really is in the administration of justice. Given that no formal training presently exists for CRO's, it is questionable whether or not officers so designated fully appreciate the authority and jurisdiction that they have been granted. Moreover, Justice Lamer stated: "I agree with the view expressed in the Second JAG Report that because of the importance of the decisions of custody review officers, they should be advised to seek legal advice."[86]

[86] Lamer., p. 52.

Under current British military law by comparison,[87] should a commanding officer desire to retain a service member in custody, it is only for a period not exceeding 48 hours after which the person must be brought before a military judicial officer. The British model distinguishes between a person arrested but not yet charged and a person who is formally charged, thus becoming an "accused." Regardless, the decision concerning retention in custody or release on any form of conditions is the sole purview of a legally-trained military judicial officer appointed by the Judge Advocate General.[88] In comparison, Canadian military judges are now independent of the Judge Advocate General, appointed by Governor-in-Council and administered by the Office of the Chief Military Judge for fixed terms of appointment. All together, the Canadian model appears more streamlined and the British model underscores the fact that considerably more quasi-judicial authority and responsibility has been placed upon Canadian officers appointed as CRO's. The American model has considerable similarity to the Canadian model and may have served as a guide is this regard. "Pre-trial Confinement and Restraint" is governed by the *Rule for Courts-Martial* 305 for offences under the *Uniform Code of Military Justice.*[89]

Custody Review Officers are empowered to review the continued retention of the accused in custody immediately following arrest and pending trial for offences not designated under NDA, s. 153, for which as discussed a military judge has absolute jurisdiction with respect to bail. Unlike its criminal counterpart, a CRO's review is by written submission only and not by *viva voce* evidence (oral testimony) in an adversarial,

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[87] United Kingdom. *Armed Forces Discipline Act*, 2000.
[88] Rant, Hon. Judge J.W. with Commodore Jeffrey Blackett. *Courts-Martial, Discipline, and the Criminal Process in the Armed Services, 2nd. ed.* (Oxford: Oxford University Press, 2003), p. 36-55.
[89] See. Davidson, Michael J. *A Guide to Military Criminal Law.* (Annapolis, MD: Naval Institute Press, c.1999), chapter 2.

show-cause hearing open to the public, as is a criminal bail hearing held pursuant to CCC, s. 515. This makes the procedure more like that conducted by a police officer-in-charge, where no formal hearing takes place and the public is not present. The proceeding cannot really be described as being *in camera* hearing like a criminal *pre-enquête* as no one else is present. It is a behind closed doors decision by one person with no written reasons or record of proceedings other than the Direction on Release from Custody on its face. This situation is not unlike that before an officer-in-charge in criminal proceedings. Any subsequent review by the chain of command of a CRO's direction for release creates an opportunity for both sides to be heard, satisfying the *audi alterm partem* rule. This procedure is similar to that of an officer-in-charge's release order being reviewed by a justice of the peace or provincial court judge. The main difference, as noted earlier, is that the military review is not by an independent judicial officer, in fact by a person with no formal legal or specialized training.

Should a Custody Review Officer decide to release the accused person with or without conditions, the decision to release may be reviewed upon application from the Military Police (MP) or whoever laid the charge. The reviewing authority is a CO if the officer is a delegated CRO, or if the CRO is in fact the CO, then by the next superior officer in the chain of command.[90] The reviewing authority will hear submissions from both the person in custody and a representative of the Canadian Forces, usually Military Police. The officer conducting the review has only the authority to vary or impose additional conditions; however, this officer has no jurisdiction to cancel the CRO's direction to release and order

[90] *NDA*, s. 158.6(2) and *QR&O*, 105.23.

the person retained in custody.[91] The significance of this point is that no one, not even a military judge, appears to have the authority to undo a CRO's release order and order the accused retained in custody. This is an odd situation in comparison to criminal law where bail reviews in a superior court can reverse the decision of a lower court to release and order an accused detained in custody, or a justice of the peace or provincial court judge can reverse the decision to release by an officer-in-charge. As mentioned, Justice Lamer addressed this shortcoming in his 2003 report.[92]

After reviewing the submissions from the accused, should a Custody Review Officer decide to order the continued retention of an accused in custody pending trial, a show-cause bail hearing will then be set before a military judge. Again, for comparison in criminal proceedings, this procedure is a hybrid between that of a justice of the peace under Sections 499(3), 503(2.2) or 515(2), and a superior court judge under Section 525 of the *Criminal Code of Canada*. A show-cause bail hearing, such as in *Semrau*, is similar in appearance to a trial in that it is adversarial in nature, except that it is not guilt or innocence of the offences alleged that is in issue, but rather release or continued custody, pending trial by court martial. Unlike when being considered by a CRO, a legally-trained military prosecutor will argue for continued retention in custody, while defence counsel will argue for the release of the accused, and a military judge will decide the outcome. With recent amendments to both the NDA, s. 159.6 and CCC, s. 537(j) and (k) to some degree, these hearings may be conducted by means of telecommunications, alleviating the previous necessity of transporting accused, witnesses, court staff and judges over large distances.

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[91] *NDA*, s. 158.6(2) and *QR&O* 105.23, also see *Military Justice at the Summary Trial Level*, c. 7, s. 4, p. 7-9 to 7-10.
[92] Lamer., p. 52.

A "Direction on Release from Custody" by a Custody Review Officer and an Undertaking by a military judge is a form of bail process akin to "Promises to Appear," "Undertakings," or "Recognizances" in criminal law. In comparing criminal and military law, numerous parallels or near equivalencies exist between *CCC, Part XVI "Compelling Appearance of Accused Before a Justice and Interim Release," NDA, Division 3 "Arrest and Pre-trial Custody,"* and *QR&O, Chapter 105 "Arrest and Pre-trial Custody"*. The following table on procedure and/or jurisdiction illustrates this point:

Military Law	**Criminal Law**
OIC/NCO IC Guard-Room [*NDA*, s. 158(3), *QR&O*, 105.14]	Officer-in-Charge [*CCC*, s. 498, 499, and 503]
Report of Custody [*NDA*, s. 158.1(1)]	Taking Before a Justice [*CCC*, s. 503(1)]
Review of Custody [*NDA*, s. 158.2]	Judicial Interim Release [*CCC*, s. 515]
Duty to Retain [*NDA*, s. 158.4 and *QR&O*, 105.20]	Duty to Detain [*CCC*, s. 515(11)
Release with or without Conditions [*NDA*, s. 158.6(1)	Release with or without Conditions [*CCC*, s. 515(2)]
Review by Military Judge [*NDA*, s. 159(1), *QR&O*, 105.27]	Review of Order of a Justice [*CCC*, s. 520 and 521]
Designated Offences [*NDA*, s. 153, wrt *QR&O*, 105.20 and 105.27]	Release by Judge Only [*CCC*, s. 522]
Review after 90 Days [*NDA*, s. 159.8]	Review after 90 Days [*CCC*, s. 525]
Review of Direction [*NDA*, s. 159.9]	Further Review [*CCC*, s. 520(8), 521(9) and 680]

A comparison of Forms also provides a tangible comparison between military and criminal bail procedures:

Military Law	**Criminal Law**
"Record of Disciplinary Proceedings" [*QR&O*, 107.015]	"An Information in Form 2" [*CCC*, s. 504, 506, 788 and 789]
Account in Writing	Police Arrest Report/Sheet
"Direction on Release from Custody" [*NDA*, s. 158.6(1), *QR&O*, 105.22]	"A Promise to Appear given to a Peace Officer Form 10, and "Undertaking" given to a Peace Officer" Form 11.1 and a "Recognizance given to an Officer in Charge" [*CCC*, s. 498, 499 501, 503]; "Undertaking Given to a Justice" Form 12 and a "Recognizance of Bail given to a Justice" Form 32

	[*CCC*, s. 515(1) and (2)(a)]
*** No equivalent ***	"Detention Order" [*CCC*, s. 515(5) and (6), 519(3), Warrant of Committal in Form 8]
*** No equivalent ***	Warrant Remanding Prisoner [*CCC*, 516 and 536, in Form 19]
Form of Direction and Undertaking [*NDA*, s. 159.4, *QR&O*, 105.22]`	Undertaking Given to a Judge [*CCC*, s. 520(7)(e), 521(8)(e), in Form 12]
Habeas Corpus	*Habeas Corpus*

As a point of clarification, Custody Review Officers deal only with "Service Custody" of persons arrested for allegedly having committed an offence against the *Code of Service Discipline*, namely service offences, which are peculiar to the military. CRO's and military judges are not empowered to deal with "Civil Custody" bail for Canadian Forces members arrested for non-*Code of Service Discipline* offences, tried in the criminal justice system. That jurisdiction rests with a justice of the peace or provincial court judge of the province and court involved, or a superior court judge in the case of CCC, s. 469 offences, such as murder. In short, if the Military Police take the matter "downtown" or outside of military jurisdiction, the matter is then outside of the military justice system and the accused is treated like any other Canadian citizen.

R. v. Harris, 2009

The recently released decision in *R. v. Harris*[93] concerning a *Charter* challenge heard as a *voir dire* to the court martial of Corporal Harris addresses numerous points salient to this paper, especially with respect to charge laying procedure and conduct of Custody Review Officers. *R. v. Harris* contains a challenge under sections 7 (right to liberty) and 9 (right against arbitrary detention) of the *Charter* (but not section 11(e) (bail)) against sections 156

[93] *R. v. Corporal B.L. Harris*, 2009 CM 3012, 25 July 2009, received by author on 16 November 2009.

to 158 of the *National Defence Act*, including questioning the constitutionality of a CRO's jurisdiction. From the perspective of this paper, this case stands as an excellent example of some undesirable consequences resulting from shortcomings in the military justice system in comparison to criminal law. In short, the case involves two Canadian Forces members who were arrested for alleged offences arising from the same set of circumstances, yet treated differently – one in the criminal justice system and the other in the military justice system. The contrast in treatment between these two accused is as striking as it is illustrative.

On the one hand is Corporal Harris, who was arrested on 23 September 2007 by the Military Police at Canadian Forces Base Borden for the criminal offence of assault contrary to the *Criminal Code*, s. 266, for events alleged earlier that day. On the other hand is Private Thompson, who was arrested on 29 September 2007 and held for a bail hearing the next day in the Ontario Court of Justice at Barrie. Subsequently, Private Thompson was released by a justice of the peace pursuant to the *Criminal* Code, s. 515(2) on a recognizance of bail, and later pled guilty before a provincial court judge on 19 December 2007, receiving an absolute discharge as sentence. In bringing Private Thompson before the criminal court, the Military Police laid an Information in Form 2 before a justice of the peace[94] and then brought the accused in custody before a justice in order to institute proceedings on 30 September 2007.[95] The crown attorney then presented evidence at a crown onus show-cause bail hearing before a justice of the peace as to why a recognizance of bail and not an undertaking was justified as a form of release.[96] At the bail hearing, a date was set for the accused's arraignment and the

[94] *Criminal Code of Canada*, s. 504.
[95] *Criminal Code of Canada*, s. 503(1).
[96] *Criminal Code of Canada*, s. 515(2).

Crown's election in First Appearance Court.[97] After three appearances in that court a trial or plea date of 19 December 2007 was set. Start to finish, Private Thompson made five court appearances[98] and was dealt with by the criminal justice system within twelve weeks.

In sharp contrast to Private Thompson, Corporal Harris was dealt with by the military justice system instead, a system supposedly designed to provide greater speed than its criminal counterpart, but not so in this particular case. Had he been charged in the criminal system, he could have been a co-accused to Private Thompson and subject to similar treatment. Arrested six days before Private Thompson and released by a Custody Review Officer that same day, the charges against Corporal Thompson were not laid by way of a Record of Disciplinary Proceedings (RDP) until eight months later on 21 May 2008, meaning that he was on restrictive bail conditions for eight months without any formal proceedings being brought against him. Such a circumstance is impossible and completely unlawful under criminal law;[99] yet, ironically he was arrested for a *Criminal Code* offence. In criminal law, no person can be placed under restrictive conditions of release without proceedings being first instituted against them – due process of law. The criminal court has no jurisdiction over an accused without a sworn Information alleging an offence known to law. Citing the recent Supreme Court of Canada case *R. v. Grant*[100] during the *voir dire*, the military judge determined that Corporal Harris had been subject to unlawful and therefore arbitrary detention and that his rights under Section 9 of the *Charter* had been violated.

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[97] *Criminal Code of Canada*, s. 536 and 537(1), 801(1)
[98] Bail Court, First Appearance Court (with two adjournments for disclosure and to retain and instruct counsel) and Plea Court. The author has firsthand experience with this procedure having presided over the very bail and first appearance courts in question.
[99] except as permitted for a very brief period between a police release and the Information being laid and process confirmed by a justice. *Criminal Code of* Canada, s. 508.
[100] *R. v. Grant*, 2009 SCC 32, 17 July 2009.

Having found the breach under Section 9 the judge did not address the challenge raised under Section 7.

In addition to illustrating the perils and shortcomings in military law by not having the benefit of a *pre-enquête*, as well as permitting matters to proceed at bail in the absence of charges being laid, *R. v. Harris* demonstrates the necessity for formal training and certification of Custody Review Officers. The military judge found irregularities in that the Custody Review Officer had proceeded without the mandatory Report of Custody (essentially the case for the prosecution reduced to writing) and without a statement indicating that the accused had been given an opportunity to make representations for his release. The CRO was provided by the Military Police with the Account in Writing and a draft Direction on Release from Custody, complete with suggested conditions of release. The accused made no representations. The judge stated:

> [107] On completion of the statement made by Corporal Harris, the MP called the Custody Review Officer, Captain Daviau, in order for him to deal with the release from custody of Corporal Harris.
>
> [108] The custody review officer went immediately to the MP detachment where he was debriefed by the military police about the situation of Corporal Harris. He never received a report of custody and a statement confirming that Corporal Harris was given the opportunity to make representations concerning his release from custody as requested by the *NDA*. However, an account in writing was produced to him and he was shown a draft form of Direction on Release of Custody with suggested conditions that were prepared by the military police.
>
> [109] The custody review officer met Corporal Harris in the interview room with the military police in order to expose to him the conditions for his release. After Corporal Harris agreed and signed the form, the custody review

> officer directed that Corporal Harris be released from custody. He was then released with conditions.[101]

This scenario is fraught with issues that would not be tolerated in the criminal justice system in Ontario. Until the early 1990's, it was common practice for justices of peace in Ontario to conduct s. 516 adjournments (remands) and s. 515 consent bail releases afterhours in police stations. The Associate Chief Judge – Coordinator of Justices of the Peace of the Ontario Court of Justice ended this practice on two grounds: 1) police stations, especially holding cell areas, were not places where the public could attend;[102] and 2) it could give the public the perception that justices of the peace were servants of the police and not independent judicial officers. *McRuer*, 1968 and later *Mewett*, c. 1981 expressed similar concerns, taking only three decades to correct. In *R. v. Harris* the perception is very strong that the CRO did exactly what the police told him to do instead of duly exercising his quasi-judicial responsibilities as prescribed by the *National Defence Act*.

In Ontario prior to 1994, many justices of the peace were on a fee-for-service or "piece-work" basis, meaning that they billed the Ministry of the Attorney General for each Information and affidavit sworn, for each summons, subpoena or warrant considered, and for each bail hearing conducted. This system gave a very real public perception that justices had to curry favour with the police for their income and if they did not sign a document placed before them in a police station, their services would not be sought in the future.[103]

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[101] *R. v. Harris*, p. 23.
[102] *Criminal Code of Canada*, s. 486(1).
[103] McRuer., p. 523-524 and Mewett., p. 23 and 106

> This is nothing more or less than an invitation to a Justice of the Peace to abdicate his judicial responsibility… The outrageous result is that some justices are perceived by both the police and the public to be police Justices of the Peace while others pay for their rectitude by receiving little in the way of fees. This is utterly intolerable and reflects complete ignorance of the proper function and authority of the Justice of the Peace, and must be stopped.[104]

How such a corruptible system remained in place for so long in a post-*Charter* environment is almost mindboggling. Since 1994, justices of the peace in Ontario are salaried and form part of the formal Bench of the Ontario Court of Justice along with provincial court judges. In contrast, the custody review procedure described in *R. v. Harris* is reminiscent of the previous situation in Ontario. In this case the Custody Review Officer did not follow the quasi-judicial procedure prescribed by the *National Defence Act*, did not act in a quasi-judicial manner and thus deprived the accused of any benefit to natural justice or procedural fairness with respect to the restrictive conditions imposed. Moreover, in this instance the impression that the CRO was de facto acting as an agent of the police is overwhelming. Comment on this case by Mr. Justice Trotter in context to the overall law of bail in Canada would be most interesting. Notwithstanding that the Military Police has no influence over a CRO's income and are normally junior in rank, perceptions are relative, and within the military community members must be confident that commissioned officers appointed as CRO's are exercising their quasi-judicial authority in a fair and independent manner. The lessons from the past must not be forgotten and the separation of police and quasi-judicial functions under military law has to be distinct and abundantly clear to all involved.

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[104] Mewett., p. 23.

Evidentiary Tests of Bail

Over time, various tests have evolved in the law of bail for weighing the evidence presented. These tests are tailored to meet requirements concerning each of the three grounds of bail, namely, the primary grounds – to ensure attendance in court, the secondary grounds – for the protection and safety of the public, and tertiary grounds – for the maintenance of public confidence in the administration of justice, or public interest. Given that *R. v. Hall* has rendered the tertiary ground inoperative, as applied in *Semrau v. R*, only the tests related to the primary and secondary grounds will be considered.

Sufficient evidence supporting any one of these grounds will justify retention. Although *NDA*, s. 159.2 prescribing the military grounds of bail specifically refers to military judges, the Custody Review Officer must apply the principles of this section in the first instance. Therefore, a CRO must consider the primary and secondary grounds when reviewing the accused's written submissions for release. In so doing, the CRO's weighing of the evidence presented and the reasoning behind the decision should be clear to the reviewing military judge, in a manner similar to the decision of a justice of the peace or provincial court judge under *CCC,* s. 515 being reviewed by a superior court judge under *CCC,* s. 520 or 521. Without a requirement for written reasons or record from the CRO, the judge's subsequent assessment of the reasons for continued retention by the CRO will have to be somewhat intuitive.

The Honourable Mr. Justice Gary T. Trotter enumerated the following tests for release or detention in his authority *The Law of Bail in Canada*, 2nd Edition.[105] These tests are just as applicable to military bail as to criminal bail, and have been adapted for determining the release or retention of a military accused.

"Primary Grounds" – Attendance at Trial

- Nature of the Offence and the Potential Penalty**.** Under this test, a Custody Review Officer must weigh the written submissions presented and determine the nature or seriousness of the offence(s) alleged and what the potential penalty might be, should the person be convicted at trial. A CRO must determine if any evidence that would support the accused person absconding from the jurisdiction to avoid prosecution. In general, the greater the potential penalty, the greater the risk of flight.

- Strength of the Evidence Against the Accused**.** Under this test, a Custody Review Officer must determine what the strength of the evidence is against the accused person. This is one of the most important tests in the law of bail for a number of reasons. First, the stronger the likelihood of conviction, the greater the temptation to flee the jurisdiction and the greater the grounds for retention in custody. Second, the weaker the likelihood of conviction, the lesser the grounds for retention in custody

[105] See. Trotter, Gary T. *The Law of Bail in Canada*, 2nd ed. Toronto: Carswell, 1999.

- Ties the Accused has to the Community. Under this test, a Custody Review Officer must determine the accused person's ties to the community, on the basis of that person's family, friends, employment, etc., in the area have greater reasons for remaining in the community and not fleeing the jurisdiction. This test has more application to civilian criminal bail than to military personnel posted to a unit; however, it may be a valid concern when dealing with new recruits who have not yet been fully socialized into military life and who have not yet developed close bonds to the Canadian Forces.

- Accused's Record of Compliance with Court Orders on Previous Occasions. Under this test, a Custody Review Officer must determine if the accused person has had the opportunity to comply with other types of judicial orders in the past. Does the accused have a disciplinary record indicating previous releases on a "Direction on Release for Custody," an "Undertaking," or a "Recognizance of Bail" in the past, demonstrating compliance or breach? Behaviour while on previous forms of release is often a good indicator in determining if the person will obey a Direction. A history of non-compliance with previous orders may provide solid grounds for continued retention in custody, whereas a history of compliance may satisfy grounds for release.

- Accused's Behaviour Prior to Apprehension: Evidence of Flight. Under this test, a Custody Review Officer must determine if the accused person was attempting or planning to flee the jurisdiction. Examples of this could be statements made to other persons about leaving, possession of tickets and travel documents indicating plans to immediately leave the area, etc. A CRO should also determine if the accused person has a disciplinary

record of being Assent Without Leave, Desertion, etc., as these could prove to useful indicators.

"Secondary Grounds" – (1) Protection of the Public

- Record of Accused for Previous Convictions. Under this test, a Custody Review Officer must determine if the accused person has any prior convictions, either under the NDA or other statute, which might indicate that there is a substantial likelihood that the person if released from custody that they will commit another serious offence. For example, if the accused person has a Conduct Sheet that indicates a history of violent behaviour and they are in custody accused of fighting (*NDA,* s. 86), this may indicate that there is a substantial likelihood that they will commit another act of violence if released. A CRO has a duty to protect the public from any substantial likelihood that this might occur.

- Is the Accused Already on Bail or Probation. Under this test, a Custody Review Officer must determine if the accused person is already subject to another form of release order or is serving probation for other offences. Allegations that the person has committed another serious offence while subject to an earlier judicial order may serve to indicate whether or not they will abide by any release order that might be made.

- Nature of the Offence and the Strength of the Evidence. Under this test, a Custody Review Officer must determine the nature or seriousness of the offence(s) alleged and what the potential penalty might be, should the person be convicted at trial. Any

evidence that indicates the degree of seriousness of the allegations as they relate to public safety is significant. For example, an open hand slap across the alleged victim's face is less serious than a closed fisted punch that renders them unconscious.

- Stability of the Accused. Under this test, a Custody Review Officer must determine if the accused has a substance abuse or addiction problem or is suffering from mental illness that makes the accused's behaviour unstable and could put public safety at risk if released from custody.

"Secondary Grounds" – (2) Interference in the Administration of Justice

- Destroying or Tampering with Evidence. Under this test, a Custody Review Officer must determine if any past history or current behaviour is alleged indicating a substantial likelihood exists that the accused person will destroy or tamper with evidence, if released from custody. If convinced that there is a substantial likelihood of this occurring, then a CRO has very strong grounds for continued retention in custody.

- Intimidating or Dissuading Witnesses. Under this test, a Custody Review Officer must determine if any past history or current behaviour is alleged indicating a substantial likelihood exists that the accused person will interfere with, intimidate or dissuade any witness involved in the case, if released from custody. If convinced that there is a substantial likelihood of this occurring, then a CRO has very strong grounds for continued retention in custody. If no evidence exists indicating this type of behaviour, then the accused

could be released but on the condition of non-association or communication with any of the named witnesses.

The Quasi-Judicial Role of Commissioned Officers

> **From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function**.[106]

Commissioned officers have a long-standing tradition of being empowered to perform quasi-judicial functions in most countries, including Canada. In the early days of Canadian history after European contact, governors, lieutenant governors and administrators were usually military officers, such as commanding generals, during both the French and British periods. Even today, this tradition continues to some degree with the Governor General of Canada being the Commander-in-Chief of the Canadian Forces, and lieutenant governors of the provinces often being honorary colonels. In addition, it is still relatively common for judges and justices to be serving reserve officers or honorary colonels.

Further to the previous discussion on legislative framework and crown prerogative of appointments, an officer's commission scroll is similar in wording and structure to the commission or letters patent of a judicial officer in any Canadian court of law. Emanating from the Sovereign as Head of State, an officer's commission recognizes specific attributes of the individual (loyalty, integrity and courage), and entrusts and empowers that named individual with authority over others on behalf of the Sovereign. Moreover, it commands those placed under the officer's authority to obey them. The consequence for failing to obey

[106] MacIntyre, J. in *R. v .Mackay* (1980), Volume 54 *Canadian Criminal Cases* (2nd Series), p. 129, quoted in *R. v. Genereux* (1992) Volume 70 *Canadian Criminal Cases* (3rd Series), p. 56.

could result in some form of imprisonment, up to and including life, or more likely release from the Canadian Forces.

In criminal proceedings, a judicial officer, such as a justice or judge, determining bail is the embodiment of the Sovereign's justice and the rule of law over the accused. The same is true for a commissioned officer appointed as a Custody Review Officer, who must diligently "administer justice according to law, without partiality, favour or affection."[107] The decision to release or retain an accused belongs solely to that officer, and as such he or she cannot be ordered to release or retain the accused by higher authority. The legal principles of "he who hears decides" and non-interference apply even at this stage of the proceedings. Under the NDA, the CRO is specifically empowered to receive submissions in favour of release and/or retention, and ultimately decides the outcome, subject to review by higher authority and in prescribed circumstances by a military judge.

In recent history, amendments to the *Criminal Code of Canada* permit a police officer-in-charge to release accused persons on Undertakings with Conditions in Form 11.1. Previously, this had been a judicial decision and the sole purview of a judge or justice. The rationale behind this amendment was to reduce the number of simple routine consent releases that were clogging up the bail courts. These courts instead needed to concentrate on complex, serious contested show-cause hearings. This is not the case in military justice; rather it is the lack of access to military judges for considering bail. Therefore, Custody Review Officers decide in matters of non-designated offences and military judges only become involved if retention is ordered. Consequently, commissioned officers received

[107] See. *QR&O* 108.27.

statutory authority to consider military bail in the first instance, which is a quasi-judicial function.

In the criminal law, officers-in-charge were not given the powers of a justice; rather they were granted the authority to impose a few standard statutory conditions as prescribed in s. 499(2) and s. 503(2.1) of the *Criminal Code*, with such Undertakings being judicially reviewable by a justice upon application. These conditions are very similar to those that may be imposed by a Custody Review Officer with one significant exception, which is to "comply with such other reasonable conditions specified in the order as the justice considers desirable."[108] Deemed judicial in nature this discretionary power is reserved for the courts, although it too has faced challenge in criminal matters for being too vague and open-ended with respect to judicial discretion, for example imposing medical counselling for substance abuse while awaiting trial.[109] Parliament granted this judicial power to CRO's under the NDA, s. 158.6(1)(e), which prescribes the authority to impose the condition to "comply with such other reasonable conditions as are specified," reinforcing the quasi-judicial nature of the appointment.

Consequently, under NDA, s. 158.6 a Custody Review Officer may direct an accused released with or without conditions. Should a CRO determine that a release with conditions is appropriate the following conditions may be imposed upon the accused, supported by evidence related to the primary and secondary grounds of bail:

- remain under military authority;

[108] *Criminal Code of* Canada, s. 515(4)(f) compare with recent changes s.499(2)(h) and s. 503(2.1)(h).
[109] Author's personal experiences while a justice with the Ontario Court of Justice.

- report at specified times to a specified military authority;
- remain within the confines of a specified defence establishment or at a location within a geographical area;
- abstain from communicating with any witness or specified person, or from going to any specified place; and (as covered above)
- comply with such other reasonable conditions as are specified (*NDA*, s. 158.6(1).

Clearly, the duties and discretionary powers of a Custody Review Officer are quasi-judicial in nature, which is not all that surprising given that all Commanding Officers and Delegated Officers are certified Presiding Officers for military summary trials. Thus, Justice MacIntyre's statement is reinforced that "from the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function."[110] As with a Presiding Officer, a Custody Review Officer must not forget that an important tenet in Canadian law and in a free and democratic society is the presumption of innocence pending trial. In 1982, this was codified in the *Charter of Rights and Freedoms*, as section 11(d), which prescribes, "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." The burden of proof lies with the accuser, not the accused, and the accuser must prove the accused guilty to the requisite standard. The standard of proof *at trial* in military law is "beyond a reasonable doubt," which is the same as the criminal law standard. That said the burden of proof for bail *pending trial* is "on a balance of

[110] MacIntyre, J. in *R. v .Mackay* (1980), Volume 54 *Canadian Criminal Cases* (2nd Series), p. 129, quoted in *R. v. Genereux* (1992) Volume 70 *Canadian Criminal Cases* (3rd Series), p. 56.

probabilities," which is the civil law standard. CRO's are not interested in guilt or innocence of the accused; however, determining the "strength of the case against the accused," is an important factor for consideration, with greater depth than that initially required for arrest or laying of charges.

Expanding on Section 11(e) of the *Charter*, which prescribes, "Any person charged with an offence has the right not to be denied bail without just cause," which presumes that an arrested accused will normally be released pending trial, and will be placed under conditions, or retained in custody, if only compelling evidence supports it. The evidence in this context that the Custody Review Officer must consider relates only to the tests of bail and not guilt or innocence in respect of the substantive offences alleged. Thus, a CRO's duty is to determine if the continued retention of the accused in custody is lawful, not arbitrary, and with just cause (providing of course that the alleged offence is not one designated in NDA, s. 153).

The differences between military and criminal bail provisions are essentially that of mechanics and terminology, as the underlying principles are identical. Thoughtful Custody Review Officers will quickly discover that the very concept of bail creates a quandary with the right of presumption of innocence. An accused in custody is presumed innocent until proven guilty, yet the CRO will have to determine if this person, who has not been and might not be convicted of anything, will lose their liberty and be retained in custody. There is little worse in our society, where the loss of liberty is the harshest of punishments, than someone languishing in custody awaiting trial, only to be later acquitted because the case was not

proven or the charges withdrawn or stayed. More problematic is retention in custody when the likelihood of a custodial sentence is unlikely, should there be a finding of guilt, by way of fine or reprimand instead of detention or imprisonment, which is statistically the norm in military justice.

Consequently, officers assigned as Custody Review Officers must constantly remind themselves that retention is to be preventative not punitive in nature. It is to be invoked only when no other option is viable. On the other hand, a person accused of committing a serious offence, who then commits further serious offences while on release, thus creating further victims, is a travesty to the very concept of preventative justice as determined so long ago in *R. v. Phillips*. CRO's and military judges must weigh the rights of the individual against the good of society. As with the training for military Presiding Officers, training for CRO's is necessary and must emphasize the quasi-judicial nature of the authority being exercised over the accused. Unfortunately, no formal training for CRO's has yet been established or undertaken.

NDA, s.158.2 requires Custody Review Officers to review custody of an accused at various times during the custodial period. The first such review must take place as soon as practicable after receiving the report of custody and accompanying documents, but not later that 48 hours after the arrest of the person in custody. This is similar to criminal law except that a peace officer must bring an accused before a justice within 24 hours of arrest unless the accused is released before that time, CCC, s. 503(1).

In commencing a custody review, the Custody Review Officer must examine the "Account in Writing" and accompanying documents. This will include the "prosecution's" case against the accused and any submissions for their retention in custody, and may include the accused's submissions in favour of release. On completing this review, a CRO ***must*** then direct either that the person in custody be released immediately ***unless*** convinced on balance of probabilities that it is necessary for the person to be retained in custody having regard to all the circumstances, including those set out in subsection 158(1) of the *NDA*, or unless a designated offence is alleged.

In the event the person in custody has not been charged with an offence within 72 hours after being arrested, the Custody Review Officer is further required to determine why a charge has not been laid and consider whether it remains necessary to retain the person in custody. This requirement is very different compared to the criminal justice system where no jurisdiction exists over the accused until the charge has been reduced to writing in an Information in Form 2 and sworn before and received by a justice, pursuant to CCC, s. 504 or 505. In the military justice system the charge is laid when a person authorized to lay charges has "reduced it to writing" by completing and signing a Record of Disciplinary Proceedings (RDP) against the accused.[111] It should be just as important for the CRO to have the RDP as it is for a justice or judge to have the sworn Information containing the charge and alleging the offence(s) before assuming jurisdiction over the accused.

A Custody Review Officer has an additional duty to release a person when there are no longer sufficient grounds for keeping the person in custody, and unlike in criminal law

[111] NB. This used to be called a "Charge Report." The criminal equivalent is called an "Information, in Form 2" pursuant to the *Criminal Code of Canada*, sections 506 and 788.

that duty continues after the initial custody review. If at anytime after receiving the report of custody and before the person in custody is brought before a military judge, a CRO no longer believes that the necessary grounds to continue custody exist, the CRO must direct that the person be released from custody. This military provision is very different from that for a judge or justice presiding at criminal bail. These judicial officers cannot sit in review of their own decisions, and become *functus officio*[112] after making an order for detention. Jurisdiction for such criminal reviews lies with a higher court, as discussed earlier.

The pre-trial custodial provisions under military law when compared with those of the criminal justice system are consistent yet tailored to meet the unique exigencies of military service. A Custody Review Officer's decision to impose a loss of liberty or restrictions of lifestyle prior to any finding of guilt and any resulting sentence of imprisonment through the denial of bail is not a decision to be taken lightly. Commissioned officers should take solace in the confidence that Parliament has placed in them by granting such important duties within a separate and distinct justice system for the armed forces, duties that in the rest of society are reserved solely for judicial officers. Such duties are consistent with the long-recognized judicial function of commissioned officers, persons who in the normal course of their duties, especially as senior officers, are vested with incredible powers over and responsibility for

[112] NB. ***Functus officio***, Latin for "having performed his office," is a legal term used to indicate that a public official, court, governing body, or statute retains no legal authority because his or its duties and functions have been completed. The term is most commonly used by a higher court as a justification for vacating or overruling all or part of a lower court's opinion. For example, if a court decides that a law comports with the requirements of due process, the court cannot then attempt to strike the law simply because the law is unwise because the court's due process determination renders it *functus officio* in the particular case. From; http://en.wikipedia.org/wiki/Functus_officio accessed 21 Nov 2006. For Canadian case law on this principle, *Black's Canadian Law Dictionary* is a quick reference.

those placed under their command. This recognition reinforces the distinctness and special purpose of the armed forces and its roles and preparations for actual operations.

As discussed, both Justice Lamer and a standing committee of the Senate have recognized shortcomings in the *National Defence Act* that the government has attempted to correct through bills C-7 and C-45 during several sessions of Parliament. Military bail still requires a mechanism for judicial review of conditions imposed by Custody Review Officers and that they seek legal advice when performing their duties. In addition to these concerns, formal training and certification should be considered for those holding CRO appointments, in a similar manner to that for summary trial presiding officers, and that the range of types of release and conditions be expanded consistent with criminal law. Without a level of judicial oversight, the present shortcomings create a potential for direct or inadvertent abuse.

CONCLUSION

While Canada has long held its military justice system separate and apart from that of civil society, this concept only received formal recognition in 1982 through enshrining a *Charter of Rights and Freedoms* within the new *Constitution of Canada*, becoming supreme law, specifically, in Section 11(f). This distinct division of law deals not only with crimes against society, but also with maintaining discipline of the armed forces, both at home and abroad.

Deprivation of an individual's liberty through any form of imprisonment is the harshest treatment that society can impose under law. Bail provisions under military law are comparable to those in the criminal justice system, but tailored to meet the unique circumstances of military service. While military law occasionally appears to be lagging behind criminal law, this is a consequence of criminal jurisprudence having a natural lead in the larger scheme of Canadian law. Since 1982, *Charter* challenges have been the driving force to changes in the law of bail. While these challenges have primarily come from the criminal courts, many of the decisions rendered have had application to military law. Any perception of inequality of justice arising because military law appears to be lagging behind criminal law is superficial, given that military counsel and judiciary are proactive in foreseeing potential shortcomings in military law. The most recent example in military bail is the decision in *Semrau v. R.* recognizing that the tertiary ground of bail being rendered inoperative in criminal law by *R. v. Hall*, which by its close association was viewed as rendering the tertiary ground in military bail inoperative as well. Consequently, while

amendments to the *National Defence Act* are not as forthcoming as those directly in the *Criminal Code of Canada*, military authorities are endeavouring to ensure that members of the Canadian Forces are not in an outmoded, second class justice system.

Canadian military law has evolved towards constitutional consistency with the other divisions of law, including its provisions bail pending trial. The *Charter* entrenched four demands upon determining whether arrested accused persons should be held in custody or released conditionally or unconditionally pending trial, namely:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **9.** Everyone has the right not to be arbitrarily detained or imprisoned.
>
> **10.** Everyone has the right on arrest or detention
>
> *c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.
>
> **11.** Any person charged with an offence has the right
>
> *e*) not to be denied reasonable bail without just cause

Although from a historical perceptive military law has adapted at a relatively rapid rate, amendments beginning in 1998 have ensured that the military justice system continues to meet the constitutional demands of supreme law. The military justice system continues to strive in being proactive in anticipating shortcomings in military law and procedure. The creation of Custody Review Officers (CRO), combined with the provisions for show-cause bail hearings before military judges, is a substantial step towards keeping pace in meeting the subsequent case law that has resulted from challenges under Section 11(e) of the *Charter*. Timeliness of proceedings is paramount in pre-trial custody or release determinations; the key feature is ready access to those with the authority to consider bail. With CRO's being

appointed at the unit level, and military judges being available either in person or by means of telecommunications to conduct show-cause bailing hearings, military members are not at a systemic disadvantage in comparison to accused in the criminal justice system. That said, shortcomings needing attention are the lack of a *pre-enquête* for instituting proceedings and compelling the attendance of the accused in a form and manner consistent with criminal law and the need for formal training for officers selected for appointment as CRO's. The recent case of *R. v. Harris* supports this conclusion. Regardless, most persons arrested for service offences are not denied bail without just cause and arbitrarily detained while awaiting summary trial or courts martial, and are not in a second-class justice system creating a perception of inequitable treatment before the law. Military law preserves and ensures the right of any person subject to a military tribunal to custodial release review when charged with an offence, so that military bail compares favourably with bail in the civilian courts, through recognizing the unique roles and functions of the armed forces in Canadian society and the world.

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CUSTODY REVIEW OFFICER'S CHECK LIST

Serial	Action Required	NDA	QR&O	Remarks
1	Have you received the Report of Custody?	158.1(1) and (2)	105.17	
2	Have you received Representations in writing from the Person in Custody or from a person acting on their behalf?	158.1(3)	105-17	
3	Have you received the Account in Writing?	158.1(4)	105.17	
4	Were the above documents presented to you within 24 hours of the person in custody's arrest?	158.1(1)	105.17	
5	Has the charge been laid and do you have the RDP?	161		
6	Have you reviewed the above documents within 48 hours of the person in custody's arrest?	158.2(1) 158.1(5)	105.18	
7	Do you have jurisdiction to consider release or is it a "designated offence"?	158.4	105.20	
8	If it is a 'designated offence" have you ordered the retention of the person in custody?	158.4	105.20	
9	If it is NOT a 'designated offence" have you reviewed the submissions for and against the release of the accused and weighed these submissions against the Grounds of Bail and their respective Tests?	188.2(2)		
10	Having reviewed the submissions above, have you made a decision for release without conditions, release with conditions, or retention in custody?			
11	Does the "evidence," contained in the submissions, support your decision?			
12	If you have decided to release the person in custody, have you completed and signed the "Direction on Release from Custody" and had the person sign it and witnessed?	158.6(1)	105.22(2)	
13	If you have decided to retain the person in custody and charges have not yet been laid, has 72 hours passed? If so, have you determined why and is the retention of the person still necessary?	158.5	105.21	
14	If you have decided to retain the person in custody, have you caused the person to be taken before a military judge for a show-cause bail hearing?	159(1)	105.24	
15	Given any constraints of military operations or the unit's location, have you determined when it would be practicable to bring the person in custody before a military judge for a show-cause bail hearing?	159(2)	105.24	
16	Have you immediately advised the Director of Military Prosecutions that a person in custody is being brought before a military judge for a show-cause bail hearing?		105.25	
17	Have you determined if the person in custody desires legal counsel to be appointed by the Director of Defence Counsel Services, intends to retain legal counsel at his or her expense, or does not require legal counsel?		105.26(2)	

18	If the person in custody desires legal counsel to be appointed by the Director of Defence Counsel Services, have you determined if the person desires a particular legal officer or is willing to accept any legal officer, and have you advised the Director of Defence Counsel Services accordingly?		105.26(3) and (4)	
19	If legal counsel from the Director of Military Prosecutions is unavailable, have you appointed a person to represent the Canadian Forces?		105.25 (NOTE)	
20	Have you continued to exercise your duty to continually monitor the requirement for retention prior to the person in custody being brought before a military judge, and if retention is no longer justified, released the person with or without conditions?	158.3		
21	If you have determined that retention is no longer justified, have you completed and signed the "Direction on Release from Custody" and had the person sign it and witnessed?	158.6(1)	105.22(2)	
22	If you have determined that retention is no longer justified and released the person, have you notified the various authorities that a show-cause hearing before a military judge is no longer required?			
23				

EXCERPTS FROM THE *NATIONAL DEFENCE ACT*

Division 3

ARREST AND PRE-TRIAL CUSTODY

Interpretation

Definitions

153. The definitions in this section apply in this Division.

"custody review officer"
« *officier réviseur* »

"custody review officer", in respect of a person in custody, means

(*a*) the officer who is the person's commanding officer, or an officer who is designated by that officer; or

(*b*) if it is not practical for an officer referred to in paragraph (*a*) to act as the custody review officer, the officer who is the commanding officer of the unit or element where the person is in custody or an officer who is designated by that officer.

"designated offence"
« *infraction désignée* »

"designated offence" means

(*a*) an offence that is punishable under section 130 that is

(i) listed in section 469 of the *Criminal Code*,

(ii) contrary to subsection 5(3), 6(3) or 7(2) of the *Controlled Drugs and Substances Act* and punishable by imprisonment for life, or

(iii) an offence of conspiring to commit an offence under any subsection referred to in subparagraph (ii);

(*b*) an offence under this Act where the minimum punishment is imprisonment for life;

(*c*) an offence under this Act for which a punishment higher in the scale of punishments than imprisonment for less than two years may be awarded that is alleged to have been committed while at large after having been released in respect of another offence pursuant to the provisions of this Division or Division 10;

(*d*) an offence under this Act that is a criminal organization offence; or

(*e*) an offence under this Act that is a terrorism offence.

R.S., 1985, c. N-5, s. 153; R.S., 1985, c. 31 (1st Supp.), s. 47; 1998, c. 35, s. 40; 2001, c. 41, s. 100.

Authority to Arrest

General authority

154. (1) Every person who has committed, is found committing or is believed on reasonable grounds to have committed a service offence, or who is charged with having committed a service offence, may be placed under arrest.

Reasonably necessary force

(2) Every person authorized to effect arrest under this Division may use such force as is reasonably necessary for that purpose.

R.S., 1985, c. N-5, s. 154; R.S., 1985, c. 31 (1st Supp.), s. 48; 1998, c. 35, s. 92.

Powers of officers

155. (1) An officer may, without a warrant, in the circumstances described in section 154, arrest or order the arrest of

(*a*) any non-commissioned member;

(*b*) any officer of equal or lower rank; and

(*c*) any officer of higher rank who is engaged in a quarrel, fray or disorder.

Powers of non-commissioned members

(2) A non-commissioned member may, without a warrant, in the circumstances described in section 154, arrest or order the arrest of

(*a*) any non-commissioned member of lower rank; and

(*b*) any non-commissioned member of equal or higher rank who is engaged in a quarrel, fray or disorder.

Arrest of persons other than officers or non-commissioned members

(3) Every person who is not an officer or non-commissioned member but who was subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence may, without a warrant, be arrested or ordered to be arrested by such person as any commanding officer may designate for that purpose.

R.S., 1985, c. N-5, s. 155; R.S., 1985, c. 31 (1st Supp.), s. 60.

Powers of military police

156. Officers and non-commissioned members who are appointed as military police under regulations for the purposes of this section may

(*a*) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence; and

(*b*) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

R.S., 1985, c. N-5, s. 156; R.S., 1985, c. 31 (1st Supp.), ss. 49, 60; 1998, c. 35, s. 41.

Issue of warrants

157. (1) Subject to subsection (2), every commanding officer, and every officer to whom the power of trying a charge summarily has been delegated under subsection 163(4), may by a warrant under his hand authorize any person to arrest any other person triable under the Code of Service Discipline who

(*a*) has committed,

(*b*) is believed on reasonable grounds to have committed, or

(*c*) is charged under this Act with having committed

a service offence.

Limitation

(2) An officer authorized to issue a warrant under this section shall not, unless the officer has certified on the face of the warrant that the exigencies of the service so require, issue a warrant for the arrest of any officer of rank higher than the rank held by the officer so authorized.

Contents of warrants

(3) In any warrant issued under this section, the offence in respect of which the warrant is issued shall be stated and the names of more persons than one in respect of the same offence, or several offences of the same nature, may be included.

Saving provision

(4) Nothing in this section shall be deemed to be in derogation of the authority that any person, including an officer or non-commissioned member, may have under other sections of this Act or otherwise under the law of Canada to arrest any other person without a warrant.

R.S., 1985, c. N-5, s. 157; R.S., 1985, c. 31 (1st Supp.), ss. 50, 60.

Action following Arrest

Release from custody

158. (1) A person arrested under this Act shall, as soon as is practicable, be released from custody by the person making the arrest, unless the person making the arrest believes on

reasonable grounds that it is necessary that the person under arrest be retained in custody having regard to all the circumstances, including

(*a*) the gravity of the offence alleged to have been committed;

(*b*) the need to establish the identity of the person under arrest;

(*c*) the need to secure or preserve evidence of or relating to the offence alleged to have been committed;

(*d*) the need to ensure that the person under arrest will appear before a service tribunal or civil court to be dealt with according to law;

(*e*) the need to prevent the continuation or repetition of the offence alleged to have been committed or the commission of any other offence; and

(*f*) the necessity to ensure the safety of the person under arrest or any other person.

Retention in custody

(2) If an arrested person is to be retained in custody, the person shall be placed in service custody or civil custody. Such force as is reasonably necessary for the purpose may be used.

Duty to receive into service custody

(3) The officer or non-commissioned member in charge of a guard or a guard-room or an officer or non-commissioned member appointed for the purposes of section 156 shall receive and keep a person under arrest who is committed to his or her custody.

Account in writing

(4) The person who commits a person under arrest to service custody shall, at the time of committal, deliver to the officer or non-commissioned member into whose custody the person under arrest is committed a signed account in writing setting out why the person under arrest is being committed to custody.

R.S., 1985, c. N-5, s. 158; R.S., 1985, c. 31 (1st Supp.), ss. 51, 60; 1998, c. 35, s. 42.

Report of custody

158.1 (1) The officer or non-commissioned member into whose custody a person under arrest is committed shall, as soon as practicable, and in any case within twenty-four hours after the arrest of the person committed to custody, deliver a report of custody, in writing, to the custody review officer.

Contents

(2) The report of custody must set out the name of the person in custody, an account of the offence alleged to have been committed by that person so far as it is known and the name and rank, if any, of the person who committed the person into service custody.

Representations concerning release

(3) Before the report of custody is delivered to the custody review officer,

(*a*) a copy of the report and the account in writing must be provided to the person in custody; and

(*b*) the person in custody must be given the opportunity to make representations concerning the person's release from custody.

Representations to be reduced to writing

(4) Representations concerning release made by or on behalf of the person in custody must be reduced to writing or recorded by any other means.

Accompanying documents

(5) When the report of custody is delivered, it must be accompanied by the account in writing and any representations made by or on behalf of the person in custody or a statement confirming that the person was given the opportunity to make representations but did not do so.

1998, c. 35, s. 42.

Initial Review

Review of report of custody

158.2 (1) The custody review officer shall review the report of custody and the accompanying documents as soon as practicable after receiving them and in any case within forty-eight hours after the arrest of the person committed to custody.

Duty to release

(2) After reviewing the report of custody and the accompanying documents, the custody review officer shall direct that the person committed to custody be released immediately unless the officer believes on reasonable grounds that it is necessary that the person be retained in custody, having regard to all the circumstances, including those set out in subsection 158(1).

1998, c. 35, s. 42.

Continuing duty to release

158.3 If, at any time after receiving the report of custody and before the person in custody is brought before a military judge, the custody review officer no longer believes that the grounds to retain the person in custody exist, the custody review officer shall direct that the person be released from custody.

1998, c. 35, s. 42.

Duty to retain in custody if designated offence

158.4 Notwithstanding subsection 158.2(2) and section 158.3, if the person in custody is charged with having committed a designated offence, the custody review officer shall direct that the person be retained in custody.

1998, c. 35, s. 42.

Duty to review where charge not laid

158.5 If a charge is not laid within seventy-two hours after the person in custody was arrested, the custody review officer shall determine why a charge has not been laid and reconsider whether it remains necessary to retain the person in custody.

1998, c. 35, s. 42.

Release with or without conditions

158.6 (1) The custody review officer may direct that the person be released without conditions or that the person be released and, as a condition of release, direct the person to comply with any of the following conditions:

(*a*) remain under military authority;

(*b*) report at specified times to a specified military authority;

(*c*) remain within the confines of a specified defence establishment or at a location within a geographical area;

(*d*) abstain from communicating with any witness or specified person, or refrain from going to any specified place; and

(*e*) comply with such other reasonable conditions as are specified.

Review

(2) A direction to release a person with or without conditions may, on application, be reviewed by

(*a*) if the custody review officer is an officer designated by a commanding officer, that commanding officer; or

(*b*) if the custody review officer is a commanding officer, the next superior officer to whom the commanding officer is responsible in matters of discipline.

Powers

(3) After giving a representative of the Canadian Forces and the released person an opportunity to be heard, the officer conducting the review may make any direction respecting conditions that a custody review officer may make under subsection (1).

1998, c. 35, s. 42.

Review by Military Judge

Hearing by military judge

159. (1) A custody review officer who does not direct the release of a person from custody shall, as soon as practicable, cause the person to be taken before a military judge for the purpose of a hearing to determine whether the person is to be retained in custody.

Applicable operational considerations

(2) In determining when it is practicable to cause the person to be taken before a military judge, the custody review officer may have regard to the constraints of military operations, including the location of the unit or element where the person is in custody and the circumstances under which it is deployed.

R.S., 1985, c. N-5, s. 159; R.S., 1985, c. 31 (1st Supp.), s. 52; 1998, c. 35, s. 42.

Onus on Canadian Forces

159.1 When the person retained in custody is taken before a military judge, the military judge shall direct that the person be released from custody unless counsel for the Canadian Forces, or in the absence of counsel a person appointed by the custody review officer, shows cause why the continued retention of the person in custody is justified or why any other direction under this Division should be made.

1998, c. 35, s. 42.

Justification for retention in custody

159.2 For the purposes of sections 159.1 and 159.3, the retention of a person in custody is only justified when one or more of the following grounds have been established to the satisfaction of the military judge:

(*a*) custody is necessary to ensure the person's attendance before a service tribunal or a civil court to be dealt with according to law;

(*b*) custody is necessary for the protection or the safety of the public, having regard to all the circumstances including any substantial likelihood that the person will, if released from custody, commit an offence or interfere with the administration of justice; and

(*c*) any other just cause has been shown, having regard to the circumstances including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

1998, c. 35, s. 42.

Onus on person in custody

159.3 (1) Notwithstanding section 159.1, if the person in custody is charged with having committed a designated offence, the military judge shall direct that the person be retained in

custody until dealt with according to law, unless the person shows cause why the person's retention in custody is not justified.

Release on undertaking

(2) If the person in custody shows cause why the person's retention in custody is not justified, the military judge shall direct that the person be released from custody on giving any undertaking to comply with any of the conditions referred to in section 158.6 that the military judge considers appropriate, unless the person in custody shows cause why the giving of an undertaking is not justified.

1998, c. 35, s. 42.

Release with or without undertaking

159.4 (1) The military judge may direct that the person be released without conditions or that the person be released on the giving of an undertaking to comply with any of the conditions referred to in section 158.6 that the military judge considers appropriate.

Variation of undertaking

(2) The undertaking under which a person is released may be varied

(*a*) by direction of a military judge on application with reasonable notice being given; or

(*b*) with the written consent of the person and the Director of Military Prosecutions.

1998, c. 35, s. 42.

Hearing may be adjourned

159.5 The military judge may adjourn the hearing on the military judge's own motion or on application, but the adjournment may not be for more than three clear days except with the consent of the person in custody.

1998, c. 35, s. 42.

Alternate means of hearing

159.6 (1) The military judge may direct that the hearing be conducted wholly or in part by the means of a telecommunications device, including by telephone, if the military judge is satisfied that the benefit of a hearing by that device outweighs the potential prejudice to the person in custody of conducting a hearing by that device.

Representations and factors to be considered

(2) In deciding whether to make the direction, the military judge shall take into account

(*a*) the location of the person in custody;

(*b*) the gravity of the offence;

(*c*) the circumstances under which the unit or element detaining the person in custody is deployed;

(*d*) the availability of counsel for the Canadian Forces and the person in custody;

(*e*) the limitations of available telecommunications devices;

(*f*) the time required to bring the person in custody and the person's counsel before the military judge; and

(*g*) any other matter that the military judge considers relevant.

1998, c. 35, s. 42.

Reasons

159.7 The military judge shall include in the minutes of any proceedings under this Division the reasons for any direction.

1998, c. 35, s. 42.

Duty of Director of Military Prosecutions

Review after 90 days

159.8 If the trial of a person who has been retained in custody has not commenced within ninety days after the day that person was last taken before a military judge, the Director of Military Prosecutions shall cause the person to be brought before a military judge to determine whether the continued retention of the person in custody is justified under section 159.2.

1998, c. 35, s. 42.

Review by Court Martial Appeal Court

Review of direction

159.9 (1) At any time before the commencement of a person's trial, a judge of the Court Martial Appeal Court may, on application, review any direction of a military judge under this Division to release the person from custody with or without an undertaking or to retain the person in custody.

Application of provisions

(2) The provisions of this Division apply, with any modifications that the circumstances require, to any review under this section.

1998, c. 35, s. 42.