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Book Review

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Abstract

The security of Canada and the safety of its inhabitants depend on the readiness of the Armed Forces. To maintain this readiness, service members are subject to special disciplinary standards and penal processes that ordinary courts are ill-suited to handle. A separate military justice system—which exists parallel to the civilian criminal justice system—imposes these distinct standards and enforces swift, stern discipline.

Book Review

Frontline Justice: The Evolution and Reform of Summary Trials in the Canadian Armed Forces by Pascal Lévesque[1]

DAVID GALVIN HEPPENSTALL[2]

THE SECURITY OF CANADA and the safety of its inhabitants depend on the readiness of the Armed Forces.[3] To maintain this readiness, service members are subject to special disciplinary standards and penal processes that ordinary courts are ill-suited to handle.[4] A separate military justice system—which exists parallel to the civilian criminal justice system—imposes these distinct standards and enforces swift, stern discipline.[5]

The overwhelming majority of disciplinary offences in the military are processed at summary trials: miniature criminal trials for minor offences.[6] The

1. (McGill-Queen's University Press, 2020) [*Frontline Justice*].
2. Juris Doctor 2021, Osgoode Hall Law School. This article is dedicated to my grandfather, Chief Warrant Officer Gerald Raymond Heppenstall CD (1922-1995), whose career with the Canadian Army would last for over thirty-seven years.
3. See *R v Généreux*, [1992] 1 SCR 259 at para 60 [*Généreux*].
4. *Ibid*. See also Lévesque, *supra* note 1 at 11-13.
5. See *ibid* at 16; *Généreux*, *supra* note 3 at paras 60, 62; Halsbury's Laws of Canada (online), *Military*, "Overview: Regulatory Framework: Statutes: *National Defence Act*" (I.1.(2).(a)) at HMI-2 "National Defence Act overview," (2019 Reissue); CED 4th (online), *Military Law*, "Military Law: Military Law Defined" (I.1) at §2.
6. See Lévesque, *supra* note 1 at 9, 49, 54; Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2018 to 31 March 2019*, by Geneviève Bernatchez, Catalogue No D1-16 (DND, 2019) at 14.

essence of these proceedings has remained unchanged over time; they provide prompt, fair justice to maintain the discipline of the troops with flexibility.[7] At a summary trial, the focus is on facts, not law.[8] Accordingly, to curtail legal debate, there are no lawyers present—not even legal counsel for the accused.[9] Further, the decision maker is not an independent military judge but a presiding officer who also participates in the fact-finding.[10] No transcript is kept, and no written reasons are required.[11] If found guilty, the accused could face "true penal consequences," including detention and a criminal record.[12]

In *Frontline Justice: The Evolution and Reform of Summary Trials in the Canadian Armed Forces* ("*Frontline Justice*"), Pascal Lévesque, former member of the Armed Forces who served as a legal officer for fifteen years, argues for reform.[13] While civilian summary justice has progressively evolved to better protect human rights, military summary justice has not evolved in the same way.[14] The military may have a greater concern for discipline, but Lévesque is concerned that summary proceedings breach the *Charter of Rights and Freedoms*.[15] Further, he argues that military summary justice has been isolated from oversight and kept apart from judicial actors; in 2018, the Auditor General of Canada "found that the Office of the Judge Advocate General did not review or study the summary trial processes in the last 10 years," possibly to avoid learning that the system does indeed breach the *Charter*.[16] Lévesque posits that, while the rights of service members are being illegitimately restricted, the summary trial system has remained overlooked and unchallenged.[17]

Military law is a highly specialized discipline. Constitutional challenges are rare, general knowledge is low, and the path to reform is steep. With few

7. See Lévesque, *supra* note 1 at 43, 136; Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces*, vol 2 (DND, 3 July 2019), art 108.02 [*QR&O*].
8. See Lévesque, *supra* note 1 at 50.
9. However, the accused is entitled to a minimally qualified "assisting officer" who takes a "limited role" in the process. *Ibid* at 46-47, 54, 97-98.
10. *Ibid* at 50, 73-74.
11. *Ibid* at 51, 82.
12. *Ibid* at 63, 66, 90, 102.
13. *Ibid* at 10.
14. *Ibid* at 33, 43, 182.
15. *Ibid* at 43, 69. See *Généreux*, *supra* note 3 at para 162; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
16. Lévesque, *supra* note 1 at 54-55, 182; Office of the Auditor General of Canada, *Report 3—Administration of Justice in the Canadian Armed Forces* (OAG, 2018) at para 3.75.
17. Lévesque, *supra* note 1 at 31, 57.

exceptions, individual service members convicted at a summary trial are unlikely to launch constitutional challenges due to the time, cost, and general unwillingness to be "perceived as troublemakers" in their tightly knit military community.[18] Further, there are few lawyers with the necessary expertise to effectively convey military law to a civilian judge.[19] There are also only a few specialists, scholars, and public officials with the necessary background to contribute meaningfully to the dialogue on reform.[20] Finally, the average Canadian's knowledge of military affairs is limited and often informed inaccurately by popular culture (*e.g.*, by *JAG* or *A Few Good Men*).[21] Lévesque suggests that this shallow pool of knowledge makes it more likely for reforms to be based on emotion rather than reason.[22] To make the case for objective reforms, Lévesque aims to educate an ambitiously wide audience—from military law scholars to the general public.[23]

Frontline Justice is an important contribution to Canadian legal literature. When military law is compared to other legal fields, "literature is scarce."[24] At best, academic consideration has been described by the Supreme Court of Canada—in the words of Justice L'Heureux-Dubé—as "not abundant."[25] In fact, one commentator, Professor Andrew Flavelle Martin, observed that the literature "virtually ignore[s]" military lawyers (*i.e.*, legal officers like Lévesque).[26] With *Frontline Justice*, Lévesque successfully closes a significant gap. He makes few assumptions and provides the reader with an accessible, detailed description of the mechanisms of the summary trial system together with a historical account of its origins and how it has responded to change over time.[27] This solid footing allows him to articulate and defend a clear analysis of how that system breaches the *Charter*.[28]

Frontline Justice is timely. Lévesque's contribution to the literature is arriving at a moment when Parliament has recently enacted new legislation to reform the military justice system.[29] It is also coming immediately prior to an independent

18. *Ibid* at 57, 75.
19. *Ibid* at 57.
20. *Ibid* at 151.
21. *Ibid*.
22. *Ibid*.
23. *Ibid* at 10-11, 151.
24. *Ibid* at 21.
25. *Généreux*, *supra* note 3 at para 159.
26. "Legal Ethics and Canada's Military Lawyers" (2019) 97 Can Bar Rev 100 at 101.
27. See "A Description of the Summary Trial" in Lévesque, *supra* note 1, 32.
28. "Charter Breaches" in *ibid*, 56; "Reasonably Available Alternatives" in *ibid*, 111; "Can Breaches Be Demonstrably Justified under Section 1?" in *ibid*, 132.
29. *Ibid* at 154-55.

review of the military justice system. In 2020, Justice Fish, retired judge of the Supreme Court of Canada, was appointed as the Independent Review Authority.[30] At the time *Frontline Justice* was written, the legislation had not yet passed. The government's latest attempt at reform, Bill C-77, was still making its way through Parliament.[31] In tandem with proposing a new model for military justice, Lévesque critically engages with the then-proposed legislation, identifies shortcomings, and advocates for options for reform.[32] Today, Bill C-77 is law, and Lévesque's recommendations remain relevant in charting the next path forward "to evolve the system so it reflects current Canadian values."[33]

To explain the function of military justice, Lévesque takes the reader on a guided tour of the summary trial system from the bottom to the top. To accomplish this, he uses second-person narrative to put the reader in a variety of situations. At the outset, the reader becomes different service members facing penal consequences.[34] Next, the reader becomes a unit legal advisor providing counsel to the presiding officer of a summary trial.[35] As lawyers are not present at summary trials, the reader's perspective is limited to being on the receiving end of a telephone call. These narratives contextualize legal concepts, but, most importantly, these authentic experiences of military life effectively orient and engage the reader.

Lévesque also uses second-person narrative to frame the function of military justice within the broader notion of military discipline.[36] For example, in one vivid account, you are engaging in routine base activities when, suddenly, sirens blare, and mortal danger is imminent. You escape peril—barely evading a rocket-propelled grenade—as a direct result of your training and self-discipline.[37] With this vignette, Lévesque masterfully hammers home the crucial importance of military discipline. In sum, his use of second-person narrative successfully

30. See Department of National Defence, News Release, "Minister of National Defence appoints the Independent Review Authority to conduct the Third Independent Review of the National Defence Act" (16 November 2020), online: <www.canada.ca/en/department-national-defence/news/2020/11/minister-of-national-defence-appoints-the-independent-review-authority-to-conduct-the-third-independent-review-of-the-national-defence-act.html> [*Independent Review*]. See also *National Defence Act*, RSC 1985, c N-5.
31. *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019 (1st Sess), c 15 (assented to 21 June 2019).
32. *Supra* note 1 at 28; "Reform Proposals" in *ibid*, 150.
33. *Independent Review*, *supra* note 30.
34. Lévesque, *supra* note 1 at 3-8.
35. *Ibid* at 32-33.
36. *Ibid* at 16.
37. *Ibid* at 18.

educates the reader about the purpose of military discipline while also situating the function of military justice in a realistic context.

To describe the legal foundation of military justice, Lévesque starts at the beginning: the Middle Ages. In medieval England, there was no standing army; instead, feudal armies were raised for individual conflicts.[38] The rules for each conflict—including disciplinary matters—were laid down in *Articles of War*, regulations that would persist only for the duration of the conflict.[39] In the wake of the English Revolution in 1688, a standing army was situated "*equably* between the Crown and Parliament" to resolve long-standing tensions and prevent divided loyalties.[40] In doing so, a legislative function was granted to Parliament, and disciplinary power was granted to the Crown.[41] With the growth of the "profession of arms," it became necessary to provide the Crown with robust powers to enforce discipline.[42] Such powers were enshrined in the 1689 *Mutiny Act*, which created a new legal distinction between soldiers and ordinary subjects.[43] This is the origin of military law.

Grounded in this historical perspective, Lévesque describes the modern Canadian military justice system. The *National Defence Act* outlines the *Code of Service Discipline*, which is binding upon all service members (*i.e.*, officers and non-commissioned members of the regular, special, and reserve forces).[44] A service member accused of breaching the *Code* is tried at one of two procedural levels: court martial or summary trial. For the most serious offences, trial is by formal court martial.[45] In contrast, for the five least serious breaches, the matter

38. *Ibid* at 33.
39. *Ibid*.
40. Charles M Clode, *The Military Forces of the Crown; Their Administration and Government*, vol 1 (John Murray, 1869) at 16, 83-84 [emphasis added].
41. *Ibid*.
42. John Boughey, *The Elements of Military Administration and Military Law*, 5th ed (William Webb, 1880) at 99.
43. *An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service* (UK), 1689, 1 Will & Mar, c 5, cited in *ibid* at 100.
44. *Supra* note 30, s 60.
45. See *Généreux*, *supra* note 3 at paras 68-69. But see *National Defence Act*, *supra* note 30, s 70 (certain very serious offences, such as murder, cannot be tried in the military justice system at all).

cannot be tried by court martial, and a summary trial is obligatory.[46] For all other offences, the accused has the right to elect for a court martial.[47]

When compared to a summary trial, a court martial is an exercise of greater formality with additional procedural safeguards, such as more stringent rules of evidence.[48] In practice, the vast majority of breaches are charged as one of the five minor offences in order to guarantee proceeding by summary trial.[49] Yet even where the right to a court martial is offered, accused service members frequently feel pressured against electing for one.[50] The convention of trying certain offences exclusively by summary trial has deep historical roots. The five minor offences that can only be tried summarily were enumerated in the English *Army Discipline and Regulation Act* of 1879.[51]

The core of *Frontline Justice* is Lévesque's meticulous, clear, and cogent analysis of the ways in which summary trials breach the *Charter*. Some arguments were already well-known, while others are novel.[52] Firstly, he argues that "the weakest point of the current system" is the lack of independent adjudicators.[53] As presiding officers are members of the executive branch, lacking in both financial security and security of tenure, the accused's right to an independent and impartial tribunal is breached.[54] Secondly, the lack of transcript undermines the notion of a fair and transparent process.[55] Specifically, it "diminishes offenders' ability to fully know

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46. See Lévesque, *supra* note 1 at 49; *QR&O*, *supra* note 7, art 108.17; *National Defence Act*, *supra* note 30, ss 85, 86, 90, 97, 129. Lévesque notes:

> A 'minor offence' is an offence contrary to one of five sections of the *National Defence Act*, namely section 85 ("Insubordinate Behaviour"), section 86 ("Quarrels and Disturbances"), section 90 ("Absence Without Leave"), section 97 ("Drunkenness"), and section 129 ("Conduct to the Prejudice of Good Order and Discipline"), but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment. In the military legal community, those 'minor offences' are colloquially known as the 'baby five' (*Supra* note 1 at 49).

47. See Lévesque, *supra* note 1 at 49; *QR&O*, *supra* note 7, art 108.17; *National Defence Act*, *supra* note 30, s 162.1.
48. See Lévesque, *supra* note 1 at 89-90.
49. *Ibid* at 49.
50. *Ibid* at 148-49. See Canada, Department of National Defence, *Annual Report of the Director of Defence Counsel Services*, by Delano Fullerton (DDCS, 2014) at para 19.
51. See *National Defence Act*, *supra* note 30, ss 85, 86, 90, 97, 129; *Army Discipline and Regulation Act 1879* (UK), 42 & 43 Vict, ss 10(2), 11, 15, 19, 40, reprinted in Boughey, *supra* note 42 at 111.
52. See Lévesque, *supra* note 1 at 30.
53. *Ibid* at 73.
54. *Ibid* at 72, 162. See *Charter*, *supra* note 15, s 11(d).
55. See Lévesque, *supra* note 1 at 82.

the case they have to meet for review, impeding their right to make a full answer and defence."[56] Thirdly, as summary trial is not available to high-ranking officers, they must face trial by court martial regardless of the severity of the offence.[57] This "substantive inequality" results in structural differential treatment based on rank[58]—a characteristic "difficult to change, or changeable only at unacceptable personal cost"[59]—and violates the *Charter*.[60] Fourthly, the accused person "does not have a right to be represented by legal counsel at a summary trial," breaching their right to a fair trial.[61] In sum, joining the Armed Forces entails voluntary assumption of risk, but Lévesque argues that this commitment "is not a *carte blanche* to water down [service members'] basic legal rights."[62]

The tension between fair justice and prompt discipline weaves through the book and throughout legal history. For example, in the case of prison discipline, where the need for swiftness is also high, Lord Denning found that allowing an accused inmate legal representation would result in unacceptable delays.[63] To balance this tension, Lévesque employs a full *Oakes* analysis to determine if these *Charter* breaches are saved by section one.[64] At the first stage, he concludes that the societal concern for swift military discipline—and national security—is both pressing and substantial.[65] However, at the second stage, he argues that summary trials limit the rights of service members using means that are neither rationally connected to the objective of military discipline nor minimally impairing nor proportionate.[66] The prose of Lévesque's *Oakes* analysis is sufficiently technical for a court's reasons for judgment but is also accessible to a broader audience.

As part of his argument for reform, Lévesque compares and evaluates the available alternatives that serve both discipline and justice.[67] First, he reviews

56. *Ibid* at 83, 162. See *Charter*, *supra* note 15, ss 7, 11(d).
57. *I.e.*, colonels and generals. See Lévesque, *supra* note 1 at 47.
58. *Ibid* at 85.
59. *Ibid* at 87, citing *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 60.
60. See Lévesque, *supra* note 1 at 85, 95, 163; *Charter*, *supra* note 15, s 15.
61. Lévesque, *supra* note 1 at 96, 162; *QR&O*, *supra* note 7, art 108.14 (note B); *Charter*, *supra* note 15, ss 7, 11(d).
62. *Supra* note 1 at 153.
63. *Ibid* at 98-99. See *Fraser v Mudge* [1975] 1 WLR 1132 at 1133-34, cited in *Howard v Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution*, [1984] 2 FC 642.
64. See "Can Breaches Be Demonstrably Justified under Section 1?" in Lévesque, *supra* note 1, 132; *Charter*, *supra* note 15, s 1; *R v Oakes* [1986] 1 SCR 103.
65. See Lévesque, *supra* note 1 at 134.
66. *Ibid* at 137-38, 143.
67. "Reasonably Available Alternatives" in *ibid*, 111.

methods for maintaining discipline in police forces and prisons in Canada.[68] Second, he examines the approaches taken by other common law military jurisdictions. These approaches include "judicialization," which strengthens procedural safeguards; "depenalization," which removes penal punishments; and hybrid approaches, which combine elements of the two.[69] In each case, he carefully weighs the advantages and disadvantages but concludes that the alternatives have "struck a better balance between protecting individual rights and maintaining discipline."[70] Through these chapters, his study of the legal principles is analytically exhaustive and persuasive.

Lévesque argues for a new model of military justice—a balanced equilibrium capable of meeting three separate needs: "political control, human rights, and operational needs."[71] The centrepiece of *Frontline Justice* is Lévesque's set of detailed recommendations to remedy *Charter* breaches. Of the necessary changes, he recommends: (1) to "remove ordinary offences from summary jurisdiction," (2) to "state that summary trials do not create criminal offences," (3) to "record summary proceedings," (4) to "eliminate rank-based distinction," (5) to "create a right of appeal to Summary Appeal Court Martial," (6) to "make election an unequivocal waiver of rights," and (7) to "give [the accused] meaningful access to legal advice."[72]

Lévesque's call for change joins a chorus. In 1986—the early post-*Charter* era—David J. Corry remarked that "if constitutional rights are to mean anything at all, military regulations should not be upheld when they infringe these rights."[73] In 1994, Janet Walker predicted that "[e]volving standards for procedural fairness…will undoubtedly form the basis for fresh challenges to the military justice system" and reasoned that service members who defend the rule of law are entitled to its benefit as much as any other citizen.[74] More recently, in 2016, Michel W. Drapeau and Joshua M. Juneau decried summary trials as an unfair "anachronism of a bygone era" and called for immediate reforms.[75]

After decades of relative stagnation in the military justice system, Bill C-77 became law in 2019.[76] This new legislation entirely reformed the summary

68. *Ibid* at 112, 117.
69. *Ibid* at 120, 123, 126.
70. *Ibid* at 130.
71. *Ibid* at 28.
72. *Ibid* at 163-70.
73. "Military Law under the Charter" (1986) 24 Osgoode Hall LJ 67 at 111.
74. "Military Justice: From Oxymoron to Aspiration" (1994) 32 Osgoode Hall LJ 1 at 3, 32.
75. "Summary trials: remain unchanged in more than 300 years" (2016) 23 *Esprit de Corps* 46 at 46.
76. *Supra* note 31.

trial system by, *inter alia*, abandoning its criminal and penal aspects.[77] This depenalization approach replaces "trials" with "hearings" where the burden of proof is the civil standard instead of the criminal standard.[78] Instead of penal punishments, service members may receive "service infractions."[79] Most significantly, this "removes detention from [the] commanders' toolbox" when dealing with undisciplined service members.[80] However, even without the possibility of the deprivation of liberty, service members may still face lasting consequences including reduction of rank and punitive financial measures.[81]

Lévesque argues that summary trials "are at a crossroads" and that Parliament's approach in Bill C-77 was flawed.[82] While depenalization dodges constitutional issues, it provides no clarity regarding the legal rights of service members.[83] Crucially, key issues relating to "transcript, legal representation, and judicial oversight" remain unaddressed.[84] For multiple reasons, Lévesque favours a judicialization approach.[85] In particular, he argues that "it represents more of an evolution based on our military tradition and less of a paradigm shift."[86] Lévesque anticipates legal challenges and urges observers to review how the reforms are implemented through regulations.[87]

In *Frontline Justice*, Lévesque considered it his duty to contribute to improving the military justice system, a system that must balance discipline and justice and operate even during extraordinary times, including during war and large-scale conflicts.[88] He succeeds. Lévesque connects a solid and compelling case for reform with a wide audience. Former Judge Advocate General Major-General Blaise Cathcart remarked that "the military justice system must always fiercely promote and protect the very democratic values and the rule of law that our men and women in uniform willingly put themselves in harm's way and are willing to die for."[89] Lévesque champions the view that our service members deserve nothing less.

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77. See Lévesque, *supra* note 1 at 154.
78. *Ibid*.
79. *Ibid*.
80. *Ibid* at 155.
81. *Ibid* at 183.
82. *Ibid* at 182.
83. *Ibid* at 161.
84. *Ibid* at 161-62.
85. *Ibid* at 31, 156.
86. *Ibid* at 183.
87. *Ibid*.
88. *Ibid* at 144, 152, 155. See also *Généreux*, *supra* note 3 at para 60.
89. Lévesque, *supra* note 1 at 153, citing BB Cathcart, "Speaking Notes for MGen/mgén B.B. Cathcart" (Military Law Conference delivered at the Faculty of Law, University of Ottawa, 13 November 2015) at 9.