

Office of the Judge Advocate General

Cabinet du Juge-avocat général

Canada



# Office of the Judge Advocate General

Brigadier-General Ken Watkin, QC



# The Position of the Judge Advocate General of the Canadian Forces

- The JAG is:
  - appointed by the Governor in Council
  - an officer of at least ten years standing at the bar who holds a rank that is not less than brigadier-general
  - holding office during pleasure for a term not exceeding four years but may be reappointed on the expiry of a term



# Roles and Responsibilities

- The Judge Advocate General acts as legal adviser to the Governor General, the Minister, the Department and the Canadian Forces in matters relating to military law
- The Judge Advocate General has the superintendence of the administration of military justice in the Canadian Forces



# Type of Services Provided

- Military Justice
- Operational Law  
*(International & Domestic Ops)*
- Military Administrative Law



# Type of Services Provided

- Prosecutions and appeals
- Defence Counsel services
- Military justice policy & research
- Military administrative law
- Legal training
- International law
- Operational law
- Field legal offices





# Office of the JAG

## Composition of the Office of the JAG:



- Legal Officers Regular Force
- Legal Officers Reserve Force
- Deployed Legal Officers
- Officer at Supreme Headquarters Allied Powers Europe
- NORAD HQ
- Exchange at the US Army JAG School
- Civilian Staff

# Organization

## Canadian Offices of the Judge Advocate General



Office of the JAG



Assistant Judge Advocate General



Deputy Judge Advocate



Regional Military Prosecutors



Directorate of Defence Counsel Services



Director Military Prosecutions



# Discipline



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 unshakable 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....

Maurice de Saxe: *Mes Reveries*, 1732

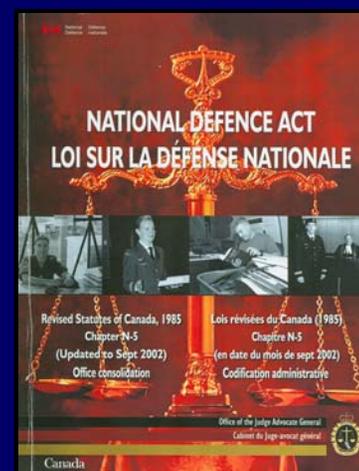
From time of ancient Rome down to the present day, the best armies have ever been the most disciplined...Whenever and wherever war takes place, it cannot occur unless those who participate in it are given to understand just whom they are and not allowed to kill, for what ends, under what circumstances and by what means. A body of [soldiers] that is not clear in its own mind about these things is not an army but a mob.

Martin Van Creveld "The Transformation of War"



# Legal Basis of the Military Justice System

- *The Constitution Act, 1867*
- *The National Defence Act*
- *The Queen's Regulations and Orders for the Canadian Forces*





# Legal Recognition of the Military Justice System

## • The *Canadian Charter of Rights and Freedoms* [subsection 11(f)]



–The Supreme Court of Canada has acknowledged the validity of the military justice system in two cases: *MacKay v. R.* and *R. v. Genereux*.

# The Charter

s.11(f): Any person charged with an offence has the right [...] except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury...

# Key Actors in the Military Justice System

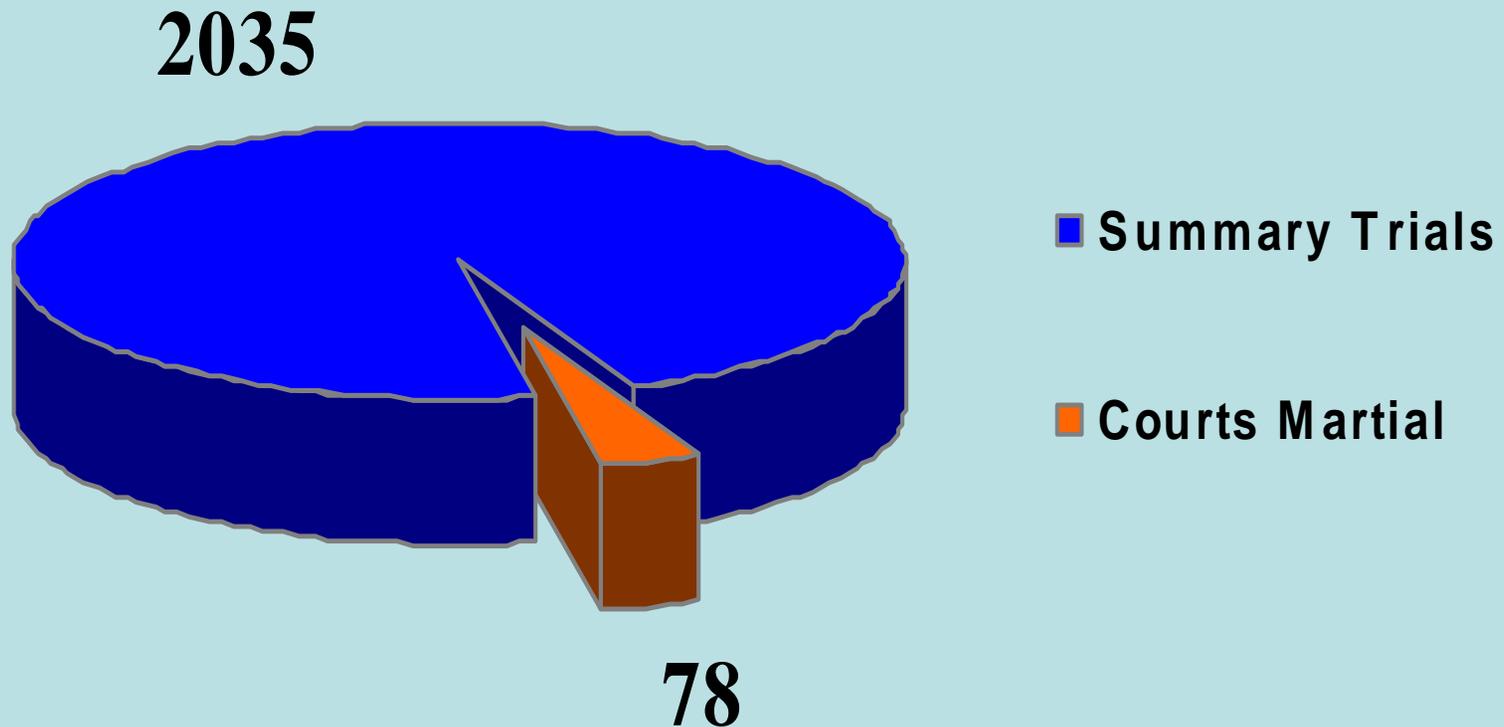
- Judge Advocate General
- Director of Military Prosecutions
- Director of Defence Counsel Services
- Office of the Chief Military Judge:
  - Military Judges
  - Chief Military Judge
  - Court Martial Administrator



# Types of Service Tribunals

- The *National Defence Act* creates a two-tiered system:
  - Summary Trial:
    - where most disciplinary matters are dealt with
    - presided over by members of the chain of command (presiding officers)
    - designed to deal with matters quickly and at the unit level
  - Court Martial:
    - formal court martial system
    - presided by a Military Judge or a Military Judge with a panel
    - more severe powers of punishment

# Disciplinary Proceedings 2007-2008









# Sentencing & Punishment

• The *NDA* authorizes the following punishments in relation to service offences:

- Imprisonment for life;
- Imprisonment for two years or more;
- Dismissal with disgrace from Her Majesty's Service;
- Imprisonment for less than two years;
- Dismissal from Her Majesty's Service;
- Detention;
- Reduction in rank;
- Forfeiture of seniority;
- Severe reprimand;
- Reprimand;
- Fine; and
- Minor punishments.



# Appeal & Review

- Courts Martial Decisions:
  - The *NDA* sets out the right of appeal by both the offender and the Minister
  - The first level of appeal is to the Court Martial Appeal Court of Canada (civilian judges)
  - The second level of appeal is to the Supreme Court of Canada (civilian judges\_
- Summary Trial Decisions:
  - Offenders have the right to request a review of a finding of guilty and the sentence imposed at summary trial.

## Billard v. Her Majesty (2008) (Court Martial Appeal Court)

A member of the Canadian Forces, whatever his or her rank, trade or occupation, is at all times a fighting soldier. The Appellant's offence did not relate to the performance of his routine duties as an intelligence operator; the evidence is that he performs those duties very well.... Rather, his offence bore directly on his failure to perform as a member of a fighting unit which was then under attack. It put at risk the lives and safety of himself and his comrades.

# Domestic Operations

- Provision of Services
- Disaster Assistance
  - Ice Storm
  - Manitoba Floods
- Assistance to Law Enforcement
  - Counter-Terrorism
  - Counter Drugs
  - Fisheries Protection
  - Immigration
  - Environment
- Aid of the Civil Power



# Boards of Inquiry

- Friendly Fire (Tarnak Farms) – Apr 2002
- Jowz Valley Mine Strike - Oct 2003
- Kabul Suicide Bomber – Jan 2004
- HMCS Chicoutimi – Oct 2004
- Snowbird Accident/Death – Dec 2004
- HMCS Montreal – Feb 2005
- Vehicle Rollover, Kandahar – Nov 2005
- Suicide Bomber, Kandahar – Jan 2006
- Helo Crash/HMCS Athabaskan – Feb 2006
- Friendly Fire (A-10) – Sep 2006
- Friendly Fire (FOB Robinson)-2006
- Detainee Handling – Feb 2007



# International Operations

- Rules of Engagement
- Targeting
- Review of Operational Plans for Compliance with the Law of Armed Conflict
- Legality of Weapons and Their Use (Laser Dazzlers, Cluster munitions)
- Investigation of War Crimes
- Handling of POWs/detainees

- Treatment of the Wounded and Sick
- Treatment of Civilians and Refugees
- Instruction in the Law of Armed Conflict
- Negotiation of Status of Forces Agreements and Memoranda of Understanding with Host Nations
- Host Nation Law
- Law of the Sea
- Rule of Law
- Bilateral/Multilateral Arrangements  
(NATO/NORAD)



- The Code of Service Discipline
- Access to information/Freedom of the Press
- Claims by or against the Crown
- Human Rights
- Material Acquisition
- Pensions and Estates
- Legal Aid



# Clash of Laws/Clash of Arms

- **International Humanitarian Law**

- *International Armed Conflict*
- *Non-International Armed Conflict*

## **International Human Rights Law**

- *Treaty based/Extra-territorial application/Law Enforcement*

## **Domestic Law (Canadian Charter of Rights and Freedoms)**

- *Extension beyond Canadian territory/non-Canadians/Law Enforcement*

# Federal Court Trial Division

**Before transferring a detainee into Afghan custody, General Laroche must be satisfied that there are no substantial grounds for believing that there exists a real risk that the detainee would be in danger of being subjected to torture or other forms of mistreatment at the hands of Afghan authorities.**

# Federal Court of Appeal

[26] The CF are not an occupying force—they are in Afghanistan at the request and with the consent of the governing authority. That authority has acquiesced to the extension of Canadian law to its nationals.

[29] There was evidence...that the Governments of Afghanistan and Canada have expressly identified international law, including international humanitarian law, as the law governing the treatment of detainees in Canadian custody.

[36] The Charter has no application to the situations therein described. There is no legal vacuum, considering the applicable law is international humanitarian law.

# Scope of the Law

Amnesty et. a. v. The CDS et. al. FCTD (12 March 2008)

- Domestic Law

- Canadian Charter of Rights and Freedoms
- Statutes (NDA, Criminal Code, War Crimes and Crimes Against Humanity Act)
- Case Law (Supreme Court of Canada)
- Military Orders

- International Law

- UN Security Council Resolutions
- International Treaties (ie. Geneva Conventions, North Atlantic Treaty, International Covenant on Civil and Political Rights, Convention Against Torture, Vienna Convention on Diplomatic Relations).
- UN Committees (Human Rights and Torture)
- Bilateral and Multilateral Arrangements (Afghan Compact, Technical Arrangements, SOFAs, Detainee Transfer Arrangements, Exchange of Letters)

- US Law

- US Supreme Court decisions

- European Law

- European Court of Human Rights
- European Commission of Human Rights
- UK Case Law

# UNSCR 1851

3. *Invites* all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order ***to embark law enforcement officials (“shipriders”)*** from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia....

6. ....the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken ***consistent with applicable international humanitarian and human rights law***;

# Targeting: Additional Protocol 1-Art 57

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, *which would be excessive in relation to the concrete and direct military advantage anticipated*

# Human Rights Approach

‘...even though it had not been established *beyond a reasonable doubt* that the bullet which killed Havva Ergi had been fired by security forces, the Court must consider whether the security forces’ operation had been planned and *conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk* to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush’

Ergi v. Turkey 31 Eur. H.R. Rep 388 (1998)

## Israeli Targeted Killing Case (2006)

...a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed

“The president told NATO and coalition commanders that the patience of the Afghan people is wearing thin with the continued killing of innocent civilians,” a statement from his office said. “Civilian deaths and arbitrary decisions to search people’s houses have reached an unacceptable level and Afghans cannot put up with it any longer”.

*Karzai Anger over Civilian Deaths, BBC News, May 2, 2007*

*Every time the innocent, even if they support the lawbreaker, are attacked or arrested, killed or imprisoned, the law is diminished and the ultimate objective of the people's will to support it is made more difficult to achieve.*

*General Sir Rupert Smith, The Utility of Force 2006*



# Rule of Law

The rule of law “expresses a preference for law and order within a community rather than anarchy, warfare and constant strife”.



# US Doctrine: Stability Operations

“[m]ilitary and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions.”







استاندارد علاج

- مریض و مجروح باید مورد احراز فوراز گردد. علاج  
بدرستی صورت گیرد. محافظت گرانده و بدون شام  
خشم و با محافظت گروهی و همچنان زینت تازوی  
بطور انسانی صورت گیرد
- سوختگی فوراز دامن زدنگی بنر و بلند برجهت  
میواند اذیت یکی از سطح کار کرد های جرم  
میباشد

Handwritten notes on a whiteboard, including the words "مراقبت" (care) and "اولیه" (first aid).

## **Brocklebank v. The Queen (1996)- Court Martial Appeal Court**

I agree with the prosecution--and I did not hear defence counsel say otherwise--that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner consistent with Canada's international obligations, the rule of law and simple humanity...





# Questions?

