

Sword and Scale

CBA National Military Law Section

Newsletter

[Message from the Chair](#)

By Cdr Martin Pelletier

Looking back on a year of transition: from the framework of a one-day national CLE in Ottawa in collaboration with the Office of the Judge Advocate General, the Section now provides a number of shorter special presentations across the country.

Important dates

[Military Law Section Meeting and CLE conference: "Military Justice – an Oxymoron?" – June 5, 2009, Ottawa](#)

A must-attend forum for discussion of recurring issues of relevance to the military justice system, presented by the National Military Law Section and the Continuing Legal Education Committee of the Canadian Bar Association.

[Notice of Election for National Military Section Executive Committee members](#)

The National Military Law Section is seeking nominations for the position of Treasurer, Secretary and up to five Executive Members, for the term Sept. 1, 2009 to Aug. 31, 2010.

Military legal news

[The Judge Advocate General to teach at the US Naval War College from 2010](#)

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[News from the Canadian Forces Military Law Centre](#)

This year marks the Canadian Forces Military Law Centre's second year of existence. The following is an overview of the academic programs and training provided by the CFMLC.

International humanitarian law/ law of armed conflict

MAY 2009

Editor:

Capt Patrick Crocco

E-Publications Editor:

Conrad McCallum

Production:

Kathryn Robichaud

Staff Liaison:

Rachelle Watson

Contributors:

LCol Randy Callan

Maj Jean-Michel Cambron

Capt Patrick Crocco

LCdr Patricia Goldman

LCdr Lyse Markert

Cdr Martin Pelletier

Joseph Rikhof

LCdr Paul Rutkus

Maj Valerie Saunders

LCdr Magdalena Siepka

Maj Jay Simpson

Maj Eric Weaver

Published by the Canadian Bar Association's **National Military Law Section.**

Don't miss a single update from the Section – add military.law@cba.org to your address book.

The views expressed in the articles contained herein are solely the views of the authors, and do not necessarily represent the views of the Canadian Bar Association.

Battle of the Windmill: Genesis of unlawful combatant trials in Canada

By LCdr Paul Rutks

Recent application of the term “unlawful combatant” as a crime in and of itself in U.S. law invites comparisons to a similar legal development in pre-Confederation Canadian history. Unlike the recent U.S. development, however, the Canadian approach in November 1838 was to try unlawful combatants in either civilian court or regularly constituted military court martial.

Child soldiers: Should they be punished?

By Joseph Rikhof

The dilemma posed by child soldiers is explored from a historical perspective. A framework of analysis is proposed; one that will balance the notion of accountability with the special needs and problems of children in contemporary conflict situations.

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By Maj Eric Weaver

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Administrative law

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So you want to advise a BOI...

By Maj Valerie Saunders

The highlights of a recent course on Boards of Inquiry in Ottawa, which brought together 48 lawyers from across the country.

Update on legislation related to the CF Reserve Force

By Maj Eric Weaver

With the passage of Bill C-40, the federal government took a step to fulfill its promise in the Oct. 16, 2007, Speech from the Throne to “work with the provinces and territories to bring forward a comprehensive plan to modernize reservist reinstatement policies.”

THE CANADIAN BAR ASSOCIATION:

500-865 Carling Avenue
Ottawa, ON K1S 5S8

Tel: 613-237-2925
Toll-free: 613-237-2925
Fax: 613-237-0185

E-mail: info@cba.org

National Military Law Section Activities

"A Year in Review: Military Law"- A presentation in Halifax

By LCdr Lyse Markert

The Assistant Judge Advocate Office (Atlantic) hosted the Canadian Bar Association – Nova Scotia, Military Law Section in Halifax on March 23, 2009. The afternoon session provided meaningful insight into topical issues relevant to the practice of military law.

"The Military Justice System" – A presentation in Quebec City

By Maj Jean Caron

On Feb. 26, 2009, the Quebec City Courthouse was the setting for a presentation on the military justice system to members of the Quebec City legal community. Attendees were provided with an overview of the military justice system, its *raison d'être*, as well as the jurisdiction of the Summary trial, wrapping up with the Court Martial.

Outreach activities in the Pacific region

LCol Randy Callan

On 28 Jan. 2009, Lawyers of the Victoria Bar Association and Legal Officers of AJAG Pacific received a presentation from Colonel Dom McAlea focusing on restoration of the Rule of Law in the Democratic Republic of Congo.

Address of the Australian Defence Force Inspector General

By Maj Jay Simpson

On June 2, 2008, the CBA National Military Law Section and the Office of the Judge Advocate General of the Canadian Forces co-hosted Mr. Geoff Earley, AM, Inspector General of the Australian Defence Force.

The National Military Section's Executive Committee members

A detailed listing of our Executive.

Final words

Message from the Editor

Capt Patrick Crocco

Interested in contributing to the next issue of *Sword & Scale*? Sept. 15 is the submission deadline.

Message from the Chair

By Cdr Martin Pelletier

Dear friends,

It is a real pleasure to write this “word from the Chair” in this spring’s edition of the *Sword and Scale* Newsletter. I have had the privilege of heading the National Military Law Section for close to 10 months now, a period during which the Section accomplished a lot in terms of outreach across Canada, hosting over 10 special presentations and contributing significantly to activities of other Sections and to the CBA as a whole.

The National Military Law Section is one of the most active national sections of the CBA. Our outreach has, in our view, responded to the wishes of the membership who have expressed the desire to benefit from section activities in locations closer to where they are practicing. In that sense, we have been able to perform an effective transition from a framework of a one-day national CLE in Ottawa in collaboration with the Office of the Judge Advocate General to a number of shorter special presentations across the country.

These outreach efforts are continuing; first, with the publication of this newsletter which includes a number of articles on recent developments in the field of military law, including training initiatives and special presentations. We’ve also included a number of substantive legal articles which should be of interest to a great number of members.

Second, on the morning of June 5, 2009, the Section will host its first independent National CLE with a half-day session on Military Justice issues, involving the participation of eminent speakers who will discuss very real and fundamental issues related to current and future challenges in the military justice system. I believe this is an event not to be missed and I hope the membership will rally to express its support in registering and participating.

Finally, the Section will have its Annual Section Meeting on the afternoon of June 5th (following the CLE session) to look at the past and discuss the future direction of the Section. Further details about the National CLE and Annual Section Meeting are set out in this issue of the *Sword & Scale*.

I wish to thank the Judge Advocate General and members of the Section who contributed to this year’s activities either by helping organizing special presentations, contributing as members of the

executive or contributing articles to this issue of the *Sword & Scale*. Special thanks go to Patrick Crocco, who has volunteered to be our editor for this issue and has done a great job of putting together a great product with the help of CBA Staff. If you did not get the chance to contribute to the Section thus far this year, there remain significant opportunities for your involvement, starting with membership in the Section's executive for next year and beyond. CBA involvement is an investment in your profession and an extremely rewarding experience. Please consider making a difference and enjoy this issue of your newsletter. I look forward to seeing you on June 5th.

[▲TOP](#)

Military Law Section Meeting and CLE conference: "Military Justice – an Oxymoron?" – June 5, 2009, Ottawa

Presented by the National Military Law Section and the Continuing Legal Education Committee of the Canadian Bar Association

Friday June 5, 2009

Royal Canadian Air Force Officer's Mess
158 Gloucester St. Ottawa, ON

What questions were raised by the Court Martial Appeal Court in the *Trepanier* decision? What about the government's legislative response? This conference will provide a forum for discussion of recurring issues of relevance to the military justice system, including:

The scope of military justice: Should military jurisdiction be subordinate to civilian courts? Should the circumstances of an offence determine military jurisdiction?

The assessment of military justice as inherently derogatory: Does equality before the law require that proceedings of civilian courts be the benchmark for military tribunals?

Military tribunals and courts martial: Has the legislated response in S.C. 2008 c.29, (Bill C-60) offered adequate choice regarding the mode of trial?

Crime and punishments: Is there room to punish military offenders

more severely? Does extended power of punishment equate with harsher sentences? Speakers include:

- Professor David McNairn, Faculty of Law, University of Ottawa
- Colonel (Ret'd) Michel W. Drapeau, O.M.M., C.D. from Michel Drapeau Law Office, Ottawa
- David Bright, Q.C. from Boyne Clarke in Dartmouth, NS

Lunch will be provided for those who wish to remain to attend the National Military Law Section Meeting in the afternoon.

[Registration](#) details and a [full program](#) are available on the CBA's website. 🗺️

For more information about this CLE, you can also contact:

Sheila Mills

CBA National Office

sheilam@cba.org

613-237-2925; 1-800-267-8860, x 107

The annual National Military Law Section meeting will be held in the afternoon (following lunch) at the Royal Canadian Air Force Officer's Mess on Friday 5 June 2009.

📌 [TOP](#)

Notice of Election for National Military Section Executive Committee members

The National Military Law Section is seeking nominations for the position of Treasurer, Secretary and up to five Executive Members, for the term Sept. 1, 2009 to Aug. 31, 2010.

If you're interested in nominating yourself or another Section member, please see the [Notice of Election](#) for full details.

Nominations must be received by **Friday, June 26, 2009** c/o [Rachelle Watson](#).

📌 [TOP](#)

The Judge Advocate General to teach at the US Naval War College from 2010

On April 3, 2009, BGen Kenneth Watkin Q.C., the Judge Advocate General for the Canadian Forces, announced that upon the completion of his term as JAG in April 2010, he will be moving to the US Naval War College to occupy the Charles H. Stockton Chair of International Law.

The United States Naval War College was founded in 1884 by the Secretary of the Navy for "an advanced course of professional study for naval officers." This mandate was expanded by its first president, Commodore Stephen Luce, who organized the college into "a place of original research on all questions relating to war, and to statesmanship connected with war, or the prevention of war."

Rear Admiral Charles Stockton is considered one of the US Navy's first uniformed experts in international law. Graduating from the US Naval Academy in 1865 he served on and off ships, returning to the US Naval Academy in 1898 as its President. RAdm Stockton was also a delegate to the 1908-09 London Naval Conference which codified international maritime law in its Declaration Concerning the Laws of Naval War.

The Charles H. Stockton Chair of International Law was created as a full-time professorship at the US Naval War College in 1951 and named in RAdm Stockton's honour in 1967. The JAG has indicated that he will be occupying the Chair from 2010 to 2012. This is a very prestigious position and we heartily congratulate the JAG on his appointment.

[TOP](#)

News from the Military Law Centre

By Maj Jean-Michel Cambon
CFMLC

This year marks the Canadian Forces Military Law Centre's second year of existence. Established as a Directorate of the Canadian Defence Academy (CDA), the CFMLC is a joint effort of the CDA and the Office of the JAG to provide innovative legal research, education and training to the Canadian Forces. The following is an overview of the academic programs and training provided by the

CFMLC.

[Read full details](#) 🗨️

(Available in French only)

[▲TOP](#)

The Battle of the Windmill: Genesis of unlawful combatant trials in Canada

By LCdr Paul Rutkus

DJA reserve officer

Canadian Forces Military Law Centre

In the first decade of the 21st century we have witnessed the application of the term “unlawful combatant” for purposes of denying combatant immunity before U.S. tribunals, i.e. killing of an armed enemy in warfare is generally lawful for a privileged combatant – such as a member of a nation state’s armed forces – but can be murder if committed by someone else. This decade has also seen the term “unlawful combatant” being defined as a crime in and of itself in U.S. law. Interestingly, in pre-Confederation Canadian history, there was a similar legal development resulting from the Battle of the Windmill, in November 1838.

Unlike the recent U.S. development, the Canadian approach was to try unlawful combatants in either civilian court or regularly constituted military court martial. This narrative explores the battle which was the genesis of the Canadian approach to unlawful combatants.

[Read the full article](#) 🗨️

[▲TOP](#)

Child soldiers: Should they be punished?

By Joseph Rikhof

Crimes against Humanity and War Crimes Section, Department of Justice

University of Ottawa Faculty of Common Law

Unlike adults involved in armed conflict, children, because of their age, their victimization and limited appreciation of their actions, pose a unique situation when the question of responsibility arises for crimes committed during a war. This paper will explore this dilemma from a historical perspective and will attempt to provide a framework of analysis, which will balance the notion of accountability with the special needs and problems of children in contemporary conflict situations.

[Read the full article](#) 📄

[▲TOP](#)

The Military Law Centre: On target

By Maj Eric Weaver
Legal Advisor CEFCOM

In the military context, “targeting” is one of those ostensibly inoffensive terms used to describe the harsh realities of war. Like *collateral damage*, *neutralization* or *pacification*, targeting is a euphemism that describes the deliberate killing of an adversary or the destruction of his stuff.

The law of targeting is set out in Additional Protocol I to the Geneva Conventions, which dictates what commanders must consider when planning or deciding upon an attack. They must do everything feasible to distinguish between civilian objects and military objectives. They must avoid and minimize civilian damage. They must balance the expected civilian damage against the anticipated military advantage. Aiding these commanders in the interpretation of these obligations are their lawyers.

Over the weekend of Sept. 13-14, 2008, in Kingston, Ontario, a handful of legal officers attended the Military Law Centre’s *Legal Aspects of Targeting* seminar. The aim of the seminar was to explore and discuss the legal and operational aspects of targeting, including recent developments in and interpretations of International Humanitarian Law.

For two days, we explored the law, the operational context and their intersection. We learned about the legal and strategic constraints on

the use of force and how these apply to different traditional military activities, such as land-based operations and special operations. We also learned about the times when force, in the traditional sense, is not used, such as in information operations, computer network operations and other types of non-kinetic targeting that focus on counterinsurgency operations.

The Military Law Centre, established as part of the Canadian Defence Academy in 2007, demonstrated yet again that it is capable of delivering a high-quality course on a timely and relevant topic. Kudos to MLC director, LCol Martin Kenny, and course OPI LCdr Stephane Pierre-Noel, for a job well done.

[TOP](#)

Changes to the Board of Inquiry process

Cmdr Patricia Goldman

Legal Advisor to the Administrative Investigation Support Centre

On March 5, 2009 the Minister of National Defence signed an Order amending Chapter 21 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) relating to Summary Investigations (SI) and Boards of Inquiry (BOI). The approval of these amendments saw the conclusion of one step in the process of implementing recommendations regarding changes to the conduct of administrative investigations within the Canadian Forces (CF). These recommendations date back to 2005 when the Chief of Defence Staff (CDS) ordered a review of the CF BOI process in response to the December 2004 Department of National Defence/ Canadian Forces Ombudsman's Report *When a Soldier Falls*. This report examined the response of the CF to the accidental death of Master Corporal Rick Wheeler during a training accident in 1992.

The Ombudsman's report contained a variety of recommendations regarding how the CF BOI process should be changed to address issues such as the treatment of families of CF members who die while on duty and the application of rules of procedural fairness to individuals who may be adversely affected by a BOI, including the attribution of blame. The CF response to these recommendations was the creation of a BOI process review team (BOI PRT). In September 2005 the BOI PRT delivered a report to Armed Forces Council (AFC) which recommended a number of changes to QR&O and Defence Administrative Orders and Directives (DAODs), and

proposed the development of a training package for BOI members.

With the endorsement of this report by AFC, the Administrative Investigation Support Centre (AISC) was created to provide training, lessons learned and advice to all BOI. The AISC was also tasked with coordinating a comprehensive legal review and consultation process for the remaining recommendations from the report of the BOI PRT. The approval by the Minister of proposed changes to the QR&O signifies an important step in this process and will now enable detailed changes to subordinate orders such as the DAODs.

Various articles in Chapter 21 of the QR&O have now been amended to improve the quality and fairness of BOI and SI conducted across the CF. Some of these changes are minor or procedural in nature, such as changes in terminology, while others have a more substantive impact on the conduct and use of BOI and SI. Among the more important changes is the strengthening of conflict of interest rules for those who convene boards as well as those who serve as members. QR&O art.21.06 now indicates that no person shall convene a BOI if a real or perceived conflict exists or may arise given the relationship of the person to the subject matter of the investigation, if that person or any of their superiors may be adversely affected by the investigation or if the person or any of their superior may be called as a witness. Similar rules exist under QR&O art. 21.08(2)d) regarding the appointment of members.

Mandatory entitlement to procedural fairness has also been incorporated into the amendments, with a clear articulation that it applies to any person who appears likely to be adversely affected by evidence received by a BOI. The protections provided include the right to notice, a reasonable opportunity to review all relevant evidence, to be present during further testimony of witnesses and to make a concluding statement. Persons provided such notice may also request that: witnesses be recalled, further witnesses be called, and further questions asked of witnesses.

In relation to the previous requirement for BOI and SI into injury or death to determine whether the deceased or injured member or any other person was to blame, QR&O art. 1.47 now refers to the requirement to make findings regarding the cause and contributing factors. The attribution of blame was a particularly sensitive issue when investigating a suicide and frequently led to the use of civil liability-like language. The amended wording of the QR&O still enables a BOI or SI to make findings regarding actions which may have contributed to the death or injury without using the

inflammatory language of “blame.”

The final substantive change to Chapter 21 relates to the removal of the mandatory requirement to conduct BOI and SI for serious injuries received in action. The use of these investigative tools had frequently proved to be unwieldy in the operational setting and inefficient for the purposes of capturing information for timely assessment of benefit entitlements for injured CF members. This amendment now means that serious injuries received in action are being treated in the same manner as deaths of CF members caused by wounds received in action. In both instances commanders would still have the option to conduct a BOI or SI if necessary, but are not required to do so. Moreover, the chain of command will continue to ensure that required information is obtained, recorded and forwarded to the appropriate organizations whenever a serious injury occurs.

As a result of these important amendments to the QR&O, the AISC is now involved in a detailed review of all DAODs regarding the conduct of BOI and SI. Proposals regarding changes to these subordinate orders should be put forward for approval by the end of this year.

 [TOP](#)

So you want to advise a Board of Inquiry...

*By Maj Valerie Saunders
DLaw Mil Pers 3*

From Feb. 12-13, 2009, 48 lawyers travelled from across the country to gather at the Albert at Bay hotel and learn about Boards of Inquiry. While most of the attendees were Majors and Lieutenant Commanders of the Legal Branch of the Canadian Forces, the group included a few junior legal officers and a smattering of senior legal officers as well as a lawyer from the Department of Justice, Office of the DND/CF Legal Advisor.

The course had been designed as part of the Legal Officer Advance Training (LOAT) program to polish the training of senior legal officers in anticipation of their participation as legal advisors to complex Boards of Inquiry. However, the recent increase in numbers and complexity of Boards of Inquiry brought about significant challenges for legal officers assigned to advise these Boards. Consequently, the Judge Advocate General now requires all legal

officers to complete this course prior to acting as legal advisors to a Board. The room was therefore heavily packed at the Albert at Bay Hotel early on the first day of the course!

LCdr Patricia Goldman started us off with a brief overview of the legal basis, the structure and function of military BOIs and SIs. Cdr Pelletier followed on with a review of procedural fairness and legal issues associated with the notice of adverse evidence. Of particular note throughout the day were the personal experiences shared by the presenters and members of the audience. Nothing brings home the message like a nice juicy example.

After lunch, we moved on the topic of BOIs and SIs into deaths and suicides. LCol MacMillan ensured that we focused on the care required in crafting terms of reference and in liaising with grieving family members and friends. We then moved on to a lecture led by LCol Strum where we discussed the limitations (geographic) of the powers of the board. This was particularly relevant as many recent boards have taken place in Afghanistan where the powers of Boards of Inquiry are limited as they pertain to civilian witnesses.

Bruce Mayo focused our attention on matters that relate to aircraft incidents and accidents. He pointed out that other legislation, such as the *Aeronautics Act*, prohibit the sharing of certain information and that our Board members may have to be reminded of this and encouraged to find alternate sources of information.

The day wound up with an examination of the factors to consider when advising on the creation of terms of reference.

Somewhere along the way during the first day of conference, the attendees discovered that we were to receive some reading and reference materials to take home with us. I personally suspect this was an attempt to introduce some physical fitness into the program as I have never seen binders that large in my life, and I'm not that young. The fact that we had one of these binders to tote home was daunting, however two of them seemed downright sadistic! Who knew there was so much to learn about Boards of Inquiry? Day two of the course had Cdr Goldman advising about how to plan an effective BOI, Major Waters walking us through the nitty gritty of the proceeding (something you just can't glean from the reference material) and Cdr Pelletier spending a few moments detailing the process for reviewing the minutes and closing the BOI.

By far the most interesting aspect of the course was the sharing of personal experiences and anecdotes by the presenters and the

participants. Of particular note were the many “firsts” that Cdr Pelletier was able to share with us that arose from his time as the legal advisor to the *HMCS Chicoutimi* Board of Inquiry. For those not familiar with the case it centered on a fatal accident at sea, involved an international element, a Board conducted on both sides of the Atlantic, significant media coverage, a federal court injunction application, and a notice of adverse evidence. If I hadn’t known this was a real case, I would have thought it had been concocted as a law school exam scenario!

At the end of the two days, the presenters were hoarse, the attendees were exhibiting signs of caffeine overload and much was learned and shared about the process of Boards of Inquiry. If nothing else, we all knew who to call if ever an unusual or unexpected scenario arose in our Board of Inquiry.

 [TOP](#)

Update on legislation related to the CF Reserve Force

Maj Eric J. Weaver
Legal Advisor CEFCOM

LCdr Magdalena Siepka
Legal Advisor to Chief Reserve and Cadets

On April 17, 2008, Bill C-40, *An Act to Amend the Canada Labour Code, the Canada Student Financial Assistance Act, the Canada Student Loans Act and the Public Service Employment Act* received Royal Assent. With this legislation, the Federal Government took a step to fulfill its promise in the Oct. 16, 2007 Speech from the Throne to “work with the provinces and territories to bring forward a comprehensive plan to modernize reservist reinstatement policies.”

[Read the full article](#) 

 [TOP](#)

"A Year in Review: Military Law" – A presentation in Halifax

LCdr Lyse Markert
DJA Halifax

On March 27, 2009, the Assistant Judge Advocate Office (Atlantic) hosted the Canadian Bar Association – Nova Scotia, Military Law Section at the Wardroom of CFB Halifax. This afternoon session, attended by military and civilian lawyers alike, was billed as “A Year in Review: Military Law” and boasted a cast of esteemed speakers who provided meaningful insight into topical issues relevant to the practice of military law.

The session kicked off with a presentation by Mr. Bill Fenrick, professor of International Law at the Dalhousie Law School, who provided an interesting overview of the complex legal issues and challenges surrounding the high profile trial of Omar Khadr. Director of Military Prosecutions, Capt(N) Holly MacDougall, outlined the delay being experienced in our military justice system and the many measures being taken to overcome the current delay. Capt(N) MacDougall’s presentation was followed by Maj Jason Samson’s comprehensive review of the recent amendments to the National Defence Act and their impact on the military justice system. Chief Military Judge Cdr Peter Lamont provided an often-sought-after view from the bench and provided some useful practice tips to counsel appearing at Courts Martial.

The session was brought to a close by Col David Henley, Commanding Officer of 36 Brigade in Halifax, who provided a command perspective of the military justice system and, in particular, insight into the many significant administrative considerations facing a unit in which one of its members is being tried by Courts Martial. This informative session was declared by all to be a huge success and was followed by the annual AJAG (Atlantic) Regional Conference where a number of the aforesaid topics were further discussed.

[▲TOP](#)

The Military Justice System" - A presentation in Quebec City

*Maj Jean Caron
Regional Military Prosecutor, Eastern Region*

Lunch time at the Quebec City Courthouse on Feb.26, 2009 was the setting for a presentation on the military justice system to members of the Quebec City legal community. Attendees were served with a complete exposé of the military justice system, its ‘raison d’être’ as well as the jurisdiction of the Summary trial, wrapping up with the

Court Martial. Jurisdiction on offenses, its application, jurisdiction on individuals and territorial jurisdiction was also reviewed in details.

Following Major Jean Caron's presentation, Mr Jean Asselin, a civilian defence attorney who has participated in approximately thirty Courts Martials throughout his career, shared his experience with the audience. He explained his interest for military law and told the audience about his experience in the *Généreux* case, which took him as a young lawyer, all the way to the Supreme Court of Canada. Mr Asselin believes that there is still work to be done and interesting points of law to debate in Court Martial, even considering the changes brought about to the *National Defence Act* as a result of this case, and more recently that of *Trépanier* at the Court Martial Appeal Court level.

Participants appreciated the content of the presentation and unanimously expressed that the presentation should be offered again, in order to ensure a greater number of lawyers are reached. As indicated Mr Asselin at the outset, lawyers of all ages and specialties would gain a lot through greater knowledge of the military justice system.

[TOP](#)

Outreach activities in the Pacific Region

LCol Randy Callan
AJAG Pacific

On Jan. 29, 2009, Lawyers of the Victoria Bar Association and Legal Officers of AJAG Pacific received a presentation from Colonel Dom McAlea focusing on restoration of the Rule of Law in the Democratic Republic of Congo.

Canadian lawyers accept the principle of Rule of Law as a given in everyday life. The Wardroom Lounge was silent as the audience of 50 during the presentation about the Congolese civil war and the catastrophic consequences the fighting inflicted on every aspect of life in the Congo. The important aspect was that in spite of the damage, the struggle for law and justice in the Congo continues. A major step back to restoration of a functioning legal architecture is the structure provided by the discipline system of the armed forces in the Democratic Republic of Congo.

Colonel McAlea's presentation outlined the rigorous efforts that have been taken by Canada and other members of the international community to help restore the military justice system in Congo. A disciplined force restores public confidence which in turn is a big piece in restoring a civil society. With no funding and little in the way of even the most basic office equipment the investigators and magistrates of the DRC Military have made great strides to restore military discipline and re establish accountability.

The presentation was followed by a lengthy question period and some intense discussion on the efforts the international community could take to provide the system with the financing and equipment to move the project further ahead. Formal adjournment was followed by a social gathering in which the issue concerning Congo and the role of Canadian Forces legal advisors were discussed. A great thanks to the Chair of the National Military Law Section, Commander Martin Pelletier, and the CBA staff for their assistance in advertising this event.

Members of AJAG Pacific were invited to a subsequent meeting of the Public Sector Lawyers sub-section in Victoria where legal officers attended a presentation by the Chief Electoral Officer of the Province of British Columbia.

On Feb. 25, 2009, Judges from Provincial and Superior Courts across Canada were hosted by AJAG Pacific for a tour of Her Majesty's Canadian Ship Regina. The tour had been arranged by AJAG CPO, COP Brian Forsyth, on request from one of the Military Judges.

The Regina's Coxswain (the senior Chief Petty Officer on the warship) provided the Judges with a comprehensive two and a half hour tour of the vessel that included the operations room and the engineering spaces. The Judges showed great interest in the ship and asked questions from the Navy operations to the Chief's role in maintaining discipline. Feedback from a social gathering in the Wardroom indicated the Judges enjoyed the tour and for most it was their first contact with the Canadian Forces, and the CF Legal Officers. Their subsequent questions focused on the role of the legal officers and the Code of Service Discipline. It was a worthwhile evening and a major event in the AJAG Pacific outreach program.

 [TOP](#)

Address of the Australian Defence Force Inspector General

By Maj Jay Simpson

JAG CIMP Project Director, Ottawa

On June 2, 2008, the CBA National Military Law Section and the Office of the Judge Advocate General of the Canadian Forces co-hosted Mr. Geoff Earley, AM, Inspector General of the Australian Defence Force. Mr. Earley presented to a packed house at the Wardroom of HMCS Bytown, with members of the National Military Law Section, the Office of the Judge Advocate General, the Department of National Defence/ Canadian Forces Legal Advisor, the Canadian Forces Grievance Board, and the Military Police Complaints Commission in attendance.

Mr. Earley was in Canada seeking an update on the Canadian Forces experience in Military Justice. The Australian Defence Force is presently implementing reforms arising from a Senate Committee inquiry in 2005 and other prior inquiries, including one led by retired Mr. Justice Birchett. The Australian Defence Force had previously considered Canadian military justice reforms over the past decade and is now looking to gain more insight from the Canadian experience. Mr. Earley was also looking to reciprocate with Canada by discussing the Australian development of a database tool to analyze the health and wellness of their military justice system.

The position of the Inspector General of the Australian Defence Force is far-reaching, encompassing elements of the roles of the Canadian Forces Ombudsman, the Canadian Forces Grievance Board, the Judge Advocate General, the Military Police Complaints Commission and even the Chief of Review Services. The Inspector General is a statutory appointment established under the *Defence Act 1903* to exercise general oversight of the health and effectiveness of the Australian military justice system, independently of the chain of command and normal line management. The Inspector General's principal functions include inquiring into complaints about the military justice system that cannot be dealt with through the usual channels and conducting an ongoing scrutiny of the effectiveness of the system through a program of rolling audits of military justice arrangements at unit level. The position also entails advisory and development functions.

Officially, the role is stated as follows:

To provide the Chief of the Defence Force with internal audit and review of the military justice system independent of the normal chain of command and to provide an avenue by which failures of the system, systemic or otherwise may be examined so that any cause for injustice may be remedied.

The Inspector General has jurisdiction to look into all aspects of military justice in the Australian Defence Force. Here there is an important distinction between Australia and Canada. In Australia, military justice is a broad concept, comprising four main areas: 1) military discipline pursuant to the *Defence Force Discipline Act*; 2) adverse administrative action against Australian Defence Force personnel; 3) the conduct of administrative inquiries; and 4) the right to complain about one's conditions of service. In Canada, military justice is limited to matters touching the Code of Service Discipline in the *National Defence Act*, whereas matters of administrative action, administrative inquiries and investigations, and the grievance process are considered part of military administrative law.

Mr. Earley explained that the Inspector General's inquiry role is one of investigation and recommendation. Investigations focus on determining whether there was a failure of some sort, whether the failure was individual or systemic, and recommending corrective changes. To accomplish this, the Inspector General has substantial powers, including to compel the attendance of witnesses and the production of documents. Derivative use immunity is provided for compelled witnesses. The Inspector General has also taken on the mantle of creating a centre of excellence for the conduct of inquiries, sharing best practices and implementing training for military investigating officers.

Although the inquiry role sometimes receives a higher profile, it is the audit role that Mr. Earley sees as a more important function for the future of the Australian Defence Force. It is really a performance review system. On two months' notice, units undergo a compliance review, which, like a staff assistance visit, is a genuine attempt to help the unit. A report is distributed to the unit Commanding Officer and the superior commander recommending adjustments and assessing the unit in pass, fail or qualified pass terms. A qualified pass will result in a follow-up review of selected trouble areas within six months. Audit team leaders also conduct focus groups across all ranks to garner the troops' views of the military justice system and seek input. A unit debrief is provided at the end of the review.

Mr. Earley noted that in addition to serving as a catalyst for systemic improvements and monitoring compliance, the Inspector General has

also added value to the Australian Defence Force in another way. He remarked that previous inquiries had received numerous submissions (for example, 158 in the case of the 2005 Senate Committee), but some of them had not been well checked for veracity. Having conducted some 7000 interviews, Mr. Earley's office has built-up a body of evidence that can put specific allegations properly into context. This has resulted in government committees and the media being better informed of military justice issues.

Managing this body of information and maximizing its value to the Australian Defence Force will be made easier through a new database tool under development by the Inspector General. Colonel Roy Abbott, Director Military Justice Performance Review, explained the new system, which is needed because existing metrics do not measure whether the military justice system is fulfilling its intended functions in a meaningful and reliable fashion. He noted the military justice system must support operational requirements and be sustainable in terms of meeting society's expectations – in short, it must “do the right thing in the right way.”

To measure the “health and wellness” of the military justice system, the new tool will monitor six key indicators; access (the means and opportunity to participate in the system), timeliness (whether the system is operating at too fast or too slow a speed), fairness (particularly respecting independence, impartiality and objectivity), accountability of decision makers, resources and training and system improvement. These indicators will be assessed both objectively and subjectively against benchmarks to be established. A “traffic light” reporting system will readily show senior leadership whether part of the system is functioning well (green), needs further investigation (amber), requires immediate action (red), or has insufficient data to support an analysis (grey). Mr. Earley has offered to share the system with Canada, should it prove to be effective.

In closing, Mr. Earley remarked that the work of his office has demonstrated that the Australian Defence Force military justice system “works effectively more often than it does not.” He also noted that if the system were broken, operational effectiveness would be affected. In this regard, he highlighted the fact that the military justice system should be seen as an “element of capability” by the chain of command, noting that:

The Australian Defence Force has a military justice system to support commanders and to ensure effective command at all levels. Commanders use the military justice system on a daily basis. It is an integral part of their ability to lead the people for whom they are

responsible. *Without an effective military justice system the ADF would not function.* (emphasis in the original)

The National Military Law Section appreciates having been able to co-host Mr. Earley and members of his staff, and we look forward to future opportunities for discourse and collaboration.

[^TOP](#)

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Message from the Editor

Capt Patrick Crocco
DJA Cen

As the editor of this issue of *Sword and Scale*, it has been a pleasure working with Cdr Pelletier, other members of the legal branch and those in the wider legal community with an academic interest in military law to provide interested readers with the content of this issue.

As I am a new reserve member of the legal branch, this work has been an excellent introduction to various aspects of military law and a terrific way to meet new colleagues.

Aspiring and established writers alike can take advantage of the opportunity to see one's name in print and to reach those members of the CBA with an interest in the activities of the Military Law Section by providing me with an article on a topic related to military law. The subject matter can be discussed in advance if required. Readers of this issue will note both the variety of topics covered by contributors and the varying length of published articles.

The deadline for receipt of articles for the next issue is Sept. 15, 2009. Drop me a note if you wish at: patrickcrocco@hotmail.com.

[▲TOP](#)

