TO: SENATE COMMITTEE ON NATIONAL SECURITY, DEFENCE AND VETERANS AFFAIRS

SUBJECT: WRITTEN SUBMISSION – BILL C-11 MILITARY JUSTICE MODERNIZATION ACT

Issue

1. Bill C-11 is presented as a solution to military justice problems relating to sexual misconduct in the Canadian Forces (CF)[1]. On the contrary, it will likely give rise to further problems. Leadership deficiencies are not remedied with legislation. Failures by CF leadership to act in a timely, reasonable, and fair manner to maintain discipline, efficiency, and morale are not ameliorated by removing jurisdiction over discipline.

Background

2. Bill C-11 is not new. It is a reintroduction of Bill C-66, which died on the Order Paper when Parliament was prorogued on 6 January 2025. Bill C-11, like Bill C-66, is driven largely by the findings of Report of the Independent External Comprehensive Review ("Arbour Report")[2]. While recommendations from the Report of the Third Independent Review Authority to the Minister of National Defence of the National Defence Act by former Supreme Court Justice Morris J. Fish ("Fish Report")[3] are also relevant, the Arbour Report, and public discourse regarding allegations of sexual misconduct in the CF, are clearly the principal catalysts. Bill C-11 represents an arbitrarily selective approach to improving discipline in the CF.

3. While Mme Arbour's methodology has rightly been criticized[4], that is not the principal basis for my objections to legislative changes proposed by Bill C-11. Even if one accepts the results of the methodology employed by Mme Arbour, the conclusion that "criminal offences of a sexual nature" must be removed from the "domestic jurisdiction" of the Code of Service Discipline is not supported by the purported facts.

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[1] While the term 'Canadian Armed Forces' has been in vogue for some time, I use the term repeatedly used in the *National Defence Act*, RSC 1985, c N-5 [*NDA*] to describe "… the armed forces of [His] Majesty raised by Canada …" rather than the "Service" that constitutes those forces. See also: Rory Fowler, "A brief rant about misconceptions concerning the organization of the Canadian Forces" (19 April 2017) online: Blog/Cunningham Swan <https://cswan.com/wp-content/uploads/2017/04/Blog-102-Rory-Fowler-April-19-2017-1ST-LINK.pdf>.

[2] The Hon. Louise Arbour, Report of the Independent External Comprehensive Review, 20 May 2022 <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/report-of-the-independent-external-comprehensive-review.html> [Arbour Report].

[3] The Hon. Morris J Fish, "Report of the Third Independent Review Authority to the Minister of National Defence Pursuant to subsection 273.601(1) of the National Defence Act, RSC 1985, c N-5 (30 April 2021), online: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/acts-regulations/third-independent-reviews-nda.html> [Fish Report].

[4] Brian C. Cox, "The Arbour Report and Supporting Effective Cultural Reform in the Canadian Armed Forces" (December 2022) Queen's University, Centre fir International and Defence Policy, online: https://www.queensu.ca/cidp/publications/special-policy-reports/arbour-report-and-supporting-effective-cultural-reform-canadian >.

4. A consistent theme in the discourse that followed the Arbour Report is that CF leadership failed to create an environment in which victims of sexual misconduct felt safe to raise concerns/complaints and that the same leadership consistently failed to take appropriate action. Bill C-11 will not correct that problem and may well set conditions to perpetuate or aggravate it.

5. The government press release entitled "Reintroduction of the Military Justice System Modernization Act"[5] identified four key areas or initiatives:

a. The removal of the CF's investigative and prosecutorial jurisdiction over Criminal Code sexual offences committed in Canada;

b. Implementation of various recommendations from the Fish Report, including the perceived need for greater 'independence' for select military justice actors;

c. Excluding military judges from the summary hearing system, and expand access to Victim Liaison Officers, under the Declaration of Victims Rights, to individuals acting on behalf of a victim; and,

d. Amendments to the *National Defence Act* to align provisions related to sex offender information and publication bans with the amendments made to the *Criminal Code*.

6. Some recommendations are not controversial. This commentary will focus on issues that are either problematic or indicative of unresolved relevant issues. The chief among these is the removal of jurisdiction within the Code of Service Discipline for CF authorities to investigate and prosecute allegations of so-called "sexual offences" described under the *Criminal Code* and which purportedly arise in Canada.

7. Rather than categorizing the points of discussion in the manner presented by the government, I will focus on the myths and mischaracterizations upon which many of these problematic recommendations have been predicated, including:

a. The incongruity between the proposed amendments and the purpose of the Code of Service Discipline;

b. The lack of evidence that supports the assertion that these changes will enhance the maintenance of discipline, efficiency, and morale in the CF;

c. The myth of the benefit of greater 'independence' for select actors; and,

d. The lack of safeguards regarding the implementation of these changes.

[5] National Defence, "Reintroduction of the Military Justice System Modernization Act" (26 September 2025) online: <https://www.canada.ca/en/department-national-defence/news/2025/09/reintroduction-of-the-military-justice-system-modernization-act.html>.

Discussion

8. I have previously discussed these issues at length in the context of Bill C-66.[6]

9. **Issue One – The Purpose and Role of the Code of Service Discipline (CSD)**. The purpose of the CSD is to maintain the discipline, efficiency, and morale of the CF.[7] This mantra is repeated by both the CF chain of command and the legal officers within the Office of the Judge Advocate General (OJAG). It has been consistently cited in litigation, over more than two decades, in which the Director of Military Prosecutions (DMP) has sought to develop, and maintain, a broad application of the CSD and DMP's prosecutorial discretion.[8] For greater clarification, Parliament has indicated that this "… relates to the discipline, efficiency and morale of the Canadian Forces even when those persons are not on duty, in uniform or on a defence establishment."[9] The Supreme Court of Canada (SCC) has upheld this very broad proposition.[10]

10. So why are the current government, the leadership of the CF, and the Judge Advocate General of the Canadian Forces (JAG) abandoning this principle in a piece-meal fashion? Why is the CSD fit for purpose for other forms of criminal misconduct? Why is it fit for purpose for allegations of sexual offences arising outside Canada?

11. The CSD is not a tool for the JAG, military lawyers generally, or the military police. It is a tool for the CF chain of command to maintain discipline, efficiency, and morale.

12. **Issue Two – Lack of Evidence in Support of the Legislative Change**. The CSD is not the only tool available to the chain of command to maintain discipline, efficiency and morale; it does not function in isolation of other statutory powers and functions. It is part of a governance matrix, which includes other mechanisms, including: the adjudication of grievances[11]; and determinations following Administrative Review[12], including decisions relating to Remedial Measures[13] or other so-called 'administrative decisions', which are better described as "statutory decision-making". Statutory powers and functions also extend to mundane decisions such as postings, promotions, and selection of personnel for deployment or courses. And these can be abused.

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[6] Rory Fowler, "Bill C-66 – Initial Observations" (21 March 2024), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/bill-c-66-initial-observations/>. See also: Rory Fowler, "Bill C-11 and the Standing Committee on National Defence" (10 February 2026), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/bill-c-11-and-the-standing-committee-on-national-defence/>.
[7] *NDA*, n 1, s 55.
[8] *R v Généreux*, [1992] 1 SCR 259; *R v Reddick*, 1996 CanLII 17940 (CMAC), 5 CMAR 485; *R v Nystrom*, 2005 CMAC 7 (CanLII), 7 CMAR 60; *R v Larouche*, 2014 CMAC 6 (CanLII), 7 CMAR 852; *R v Moriarity*, 2015 SCC 55; *R v Cawthorne*, 2016 SCC 32; *R v Stillman*, 2019 SCC 40; *R v Edwards*, 2024 SCC 15.
[9] *NDA*, n 1, s 52(2).
[10] *Moriarity*, n 8, *supra*. See also: *R v Royes*, 2016 CMAC 1, para 26, paras 42 to 51.
[11] *NDA*, n 1, s 29; Queen's Regulations and Orders for the Canadian Forces [QR&O), Chapter 7 - Grievances; DAOD 2017-0 Military Grievances; DAOD 2017-1 Military Grievance Process.
[12] DAOD 5019-2 Administrative Review.
[13] DAOD 5019-4 Remedial Measures.

13. When CF leaders fail to use the tools available to them properly – i.e., in an effective, timely, fair, and reasonable manner – the fault does not lie with the tool. It lies with the operator.

14. Civil courts of criminal jurisdiction are not responsible for the leadership of the CF. Neither are courts martial. However, courts martial are a manifestation of a process that does lie within the sphere of influence of the CF chain of command.

15. Mme Arbour recommended that 'sexual offences', alleged to have arisen in Canada, should be the exclusive purview of civil authorities, both in terms of investigation and prosecution. This is predicated upon the conclusion that the CSD – including the functions not only of military prosecutors and courts martial, but also military police and the CF chain of command – is not fit for purpose.

16. According to previous 'technical briefings' by the JAG, the rationale for the proposed changes is that this would provide "clarity" to CF personnel including complainants. That is a disingenuous characterization. It is motivated as much, or more, by the supposed loss of confidence that select people have expressed in the capacity of the CF to investigate and prosecute sexual offences. Certainly, that sentiment is repeated regularly in news media and social media.

17. But how is removal of jurisdiction for select offences in select circumstances going to re-instill confidence? How will it reinvigorate accountability? And why is this limited only to 'sexual offences' and why only within Canada?

18. If we are to believe that the chain of command has either failed to act, or has over-reacted, when subordinates have raised allegations of sexual misconduct, why should we have confidence that the same isn't true for non-sexual offences that are similarly related to the marginalization of select CF members?

19. **Issue Three – Myth of Independence**. While military justice actors must have sufficient independence to perform their duties and functions, the proposed amendments will not markedly enhance independence. There is little or no evidence to support the conclusion that the proposed amendments will improve the functioning of the CSD.

20. First, we must understand what we mean by 'independence'. It is not a binary state; it is best characterized as falling on a sliding scale. An apt way to characterize 'independence' is by asking two questions: From whom? To what extent?[14]

21. At one end of the spectrum is 'judicial independence', which requires that judges benefit from: (i) security of tenure; (ii) financial security; and, (iii) administrative or

[14] See my comments at: Rory Fowler, "The Military Justice System – Use it or Lose it" (17 October 2021), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/the-military-justice-system-use-it-or-lose-it/>.

institutional independence.[15] Judicial independence was examined in the 2024 judgment of the SCC in *Edwards*[16], a judgment about which I have expressed reservations[17].

22. There is no evidence that DMP has been improperly influenced by the CF chain of command, or by the JAG, or that appointment by the Governor in Council (GiC) would grant such independence. On the contrary, there is evidence that DMP's decision-making has been influenced by political decision-makers and by news media pressures. The joint decision by DMP and the Canadian Forces Provost Marshal (CFPM) to cease prosecuting and investigating most allegations of sexual offences[18] was clearly the product either of: (a) direction purportedly coming from the (then) Minister of National Defence, and which, contrary to express provisions in the *NDA*[19], does not appear to have been communicated through, respectively, the JAG and the Chief of the Defence Staff (and Vice Chief of the Defence Staff); or, (b) the indirect impact of the Minister's public statements.[20]

23. Influence tends to be external to the CF. In *R v Captain Stacey*[21], prosecution before a court martial was stayed for delay. The accused was charged with "harassment" contrary to s 129 of the *NDA* on 24 April 2018, following a complaint to the military police on or about 31 October 2016. The judgment by the court martial does not explain why it took 18 months to lay a charge. This charge would have required pre-charge legal advice from the OJAG and, if the charges were laid by the military police, that pre-charge legal advice would have come from a prosecutor with the Canadian Military Prosecution Service (CMPS), which falls under the supervision of DMP. However, in August 2018, the military prosecutor decided not to prefer charges.

24. Shortly thereafter, the alleged victim complained to the JAG.[22] A new prosecutor was assigned to review the matter and, on 1 November 2018, that prosecutor preferred the charge. By that point, the process had already incurred six months of post-charge

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[15] *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3; *R v Lippé*, [1991] 2 SCR 114; *Valente v The Queen*, [1985] 2 SCR 673; *The Queen v Beauregard*, [1986] 2 SCR 56; *MacKay v The Queen*, [1980] 2 SCR 370; *Généreux*, n 8.

[16] *Edwards*, n 8.

[17] Afton David & Rory Fowler, "*R v Edwards* and Independence of Canadian Military Judiciary", (2025) 103:1 Can Bar Rev 153 <https://cbr.cba.org/index.php/cbr/article/view/5003/4592>; Rory Fowler, "*R v Edwards*, 2024 SCC 15 … Meh …" (29 April 2024), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/r-v-edwards-2024-scc-15-meh/>; Afton David & Rory Fowler, "Independence of the Canadian Military Judiciary: Much to be Desired?" (November 2024), online: Canadian Global Affairs Institute <https://www.cgai.ca/independence_of_the_canadian_military_judiciary_much_to_be_desired>.

[18] Joint Statement of the Canadian Forces Provost Marshal and the Director of Military Prosecutions (5 November 2021), online: <https://www.canada.ca/en/department-national-defence/news/2021/11/joint-statement-of-the-canadian-forces-provost-marshal-and-the-director-of-military-prosecutions.html>.

[19] *NDA*, n 1, ss 18, 18.5, 165.17.

[20] Rory Fowler, "Minister of National Defence Announcement – Sexual Misconduct" (5 November 2021), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/minister-of-national-defence-announcement-sexual-misconduct/>; Rory Fowler, "The MND's New Policy and the Rule of Law" (19 November 2021), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/the-mnds-new-policy-and-the-rule-of-law/>.

[21] *R v Captain Stacey*, 2019 CM 3017.

[22] As an aside, less than a week later, DMP promulgated its Canadian Military Prosecution Service (CMPS) Complaints Policy – *Captain Stacey*, *id*., para 6(h).

delay. There was no undue influence from the CF chain of command outside DMP and the CMPS. However, it would not be unreasonable to conclude that the reversal of the initial exercise of prosecutorial discretion was driven by a fear that the complainant would have raised a public criticism had the charge not been preferred.

25. The recent failed prosecution of Lieutenant-General Whelan illustrates what happens when prosecutorial decisions are driven by public perception, rather than objective analysis of relevant evidence.[23] It was not undue or improper influence by the CF chain of command that precipitated the problematic conduct of the military police regarding disclosure in the prosecution of Lieutenant-General Trevor Cadieu. That prosecution was stayed for delay that was directly attributable to repeated delays by the military police in providing portions of the investigation file to the civilian prosecutor.[24]

26. Legislation that requires DMP to be appointed to a 7-year term marginally enhances security of tenure (which is already provided for at s 165.1 of the *NDA*)[25]. However, appointment by the GiC does not materially alter this factor. Nor does it insulate DMP from influence arising from media pressure or political pressure. Nor will it alter potential for influence over a DMP who has ambitions beyond that position. The same is true for the position of Director Defence Counsel Services (DDCS).

27. Conversely, legal officers posted to Defence Counsel Services (DCS) can be concerned that, if they do their jobs "too well", they could suffer veiled consequences. DCS can be viewed as working 'against' the chain of command and the rest of the OJAG. Their role is vital to ensuring that members of the CF and the Canadian public have confidence in military justice. However, they are dependent upon the goodwill of the JAG and the senior leadership of the OJAG for career advancement. Appointment of DDCS to a 7-year term by the GiC does nothing to alter that dynamic.

28. What the proposed amendment does do is reduce the scope by which the JAG superintends military justice. Bill C-11 will amend s 9.2 of the *NDA* with ambiguous language "respecting the independence of" the CFPM, DMP and DDCS. Where is the evidence that this is not already the case? Presumably, the JAG will retain the responsibility to superintend military justice. By virtue of amendments arising from Bill C-77, "military justice" means the "Code of Service Discipline".[26] But, if Bill C-11 becomes law, the JAG will have little authority over DMP – certainly not regarding the principal

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[23] Rory Fowler, "Why is Lieutenant-General Whelan being court martialed?" (1 October 2023), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/why-is-lieutenant-general-whelan-being-court-martialed/>.
[24] Rory Fowler, "Delay and the Prosecution of LGen Cadieu (ret'd)" (15 October 2023), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/delay-and-the-prosecution-of-lgen-cadieu-retd/>.
[25] As an aside, the similar protection of tenure for DDCS, found at s 249.18 of the *NDA*, n 1 – namely, the benefit of an 'Inquiry Committee' – was introduced in the evocatively named *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c. 24. The security of tenure for DMP, though clarified in the *Strengthening Military Justice in the Defence of Canada Act*, dated to Bill C-25, enacted in 1999.
[26] *NDA*, n 1, s 2: "military justice means all aspects of the application of the Code of Service Discipline". Although why it is necessary to define one statutory legal term of art as synonymous with another statutory legal term of art seems to border on redundant and pointless.

functions of that office. The JAG will not superintend military justice pertaining to courts martial. Then again, 'superintendence' is ill-defined.

29. Even without Bill C-11, DMP[27] and DDCS[28] enjoy security of tenure. DDCS only gained protections commensurate with those of DMP in 2013 even though, arguably, DDCS is more vulnerable to criticism by the chain of command of the CF and the JAG because of the adversarial role that DDCS plays. Both DMP and DDCS have greater security of tenure than the JAG. Why doesn't the JAG have such protections?

30. Thus, Bill C-11 does not ameliorate any real concerns over independence, but it does give rise to some pertinent questions regarding accountability.

31. There is a consistent theme throughout the past few years regarding failures by the military police to conduct timely investigations, delayed disclosure, leaked military police investigations, and overall effectiveness. The CF has had an arm's length body – the Military Police Complaints Commission (MPCC) – for 25 years. Recently, the MPCC delivered scathing Reports in the Fortin Public Interest Investigation (PII) [29] and the Hiestand PII[30]. The CFPM was largely dismissive of these conclusions. And we have witnessed little improvement in accountability by the military police.

32. While there isn't much evidence of 'lessons learned' by the CF regarding the allegations raised against several General Officers and Flag Officers (GOFO), or the prosecution of a select number of these GOFO, one common thread throughout these matters arises from shortcomings by the military police.[31] And those are not the only shortcomings that have been evident.[32]

33. **Issue Four – Lack of Safeguards and Conceptual Shortcomings**. Bill C-11 isn't a solution. However, it will certainly give rise to problems.

34. If it is enacted, military police will, presumably have less exposure to the investigation of sexual offences. Military prosecutors and military defence counsel will have less experience prosecuting, and defending against, such allegations. Military judges will have less experience presiding over courts martial concerning such offences. But, since jurisdiction for allegations arising outside Canada will remain, they will still be

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[27] *NDA*, n 1, s 165.1.
[28] *NDA*, n 1, s 249.18.
[29] MPCC-2023-006.
[30] MPCC-2022-017, MPCC-2022-041, MPCC-2022-043.
[31] Rory Fowler, "What can we learn from the recent prosecutions of GOFO?" (23 September 2024), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/what-can-we-learn-from-the-recent-prosecutions-of-gofo/>.
[32] Rory Fowler, "Why are the military police threatening to charge a civilian?" (11 January 2024), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/why-are-the-military-police-threatening-to-charge-a-civilian/>; Rory Fowler, "More Military Police Shenanigans" (9 October 2024), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/more-military-police-shenanigans/>; Rory Fowler, "When are we going to take military police accountability seriously?" (02 February 2025), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/when-are-we-going-to-take-military-police-accountability-seriously/>.

called upon, respectively, to investigate, to prosecute, to defend, and to preside over such charges. It's just that they will do so with markedly less experience.

35. Bill C-11 purports to eliminate the jurisdiction of military police (and the chain of command) to investigate allegations of sexual offences. However, there are 'loopholes' insofar as evidence may still be "secured". Relevant authorities will still have powers of arrest and powers to conduct searches incident to arrest. It's not a true prohibition, and there is scope for disingenuous abuse. And assurances that we can rely on Crown actors to not abuse their powers is weak reassurance.[33]

36. On the other side of the equation, civilian investigators will now be responsible for investigating allegations in which witnesses may be located in diverse locations across Canada, or even overseas[34]. The difficulties that such investigators may encounter can potentially encourage CF authorities to assist with such investigations to the point that one of the central proposed objectives of Bill C-11 would be eroded significantly.

37. However, now that investigation of sexual misconduct (that allegedly arises in Canada) will purportedly be removed from the chain of command and any 'force multipliers' that the chain of command might otherwise employ or upon which they might rely, CF leadership will be hampered in their leadership functions. Arguably, they will be given a ready excuse for delayed or limited action responding to such allegations when the investigation lies with civil authorities.

38. Alternatively, CF leadership may feel compelled to act, due to political or media pressure, or complaints from complainants/victims, notwithstanding that they will have little information due to jurisdictional limitations. An accused/respondent, who faces jeopardy in a separate civilian justice system, can then face the untenable circumstance of having to answer to allegations in different processes with different, or non-existent, disclosure. There are multiple examples of the CF chain of command unreasonably and unfairly attempting to 'prosecute' criminal or disciplinary wrongdoing with administrative (read: statutory) processes that are ill-suited to testing disputed evidence. The problem is that these processes are typically not public. I have regularly commented on the dangers of using so-called "administrative processes" for disciplinary purposes. Recently, the Inspector General of the Australian Defence Force (IGADF) completed a report that discussed a similar phenomenon.[35]

39. It remains unclear how any action the chain of command might take, whether under the Military Justice at the Unit Level ("MJUL") or under statutory processes described in DAOD – such as DAOD 5019-2 Administrative Review or DAOD 5019-4 Remedial Measures – would be deconflicted with civilian investigation and prosecution of such

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[33] *R v Bain*, [1992] 1 SCR 91, per Cory J, 103-104; *R v Nur*, 2015 SCC 15, para 95.
[34] There is a realistic possibility that, even for allegations arising within Canada, one or more witnesses may be deployed or posted outside Canada by the time an investigation commences.
[35] James Gaynor CSC, "Inquiry into the Weaponization of the Military justice System" (19 May 2026) online: Government of Australia/IGADF <https://www.igadf.gov.au/sites/default/files/2026-05/IGADF%20INQ%2001_24%20-%20Inquiry%20Report.pdf>; in particular, the discussion regarding abuses arising from concurrent disciplinary and administrative action.

offences. Difficulty arising from co-ordination of such disparate processes was one of the principal reasons why sexual offences arising in Canada were brought within the jurisdiction of the Code of Service Discipline a generation ago.

40. Little or no explanation has been offered regarding protection of an accused's rights under statutory processes disparate processes are employed by markedly different statutory actors. These are not 'case-by-case' issues. The CF chain of command has repeatedly demonstrated a lack of familiarity with, and understanding of, procedural safeguards, even when those safeguards are described clearly in policies.

41. Under the previous version of summary justice within the CSD (i.e., summary trials), and expressly relying on advice from the OJAG, CF decision-makers repeatedly and improperly denied accused the right to elect trial by court martial.[36] CF decision-makers have attempted to 'prosecute' service infractions and offences using remedial measures under DAOD 5019-4.

42. And what if a civilian prosecutor chooses not to prosecute a sexual offence, as arose in *R v MacPherson*?[37] Would the CF then try to prosecute allegations as disgraceful conduct under s 93 of the *NDA*[38] or as an offence contrary to s 129 of the NDA[39]? Despite the so-called 'clarity' offered in Bill C-11, would an accused still be subject to venue-shopping when the glare of media scrutiny again turns to the CF?

43. One vital element which seems to have escaped the media coverage on both Bill C-66 and C-11 is the issue of access to justice.[40] By transferring 'sexual offences' to the civilian system, the accused lose their entitlement to representation by Defence Counsel Services.[41] CF members charged with 'sexual offences' in the civilian criminal justice system will invariably spend tens of thousands of dollars on counsel who may or may not have adequate knowledge of the military environment. Most, if not all, of these accused will not be entitled to provincial legal aid. One wonders if this is an unstated objective of the proposed legislation. If one of the goals is to increase the rate of conviction (and it is debatable that an increase in a conviction rate represents an improvement of justice),

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[36] *Noonan v Canada (Attorney General)*, 2023 FC 618.
[37] *R v MacPherson*, 2022 CMAC 8, aff'g 2021 CM 2014. See also: Rory Fowler, "*R v MacPherson*, 2021 CM 2014 – What were they thinking?" (14 September 2021), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/r-v-macpherson-2021-cm-2014-what-were-they-thinking/>.
[38] *NDA*, n 1, s 93; Consider *R v Corporal Spriggs*, 2019 CM 4002, in which DMP withdrew charges of sexual assault contrary to s 271 of the *Criminal Code*, RSC 1985, c C-46, and prosecuted under s 130 of the *NDA*, and substituted a charge for disgraceful conduct, contrary to s 93 of the *NDA*, in order to avoid the impact of the Judgment of the Court Martial Appeal Court of Canada in *Beaudry v R*, 2018 CMAC 4.
[39] *R v Lieutenant-Colonel Jonasson*, 2019 CM 2002; *R v Lieutenant-Colonel Jonasson*, 2019 CM 2002.
[40] Rory Fowler, "Impact of Access to Justice on Sexual Misconduct Charges" (23 June 2022), online: Law Office of Rory G Fowler/Blog <https://roryfowlerlaw.com/impact-of-access-to-justice-on-sexual-misconduct-charges/>.
[41] CF members charged with 'service offences' under the CSD can be represented by Defence Counsel Services. This removes a key barrier to access to justice within the military justice system, thereby improving fairness – and application of the presumption of innocence – significantly. This in an integral aspect of the military justice system, which is lost as a result of the proposed amendments in Bill C-11.

then increasing barriers to access to justice is one way to accomplish that goal, albeit one that is unacceptable in a free and democratic society.

Positive Elements

44. Bill C-11 is not without merit. The proposed legislation appears to cast a wider net for the talent pool for military judges. Currently, only officers in the CF who are barristers or advocates with at least 10 years' standing in their respective Bar are eligible to be appointed as military judges. Bill C-11 would extend eligibility to non-commissioned members (NCM), recognizing that a commission is not a prerequisite. However, it raises an equally pertinent question: why is eligibility limited only to serving officers and NCM?

45. Second, drafters of Bill C-11 recognize what the SCC refused to acknowledge in *R v Edwards*: subjecting military judges to summary discipline under the CSD fundamentally undermines their independence. When the CSD was bifurcated in 2022, the exemption removing military judges from the jurisdiction of summary trials repealed. Military judges presently fall within the jurisdiction of summary hearings and can be tried for any of the vaguely drafted services infractions the QR&O.

Conclusion

46. Although there are a few positive elements flowing from Bill C-11, many of the elements it attempts to address miss the mark. The problem the CF faces is not the jurisdiction of the Code of Service Discipline. The problem is not the tools that are available to CF leaders. The problem is a failure of leadership, and a failure to hold leaders accountable. Junior CF personnel are routinely admonished in administrative and disciplinary processes for a failure to uphold CF Code of Values and Ethics. The same is not true for senior leaders.

47. Ironically, CF statutory decision-makers have frequently failed to uphold CF Values and Ethics when punishing subordinates for purportedly failing to uphold CF Values and Ethics. There is no evidence that any of these decision-makers have ever been subjected to remedial measures or other corrective actions when their faults have been exposed through judicial review or grievances.

48. This isn't just about sexual misconduct. The central issue is accountability. Bill C-11 does not improve the mechanisms to hold CF leaders accountable for inaction or bad decision-making. On the contrary, it provides them with a convenient excuse to avoid action. It creates uncertainty regarding the use of mechanisms that will remain available to CF leadership. It creates loopholes to supposed barriers to jurisdiction which can be abused. It creates conditions for abuse of process when so-called 'administrative mechanisms' are used for disciplinary purposes.

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