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THE SOMALIA AFFAIR AND THE TRANSFORMATION OF CANADIAN MILITARY JUSTICE

PRESTON JORDAN LIM[†]

I. INTRODUCTION

On the evening of 16 March 1993, soldiers of the Canadian Airborne Regiment (CAR) captured, beat, and ultimately killed an unarmed, 16-year-old Somali teenager named Shidane Abukar Arone. Canadian troops were serving in Somalia as part of the United Task Force, a UN-sanctioned and US-led peace operation authorized to establish “a secure environment for humanitarian relief operations in Somalia”.¹ Somalia, riven by conflict between warlords, was suffering from a famine of catastrophic proportions. The first Canadian troops arrived in late 1992 and deployed to the town of Belet Huen, located in south-central Somalia. As historian Grant Dawson has noted, the Canadians accomplished a great deal in Somalia; the CAR, for example, rebuilt infrastructure, provided

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¹ SC Res 794, UNSCOR, 47th year, 3145th Mtg, UN Doc S/RES/794 (3 December 1992) 3. It is important to note that the Canadian contribution to the United Task Force in Somalia did not only consist of paratroopers from the Canadian Airborne Regiment. Instead, the CAR served as the kernel of the Canadian Airborne Regiment Battle Group, which was staffed by a total of 845 personnel. The Battle Group consisted of the three infantry commandos, as well as a headquarters commando, an engineer squadron, a service commando, and an armoured squadron. Lt Col Carol Mathieu commanded the Battle Group. The overall commander of Canadian troops in Somalia—designated Canadian Joint Force Somalia (CJFS)—was Colonel Serge Labbé. Lt Col Mathieu was subordinate to Col Labbé. Lt Col Mathieu’s Battle Group formed the main kernel of CJFS, which also consisted of a Canadian Navy ship, the *HMCS Preserver*.

medical training to Somalis, and obtained uniforms for the local police force.² Many of Canada's soldiers, however, became disillusioned with their mission and thought the local population to be ungrateful.³ The Canadians suffered from the "effects of hard rations, illness, and the limited opportunities for communication with their families" and faced an endemic thievery problem whereby Somali adults, teenagers, and even children would infiltrate the Canadian camp.⁴

The Canadian contingent in Somalia failed to develop proper procedures for dealing with thieves. Instead, Lieutenant Colonel Carol Mathieu, commanding officer of the CAR, instructed his troops in January 1993 that "they could shoot at thieves under certain circumstances."⁵ And on the morning of 16 March, Major Anthony Seward, the officer commanding 2 Commando of CAR, held an orders group and instructed his platoon commanders to "capture and abuse the prisoners."⁶ That evening, three paratroopers captured Shidane Arone in an abandoned US Seabees Compound located beside the 2 Commando Compound. After Arone was taken into custody, Master Corporal Clayton Matchee spent the evening "severely and brutally" beating the

² See Grant Dawson, *"Here is Hell": Canada's Engagement in Somalia* (Vancouver: UBC Press, 2007) at 152.

³ See Sherene Razack, *Dark Threats & White Knights: The Somalia Affair, Peacekeeping, and the New Imperialism* (Toronto: University of Toronto Press, 2004), at 43. See also *ibid* at 162–63.

⁴ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, vol 1 (Ottawa: Minister of Public Works and Government Services Canada, 1997) (Chair: Honourable Justice Gilles Lévesque) at 318 [Dishonoured Legacy].

⁵ *Ibid*, vol 5 at 1061. See generally *R v Mathieu*, 1995 CMAC-379, 5 CMAR 363 [Mathieu].

⁶ See Dishonoured Legacy, *supra* note 4, vol 1 at 55. As the Somalia Commission explained, the major infantry unit in the Canadian Army order of battle is the battalion, which consists of companies. The Canadian Airborne Regiment was a battalion-sized infantry unit, and its companies were termed "commandos". Commandos/companies each consist of three platoons, which each consist of three sections. See also Dishonoured Legacy, *supra* note 4 at 319.

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teenager with the help of Private Kyle Brown.⁷ A number of other paratroopers heard screams coming from the bunker where Arone was detained but did nothing to intervene.⁸

The murder of Shidane Arone shocked Canadians. After all, Canada was proud of its rich peacekeeping tradition. Former Prime Minister Lester Pearson had received a Nobel Peace Prize for his role in organizing the United Nations Emergency Force, which deployed to the Near East in the aftermath of the Suez Canal Crisis. In the years since, Canadians had proudly watched as the Canadian Forces (CF)⁹ deployed in support of various UN operations. How could the country of peacekeeping, Lester Pearson, and multiculturalism be guilty of such serious disciplinary offences? How could the Airborne Regiment, which had served honourably on past operations, have so utterly disgraced the flag in Somalia?

Moreover, over the following months and years, Canadians discovered that paratroopers had committed a litany of offences in Somalia. As the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (“Somalia Commission”) made clear, 16 March was not an exception or a one-off, but was instead a symptom of a much deeper malaise. Earlier during the mission, in February 1993, Canadian troops had fired into a crowd gathered at Belet Huen’s Bailey Bridge.¹⁰ On 4 March, just days before the death of Shidane Arone, Captain Michel Rainville, leader of CAR’s

⁷ Dishonoured Legacy, *supra* note 4, vol 1 at 321.

⁸ See *ibid*, vol 1 at 324.

⁹ See Postmedia News, “Canada’s Military Is Getting a New Name—Again”, *National Post* (12 March 2013), online: <nationalpost.com/news/canada/109anadas-military-is-getting-a-new-name-again>. The Harper government renamed the “Canadian Forces” as the “Canadian Armed Forces” in 2013. Since most—though not all—of the events addressed in this paper occurred before 2013, this article will generally employ the term “Canadian Forces” to refer to the military. It should also be noted that the term “Canadian Forces” is still current under s 14 of the *National Defence Act*. See *National Defence Act*, RSC 1985, c N-5, s 14. In referring to the modern military, however, this article will employ the term “Canadian Armed Forces.”

¹⁰ See Dishonoured Legacy, *supra* note 4, vol 2 at 653.

Reconnaissance Platoon, took his men on a mission to entrap any Somalis trying to break into the compound of the Field Squadron of Engineers.¹¹ Two Somalis—Ahmed Afraraho Aruush and Abdi Hunde Bei Sabrie—approached the Engineers' compound; instead of capturing both Somalis, Rainville's men fired live ammunition, killing the former and injuring the latter. And the day after Arone's death, on 17 March, Canadian soldiers "shot a Somali national at the compound of the International Committee of the Red Cross in Belet Huen."¹² The Canadian government could not merely dismiss the conduct of troops in Somalia as the work of a few bad apples but had to confront the prospect of more systemic issues, ranging from poor leadership to a faulty military justice system.

Unsurprisingly, the Somalia Affair—as the collective abuses and disciplinary offences committed by Canadian troops in Somalia were termed—has attracted no shortage of discussion, controversy, and scholarship. Some scholars have blamed the Canadian Forces' troubles on the post-war deterioration of military professionalism. David Bercuson argued in *Significant Incident* that "[a]t the heart of the Canadian army's deepest crisis lies the struggle to ensure that the army's leaders are, first and foremost, true warriors whose morality, integrity, and courage in leadership in battle and in peace set the tone for the entire chain of command."¹³ John A. English, in his *Lament for an Army*, similarly cast the Somalia Affair as a "symptom . . . of a waning military professionalism."¹⁴ Christi Siver, while focusing on the toxic subculture of the CAR's 2 Commando, noted that the military did not have a robust law of war or peacekeeping training

¹¹ See *ibid*, vol 1 at 298.

¹² *Ibid*, vol 2 at 653.

¹³ David Bercuson, *Significant Incident: Canada's Army, the Airborne, and the Murder in Somalia* (Toronto: McClelland & Stewart, 1996) at 114 [Bercuson, Significant Incident].

¹⁴ John A English, *Lament for an Army: The Decline of Canadian Military Professionalism* (Concord: Irwin Publishing, 1998) at xi.

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curriculum in place, which consequently impacted the CAR's professionalism.¹⁵

Other writers have focused on the shortcomings of the government's response to the Somalia Affair. Sherene Razack characterized Canada's mission in Somalia as a contemporary manifestation of colonialism and contended that the Somalia Commission, appointed by the Government to fully evaluate Canadian conduct in Somalia, failed to confront the systemic racism afflicting the Canadian Forces.¹⁶ Peter Desbarats, one of the Somalia Commission's three Commissioners, argued that the Government prematurely shut down the Inquiry before it could investigate cover-up attempts by senior members of the Canadian government.¹⁷

More recently, scholars have examined the legacy of the Somalia Affair and gauged the extent to which the government and CF implemented reforms. Colonel (as he then was) R.T. Strickland argued that the Somalia Affair served as a "catalyst", inspiring wide-ranging change in the CF; the success of reform was partially due, Strickland suggested, to the "civilian imposition of these reforms" on the military.¹⁸ Bercuson also assessed the reforms positively, concluding that the CF "eventually began to march forward with determination to a new professionalism rooted in the history and values of Canadian society".¹⁹ In 2015, Colonel Bernd Horn and Dr. Bill Bentley assessed the implementation of educational reforms, warning that the military was in danger once again of paying "insufficient attention . . . to the vital importance of

¹⁵ See Christi Siver, *Military Interventions, War Crimes, and Protecting Civilians* (Cham: Palgrave Pivot, 2018) at 119.

¹⁶ See Razack, *supra* note 3 at 9, 129.

¹⁷ See Peter Desbarats, *Somalia Cover-Up: A Commissioner's Journal* (Toronto: McClelland & Stewart, 1997), at 217–19.

¹⁸ Richard Tod Strickland, "Crisis to Catalyst: The Strategic Effects of the Somalia Affair on the Canadian Armed Forces" (2017) at 45–46, online (pdf): *US Army Command and General Staff College* <cgsc.contentdm.oclc.org/digital/collection/p4013coll3/id/3665>.

¹⁹ David Bercuson, "Up From the Ashes: The Re-Professionalization of the Canadian Forces After the Somalia Affair" (2009) 9:3 *Can Military J* 37 at 37 [Bercuson, "Up From the Ashes"].

... the professional development, especially higher education, of the officer corps.”²⁰ In 2018, Katie Domansky also evaluated the state of educational reforms, concluding that the CF not only made the necessary reforms, but had also implemented a “plan for continued change.”²¹

Finally, several commentators have compared the Somalia Commission with other commissions of inquiry. Justice John Gomery pointed to the amount of litigation surrounding the Somalia Commission and concluded that the “inquiry simply ran out of time.”²² Professor Gerard Kennedy cited the Somalia Commission as an example of an unsuccessful inquiry, suggesting that political pressure may have resulted in an overly broad mandate.²³

Despite the richness of the extant literature, few scholars have paid the requisite attention to the Somalia Affair’s impact on Canada’s military justice system. Such a gap is a significant one, since almost all of the investigations and commissions established by the government agreed that the Somalia Affair highlighted serious deficiencies in the military justice system and consequently called for revolutionary reform. The government and CF responded effectively to those calls for reform. Ultimately, the Somalia Affair and the reforms it sparked inaugurated the modern era of Canadian military justice. Many aspects of the modern military justice system find their origin in the extraordinary period of intellectual ferment and reform that commenced in 1995 and continued into the current millennium.²⁴

²⁰ Bernd Horn & Bill Bentley, *Forced to Change: Crisis and Reform in the Canadian Armed Forces* (Toronto: Dundurn, 2015) at 132.

²¹ Katie Domansky, *Post-Somalia Reform in the Canadian Armed Forces: Leadership, Education, and Professional Development* (PhD Dissertation, University of Calgary, 2018) at 216 [unpublished].

²² Justice John H Gomery, “The Pros and Cons of Commissions of Inquiry” (2006) 51:4 McGill LJ 783 at 791.

²³ Gerard J Kennedy, “Public Inquiries’ Terms of Reference: Lessons from the Past—And for the Future” (2018) 41:1 Man LJ 317 at 340.

²⁴ See The Honourable Morris J Fish, *Report of the Third Independent Review Authority to the Minister of National Defence* (Ottawa: Department of National Defence, 2021) at i [Fish Report]. Justice Fish adopted a wide view of military

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In this article, I first tell the story of how the Somalia Affair sparked military justice reform before distilling broader lessons from the government and CF's reforms. Part 2 of the article breaks down the post-Somalia military justice reforms into three phases. In Phase I, which lasted from 1993–95, the CF adopted an “internal” approach to reform, attempting to manage the fallout from the Somalia Affair on its own. The insufficiency of the internal approach led the government to implement Phase II, which lasted from 1995–98 and was marked by an “external” approach to reform. The government commissioned a range of outside experts to analyze the failures of the CF and suggest reforms. I break these external reports down into two types—the comprehensive and the targeted—and suggest that the interplay between and complementarity of these two types of investigations ultimately drove the success of the reform period. During the course of Phase III, which commenced in 1998 and has lasted to the present day, the government and the CF implemented the reforms generated during Phase II, established robust monitoring mechanisms, and ultimately inculcated a culture of continual reform.

Part 3 of the article distils broader lessons from the government and CF's handling of the Somalia Affair. First, I argue that Ottawa's response to the Somalia Affair can serve as a template for other countries that have to deal with war crimes or serious disciplinary offences. Next, I turn to contemporary Canada and argue that modern Canadian policy-makers and military lawyers must live out a reformist mindset if they are to ensure the continued health of the military justice system.

justice in his report. This paper takes a somewhat narrower approach towards the military justice system. I focus predominantly on the Code of Service Discipline, the operation of summary trials and courts martial, prosecution and defence counsel services, and military police arrangements. See generally Bercuson, “Up From the Ashes,” *supra* note 19; Horn & Bentley *supra* note 20; Domansky, *supra* note 21.

II. RESPONDING TO SOMALIA

A. PHASE I: THE INSUFFICIENCIES OF THE INTERNAL APPROACH

Had the CF acted swiftly and decisively in response to the disciplinary breakdown that occurred in Somalia, there might not have been a need for an external investigation at all. Admiral John Anderson, who succeeded General John de Chastelain as Chief of the Defence Staff in 1993, convened a board of inquiry under Major General Thomas Frank de Faye to investigate the “leadership, discipline, operations, actions, and procedures of the Canadian Airborne Regiment Battle Group”.²⁵ This section argues that the de Faye inquiry had the potential to succeed, given the inclusion of a civilian on the board and its success in sparking initial military reforms. Yet because of its limited mandate, the de Faye Board ultimately failed to suggest revolutionary reform. The CF was thus unable to maintain “the practice of self-regulation.”²⁶ The Canadian government deemed the board’s recommendations to be insufficient and terminated the CF’s “internal approach” to military reform by establishing several external investigations.

Boards of inquiry have a wide set of powers: under the *National Defence Act*, for example, boards of inquiry can summon persons and compel them to give evidence under oath, among other powers.²⁷ Yet the de Faye Board of Inquiry had a limited mandate, which consisted of two phases. In its first phase, the inquiry was to focus on matters “other than those that were the subject of investigations or other legal proceedings”.²⁸ Specifically, the board could not inquire into “any allegation of conduct that would be a

²⁵ Dishonoured Legacy, *supra* note 4, vol 1 at 341.

²⁶ Strickland, *supra* note 18 at 42.

²⁷ *National Defence Act*, RSC 1985, c N-5, s 45(2). Since the de Faye Board of Inquiry, the CF has generally refrained from convening boards of inquiry to investigate significant matters. The CF did convene a board of inquiry into the 2002 Tarnak Farm incident, but the trend consists of a move away from such boards. The demise of the board of inquiry falls outside the scope of this paper. One unanswered question is whether the de Faye Board of Inquiry cemented an aversion on the part of CF leaders towards the board of inquiry.

²⁸ Dishonoured Legacy, *supra* note 4, vol 1 at 341.

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service offence under the *National Defence Act*, and in particular any *Criminal Code* offence”.²⁹ The second phase was to address remaining issues after the various courts-martial of Canadian personnel had concluded.³⁰ The inquiry released its Phase I report on 19 July 1993 and, among other findings, concluded that 2 Commando of the CAR was characterized by particularly poor discipline. Yet the board’s overall conclusion was that the “professional values and attitudes” of the Canadian contingent in Somalia “were of the highest order” and that there were few indications of systemic fault in either the CAR or the CF more broadly.³¹

Evaluation of the board’s performance has been tepid at best. Razack disapprovingly wrote that according to the inquiry, “the violence had simply been the work of a few bad apples, men witnesses described . . . as ‘rambunctious young men who get into trouble on R&R.’”³² David Bercuson assessed the board more neutrally, contending that its report “pointed to much deeper malaises in the army, but noted that its investigation had been limited both by resources and by its mandate.”³³ The insufficiency of the de Faye report was perhaps most clearly demonstrated by the internal, military response to the board’s report. At the end of 1993, the CF and Department of National Defence (DND) appointed a Somalia Inquiry Liaison Team (SILT), headed by Major General Jean Boyle and designed to coordinate CF/DND’s response to the Somalia Affair. In response to the de Faye Board’s report, Major General Boyle wrote an assessment that criticized the “serious deficiencies and weaknesses in the de Faye Board’s analysis and recommendations” and warned that some of the board’s conclusions “did not appear to be borne out by the testimony actually heard by the board.”³⁴ Such scathing criticism—

²⁹ *Ibid*, vol 5 at 1514.

³⁰ See *ibid*, vol 1 at 341.

³¹ *Ibid*, vol 1 at 344.

³² Razack, *supra* note 3 at 121.

³³ Bercuson, “Up From the Ashes,” *supra* note 19 at 35.

³⁴ Dishonoured Legacy, *supra* note 4, vol 1 at 341.

by no less than the senior Canadian officer tasked with responding to the Somalia Affair—indicates that the board failed to produce a comprehensive and adequate report. Bound by a narrow mandate, the de Faye Board simply did not have the requisite time to study, evaluate, and comprehend the range of issues which the Somalia Commission ultimately scrutinized.

Yet despite the board's failures, it did have some redeeming features. First, the board was formed as a mixed body of civilian and military experts. Professor Harriet Critchley served as a member of the board, which also benefitted from the services of civilian special advisors.³⁵ According to Domansky, the "board set a precedent in that it represented the first time that civilians were appointed as members and special advisors on an investigation into internal military matters."³⁶ Appointing a mixed board was a good idea. There was strong precedent in foreign military history for such a decision. As noted by Professor Martin Friedland, who prepared a report on Canadian military justice for the Somalia Commission, the United States military had responded to the infamous My Lai incident by appointing the Peers Inquiry, which included two prominent New York lawyers.³⁷ The effect of the appointment of civilians to the Peers Inquiry, according to another commentator, was to blunt the demand for an outside panel.³⁸

A mixed board offers certain advantages over a board comprised exclusively of military personnel. Namely, civilian members are likely to offer fresh perspectives on military issues. The issue, however—and one that possibly occurred in the de Faye case—is that civilian members can become captured by the military members of the board and thus merely go along with traditional military conclusions. Scholarship on the behaviour of civilian judges who hear military cases furnishes insight into the related phenomenon of capture in the administrative law context. Eugene Fidell, writing in the American legal context, has

³⁵ See *ibid*, vol 5 at 1513.

³⁶ Domansky, *supra* note 21 at 126.

³⁷ Martin L Friedland, *Controlling Misconduct in the Military* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 111.

³⁸ See Seymour M Hersh, *Cover-Up* (New York: Random House, 1972) at 232.

concluded that those judges without a service background may feel “at a disadvantage when dealing with [legal] cases that involve military matters” and thus may approach military issues with excessive caution.³⁹ Fidell suggests that judges with “real military experience may be less likely to defer.”⁴⁰ One potential solution to excessive deference—at least in the case of a board—would be to appoint a mix of civilians, military members, and individuals who straddle the line: veterans, for example, who understand both military and civilian life. Given the de Faye Board’s deeply imperfect Phase I report, it is probable that capture occurred. Perhaps if the CF had appointed non-Regular-Force personnel or more civilians to the board, the de Faye inquiry might have generated more useful recommendations. Internal boards of inquiry are not necessarily doomed to fail, and modern militaries might employ the de Faye Board’s mixed composition as a template, while simultaneously instituting safeguards to prevent capture and ensure an appropriate degree of independence from the chain of command.

Second, despite its underwhelming nature, the de Faye report did inspire military reforms. Admiral Anderson, the Chief of the Defence Staff, disagreed with some of the de Faye recommendations, but agreed with and implemented others. For example, he ordered senior military leadership to revamp CAR’s training regimen in response to the de Faye recommendation that the CAR needed better leadership.⁴¹ Admiral Anderson also directed his Deputy Chief to review Canadian Forces doctrine on the handling of field detainees, as well as existing rules of engagement.⁴² Clearly, the military was not static and managed to implement key reforms before the initiation of the external period. To dismiss the de Faye report completely is thus to blur the history of Canadian military reform. Yet it is also evident that the de Faye recommendations did not go far enough, particularly with respect

³⁹ Eugene R Fidell, “Justice John Paul Stevens and Judicial Deference in Military Matters” (2010) 43 UC Davis L Rev 999 at 1018.

⁴⁰ *Ibid.*

⁴¹ See Dishonoured Legacy, *supra* note 4, vol 1 at 345.

⁴² See *ibid* at 346.

to the military justice system. Had the de Faye Board proceeded to the second phase of its mandate, it might well have generated useful recommendations regarding the military justice system. Before the de Faye Board could continue on, however, the Canadian government decided that the military's internal approach was insufficient and that true reform would only come through an external approach.

B. PHASE II: THE TRIUMPHS OF THE EXTERNAL APPROACH

In January 1995, Canadian media released two old videotapes that shocked the country. The first depicted an Airborne corporal who complained in front of the camera that he had not killed enough Somalis yet (the corporal used the n-word in the video clip).⁴³ The second video, filmed in the summer of 1992, depicted the Airborne's brutal hazing practices; a black paratrooper "on a leash" was "led around on all fours with the words 'I love the KKK' scrawled on his back".⁴⁴ The videos represented an affront to the Canadian public and government and underscored the need for complete reform of the CAR and the CF more broadly. Luke Fisher, writing for *Maclean's* shortly after the release of the videotapes, warned that "for Canada's elite paratroopers, last week may well have been the beginning of the end."⁴⁵

Chidley was right. As January 1995 came to a close, Minister of National Defence David Collenette disbanded the Airborne Regiment.⁴⁶ The Canadian government did not stop there. Instead, over the next several years, the government commissioned multiple external commissions and reports into various aspects of the Canadian Forces. The total array of external reports constitutes a veritable alphabet soup. With the Somalia Affair now a distant memory for many Canadians, it has become all too easy to simplify

⁴³ See Luke Fisher, "Canada's Shame", *Maclean's* 108:5 (30 January 1995) 14, at 14.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ See "Canadian Airborne Regiment Disbanded", *AP News* (24 January 1995), online: <apnews.com/article/c94a303799e540e8b27a9fe64a543959>.

the story of reform and to over- or under-emphasize certain reports. Colonel Strickland, for example, contended that the “primary driver for change was ultimately *The Young Report*” rather than the Somalia Commission.⁴⁷ Razack, in contrast, focused almost exclusively on the Report of the Somalia Commission.⁴⁸ Peter Desbarats, one of the Somalia Commissioners, contemptuously dismissed the panel headed by former Supreme Court Justice Brian Dickson, arguing that the panel’s “real focus” was a “concerted attempt to gain access to our research on military justice.”⁴⁹ The truth, of course, is a great deal muddier than the modern observer would prefer. Each of the reports played a role in driving military reform. None of the reports was perfect on its own. Instead, it was only by pulling from each of the various reports that the government was able to lay the groundwork for the modern era of Canadian military justice.

This section of the article thus argues that the triumph of the external phase lies in the diversity of the various external reports. There were two complementary types of external investigation. The section first analyzes the impact on military justice reform of the Somalia Commission and argues that the Commission’s primary function was to produce a comprehensive account of the Somalia deployment. The section then analyzes those reports with a comparatively narrow mandate—the two Dickson Reports, the Young Report, and the Belzile Report—and argues that these reports were designed to scrutinize particular aspects of the military system. It was the combination of these two strands of reports—a comprehensive search for the truth combined with targeted investigations into particular problems within the military system—that brought about the success of the external period.

Given the sheer number of reports, it is helpful to first summarize the chronology of change. The Somalia Commission was established on 20 March 1995 and submitted its final report

⁴⁷ Strickland, *supra* note 18 at 34.

⁴⁸ See e.g. Razack, *supra* note 3 at 11, 118, 134, 141.

⁴⁹ Desbarats, *supra* note 17 at 249.

(“Somalia Commission Report”) on 30 June 1997.⁵⁰ Chief Justice Brian Dickson’s Special Advisory Group was created by ministerial direction on 17 January 1997 and released its first report (“Dickson I Report”) on 14 March 1997.⁵¹ Minister of National Defence Douglas Young released his “Report to the Prime Minister on the Leadership and Management of the Canadian Forces” (“Young Report”) shortly thereafter, on 25 March 1997.⁵² Chief Justice Dickson’s Special Advisory Group, now tasked with investigating the “quasi-judicial role of the Minister”, released its second report (“Dickson II Report”) on 25 July 1997.⁵³ Chief Justice Dickson passed away on 17 October 1998, as the Special Advisory Group was in the midst of its investigation into the military police.⁵⁴ Lieutenant-General Charles Belzile, one of the members of the Special Advisory Group, took over as Chairman and presented the “Report of the Military Police Services Review Group” (“Belzile Report”) on 11 December 1998.⁵⁵ It should be noted that other reports on the Canadian Forces were released during this time

⁵⁰ Dishonoured Legacy, *supra* note 4.

⁵¹ Canada, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (1997), online (pdf): <military-justice.ca/wp-content/uploads/2018/12/Report-of-the-Special-Advisory-Group-on-Military-Justice-and-Military-Police-Investigation-Services.pdf> [Dickson I Report].

⁵² Canada, Minister of National Defence, *Report to the Prime Minister on the Leadership and Management of the Canadian Forces* (1997), online: <web.archive.org/web/20050103214357/http://www.forces.gc.ca/site/minister/eng/pm/mnd60.html> [Young Report].

⁵³ Canada, Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on the Quasi-Judicial Role of the Minister of National Defence* (1997), online: <web.archive.org/web/20010612030155/http://www.dnd.ca/eng/archive/1997/oct97/quasijud_e.rtf> [Dickson II Report].

⁵⁴ See “Brian Dickson” (24 January 2008), online: *Canadian Encyclopedia* <thecanadianencyclopedia.ca/en/article/brian-dickson>.

⁵⁵ Canada, *Report of the Military Police Services Review Group* (1998), online: <web.archive.org/web/20021023144225/http://www.dnd.ca/menu/press/Reports/mps/eng/Report_e.html> [Belzile Report].

period;⁵⁶ this article, however, only focuses on those reports with a nexus to Canadian military justice. A schematic has been included below, ordering the external reports by publication date.

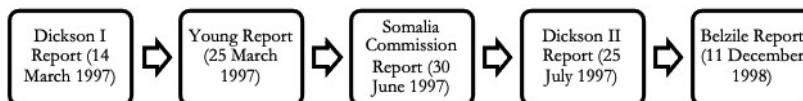


Figure 1: Publication Dates of External Reports

1. COMPREHENSIVE INVESTIGATION: THE SOMALIA COMMISSION

Did the Somalia Commission do its job well? In this sub-section, I briefly summarize the key findings of the Somalia Commission Report, and then identify the triumphs and failures of the Commission. I argue that the Somalia Commission's investigation into military justice succeeded because the Commission pulled from a broad range of military justice sources. The seeming failure of the Commission—a failure to produce timely recommendations—was, I argue, less a fault of the Commission and more a function of its sweeping mandate and the DND's unwillingness to transfer documents. I conclude that the principal function of the Commission was not merely to generate reforms but to produce a comprehensive version of events; the Commission succeeded in this goal and in so doing made a major contribution to the post-Somalia reform process.

Of the post-Somalia external investigations, the Somalia Commission was the most comprehensive. The Commission had the statutory power to compel attendance and the capacity to receive evidence under oath. Furthermore, the Privy Council articulated a broad mandate, advising the Commission to:

⁵⁶ See especially Larry T Doshen, *Report on the Study of Mechanisms of Voice/Complaint Resolution in the Canadian Forces* (Vista Knowledge Services, 1995).

investigate and report on

the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and the actions and decisions of the Department of National Defence in respect of the Canadian Forces deployment to Somalia and, without restricting the generality of the foregoing, the following matters related to the pre-deployment, in-theatre and post-deployment phases of the Somalia deployment.⁵⁷

Despite the government's decision to terminate the investigation early, the Somalia Commission managed to analyze most of the issues contained within its mandate and generated a bevy of useful recommendations on multiple facets of the military system. Breaking its analysis down by theme, the Commission furnished recommendations on leadership, accountability, the chain of command, discipline, personnel selection and screening, training, rules of engagement, operational readiness, Canada's mission in Somalia, the military planning system, openness and disclosure, and military justice.

The Commission devoted a great deal of energy to its analysis of the military justice system and produced over 40 recommendations on that topic alone.⁵⁸ Some of its suggested reforms were truly revolutionary. For example, the Commission recommended abolishing the position of Judge Advocate General ("JAG"), which the Commission argued was an "unfortunate vestige of the past."⁵⁹ In its place, the Commission recommended the creation of two independent institutions: first, the Chief Military Judge, who would take over the judicial functions performed by the JAG and second, a Director General of Military Legal Services, who would assume the "prosecution, defence and legal advisory roles" performed by the JAG.⁶⁰ The Commission also recommended the establishment of an Office of the Inspector

⁵⁷ Dishonoured Legacy, *supra* note 4, vol 1 at 4.

⁵⁸ See *ibid*, vol 5 at 1293–1313.

⁵⁹ *Ibid*, vol 5 at 1306.

⁶⁰ *Ibid*.

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General; the Inspector would launch inspections into “systemic problems within the military justice system”, and receive and investigate “complaints about officer misconduct”, among other responsibilities.⁶¹ The military implemented these recommendations only indirectly: the military retained the Office of the JAG, though it did accept the need for separation between the JAG’s judicial, prosecutorial and defence functions.⁶² While the military did not establish the Office of the Inspector General, it did recommend the establishment of the Ombudsman, Canadian Forces Grievance Board, and Military Police Complaints Commission.⁶³

Alongside these dramatic recommendations, the Commission also made a series of smaller, more practical recommendations. The Commission recommended, for example, “[p]rofessional police standards and codes of conduct be developed for Military Police”⁶⁴ and that “[m]ilitary police be independent of the chain of command when investigating major disciplinary and criminal misconduct.”⁶⁵ Another line of recommendations focused on reducing the prominent role of the commanding officer within the military justice system.⁶⁶

As this article will later demonstrate, most—though not all—of the Somalia Commission’s military justice recommendations were accepted and in turn formed the foundations of the modern Canadian military justice system. Why did the Commission’s

⁶¹ *Ibid*, vol 5 at 1311.

⁶² See Canada, “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 Other Acts*, as Required Under Section 96 of Statutes of Canada 1998, c.35” (Ottawa: Department of National Defence, 2003) at 26 [Lamer Report]. See also Canada, Department of National Defence, *Report on the Recommendations of the Somalia Commission of Inquiry* (1997), online: <web.archive.org/web/20030114060602/http://www.dnd.ca/menu/press/Reports/somalia/index_e.htm> [Response to Somalia Commission].

⁶³ See Response to Somalia Commission, *supra* note 62.

⁶⁴ Dishonoured Legacy, *supra* note 4, vol 5 at 1299.

⁶⁵ *Ibid*, vol 5 at 1296.

⁶⁶ See e.g. *ibid*, vol 5 at 1301.

investigation of military justice issues prove so successful? The first reason for success is that the Commission pulled from an impressive range of sources. The Commission's witness list contained a number of legal officers.⁶⁷ In addition, Canadian and foreign legal officers provided the Commission with background briefings; notably, the Commission heard from the British and American Judge Advocates General, the Australian Director of Army Legal Services, and the American Chief of Criminal Law Division.⁶⁸ On the Canadian side, the Commission heard from Brigadier General Pierre Boutet—the Judge Advocate General—as well as from other legal officers on a number of topics, including the operation of the Canadian Forces.⁶⁹ Such sources undoubtedly provided a valuable insider perspective into the military legal system, helping the Commissioners to master the intricacies of the Canadian military legal system while placing that system into comparative perspective.

The Commission chose to balance these insider perspectives by commissioning research studies from a wide number of civilian experts. Of the 10 civilian studies commissioned, two focused explicitly on military justice. Professor Martin Friedland, a former Dean of Law at the University of Toronto, wrote a study, entitled "Controlling Misconduct in the Military", that influenced both the Somalia Commission Report and Chief Justice Dickson's investigation of military justice issues. Professor Friedland urged, for example, that summary trials should only result in a maximum detention period of 30 days rather than the then-current 90-day period, a reform later implemented in Bill C-25.⁷⁰ He also warned that future peace operations "should not be forced to operate in the absence of sufficient numbers of military police"; the Somalia Commission had discussed the need for "[a]dequate numbers of

⁶⁷ See *ibid*, vol 5 at 1662–65.

⁶⁸ See *ibid*, vol 5 at 1671–72.

⁶⁹ See *ibid*, vol 5 at 1669.

⁷⁰ See *An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts*, SC 1998, c 35, s 163(3)(A) [Bill C-25]; Friedland, *supra* note 37 at 26.

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appropriately trained Military Police” through recommendation 40.16.⁷¹

James W. O’Reilly and Patrick Healy, both eminent criminal law thinkers, wrote a study on “Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion”; as with Friedland’s recommendations, many of their suggested reforms were ultimately implemented. O’Reilly and Healy recommended, for example, that commanding officers should only retain disciplinary authority in relation to “minor service offences” but that more serious offences “should not be the responsibility of commanding officers.”⁷² The Somalia Commission adopted this recommendation fully, calling for investigations of serious misconduct to be “removed from the possible influence of the commanding officer.”⁷³

By calling on civilian experts to supplement the investigation, the Somalia Commission instituted safeguards against capture. Military law expert Chris Madsen would later accuse Chief Justice Dickson’s inquiry of “naively” accepting the “military’s explanations at face value without independent research”; this was, as this article subsequently demonstrates, an inaccurate and unduly harsh assessment.⁷⁴ The point is, however, that the Somalia Commission found a solution to the potential issue of capture; by commissioning detailed studies from eminent civilians, and by considering their recommendations alongside those of military experts, the Somalia Commission ensured that its judgment on military justice issues would be balanced and sound. That the Somalia Commission pulled multiple recommendations from Friedland, O’Reilly, and Healy’s studies indicates the value of soliciting civilian contributions.

⁷¹ Friedland, *supra* note 37 at 65; see also *Dishonoured Legacy*, *supra* note 4, vol 5 at 1300.

⁷² James W. O’Reilly & Patrick Healy, *Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 79.

⁷³ *Dishonoured Legacy*, *supra* note 4, vol 5 at 1297.

⁷⁴ Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press, 1999) at 147.

Despite its successes, the Somalia Commission attracted a great deal of controversy. Politicians and commentators criticized the Somalia Commission as taking too long to deliver its recommendations. Speaking in the House of Commons on 10 December 1996, Minister of National Defence Douglas Young criticized the pace of the Inquiry and asked whether it was worth it for the inquiry to go on for “a year, two years, three years or four years”.⁷⁵ Young intimated that the military needed to implement reforms immediately and that the Commission’s recommendations might come too late to be of use: “I guess it is all a question of whether [reform] happens in our lifetime or not.”⁷⁶ Chris Madsen proved even more critical of the Commission’s record. According to Madsen, Justice Gilles Létourneau, who chaired the Commission, interpreted the “terms of reference so broadly that the commission could not finish within the original time limit and budget.”⁷⁷ Madsen implied that Justice Létourneau was wrong to grant standing to counsel representing certain individuals, for doing so “allowed lawyers to hijack the proceedings.”⁷⁸

Are such criticisms fair? Certainly, in comparison to later investigations by Chief Justice Dickson’s Special Advisory Group, the Somalia Commission took a long time—over two years—to publish its final report. One major problem was that the Somalia Commission suffered from mission creep and spent a great deal of time on seemingly miscellaneous topics. The Commission did not need to conduct such detailed research into topics such as the structure of the Canadian Forces’ chain of command or the global and Canadian history of peacekeeping. Such topics were, at best, tangentially related to the Somalia Affair itself, and could easily have been addressed in several sentences rather than in long chapters.

Nonetheless, it makes little sense to compare the Somalia Commission to the later string of external reports, for they had

⁷⁵ “Somalia Inquiry”, *House of Commons Debates*, 35-2, No 117 (10 December 1996) at 7314 (Hon Douglas Young).

⁷⁶ *Ibid.*

⁷⁷ Madsen, *supra* note 74 at 146.

⁷⁸ *Ibid.*

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different goals. The Somalia Commission had the broadest mandate of any external report. Whereas later reports only investigated specific aspects of the military system—military justice or the quasi-judicial role of the Minister, for example—the Somalia Commission was charged with looking at the pre-deployment, in-theatre, and post-deployment phases and with investigating issues as varied as the chain of command and the departmental response to the Somalia Affair. The Somalia Affair was to establish an authoritative version of events and it did so with considerable thoroughness. The Commission's chapter on the 4 March incident alone was a model of transparency; had the Commission been granted an extension until the end of 1997, it may well have been able to articulate similarly authoritative narratives on the 17 February Bailey Bridge incident, the 16 March death of Shidane Arone, and the 17 March shooting at the Red Cross Compound. Instead, the government's decision to curtail the Commission has meant that the Canadian public will never have a fully authoritative account of these important events. Getting the full truth matters, not only for purposes of accountability, but also for the sake of reform: reform ideas were, after all, meant to flow ineluctably from the Commission's assessment of what had gone wrong in Somalia.

Moreover, the Somalia Commission's slow pace was in part due to the fact that the CF and DND often were tardy in passing on vital documents to the Somalia Commission. As the Commission noted, the DND's public affairs directorate "failed to comply with our order for disclosure" of documents and even "attempted to destroy Somalia-related documents that we had requested."⁷⁹ As Peter Desbarats wrote, documentation arrived months after an initial request, the files were all "mixed up" and took time to reconstruct, and the military did little to "assist us in sorting out the confusion."⁸⁰ Without timely access to departmental records, it was difficult for the Commission to meet its original reporting deadlines.

⁷⁹ Dishonoured Legacy, *supra* note 4 at ES-36.

⁸⁰ Desbarats, *supra* note 17 at 71.

In sum, the Somalia Commission's slow pace, while partly attributable to the three Commissioners' decision to examine extraneous topics in great detail, was also due to its expansive mandate and the uncooperative attitude of some at DND. It was unrealistic to expect the Commission to publish its findings quickly—the Privy Council's initial estimate that the Commission would only require nine months was "laughable," to say the least—since its primary objective was to articulate a complete account of what had gone wrong in Somalia.⁸¹ The government should have granted the Commission's request for a final extension until the end of 1997. And if the government had truly desired to implement reforms immediately, it could have requested the Commission to release its report in phases—the Commission could have published the bulk of its findings in June 1997, for example, and then spent the rest of the year completing its investigation into the remaining questions. Ultimately, however, the Commission published a fairly full account of the Somalia Affair and, by consulting both legal officers and eminent civilians, generated an impressive list of suggested military justice reforms.

2. TARGETED INVESTIGATION: THE SPECIAL ADVISORY GROUP AND THE YOUNG REPORT

Even if Minister Young was wrong to criticize the pace of the Somalia Commission, it was clear by 1997, if not earlier, that the military justice system was in need of immediate reform. Indeed, the military had begun to implement reforms even before the publication of the various external reports, partly due to the de Faye Board of Inquiry's recommendations and partly in response to reform recommendations that predated the Somalia Affair. Professor Friedland, writing before the publication of the Somalia Commission Report, noted that the military had already started the process of removing capital punishment as an available sentence under the *National Defence Act*.⁸² As the Somalia Commission continued methodically with its investigation, the

⁸¹ See *ibid* at 7.

⁸² See Friedland, *supra* note 37 at 71.

government published or commissioned a number of targeted reports—namely, the Dickson I Report, the Young Report, the Dickson II Report, and the Belzile Report—in order to rapidly generate a menu of reform options.

In this section, I first summarize the key military justice findings of each of the targeted reports. I then argue that the reports proved successful at spurring reform for two reasons: first, they had a practical and narrow mandate, and second, they were in certain cases able to capitalize on the Somalia Commission's work and record. Although some commentators have contended that the military successfully captured these external inquiries, I contend that capture did not occur.⁸³

1. Dickson I Report

The Dickson I Report was the first report released by the Special Advisory Group on Military Justice and Military Police Investigations. Former Supreme Court Chief Justice Brian Dickson, who had served with the Royal Canadian Artillery during the Second World War and had lost a leg to friendly fire, chaired the Group. Lieutenant General Charles Belzile (retired), a well-regarded leader, and John Williston Bird, a prominent businessman and former Progressive Conservative MP, were the other two members of the Group. The Dickson I Report focused on the military justice system broadly and articulated reforms that have ultimately laid the foundation for modern Canadian military justice.

The report recommended the creation or reform of a number of positions within the military justice system: the report called for an independent Director of Prosecutions, who today directs prosecutorial functions within the military justice system; a Canadian Forces Provost Marshal, who commands military police; and an “independent office of complaint review and system oversight, such as a military ombudsman.”⁸⁴ Today, there is a

⁸³ See e.g. Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press, 1999) at 147.

⁸⁴ See Dickson I Report, *supra* note 51 at 87, 91.

Military Grievances External Review Committee—formerly the Canadian Forces Grievance Board—as well as a DND/CF Ombudsman.⁸⁵ Moreover, the report advocated for sentencing reform: the Special Advisory Group called for the abolition of the death penalty in the military justice context and suggested that “the sentencing function at a court martial be performed by the judge presiding at the court martial” rather than by the panel (i.e., the military analog to a jury).⁸⁶ Perhaps most significantly, the report called for the establishment of a military police National Investigation Service (NIS), which was to “operate independently of the chain of command” and investigate “all service offences of a serious or sensitive nature, or offences requiring complex or specialized investigations”.⁸⁷ The military established the NIS on 1 September 1997.⁸⁸ Minister Young agreed to implement all of the recommendations contained in the Dickson I Report.⁸⁹

2. *Young Report*

Minister of National Defence Doug Young then followed the Dickson I Report with his own report, published on 25 March 1997. Minister Young had announced his investigation on 31 December 1996 and consulted closely with four experts: Professors David Bercuson, Jack Granatstein, Albert Legault, and Desmond Morton. Of the various targeted reports, Young’s was the most wide-ranging, addressing the following topics: the role of the Canadian Forces; military discipline; values and ethics; military

⁸⁵ For the history of the establishment of these two entities, see Charlotte Duval-Lantoine, “Reforming the Office of the Ombudsman: Establishing Meaningful Oversight of the Canadian Armed Forces”, *CGAI* (April 2022), online: cgai.ca/reforming_the_office_of_the_ombudsman_establishing_meaningful_oversight_of_the_canadian_armed_forces.

⁸⁶ See Dickson I Report, *supra* note 51 at 72, 90. See also *R v Master Seaman RJ Middlemiss*, 2009 CM 1001 at paras 38–42, 81 WCB (2d) 756; *R v Penner*, 2013 CM 1005 at para 9, 108 WCB (2d) 785.

⁸⁷ Dickson I Report, *supra* note 51 at 88.

⁸⁸ See Belzile Report, *supra* note 55.

⁸⁹ See Young Report, *supra* note 52.

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leadership; command and rank structure; operational missions; terms and conditions of service; the integrated civilian-military headquarters; and informing Canadians. Despite its breadth, the Young report was much less comprehensive than the Somalia Commission Report, especially since the Minister did not have the same power to compel attendance and receive evidence under oath.

In his report, Minister Young largely agreed with the Dickson I Report and laid out some proposals for implementation. The government, Young announced, would implement the bulk of the Dickson I Report through amendments to the *National Defence Act*. In addition, Young called for an independent review board to serve as “final arbiter” in the Canadian Forces grievance process. Young also recommended the establishment of an Ombudsman to “provide information, advice and guidance to all personnel, military and civilian . . . who believe they have been treated improperly.”⁹⁰ The Ombudsman would have a different mandate, Young specified, than the “office of independent review and oversight” recommended by the Special Advisory Group.⁹¹ The latter would primarily “monitor the functioning of military justice and military police investigations.”⁹² Finally, Minister Young called on the Special Advisory Group to study the “quasi-judicial role” of the Minister of National Defence within the military justice system.⁹³

3. *Dickson II Report*

The Special Advisory Group published its second report, which focused on the quasi-judicial role of the Minister of National Defence, on 25 July 1997. The report studied foreign jurisdictions—namely, England, Australia, and the United States—and concluded that “in none of them does the Minister or Secretary responsible for defence retain as many quasi-judicial

⁹⁰ *Ibid* at Military Discipline.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Ibid*.

powers as in Canada.”⁹⁴ Thus, the Special Advisory Group (the “Group”) recommended a series of reforms aimed at lessening the Minister’s influence on the military justice system. For example, the Group recommended that the authority to decide whether civilians should be tried by court martial be vested not in the Minister but in an independent Director of Prosecutions. Not all of the Group’s recommendations focused on the quasi-judicial role of the Minister. Notably, the Group recommended that an independent review of the legislation that governs the DND and CF—i.e., the *National Defence Act*—be undertaken every five years “following the enactment of the legislative changes” recommended in the Dickson I and Dickson II Reports.⁹⁵ Periodic independent review, as this article will later discuss, has become a feature of the modern Canadian military justice system. The Group also recommended the abolition of hard labour as a punishment.⁹⁶

4. *Belzile Report*

The Belzile Report came sometime after the first three targeted investigations. On 8 September 1998, the Vice Chief of the Defence Staff commissioned the Special Advisory Group to conduct a review of the Canadian Forces Provost Marshal and the military police National Investigative Service—both institutions recommended in the Dickson I Report. The Special Advisory Group was to recommend any “necessary improvements to oversight, transparency and effectiveness of military policing activities.”⁹⁷ Chief Justice Dickson passed away during the course of the investigation, with Lieutenant General Belzile taking the reins after.

All of the changes were “in the nature of adjustments, rather than wholesale or radical changes.”⁹⁸ A number of reforms aimed at clarifying the relationship between the NIS and those military

⁹⁴ Dickson II Report, *supra* note 53 at 5.

⁹⁵ *Ibid* at 28.

⁹⁶ See *ibid* at 17, 29.

⁹⁷ Belzile Report, *supra* note 55 at chapter 1.

⁹⁸ *Ibid* at chapter 1.

police (MPs) attached to local bases. Given the backload of cases that the NIS faced, the Group recommended that “discretion to waive NIS investigations to the base/wing military police be exercised more aggressively than it has in the past.”⁹⁹ Pushing for more cooperation between the NIS and local base MPs, the Group also stated that the NIS should “involve base/wing MPs in their investigations as much as possible.”¹⁰⁰ The Group also stressed that the Provost Marshal ought to more effectively communicate relevant “changes in the law” to “all military police, particularly those charged with base security and investigations.”¹⁰¹

5. Evaluation of the Targeted Reports

The four targeted reports proved successful in spurring military justice reform. Why were these reports so thoughtful and useful? First, the four targeted reports had practical and narrow mandates. The Dickson I Report looked at military justice and military police arrangements. The Dickson II report focused almost exclusively on the Minister of National Defence’s quasi-judicial role within the military justice system. The Belzile Report was perhaps the narrowest, focusing on the functionality of two institutions—the Canadian Forces Provost Marshal and the National Investigation Service. Tellingly, it was the Young Report, with its comparatively wide mandate, that had the least to offer on the topic of military justice reform. Yet because the four reports—including the Young Report—were tasked with targeted mandates, the speedy generation of reform ideas tended not to be a problem and none of the investigations suffered the same delays as the Somalia Commission. At first glance then, a good way to generate quick, useful reforms is to convene an investigation with a narrow mandate and a tight deadline.

Yet the success of the targeted reports was in part due to open communication with the Somalia Commission. The Group, which produced three of the four targeted investigations, clearly made

⁹⁹ *Ibid* at chapter 4.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*.

use of the Somalia Commission's materials. For example, the Dickson I Report stated that the Group accessed and considered Professor Martin Friedland's report on military discipline, which he had prepared for the Somalia Commission.¹⁰² Friedland's recommendations, as previously recounted, can be seen in a number of the Group's own recommendations.¹⁰³ Somalia Commissioner Peter Desbarats was piqued by such information-sharing and asked why the Commission should want to "assist the 'competition' in this way", as doing so would only confirm that the targeted investigations could get the job done more quickly than the Somalia Commission.¹⁰⁴ Desbarats' complaints were melodramatic and unnecessarily disrespectful, but they had a point: the success of the targeted investigations was partially linked to the Somalia Commission's record. Without access to the Somalia Commission's research, the targeted reports—or at least the reports of the Group—might not have proven so useful. In addition, the government ultimately implemented recommendations from the Somalia Commission as well as the targeted reports. Thus, it would be historically inaccurate to focus exclusively on the triumphs of the targeted reports: the targeted reports operated in conjunction with the comprehensive report—i.e., the Somalia Commission—to lay the groundwork for meaningful change.

At the same time, it is important not to overstate the influence of the Somalia Commission on the targeted investigations. After all, the publication of the Somalia Commission Report came only after the publication of two of targeted reports. Both Minister Doug Young and the Special Advisory Group conducted independent investigations and interviews. Minister Young's decision to consult four eminent civilians was wise and served as an institutional safeguard to capture. The Special Advisory Group

¹⁰² See Dickson I Report, *supra* note 51 at 22.

¹⁰³ See e.g. *ibid* at 2 (recommending the reduction of "the maximum period of detention that can be imposed at a summary trial to 30 days"); *cf* Friedland, *supra* note 37 at 100 (calling for a reduction in the possible detention period that can be issued at summary trial to "something like 30 days").

¹⁰⁴ Desbarats, *supra* note 17 at 249.

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followed a gruelling schedule of base visits and interviews, both with independent experts and members of the military. Both Minister Young and the Special Advisory Group thus came to their own conclusions, even if they were aided somewhat by the prior work of the Somalia Commission. Although the four reports shared many points of overlap with the Somalia Commission's recommendations, there were important divergences too: for example, none of the targeted reports criticized the Office of the JAG in quite so open a fashion as the Somalia Commission.¹⁰⁵

Did the targeted investigations suffer from any shortcomings? Obviously, none of the reports was as comprehensive as the Somalia Commission Report; they were not designed to be comprehensive, however, and were instead meant to generate reforms on specific issues within a tight timeframe. A more serious charge, however, is that these targeted reports suffered from capture by the military. Chris Madsen argued, for example, that the Judge Advocate General's "influence was conspicuous in a number of" the Dickson I recommendations and scathingly suggested that "Dickson naively accepted the military's explanations at face value without independent research."¹⁰⁶ Madsen also argued that the Judge Advocate General's influence was "even more evident" in the Dickson II Report.¹⁰⁷ It is impossible to completely dismiss the possibility of capture. Without access to the deliberations of the Special Advisory Group, it is difficult to assess the emphasis that the Group put on the Judge Advocate General's advice.

Yet Madsen's criticism nonetheless appears inaccurate for several reasons. First, many of the Special Advisory Group's recommendations resembled those of the Somalia Commission. The Department of National Defence, in its "Report on the Recommendations of the Somalia Commission of Inquiry" ("Response to Somalia Commission"), highlighted the "substantial convergence on common concerns which emerges from the reports of the [Somalia] Commission and the Special Advisory

¹⁰⁵ See Dishonoured Legacy, *supra* note 4, vol 5 at 1306.

¹⁰⁶ Madsen, *supra* note 74 at 147.

¹⁰⁷ *Ibid.*

Group.”¹⁰⁸ The Somalia Commission had built in substantial safeguards against capture. That the Group often came to the same conclusion as the Commission indicates that it was not captured to the extent that Madsen suggested. Second, the Group’s decision to consult the Somalia Commission’s voluminous record meant that it had ready access to sources beyond the Office of the JAG. The influence of these diverse sources—namely, Professor Friedland’s recommendations—is manifest in the Group’s various reports. Madsen’s critique goes too far.

The external approach to military justice reform was a triumph. The various reports generated bold and diverse recommendations. The success of these reports lay in the complementary nature of their functions. The Somalia Commission was comprehensive, designed to consult a wide variety of sources and to produce a detailed account of events. In contrast, the targeted investigations—the Dickson I, Dickson II, Young, and Belzile Reports—addressed highly specific issues within tight timeframes. The targeted investigations drew at least partially on the Somalia Commission’s record. The variety of reforms generated—both by the Somalia Commission and the targeted reports—was the key to the success of Canadian post-Somalia reform. Had the Canadian government emphasized the comprehensive investigation at the expense of the targeted investigation or vice versa, post-Somalia reform would not have been as robust, wide-ranging, or revolutionary.

C. PHASE III: THE IMPLEMENTATION OF REFORM

The Canadian government responded positively to the bevy of reforms generated during the external phase. The Department of National Defence announced that it agreed with 132 of the Somalia Commission’s 160 recommendations; of the Commission’s 48 suggested reforms to the military justice system, the Government took 37.¹⁰⁹ The Minister’s Monitoring Committee on Change in the Department of National Defence and the Canadian

¹⁰⁸ Response to Somalia Commission, *supra* note 62 at part II.

¹⁰⁹ See *ibid.*

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Forces (“Minister’s Monitoring Committee” or “MMC”), the primary organization designed to monitor the implementation of reform, provides the most detailed quantitative analysis. The MMC was tasked with monitoring the implementation of reforms articulated in the five reports discussed in Section II(B): the Somalia Commission, Young, Dickson I and II, and Belzile Reports. The MMC was also to monitor the implementation of reforms from the “Report of the Special Commission on the Restructuring of the Reserves,” a report which is beyond the scope of this article given its minimal nexus to military justice. Those six reports generated a total of 336 recommendations; of those, the Minister only rejected 24.¹¹⁰ Of course, the percentage of accepted reforms can be misleading: among the 24 rejected reforms were some of the most significant reforms that the Somalia Commission had generated.¹¹¹ Still, the government clearly agreed with the vast majority of recommended reforms.

The government included the most significant of the proposed military justice reforms in Bill C-25, which was titled *An Act to Amend the National Defence Act and to make consequential amendments to other Acts*. The Bill received Royal Assent in December 1998. Bill C-25 is a vital cornerstone of the modern Canadian military justice system. Arguably, it is the most significant piece of military justice legislation since the 1950 *National Defence Act*. Bill C-25 directly implemented key recommendations generated during the external phase of reform. By removing hard labour and the death penalty from the available list of sentences, the bill achieved sentencing reform.¹¹² By placing certain positions—namely, the Minister of National Defence and the Judge Advocate General—on firm statutory footing, the Bill clarified roles and functions. Section nine of the Bill, for example,

¹¹⁰ See Canada, Minister’s Monitoring Committee on Change in the Department of National Defence and the Canadian Forces, *Preliminary Report* (1998), online: web.archive.org/web/20041013003119/http://www.forces.gc.ca/site/minister/eng/Monitoring/preliminary.htm [MMC March 1998 Report].

¹¹¹ See *ibid.*

¹¹² See Bill C-25, *supra* note 70, s 139(1).

defined the various duties of the Judge Advocate General and required him to “report annually to the Minister [of National Defence] on the administration of military justice in the Canadian Forces”;¹¹³ Bill C-25 thus placed the Judge Advocate General and the legal branch itself under the Minister’s authority.¹¹⁴

The Bill also established new institutions or positions that have proven vital to this day, such as the Director of Military Prosecutions, who heads up the Military Prosecutions Service, or the Military Police Complaints Commission, an independent body that reviews complaints of military police as well as complaints by military police concerning improper interference by CF and DND personnel into military police investigations.¹¹⁵ In short, the modern military justice system—characterized by institutional separation between the prosecution and defence; an empowered and professional military judiciary that largely resembles the civilian judiciary; a clear demarcation of authority between various roles; a lessened role for the Minister of National Defence; and new protections and standards for the military police—emerged out of Bill C-25.

It is important not to overstate the influence of the Somalia Affair on Bill C-25, however. The Somalia Affair was not the only driver of military reform in the late 1990s. For example, Bill C-25 was partially responsive to the foundational 1992 Supreme Court case, *R v Généreux*. In *Généreux*, the Supreme Court held that the *Canadian Charter of Rights and Freedoms* permits a “parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns.”¹¹⁶ The accused, Michel Généreux, had been tried by a General Court Martial—one of the four types of courts martial that existed at that time under the military justice system.¹¹⁷ The Supreme Court held

¹¹³ *Ibid*, s 9.3(2).

¹¹⁴ See *ibid* at s 9.3(1), (10). See also QR&O 4.081; Dishonoured Legacy, *supra* note 4, vol 5 at 1306.

¹¹⁵ Bill C-25, *supra* note 70 ss 29.16, 165–165.1, 250.1.

¹¹⁶ *R v Généreux*, [1992] 1 SCR 259 at 261, 88 DLR (4th) 110 [*Généreux*].

¹¹⁷ Parliament has since cut two of the four types of courts martial. Today, there are two types of courts martial. A General Court Martial is composed of a

that the General Court Martial “incorporated features which, in the eyes of a reasonable person, could call the independence and impartiality of the tribunal into question” and thereby infringed the appellant’s rights under subsection 11(d) of the *Charter*; the government failed to justify the subsection 11(d) breach at the section 1 stage of the analysis.¹¹⁸ The judge at the court martial did not enjoy sufficient security of tenure, financial security, or institutional independence.¹¹⁹

As Professor Friedland notes, the military responded to *Généreux* immediately, amending the *National Defence Act* as well as the *Queen’s Regulations and Orders* (QR&O), which are rules for the governance of the CF.¹²⁰ One QR&O held that the Chief Military Judge would henceforth be responsible for appointing the panel—i.e., jury—of a court martial and would do so “using random methodology.”¹²¹ A number of *Généreux*-responsive reforms were implemented in Bill C-25 too. Notably, quite a few of Bill C-25’s provisions lessened the chain of command’s influence within the military justice system; other provisions placed the Chief Military Judge on firm statutory footing and clarified his responsibilities.¹²² The *Généreux* case is indicative of the vital influence that appellate judgments have on Canadian military justice reform. Appellate judgments continue to drive military justice reform in the 21st century.¹²³

military judge and a panel of five members. A Standing Court Martial is composed of a judge alone. See *R. v. Généreux*, [1992] 1 S.C.R. 259 at 271, 297; *National Defence Act*, *supra* note 27, ss 166–175.

¹¹⁸ See *Généreux*, *supra* note 116 at 314.

¹¹⁹ See *ibid* at 261–62.

¹²⁰ Friedland, *supra* note 37 at 84–85.

¹²¹ *Ibid* at 84.

¹²² See Bill C-25, *supra* note 70, ss 163.1, 165.24–165.27, 184(1).

¹²³ See e.g. Canada, *Annual report of the Judge Advocate General: A report to the Minister of National Defence on the administration of military justice from 1 April 2011 to 31 March 2012* (Ottawa: Department of National Defence, 2012) at 17. See also *R v LeBlanc*, 2011 CMAC 4 [*LeBlanc*]. The *LeBlanc* decision drove Parliament to establish clearer parameters for the tenure of military judges.

In addition, the creation of two offices that are key features of the modern military justice system—the Ombudsman and the Canadian Forces Grievance Board—had less to do with the Somalia Affair and more to do with a broader push by the Canadian Forces for new oversight and complaint mechanisms. Bill C-25 did not contain provisions on the Ombudsman but did place the Grievance Board on statutory footing.¹²⁴ Both offices emerged out of reform suggestions that preceded the Somalia Affair. Minister of National Defence Art Eggleton appointed the first Ombudsman, André Marin, in June 1998 “in the wake of several highly publicized reports on sexual harassment”; as Marin himself noted, the concept “of an independent oversight agency . . . had in fact been in constant evolution for several years.”¹²⁵ The Canadian Forces Grievance Board similarly grew out of a “number of studies and working groups . . . initiated to help identify and propose solutions for a number of issues that existed with the military’s complaint resolution methods”;¹²⁶ the other major impetus for the creation of the Grievance Board was Parliament’s establishment in the late 1980s of the Royal Canadian Mounted Police’s External Review Committee—the latter body served as a rough template for the Grievance Board.¹²⁷

Lastly, the military did not only implement post-Somalia reforms through Bill C-25. Multiple post-Somalia reforms were not included in Bill C-25 but were instead implemented through non-statutory means. Perhaps most significantly, the Office of the JAG (OJAG) radically increased in size under the leadership of Major General Jerry Pitzul, who became the Judge Advocate General in

¹²⁴ Bill C-25, *supra* note 70, s 29.16.

¹²⁵ Canada, National Defence and Canadian Armed Forces Ombudsman, *The Way Forward* (1999) at 7, online (pdf): <ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/wf-aa.pdf>.

¹²⁶ “Evaluation of the CFGB Review of Military Grievances Program” (July 2010), online: *Canadian Forces Grievance Board* <kuny.ca/temp/english/Eval_CFGB_ERMGP0710.html>.

¹²⁷ See *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, ss 25–30.

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1998. In 1998, OJAG had “approximately 100 legal officers.”¹²⁸ Several years later, in 2013, the OJAG employed “160 full-time, regular force legal officers, 60 part-time legal officers, and 100 legal support staff.”¹²⁹ While part of this growth is due to Canada’s contribution to coalition operations in Afghanistan, Major-General Pitzul played the key role in growing the size of OJAG. Since OJAG is now a bigger office, more legal officers are able to deploy on overseas operations and work closely with the chain of command to ensure compliance with international law as well as the efficient operation of the military justice system.

In sum, while Parliament implemented the bulk of post-Somalia military justice reforms through Bill C-25, that statute is only part of the story. The military implemented reforms through non-statutory means too—namely, the DND’s establishment of the Ombudsman and the OJAG’s growth in size both constituted non-statutory reforms. Furthermore, Bill C-25 was responsive not just to the post-Somalia reports but also to factors such as court cases and pre-Somalia reform suggestions. The remainder of this section turns to the larger story of implementation and argues that the implementation phase of reform proved successful because the government established two innovative institutions. First, the government established the Minister’s Monitoring Committee to monitor the implementation of every reform generated during the external phase. Since Bill C-25 contained only a sub-section of these reforms, the MMC played a critical role in ensuring that the remainder did not slip through the cracks. Second, Bill C-25 instituted a system of regular, independent review. Since 1998, three independent reviews have occurred—one by former Supreme Court of Canada Chief Justice of Canada Antonio Lamer, a second by former Ontario Superior Court of Justice Chief Justice Patrick LeSage, and a third by former Supreme Court of Canada Justice Morris Fish. These independent

¹²⁸ Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 36th Parl, 1st Sess, (7 October 1998).

¹²⁹ Jennifer Brown, “JAG Offers Lessons Learned to In-House Counsel” (22 April 2013), online: *Canadian Lawyer* <canadianlawyermag.com/news/general/jag-offers-lessons-learned-to-in-house-counsel/268972>.

reviews have proven their worth, monitoring Bill C-25's long-term operation and suggesting further changes to the military justice system.

1. HARD-LOOK REVIEW: THE MINISTER'S MONITORING COMMITTEE ON CHANGE

The MMC had two phases. Only the first phase focused meaningfully on Canadian military justice. As part of the first phase, the MMC was tasked with monitoring the implementation of 252 of the recommendations generated by the external phase reports. The MMC issued four reports: a March 1998 plan of work, interim reports in November 1998 and June 1999, and a concluding report in December 1999. In 2000, Minister of National Defence Art Eggleton reconstituted the MMC to monitor reforms to the military reserve force; this second phase of the MMC's work is beyond the scope of this article. Throughout its life, the MMC proved willing to conduct hard-look review: that is, to scrutinize and criticize the CF and DND's implementation of reforms.

The MMC first reorganized the 252 recommendations into eight chapters: openness and disclosure issues; accountability issues; human resource management issues; leadership issues; military justice issues; operational issues; reserves and cadets issues; and miscellaneous issues.¹³⁰ In each of these eight chapters, the MMC listed out the reforms suggested by the external reports, indicated whether each reform had been completed, and made broader observations about the pace and nature of reform. In its preliminary, March 1998 report, the MMC praised the CF and DND for their "high degree of commitment to . . . change initiatives."¹³¹ The MMC maintained that positive tone in its November 1998 report, stating that it was "impressed by the Department's ability to respond quickly with a broad package of changes to the justice

¹³⁰ Canada, "Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces: Final Report, 1999" (1999), online: web.archive.org/web/20021218235727/http://www.dnd.ca/menu/press/Reports/monitor_com_final/eng/cover_e.htm [MMC Final Report, 1999].

¹³¹ MMC March 1998 Report, *supra* note 110.

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system that is both meaningful and comprehensive, well beyond the parameters of legal minutiae that often distract observers of legal and judicial debate.”¹³²

By June 1999, however, the MMC was openly critical. The Committee expressed its concern that the DND and CF had “pursued the reform program without a clear vision of where they want to be.”¹³³ More specifically, the MMC criticized the delays in the implementation of “elements critical to the complaint resolution system”¹³⁴—namely, the Ombudsman, the Grievance Review Board, and the Military Police Complaints Commission. In concluding that a successful renewal problem depended upon a “necessary transition in attitude and culture”, the MMC demonstrated that it was no rubber stamp.¹³⁵ The MMC lived up to its primary responsibility of ensuring that the DND and CF followed through with change.

In its final report of December 1999, the MMC reported improvements in the military’s reform program. The MMC praised the CF and DND for their resolution of various military justice issues, concluding: “most of our outstanding concerns have been addressed as our monitoring begins to wind down.”¹³⁶ There was still important work to do, of course: one outstanding issue was the JAG’s response to Chief Justice of Canada Dickson’s recommendation that statistics on summary trials be kept and regularly publicized.¹³⁷ Evidently, however, the government had

¹³² Canada, “Minister’s Monitoring Committee on Change in the Department of National Defence and the Canadian Forces: Interim Report—1998” (1998), online: web.archive.org/web/20010609023125/http://www.dnd.ca/menu/press/Reports/Changes/Eng/cover_e.htm [MMC November 1998 Report].

¹³³ Canada, “Minister’s Monitoring Committee on Change in the Department of National Defence and the Canadian Forces: Interim Report—1999” (1999), online: web.archive.org/web/20050319101004/http://www.forces.gc.ca/site/reports/mmcc/monitor_com/eng/cover_e.htm [MMC June 1999 Report].

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ MMC Final Report, 1999, *supra* note 130 at chapter 5.

¹³⁷ See *ibid.*

implemented the most significant military justice reforms, either through Bill C-25 or through administrative action.¹³⁸

Despite the number of positive changes, however, the Committee criticized various “deficiencies in how the Department and the CF have tackled reform.”¹³⁹ “In the absence of an overall strategic agenda,” the Committee warned, the DND and CF would fail to implement the reforms in a “cohesive” manner.¹⁴⁰ Only by inculcating a spirit of reform and achieving “extraordinary measures of vision, leadership, and determination” would the DND and CF be able to ensure the long-term success of reform.¹⁴¹ Thus, the final report awarded the DND and CF a passing grade, but warned that without an “overarching philosophical shift in the way business is done,” any presumptive gains might wither away over time.¹⁴²

Why was the MMC so successful? First, the MMC, as with a number of external phase investigations, had both civilian and military members. Such a composition presumably protected against capture. Of the seven committee members, only one—Brigadier-General (retd.) Sheila Hellstrom—had a significant service record.¹⁴³ The remainder were eminent civilians. The Honourable John A. Fraser, a former Cabinet Minister and Speaker of the House of Commons, chaired the Committee.¹⁴⁴ Given its mixed composition, it comes as little surprise that the MMC proved willing time and time again to conduct hard-look review.

More significantly, the MMC succeeded because it had to report regularly on the implementation of reform. Had the MMC only issued a single report—say, in late 1998—it may well have missed key shortcomings in the military’s reform program. Clearly, the MMC changed its mind over time. While its first two reports

¹³⁸ See *ibid.*

¹³⁹ *Ibid* at Part One.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ See *ibid* at Annex 2.

¹⁴⁴ See *ibid.*

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largely praised the military, its final two reports were highly critical in tone. Since the MMC insisted on periodic examinations of the military's reform program, it was less likely to serve as a rubber stamp. And because the MMC issued periodic examinations, the military was bound to improve upon its reform measures. Had the MMC issued a single report, the military could easily have stonewalled, since it could live without the fear of future scrutiny. In sum, the MMC succeeded because it approached reform as an ongoing process, requiring periodic scrutiny, rather than as a one-off event.

A final reason for the MMC's success was the public-facing nature of its work. By publishing its four reports, the MMC granted the public and Parliament a window into the reform saga. Had the CF and DND delayed the implementation of reforms, the MMC would have so indicated, and the ensuing public and parliamentary backlash would have forced the military to act more quickly. In other words, the public-facing nature of the MMC's work acted as further incentive for the timely implementation of reforms. Were the MMC structured as a purely internal organization—with its reports kept confidential—it would have become infinitely harder for the public and Parliament to keep track of reform.

2. INSTITUTIONALIZATION OF REFORM: BILL C-25 AND INDEPENDENT REVIEW

In the Dickson II Report, the Special Advisory Group recommended that an “independent review of the legislation that governs the Department of National Defence and the Canadian Forces be undertaken every five years following the enactment of the legislative changes required to implement the recommendations contained in this Report and in our March 1997 [Dickson I] Report.”¹⁴⁵ Commentators would later pore over these words to make arguments about the appropriate scope of the independent review's mandate. The point is, however, that the Special Advisory Group realized the need for regular review of the

¹⁴⁵ Dickson II Report, *supra* note 53.

Canadian military justice system. In Bill C-25, Parliament institutionalized the Dickson II recommendation, specifying that the Minister of National Defence was to lay a review of the “provisions and operations of this act” before each House of Parliament every five years.¹⁴⁶ By statutorily creating a review mechanism, Bill C-25 ensured regular civilian control and oversight of the military justice system.

Thus far, there have been three independent reviews. Chief Justice of Canada Antonio Lamer submitted the First Independent Review in September 2003. The government failed to keep pace with Bill C-25’s schedule, however: Justice Patrick LeSage received Ministerial Direction only in March 2011 and submitted the Second Independent Review in December 2011. Justice LeSage recommended that the five-year review cycle be amended to a ten-year review cycle.¹⁴⁷ The government opted for a seven-year cycle instead.¹⁴⁸ In April 2021, retired Supreme Court Justice Morris Fish published his Third Independent Review.¹⁴⁹ The success of Parliament and the executive branch’s implementation of Justice Fish’s recommendations remains to be seen.

This section will briefly summarize the mandates and findings of past Independent Reviews, before conducting a critical evaluation. Although the Independent Reviews have generated useful reforms, Parliament has not implemented those reforms in an efficient manner. One solution to this issue would be to model any organization charged with overseeing implementation upon the Minister’s Monitoring Committee. Moreover, the executive branch should continue to convene targeted external reviews that cooperate with and draw upon the research of the Independent Reviews. As in the immediate post-Somalia period, such complementarity is likely to generate robust reform ideas.

¹⁴⁶ Bill C-25, *supra* note 70, s 96.

¹⁴⁷ The Honourable Patrick J LeSage, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence* (Ottawa: Department of National Defence, 2011) at 9 [LeSage Report].

¹⁴⁸ See *An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts*, SC 2013, c 24, s 273.601(2) [Bill C-15].

¹⁴⁹ See Fish Report, *supra* note 24.

1. *Chief Justice of Canada Lamer's Report*

CJC Lamer had a fairly narrow mandate. According to the Ministerial Direction, the “review of provisions in the National Defence Act that were not amended by Bill C-25 is not within the mandate of the Independent Review Authority.”¹⁵⁰ In other words, CJC Lamer was to focus on the “provisions and operation of Bill C-25”, rather than to conduct a wide-ranging investigation.¹⁵¹ In many ways, CJC Lamer’s report marked the end of the revolutionary phase of post-Somalia reform and the commencement of the evolutionary phase. The reforms that he and that Justice LeSage would later suggest were significant but were by no means as disruptive and bold as those generated during the external period of reform.

Chief Justice of Canada Lamer concluded that the “military justice system is generally working well.”¹⁵² He made multiple recommendations, related to the following themes or issues: the military court, military police, the *Code of Service Discipline*, the independence of key actors, and the grievance process.¹⁵³ The Director of Defence Counsel Services, he concluded, had to enjoy the same security of tenure provisions as the Director of Military Prosecutions.¹⁵⁴ The Military Police Complaints Commission was underworked and an internal audit of its requirements was in order.¹⁵⁵ Most of CJC Lamer’s serious criticisms focused on the grievances process, which was inefficient and terribly backlogged: among other recommendations, he called on the CF to form a

¹⁵⁰ Canada, “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 Other Acts*, as Required Under Section 96 of Statutes of Canada 1998, c.35” (Ottawa: Department of National Defence, 2003) at 1–2 [Lamer Report].

¹⁵¹ *Ibid* at 1.

¹⁵² *Ibid* at Foreword.

¹⁵³ See *ibid*.

¹⁵⁴ See *ibid* at 15–16.

¹⁵⁵ See *ibid* at 78–80.

senior task force to cut through the backlog and urged the Chief of Defence Staff to issue an annual report on the grievance process.¹⁵⁶

Parliament took almost a decade to act on CJC Lamer's recommendations. Several bills—notably, Bills C-7, C-45, and C-60—would have incorporated a number of CJC Lamer's recommendations, but unfortunately died on the Order Paper. Parliament successfully enacted a number of military justice reforms in Bill C-60—reducing, for example, “the types of courts martial from four to two”—but that bill was more responsive to the Court Martial Appeal Court's holding in *R v Trépanier* than to the Independent Review.¹⁵⁷ CJC Lamer's recommendations were instead implemented in Bill C-15, which received Royal Assent on 19 June 2013, after the Second Independent Review Authority had published its findings. Bill C-15, despite its tardiness, proved responsive to Justice Lamer's recommendations. In particular, Parliament improved the grievances system. Previously, the Chief of the Defence Staff had to adjudicate any matter that had to be referred to the Canadian Forces Grievances Board. Bill C-15 renamed the Grievances Board as the Military Grievances External Review Committee (MGERC) and notably allowed the Chief of the Defence Staff to delegate remedial powers to another officer even where the grievance was subject to mandatory findings and recommendations from the MGERC.¹⁵⁸

¹⁵⁶ See *ibid* at 101, 107.

¹⁵⁷ *An Act to Amend the National Defence Act (Court Martial) and to Make a Consequential Amendment to Another Act*, SC 2008, c 29 [Bill C-60]. See also *R v Trépanier*, 2008 CMAC 3. Bill C-60, it should be noted, provided the Senate Standing Committee on Constitutional and Legal Affairs an opportunity to study the court martial system and to make useful recommendations. See generally Senate, *Equal Justice: Reforming Canada's System of Courts Martial* (May 2009) (Chair: Joan Fraser).

¹⁵⁸ Lamer Report, *supra* note 151 at 100 (recommending that “the Chief of Defence Staff be given the authority to delegate to any officer under his direct command and control, any of the powers, duties or functions of the Chief of Defence Staff as final authority in the grievance process”). Cf Bill C-15, *supra* note 148 at s 29.14(1).

2. *Justice LeSage's Report*

Before Parliament had acted upon CJC Lamer's recommendations, Minister of National Defence Peter Mackay directed Justice LeSage to conduct the Second Independent Review. Minister Mackay granted Justice LeSage a fairly wide mandate, at least compared to that enjoyed by CJC Lamer: the Second Independent Review was to review the provisions and operation of Bill C-25 as well as conduct an Independent Review of the recently enacted Bill C-60.¹⁵⁹ Justice Lesage generated 55 recommendations. A great many focused on reforms to the Military Police: the military police should, for example, "establish close working relationships" with civilian police agencies.¹⁶⁰ Justice LeSage found various provisions within the National Defence Act to be unclear: in particular, he urged military authorities to clarify the scope of section 129 of the Act, which prohibits "acts, conduct, disorder or neglect to the prejudice of good order and discipline."¹⁶¹ Turning to the military grievance system, Justice LeSage noted that the system was marked by delays and inefficiency: he argued that there should be a one-year time limit for "a decision respecting a grievance".¹⁶² Like his predecessor, Justice LeSage's overall conclusion was that "the military justice system is sound, but some modifications will assist in ensuring its continued strength and viability."¹⁶³ Evolutionary, not revolutionary, change was the watchword of the day.¹⁶⁴

As with the First Independent Review, implementation of Justice LeSage's recommendations was slow. As the OJAG has noted, some of Justice LeSage's recommendations were "reflected in Bill C-15 regulations which came into force in September 2018,

¹⁵⁹ See LeSage Report, *supra* note 147 at 1.

¹⁶⁰ *Ibid* at 76.

¹⁶¹ *Ibid* at 18–20.

¹⁶² *Ibid* at 57.

¹⁶³ *Ibid* at 12.

¹⁶⁴ See *ibid*.

as well as in revised policies.”¹⁶⁵ Whereas Parliament took over a year after the publication of the Dickson I Report to pass Bill C-25, the government took almost seven years to respond to the Lesage recommendations. Part of the delay was surely due to the wave of minority parliaments that governed in the 2000s: without a majority mandate, the government of the day was unable to speedily enact legislation. Given that the 45th Parliament is also a minority parliament, the Trudeau government may not be able to respond effectively and immediately to Justice Fish’s Independent Review either.

3. *Justice Fish’s Report*

Minister of National Defence Harjit Sajjan appointed retired Supreme Court Justice Morris Fish as the Third Independent Review Authority in November 2020. Justice Fish released his report—the most comprehensive of the three Independent Review Authority reports—on 30 April 2021. Justice Fish benefited from a broad mandate; in response to Chief Justice of Canada Lamer’s recommendation that Parliament enhance the scope of the Independent Review Authority’s mandate, Parliament enacted subsection 273.601(1) of the *National Defence Act*, which now requires the Review Authority to, in Justice Fish’s words, “‘rigorously scrutinize and analyze’ the structure and operation of Canada’s military justice system writ large.”¹⁶⁶

While affirming the need for a separate military justice system, Justice Fish recommended that Parliament and the executive branch reform key aspects of the system to resemble civilian norms more closely.¹⁶⁷ In addressing the status of military judges, for example, Justice Fish “recommend[ed] that military judges cease to be members of the [Canadian Armed Forces (CAF)] and renounce their military rank at the time of their appointment”;

¹⁶⁵ Geneviève Bernatchez, *The Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2019 to 31 March 2020* (Ottawa: Department of National Defence, 2020) at 47.

¹⁶⁶ Fish Report, *supra* note 24 at i [emphasis in original].

¹⁶⁷ See *ibid* at iv, vi–vii, 13, 18–19.

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civilianization of military judges would “ensure their impartiality and independence from the chain of command.”¹⁶⁸ Moreover, in the case of “a jurisdictional conflict between military and civilian authorities” in deciding which system should prosecute an accused, Justice Fish recommended that civilian jurisdiction and authorities ought to take precedence.¹⁶⁹

Like past Independent Review Authorities, Justice Fish did not refrain from criticizing ineffective aspects of the military justice system. He noted that “trials by court martial currently take longer than comparable civilian trials” and listed several mechanisms that members of the military justice system might take to minimize delay.¹⁷⁰ The military grievance process remained ineffective and bogged down by delay.¹⁷¹ Justice Fish suggested several reforms to the grievance process, including the implementation of a digitized complaints system, which “would favour transparency and . . . accountability.”¹⁷²

The government has implied that it will take a more proactive approach to the implementation of the Independent Review Authority’s recommendations. Minister Sajjan noted that the DND and CAF accepted Justice Fish’s recommendations in principle and would proceed immediately with 36 of them.¹⁷³ In a move that will surely improve transparency, the DND has “commit[ted] to providing twice yearly a report to the Standing Committee on National Defence”.¹⁷⁴

¹⁶⁸ *Ibid* at 203.

¹⁶⁹ *Ibid* at 206.

¹⁷⁰ *Ibid* at 210–11.

¹⁷¹ See *ibid* at iv.

¹⁷² *Ibid* at 215.

¹⁷³ See Government of Canada, “Defence Minister releases results of the Third Independent Review of the *National Defence Act* and begins implementation of recommendations” (1 June 2021), online: *Government of Canada* <canada.ca/en/department-national-defence/news/2021/06/defence-minister-releases-results-of-the-third-independent-review-of-the-national-defence-act-and-begins-implementation-of-recommendations.html> [Government of Canada, “Third Independent Review”].

¹⁷⁴ *Ibid*.

Perhaps the most interesting aspect of the Third Independent Review Authority report, from the standpoint of this article, is that Justice Fish explicitly recognized the value of combining comprehensive and targeted investigations. Despite his broad mandate, Justice Fish noted that he did not have sufficient information or time to consider two specific issues: the Office of the Ombudsman for the DND and CAF and second, “the role of the military justice system in combatting hateful conduct.”¹⁷⁵ Justice Fish recommended targeted reviews on these two topics, and also noted the ways in which retired Supreme Court Justice Louise Arbour’s targeted review of sexual misconduct in the military might benefit from the Third Independent Review Authority’s record and research.¹⁷⁶ Just as in the immediate aftermath of the Somalia Affair, the best way to generate robust military justice reform in the present day is to launch complementary comprehensive and targeted inquiries.

4. *Evaluation of the Independent Reviews*

In the 2019 case *R v Stillman*, the Supreme Court praised the Independent Review mechanism. The Court wrote that the “continuing evolution of [the military justice] system [has been] facilitated by the periodic independent reviews”, which ensure that the system is “rigorously scrutinized, analyzed, and refined at regular intervals. This speaks to the dynamic nature of the military justice system.”¹⁷⁷ The Supreme Court’s assessment is largely correct. Justices Lamer, LeSage, and Fish generated thoughtful and helpful recommendations covering a wide variety of military justice topics. Nonetheless, the Independent Review mechanism is imperfect. Both Parliament and the executive branch must remain vigilant if they wish to guarantee the continued health of the military justice system. Specifically, they must ensure hard-look review of implementation efforts and continue to combine targeted and comprehensive inquiries.

¹⁷⁵ Fish Report, *supra* note 24 at 216.

¹⁷⁶ See *ibid* at 216, vi.

¹⁷⁷ *R v Stillman*, 2019 SCC 40 at para 53.

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First, although the Independent Reviews have generated useful reforms, efficient implementation has been an issue. It took 10 years for Parliament to enact many of CJC Lamer's recommendations—a period so long that the Second Independent Review Authority had both started and finished its report by the time Bill C-15 received royal assent. The implementation of Justice LeSage's recommendations was a similarly laborious process. Arguably, many of the recommendations contained in both reports were not particularly pressing in nature—reforms to the tenure provisions of the director of Defence Counsel Services did not need to be implemented straightaway, for example.¹⁷⁸

But at least some of the recommendations covered topics of fundamental justice. Notably, the military grievances process was still functioning poorly when Justice LeSage mounted his investigation. Justice LeSage's observation that "many of the same concerns" raised before CJC Lamer were "raised by CF members at the bases [Justice LeSage] visited in the summer of 2011" was a stunning indictment of the grievances process.¹⁷⁹ CAF personnel, who regularly labour under difficult and dangerous conditions, should have access to a first-rate grievance system. Parliament's failure to promptly reform the grievance process in response to Chief Justice of Canada Lamer's report was egregious. Whether Parliament and the executive branch will efficiently implement Justice Fish's recommendations remains to be seen, though if past practice is an accurate predictor of future behaviour, the odds are low.

The DND and CAF have pledged to provide two reports a year "to the Standing Committee on National Defence on the progress on implementing [Justice Fish's] recommendations."¹⁸⁰ This is an important step, as Parliament will be able to effectively scrutinize the pace and extent of the executive branch's reforms. The Minister of National Defence should ensure that the body charged with reporting to Parliament closely resembles the minister's

¹⁷⁸ See Lamer Report, *supra* note 150 at 15–16.

¹⁷⁹ LeSage Report, *supra* note 147 at 54.

¹⁸⁰ Government of Canada, "Third Independent Review", *supra* note 173.

Monitoring Committee, which played such a vital role in overseeing the implementation of the external reports' recommendations in the aftermath of the Somalia Affair. That body might consist of a small body of civilians—say, three experts—who would be completely independent from the CAF chain of command. If the military is too slow in implementing reforms, then the body's submissions to Parliament—which ought to be publicized—will prod the military back towards reform. Structuring that body similarly to the MMC would be a relatively low-cost method of ensuring the timely and full implementation of Justice Fish's reforms.

Second, Parliament and the executive branch should continue to launch both comprehensive and targeted reviews of the military justice system. The combination of these two types of reviews was, this paper has argued, a major reason for the success of post-Somalia reform. Recent developments indicate that Parliament and the executive branch have internalized this lesson. Justice Fish's report was comprehensive in scope, since Parliament expanded the mandate of Independent Reviews by enacting section 273.601 of the *National Defence Act*.¹⁸¹ Even prior to the publication of the Fish report, however, the Minister of National Defence appointed Justice Arbour to conduct a targeted review into sexual misconduct in the CAF.¹⁸² The minister has also accepted Justice Fish's recommendation to organize a targeted review into "the role of the military justice system in combatting

¹⁸¹ See Canada, "Independent Reviews of the National Defence Act", online: <[canada.ca/en/department-national-defence/corporate/policies-standards/acts-regulations/independent-reviews-national-defence-act.html](https://www.canada.ca/en/department-national-defence/corporate/policies-standards/acts-regulations/independent-reviews-national-defence-act.html)>.

¹⁸² See Fish Report, *supra* note 24 at 6; Canada, Press Release, "Government releases final Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces and outlines next steps to address and eradicate sexual harassment and misconduct" (30 May 2022), online: <[canada.ca/en/department-national-defence/news/2022/05/government-releases-final-independent-external-comprehensive-review-of-the-department-of-national-defence-and-the-canadian-armed-forces-and-outline.html](https://www.canada.ca/en/department-national-defence/news/2022/05/government-releases-final-independent-external-comprehensive-review-of-the-department-of-national-defence-and-the-canadian-armed-forces-and-outline.html)>.

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hateful conduct”.¹⁸³ It would seem that the Canadian state has fully learned the value of combining comprehensive and targeted external inquiries.

One potential criticism of multiple, complementary reviews is that the reviews will take too long. The seven-year period between Independent Reviews, however, already gives the government plenty of time to work with. If the government was truly worried about an Independent Review meeting its deadline, it should appoint the authority six to seven years after the last review, thereby giving the authority at least a year to produce a report. Moreover, targeted reviews could draw on the records and evidence considered by the Independent Review Authority. After all, this was one of the reasons for the rapidity of the targeted reviews in the post-Somalia period. The Special Advisory Group, so ably led by former Chief Justice of Canada Brian Dickson, took under two months to deliver its landmark first report. It moved quickly in part because it drew on materials that the Somalia Commission had collected and considered. The ability of targeted review authorities to collaborate closely with the Independent Review Authority means that the reviews will be timely.

III. THE BROADER LESSONS OF SOMALIA

Might the Canadian government’s response to the Somalia Affair contain lessons for modern-day policy-makers? The answer is yes, although policy-makers should be wary of over-operationalizing the lessons from Somalia. The Canadian Forces’ conduct in Somalia was highly contextual and it would be dangerous to blindly transplant the governmental response to the Somalia Affair to other contexts. With that caveat in mind, this section of the article argues that the lessons of the Somalia Affair apply to at least two modern contexts. First, the government’s response to the Somalia Affair is a useful template for other countries that must deal with war crimes or serious disciplinary violations. Second, Canadian politicians and military lawyers should not retreat into

¹⁸³ Fish Report, *supra* note 24 at at 238.

complacency and should instead revisit and improve various aspects of the modern military justice system.

A. APPLYING THE SOMALIA MODEL TO OTHER COUNTRIES

Foreign democracies can derive several lessons from the Canadian government's response to the Somalia Affair—henceforth termed the “Somalia model.” One overarching lesson is that it may not be sufficient to respond to military members' commission of grave disciplinary offences or war crimes with a handful of courts martial. In certain circumstances—particularly where those breaches disclose wider cultural problems within the military—it will be necessary to pursue individual criminal accountability as well as implement larger, structural reforms. It should be noted that this applies in the context of international criminal law too; in war crimes cases, for example, international tribunals and organizations would do well to consider pairing prosecutions with structural remedies that aim towards the wholesale reform of a national military. In pursuing structural military reforms, foreign democracies can derive at least three specific lessons from the Canadian experience—first, the value of multiple, complementary investigations; second, the multi-faceted nature of the Somalia model; and third, the importance of robust implementation.

The first key lesson from Somalia is that commissioning multiple, complementary investigations can generate useful and bold reform ideas. Had the Canadian government merely relied on the de Faye Board of Inquiry, it is unlikely that the post-Somalia wave of reforms would have occurred. Instead, by combining a comprehensive investigation—the Somalia Commission—with a number of targeted investigations, the Canadian government was able to generate meaningful reforms in a timely fashion. Of course, foreign policy-makers should not entirely dismiss the value of internal investigations. Although the de Faye Board of Inquiry failed to suggest revolutionary reform, internal investigations might succeed in other contexts—where, for example, internal investigators are steeped in a culture of independence and objectivity. Moreover, other countries might copy the de Faye Board's mixed civilian-military makeup, while ensuring that adequate safeguards against capture are in place. Even countries

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that are capable of mounting robust, internal investigations, however, will benefit from commissioning additional, external investigations. Properly structured, these external investigations can help fill gaps and suggest additional reforms.

The second key lesson is that there are no silver bullets for a government that has the unenviable job of dealing with war crimes or other major disciplinary infractions. Modern commentators have focused inordinately on the Canadian government's decision to disband the Canadian Airborne Regiment.¹⁸⁴ Yet such a focus obscures the true story of reform. The Somalia model succeeded not because of the isolated decision to disband a regiment, but because the government was willing to go the whole nine yards: that is, to commission a battery of external investigations and to act upon suggested reforms. A focus on silver bullets can be dangerous. Disbanding a unit or even a regiment does little on its own. If the Canadian government had merely disbanded the Airborne Regiment without implementing deeper reforms, it is possible that ex-Airborne soldiers would have brought the toxic Airborne culture to their new units. Only by introducing systemic reform was the Canadian government and military able to prevent a repeat of the Somalia Affair.

The final lesson is that implementation matters just as much as idea generation. The comprehensive and targeted investigations generated an impressive range of ideas. Yet as the experience of the Minister's Monitoring Committee demonstrates, the military may be slow to implement suggested reforms. External scrutiny can help get the job done. Moreover, as the Minister's Monitoring Committee argued, the Canadian Forces had to not only implement suggested reforms, but also develop a reformist mindset.¹⁸⁵ Militaries are, by their very nature, conservative organizations. A reformist mindset, developed through institutions such as regular,

¹⁸⁴ See e.g. Taylor C Noakes, "We Disbanded the Canadian Airborne Regiment 25 years Ago. Now, It's the RCMP's Turn", *The Globe and Mail* (3 July 2020), online: <[the globe and mail.com/opinion/article-we-disbanded-the-canadian-airborne-regiment-25-years-ago-now-its/](https://www.theglobeandmail.com/opinion/article-we-disbanded-the-canadian-airborne-regiment-25-years-ago-now-its/)>.

¹⁸⁵ See MMC Final Report, 1999, *supra* note 130 at Part One.

independent review, is the only way to ensure the continued health of a military.

B. THE SOMALIA MODEL AND ITS CANADIAN LEGACY

The CAF has once again found itself gripped by crisis. The revelation that several high-ranking officers are the subject of pending sexual misconduct investigations has created a crisis of confidence in the CAF's ability to adequately manage sexual harassment cases within its ranks.¹⁸⁶ In November 2021, Minister of National Defence Anita Anand adopted the recommendations of Justices Fish and Arbour and announced that civilian authorities, rather than the military justice apparatus, would henceforth investigate and prosecute military sexual misconduct cases.¹⁸⁷ Such reform will take time: police forces across the country have already warned that they "cannot [take on military sexual misconduct] cases without additional resources, because their staff and budgets are already too stretched."¹⁸⁸

Moreover, the sexual misconduct crisis is not the only problem that the Canadian military justice system is currently facing. As Justice Fish's report demonstrates, the Canadian military justice system remains imperfect.¹⁸⁹ Despite the supposed need for dispatch, the military justice system is marked by "delays in deciding whether to lay charges" and "overly long periods of time

¹⁸⁶ See e.g. Marieke Walsh, "Senior military officer charged with five counts of sexual assault", *The Globe and Mail* (23 February 2022), online: <theglobeandmail.com/politics/article-senior-military-officer-charged-with-five-counts-of-sexual-assault/>.

¹⁸⁷ See Lee Berthiaume, "Defence minister says military sexual misconduct cases will be handled by civilians", *CTV News* (4 November 2021), online: <ctvnews.ca/politics/defence-minister-says-military-sexual-misconduct-cases-will-be-handled-by-civilians-1.5652020>.

¹⁸⁸ Colin Freeze, "Police challenge Ottawa's plan to offload military sexual assault cases", *The Globe and Mail* (15 March 2022), online: <theglobeandmail.com/canada/article-police-question-federal-downloading-of-military-sexual-assault-cases/>.

¹⁸⁹ See Fish Report, *supra* note 24 a i–viii.

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setting up courts martial”.¹⁹⁰ The vast majority of disciplinary breaches are dealt with not through courts martial, but through summary proceedings, which, as Pascal Lévesque has argued, can be improved in multiple ways.¹⁹¹ The Ombudsman, Military Police Complaints Commission (MPCC), and the Military Grievances External Review Committee are inefficient and costly bodies.

How to deal with such problems? I suggest that today’s military lawyers and planners must ensure the continued inculcation of a reformist mindset. They can do so by applying the lessons of the Somalia model. Policy-makers might dig back into the Somalia record, because the post-Somalia reports are a veritable treasure trove of reform ideas. Since not all the Somalia Commission’s recommendations were accepted and implemented, policy-makers might benefit from resurrecting some reform ideas. For example, the Ombudsman, MPCC, and Military Grievances External Review Committee could be abolished as institutions and reorganized under one office—that of the Inspector General—to create economies of scale. The government must remember too that implementation is as important as the generation of reform ideas. The government must ensure, for example, that the body within the DND and CAF that reports to the Standing Committee on National Defence on the implementation of Justice Fish’s recommendations is immune to capture and is composed not only of military personnel.¹⁹²

As CJC Lamer so eloquently put it, “[t]hose responsible for organizing and administrating Canada’s military justice system . . . must continue to strive . . . to offer a better system than merely that which cannot be constitutionally denied.”¹⁹³ Only by adopting

¹⁹⁰ Lee Berthiaume, “Canada’s military justice system faces constitutionality issues, leaving cases in limbo”, *Global News* (16 October 2020), online: <globalnews.ca/news/7400844/canada-military-justice-system-constitutionality-issues/>.

¹⁹¹ See Pascal Lévesque, *Frontline Justice: The Evolution and Reform of Summary Trials in the Canadian Armed Forces* (Montreal: McGill-Queen’s University Press, 2020), at 163–65.

¹⁹² See generally Government of Canada, “Third Independent Review”, *supra* note 173.

¹⁹³ Lamer Report, *supra* note 151 at Foreword.

a reformist mindset will Canadian military leaders be able to prevent a future repetition of the Somalia Affair and ensure the excellence of the Canadian military justice system.