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Chapter 5. Revolution and Evolution

Although the two decades immediately preceding the seventies had their legal challenges and moments of drama, the country did not seem to be caught up in the revolutionary activities that beset many other nations, including the United States, during the latter part of the sixties. Events in Quebec at the beginning of the seventies showed that even Canada was not immune from violence in politics. In an interesting contrast, the seventies would start with government repression of human rights and end with the same leaders strongly promoting human rights.

For the most part military lawyers in the fifties and sixties had been involved in providing advice and services on the way the existing law should be applied in specific circumstances. With the exception of the integration and unification legislation in the sixties, the law itself had seen only relatively minor changes that had a direct impact on the military and its policies since the passage of the *National Defence Act* in 1950. This period of legislative tranquillity ended abruptly in the late seventies when human rights legislation created an effective means of attacking many of the employment policies of the Federal Government, including a host of long-cherished policies and traditions of the Canadian Forces. Constitutional developments in the early eighties gave additional legal tools to those who disagreed with such policies and traditions. The concentration on the rights of the individual was also reflected in legislation increasing the right to access government information and improving the protection of individual privacy where government records were concerned. There was a discernible shift in the decision-making power at the federal level from the executive and legislative branches to the judicial arm, especially to the specialized tribunals that were created in this period. While the seventies and eighties were years of significant developments in the law impacting on all Canadians, the military was one of the bodies most affected.

The October Crisis

The seventies started off with a bang, literally. From a peaceful country eyeing the violence of the rest of the world, Canada became the focus of both terrorism and repression. The "October Crisis" of 1970 made Canadians realize the extent of dissatisfaction in Quebec and the potential consequences of too much complacency.

There had been incidents in the sixties showing that Canada was not immune from the revolutionary fervour that seemed to be gripping much of the world at the time. Bombs had exploded and people had been hurt. There were also a considerable number of robberies to provide funding for revolutionary activities. However, the incidents concentrated in Quebec and had seemed relatively re-

Besides the government-level assistance, the JAG lawyers were kept hustling advising the units in their areas. They had to give briefings on the legal status of the soldiers, the limitations on the use of force, the proper chain of authority, and all the other legal details that impact on the way the soldiers carry out their roles. There were also the secondary issues to handle such as claims for damage done by the soldiers. In one case, there was a claim for a window that was shot out when a soldier guarding the hotel room of a Quebec Cabinet Minister almost shot his commanding officer who came up to him unexpectedly. It is uncertain which was the more embarrassing to the soldier, the shot at the CO or the fact that he missed.

In Ottawa, too, the hornet's nest had been stirred. Legal officers were scrambling to give briefings to local troops guarding the Capital at the same time as advice to senior military and government officials was in peak demand. Senior levels needed to know the extent of the powers available under the *War Measures Act* and the ways in which those powers could be exercised. Even when the FLQ hideout was located and the hostage crisis came to a negotiated end, civilian and military officials were deeply involved in discussions on the lessons learned from the affair. One of the most important lessons was the need for a law that would enable the government to deal with the situation in a more focused fashion. Ultimately, Parliament passed new federal legislation that addressed the different types of national emergencies that might arise while respecting fundamental rights to the greatest extent possible.¹

New Blood

The late sixties and early seventies saw the start of a generational change in the Legal Branch. Up until then, all of the members of the Branch had been former members of the pre-unification RCN, Canadian Army or RCAF. The average age in the Branch had been climbing. There had been considerable stagnation in the Branch as senior officers, including the JAG, had held their ranks for lengthy periods. Several had done so for almost two decades. As a result, it seemed that everyone was retiring at about the same time. For the first time in a number of years, recruiting was on the rise. The newly enrolled members would be the first generation of purely "Canadian Forces" legal officers. This recruiting blitz was a blessing as a professional organization such as the Office of the JAG constantly needs both new blood and a little intellectual stirring of the older blood in order to keep its edge.

Traditionally, the JAG organization had recruited its members either from the ranks of civilian lawyers or from members of the military who had already obtained their law degrees but had joined other branches of the Forces. In the late sixties and early seventies a number of bright new officers were brought into the fold through this traditional type of recruiting. Officers who would become future leaders of the organization like Armand DesRoches, Pierre Boutet, Frederick

(Fred) Blair, Scott Forster, Guy Brais, and Bruno Champagne were among those who succumbed to the charms of the uniformed life.

Recruiting civilian lawyers was not the only way the Branch filled its ranks. Many of the senior leadership in the late sixties had had previous military experience before joining the Legal Branch. In the early 1970s the Branch leadership decided to follow the trend of other military professions, such as the Medical and Dental Branches, and obtain new legal officers by sending to law school officers currently serving in other military branches. In 1974, the Military Legal Training Plan (MLTP) was instituted.

As with all of the plans for subsidized university training in the Forces, there was a long list of those wishing to be selected for MLTP. Only officers of Captain rank or lower were eligible. Any officers of higher rank who wished to compete would have to revert back to Captain if selected due to the fact that Legal Branch Majors were considered to be experienced military lawyers capable of handling all normal problems of military law. Once selected, the officer was sent to a law school on full pay and allowances. Effectively, the duty of the officer was to learn law, graduate, get called to the Bar of a province, and come to work for the Legal Branch. All law school graduates had to serve a period as an articled clerk with



The Four JAGs, 1974

Left to right: Brig. R.J. Orde, BGen J.M. Simpson, BGen H.A. McLearn, BGen W.J. Lawson

an experienced lawyer or a judge before he or she could be called to the Bar of a province. For MLTP officers this time was usually served with a civilian law firm, one of the civilian courts in Canada, or perhaps with the Department of Justice. The first class of five officers graduated in 1977.

The Branch may have had some second thoughts on the wisdom of instituting this plan. During the Branch's annual conference in 1977, the first batch of graduating MLTP officers was in attendance. They were still either going through their Bar Admission courses or else finishing their articles. Not hesitant to put their new-found legal skills into practice, they immediately challenged the Branch policies on the pay and promotion of MLTP officers. They argued that the policies did not comply with Canadian Forces regulations and orders. It took a couple of years before these matters were finally resolved with amendments to the Branch policies. Despite the rocky beginning, the plan continued to train military officers at the end of the millennium.

While MLTP was a major program for training lawyers who were already in the service, it was far from the only Branch training program. The Legal Branch must have had one of the largest percentages of postgraduate degrees and diplomas of any law firm in Canada. Since the earliest days of the Office of the JAG there had been a heavy concentration on ensuring that legal officers were true experts in their fields. They had been sent to both civilian and military universities for educational upgrading. By the end of the century there were legal officers with Masters Degrees or Diplomas in International Law, Criminal Law, Constitutional Law, Legislative Drafting, Contract Law, Military Law and other areas of expertise needed by the Branch. Between 1976 and 2000 at least twenty-eight legal officers attended university to obtain postgraduate credentials. They also frequently attended continuing legal education seminars put on by provincial bar societies as well as by other legal organizations.

As legal officers were military officers as well as lawyers, there was also a requirement for them to have a thorough knowledge of military forces. To this end, military lawyers went to the Imperial War College in London, the NATO Staff College in Rome, the Canadian Forces Staff College in Toronto, the Army Staff College in Kingston, and on national and international courses relating to the military and military law. The Branch even ran its own courses in areas such as basic legal officer skills, the laws of armed conflict and court martial defence and prosecution.

At the start of the seventies, legal officers served in JAG Headquarters or the Directorate of Personnel Legal Services in Ottawa, or in one of the regional offices that were spread throughout the country and in Germany. A military lawyer normally would begin his or her career in the rank of Captain posted to one of the Headquarters directorates or as an Assistant Deputy Judge Advocate in one of the field offices. Some attempts were made to rotate the junior legal officers in

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Ottawa through different directorates to provide experience in a variety of legal disciplines. However, these attempts tended to be somewhat haphazard and often succumbed to the immediate needs of the organization. In the field offices the junior lawyers received a healthy dose of disciplinary experience by assisting at courts martial in either the prosecution or defence mode and later taking the cases on their own. They would also review charge reports used in the summary trials by the units in their region to ensure there were no obvious errors that required the case to be quashed. There were legal aid cases to handle, lectures on the law to give, Boards of Inquiry to advise, and a myriad of other tasks to keep the young lawyers active.

One of the principal field offices was that of the Senior Legal Adviser Europe in Lahr, Germany. Legal officers newly arrived at this outpost had a considerable number of adjustments to make. There were obviously increased duties concerning relations between the Canadian Forces and the host Germans. However, Lahr was also close to the potential front lines if the Cold War turned hot. The forces there needed to be tested on their readiness in case the balloon went up suddenly. "Snowball" exercises were the means used. They usually took place in the night. Warnings would go out over the Canadian Forces radio system and, as telephones were rare at the residences in the seventies, personnel would go from door to door to wake the residents and get them to their duty stations. Lawyers were no exception and often had to crawl out of bed to go to the office until the exercise was finished.

While the junior legal officers provided the front line legal advice, those in charge of the regional offices or the Ottawa directorates would be advising the regional commanders or the senior officers at National Defence Headquarters.



JAG Conference, 1974

Change at the Top

Besides recruiting new lawyers, the Branch was also losing others to retirement. Brigadier-General

McLearn reached compulsory retirement age in 1972 and Colonel James Megarry (Jim) Simpson was promoted to assume the mantle of JAG. Simpson was born in 1923 in Winnipeg. Like many legal officers, he did not start his military career as a lawyer. Instead, he joined the Royal Canadian Artillery in 1940 and served with the 54th Light Anti-Aircraft Battery in the U.K. from December of that year until March of 1942. He transferred to the RCAF and trained as a navigator/radio observer because, he said, the air force slept with sheets and pil-



Brigadier-General J.M. Simpson, C.D., Q.C.

lowcases while the army only had horsehair blankets. This led to tours in England, France and Germany with 409 Squadron until his return to civilian life in mid-1945. For the next three years Brigadier-General Simpson attended the University of Manitoba, but the call to uniform was too strong to resist. In 1948 he re-joined the Royal Canadian Air Force and helped map northern Canada as a navigator with 414 Squadron. This only lasted a year as he again turned in his uniform to study for a law degree at his alma mater. However, as soon as he obtained that degree in 1951, he was back in the Forces again. This time it was with the Security Branch of the RCAF as there were no positions open with the JAG. In 1952 he finally found his niche on transferring to the Office of the JAG as a legal officer.

Flight Lieutenant Simpson soon got a taste for international travel. From 1953 to 1956 he served as the Command Legal Officer for 1 Air Division in France and Germany before heading back to headquarters in Ottawa. After promotion to Squadron Leader, he was off again in 1958, this time to Harvard Law School to earn a Master's degree in International Law. Promoted to Wing Commander in 1960, Simpson lent his legal acumen to the Ontario region as senior legal adviser to Central Command Headquarters, Canadian Army, in Oakville, Ontario, in 1961. He remained there until he was selected for the Imperial Defence College in London, England, in 1964. Like most legal officers, it was back to Ottawa again on completion of his studies. In 1968 he became Group Captain Simpson

and took the position of Deputy Judge Advocate General. Appointed a Queen's Counsel in 1972, he was promoted to Brigadier-General later that year and took over the JAG post.

In 1976, a notice from the Department of External Affairs saying that the United Nations Headquarters in New York was looking for a lawyer with international law experience crossed General Simpson's desk. Although he could have had many more years as JAG, Brigadier-General Simpson decided it was time for a career change. He applied for and won the job as a senior legal officer at United Nations Headquarters in New York and retired from the Canadian Forces. After retirement he held positions with the UN in New York and Vienna, the Law Reform Commission of Canada in Ottawa, the International Telecommunications Union in Geneva, and the Somalia Inquiry in Ottawa. He even took up long distance running. In 1993, at the age of seventy, he ran his first marathon. Finally, he retired for good(?) in 1997.

In recognition of his service to the Legal Branch, Brigadier-General Simpson was appointed the first Colonel Commandant of the Legal Branch on June 1, 1990. He was re-appointed for a second three-year term that expired in 1996. Brigadier-General Simpson served in this honorary position with distinction, giving his time and wisdom with unfailing grace.

Court Reporters

Although the court, the accused and the lawyers are usually the focus of attention at courts martial, they are far from the only actors on this stage. An essential player in any court martial is the court reporter. While judges, lawyers and witnesses would be expressing themselves, frequently at length, it is the court reporter who is there to ensure that the orations are taken down for posterity. It is essential that an accurate transcript is made of the proceedings, both for review by military authorities and in case one or both the parties should wish to appeal the decision.

Court reporters were originally taken from the administrative trades of the Canadian Forces. Besides having a good ear so that they could hear the proceedings, the early court reporters had to be lightning fast at shorthand in order to copy the testimony and speeches accurately. A speed of 150 words a minute was the minimum to qualify. In the mid-1970s a machine came to the rescue. Rather than using shorthand, the court reporters could now use a stenographer's mask. The reporter would repeat into the mask everything that was said in the courtroom. This would be recorded on a belt-type of dictating machine or, later in the 1970s, onto a tape cassette. After the trial the reporter would prepare a transcript from the tapes.



JAG Court Reporters, 1981

Rear, left to right: Bob Garrigan, Dick Dickson, Andy Powell, Denis Gadoury, Bill Picard, Frank Bergeron, Gilles Caty, Len Marriner

Front: Gord Radul, Bill Cook, Denis Coleville, Dick Pucci, Bob Martin

The steno mask completely covered the nose and mouth of the court reporter so that he or she could talk without being heard in the courtroom. However, this was not the most pleasant experience for the reporter. On hot days the mask would become unbearable after a short time. Even when the temperature was moderate, the court would have to remember to take a break in order to let the reporter get a decent breath of air. By the end of the nineties, however, recording trials had gone from an art to a science. Rather than steno masks, the court reporters used automatic "advocate" machines that took the input directly from microphones at each major position in the courtroom. While the court reporter was responsible for setting up the system and dismantling it after the court finished, the reporter's main function was producing a transcript of the testimony from the tapes.

In the fall of 1970 the court reporter trade was civilianized and all of the court reporters handed in their uniforms for sports jackets and ties. One of the reasons for this switch was the large number of court reporters who were being lost to other organizations such as the immigration tribunals. These provided better pay and an easier job than a military court reporter could expect. Although the change would potentially give the court reporters some advantages in pay and working conditions, it was not universally popular among those affected.

Besides being trained professionals in their occupation, the court reporters frequently had the sometimes-pleasant, sometimes-arduous, duty of being the Judge Advocate's companion during courts martial. To maintain the appearance and reality of impartiality during a trial, Judge Advocates were supposed to stay apart from the participants in a court martial and the authorities who may have been involved in convening the trial. This could be difficult and lonely when the trial was taking place in the field or away from an urban centre. The only other neutral person at the court martial site that the Judge Advocate knew was usually the court reporter. As the Judge Advocate outranked the court reporter, the reporter often got drafted to accompany the Judge Advocate for meals and social activities while the court was in session.

The switch to civilian court reporters did not last. In 1981 the court reporter occupation was reactivated in the Forces and military reporters gradually started replacing the civilian ones as they retired. However, this was a long-term process and even at the end of the millennium there was still a mix of civilian and military reporters supporting the military justice system.

Military Justice

During the 1970s and early 1980s drugs kept the court martial system steaming along. The Forces had a strict policy against trafficking in, possessing or using prohibited drugs. A member caught in any of these activities could expect both a court martial and a short career. Unlike the offences against the *Narcotic Control Act* that regulated civilian drug prosecutions, military authorities also had the ability to charge members for "use" of narcotics under the "conduct to the prejudice of good order and discipline" offence in the Code of Service Discipline. Furthermore, even sharing a "joint" with another person would likely result in a charge of trafficking in a narcotic as the *Narcotic Control Act* included "giving" in its definition of trafficking. Civilian authorities would rarely, if ever, prosecute this level of trafficking, but military authorities were much more concerned about the impact of drugs on the operational capabilities of the units. The American experience in Vietnam had been a sobering example of the effect of drug use in a military environment.

In 1972, Colonel A.E. (Al) Beaupré took over the position of Chief Judge Advocate. He had one distinct advantage when it came to sentencing experience, since he had been on the receiving end. During WWII he had joined the ranks of the Royal Canadian Air Force. He was eventually transferred to 408 Squadron in Yorkshire, England, while awaiting consideration for aircrew training. Not always noted for diplomacy, young Beaupré took the liberty of telling his Sergeant where to go. After a summary trial he spent the next fourteen days in detention scrubbing floors with a toothbrush. Any accused in his court looking for sympathy when facing a possible sentence of detention was definitely before the wrong

judge. Colonel Beaupré retired in 1976 and spent the next ten years as a member of the National Parole Board.

In a case of note during the seventies, drugs played a role in a rare trial of a commanding officer. The commanding officer of the Canadian Forces School of Communications and Electronics Engineering, Colonel M.J. Braun, was court martialled in April, 1975. A Standing Court Martial had convicted an officer under Colonel Braun's command, Captain Campbell, of possession of marijuana. Under such circumstances, a commanding officer had to make a decision as to whether to recommend release or retention of the convicted officer. Braun had originally recommended retention.

The school for which Braun was the commanding officer was located at Canadian Forces Base Kingston, Ontario. The Base was part of Training Command. In March, 1975, the Base Commander received a message from the Commander of Training Command ordering him to have Colonel Braun give Captain Campbell a Notice of Intent to Recommend Release. This was a form that had to be served on the member before he or she was released so that the individual could provide his or her objections to the release, if there were any. The order from Training Command also set out the specific reasons for recommending release that were to be included on the form. The Base Commander passed this direction on to Colonel Braun, but Braun had misgivings. Besides some factual inaccuracies in the wording, he did not agree with the reasons given. He ultimately refused to sign such a form and serve it on Captain Campbell. Colonel Braun was charged with disobedience of a lawful command and subsequently convicted by a General Court Martial. He was sentenced to two years forfeiture of seniority and a severe reprimand.

On appeal, the Court Martial Appeal Court directed a finding of not guilty. It found that the accused did not have the necessary intent to disobey a lawful command. More importantly, it made a finding that has been reflected with consistency in the Appeal Court's decisions. In effect, it decided that when the law gives a commanding officer a discretion to exercise, that discretion cannot be overridden by a superior officer. Therefore the order from the Commander of Training Command was not lawful.

The military justice system also continued to evolve. Training for military judges prior to the mid-seventies was similar to the training for civilian judges at the time—trial by fire. All that was required was sufficient time as a lawyer to meet the statutory requirement of ten years at the Bar and sufficient experience in courts martial to satisfy the Chief Judge Advocate. In the late seventies, however, the Legal Branch took steps to determine which legal officers were best suited for the judicial positions and to provide them with appropriate instruction on the formalities of running a court martial. It set up a training course for candidates with experienced military judges as instructors. Despite some initial difficulties

with the course, it eventually produced highly capable Judge Advocates. Two of the graduates of the first course were sitting on provincial supreme courts at the end of the century. Mr. Justice Armand DesRoches was a member of the Prince Edward Island Supreme Court while Mr. Justice Walter Goodfellow sat on the Nova Scotia Supreme Court. Both were members of the Court Martial Appeal Court of Canada.

The Creation of the JAG Reserve

At times, the resources of Regular Force legal officers were stretched to the limit. They needed help. However, from the Second World War up to the 1970s, the JAG Reserve was virtually non-existent. The Forces had a system of Reserves, which included the Primary Reserve, the Supplementary Holding List, the Cadet Instructors List and the Canadian Rangers. The Primary Reserve had its own units and regular training. The Supplementary Holding List, on the other hand, consisted of personnel who had special expertise that might be used by the Forces. For the most part this meant retired military members, including retired military lawyers. If there was a need for a legally qualified military officer that could not be filled by those in the Regular Force, a lawyer in the Supplementary Holding List or one in the Primary Reserve who was serving in a non-legal capacity might be requested to provide his services. Despite the availability of this source of assistance, it was seldom exploited.

In the late sixties and early seventies things began to change somewhat. A Reserve naval officer, Lieutenant-Commander René Marin, was a Provincial Court Judge in Ontario at a time when drugs were becoming a serious problem in Canada and the Forces. He had presided over the trial of a Cadet from Royal Military College in Kingston on charges relating to possession of a narcotic for the purpose of trafficking. Lieutenant-Commander Marin had also given a series of lectures to his fellow judges on the trial of drug cases. The JAG, Brigadier-General McLearn, asked him to give a similar presentation to the annual conference of the Legal Branch. This led to the JAG asking Lieutenant-Commander Marin for a plan as to how legally trained Reserve officers might augment the legal officers in the Regular Force. The result was the birth of the JAG Reserve.

By contacting lawyers already in the Reserves but serving in non-legal capacities, Marin managed to find enough who were willing to join the JAG Branch to create a network across Canada. For the most part they were naval officers, but a few army and air force officers were also recruited. He also raided the Federal Department of Justice after finding out which of their lawyers had previous military experience of some sort. Retired members of the Legal Branch filled out the empty slots.

Lieutenant-Commander Marin himself also switched from naval operations at H.M.C.S. *Carleton* in Ottawa to the JAG Reserve. He was promoted to

Commander and later Captain(N). He ultimately became the first Deputy Judge Advocate General/Reserves. He and Commander (later Captain(N)) Walter Goodfellow were the first Reserve legal officers from the new organization to preside as military judges at a court martial. In the late seventies, Major-General Richard Rhomer, the head of the Reserve Force, asked for a Reserve legal officer to be appointed as an adviser to the Reserve Council. Marin's name was at the top of the list and he took on the title of Senior Reserve Adviser (Legal) as well. The Branch now had the nucleus of an effective and enthusiastic corps of part-time legal officers who were able to advise Reserve units, as well as augment Regular Force legal officers when needed.



Major-General J.P. Wolf, C.D., Q.C.

A Veteran Takes Over

The Ottawa scene changed once again in 1976 when Brigadier-General Simpson got seduced by the United Nations. It then became Colonel John Patterson (Jack) Wolfe's turn to put up the maple leaf of a Brigadier-General and take over the Branch leadership. Like his predecessor, Brigadier-General Wolfe enjoyed the international arena. This was fortunate as dealing with international law was to take up a good portion of his adult life. Another of Manitoba's crop, he was born in 1924 in Winnipeg. He did not wait long to start his military career. At age 17 he joined the Royal Canadian Corps of Signals to do his part for the war effort. While serving with the Royal Hamilton Light Infantry in 1944, he was wounded in action and repatriated to Canada. On his release from the Forces he considered joining the merchant marine in Vancouver for a change of pace (and to get a job), but he ended up canning salmon instead. With this questionable career prospect facing him, he decided he had to improve his education.

Although he had already started law school, the Korean War interrupted Wolfe's studies in 1951. He joined the artillery and also qualified as a paratrooper. While stationed in Winnipeg he continued his education. He attended law school in the morning, worked with the Assistant Judge Advocate General, Lieutenant-Colonel Michael Cloney, in the afternoon and taught artillery skills to the Re-

serves in the evening. The University of Manitoba awarded Jack Wolfe his LL.B. in 1954. Despite the difficult circumstances, on graduation he was awarded the Gold Medal for coming first in his class. Called to the Manitoba Bar that year, Wolfe was immediately recruited into the Office of the JAG.

During the early part of his JAG career, Major-General Wolfe managed to get posted to interesting places providing a rich variety of experiences. He underwent his initial seasoning in the claims section in Ottawa, but this was only a minor detour. Wolfe's international law career started in 1956 when he was posted as the defence legal adviser to the Canadian Embassy in Bonn. This was followed by a continuing diet of international challenges with a tour as a legal officer at the Canadian Army Headquarters in Soest, Federal Republic of Germany. Foreign travel may have seemed a little less exotic, though, when he had to endure the less comfortable climate and accommodations as the legal adviser to the Canadian Contingent, United Nations Force Middle East in Egypt in 1962.

Major-General Wolfe's legal skills were not to be hoarded for the benefit of the Canadian Forces alone. For a year and a half in 1965 and 1966 he was loaned to the Tanzanian government to help with the drafting the Defence legislation for the new country.

Working in Tanzania was interesting, but the posting had its hazards. While standing at a beach one day, Major Wolfe saw a huge reptile called a monitor lizard swimming in the water. A very forceful English lady nearby became concerned that the animal was going to drown and told him to rescue it! Unable to resist her demands, he swam out, caught the lizard, swam back desperately gripping the beast under his arm, and released it into the bush. The English matron treated the action as if it was only to be expected of any true gentleman.

After his return to Canada, Wolfe took over as head of the General and International Law Section at JAG Headquarters. But Ottawa could not keep him home. In 1967 he was sent to King's College, University of London, to obtain his Master's degree in International Law. On receiving his degree in 1968, he was promoted to Lieutenant-Colonel and seconded to the British Office of the Judge Advocate General for a short period.

Lieutenant-Colonel Wolfe took over the International Law and Advisory Section in late 1968 and stayed in that position for the next four years until his promotion to Colonel in 1972. However, when the chance for travel came again, he readily accepted. For six months at the beginning of 1973 he served as the legal adviser to the International Commission of Control and Supervision in Vietnam. At the end of this tour, he was back in Ottawa, having been appointed Deputy Judge Advocate General. Colonel Wolfe was appointed a Queen's Counsel in 1974 in recognition of his legal contributions. Two years later he was travelling again to take over as the Senior Legal Adviser Europe. In 1976 Colonel Wolfe was pro-

moted to Brigadier-General and appointed as JAG to take over from Brigadier-General Simpson. Further recognition came in 1981 when he was promoted to Major-General, only the second JAG in Canada's history to receive such a promotion.² Major-General Wolfe retired from the Canadian Forces in the fall of 1982 to enjoy the beauties of British Columbia.

Branch Routine

Routine tasks continued to be the lifeblood of a legal officer's day. In the field the discipline system still made up a good portion of the work. In Ottawa the work depended on the political mini-crisis of the day and the directorate in which you were working. Major Dave MacTavish was the administration officer who kept the staff of the Branch headquarters functioning during the seventies. He later went on to become a senior civilian director in National Defence Headquarters. Besides their role in the military justice system, legal officers also had to support the soldiers in the field with the other legal difficulties that might develop. For instance, legal officers were often sent on exercises in Canada or on foreign soil to deal with the claims that might arise from the activities of the Canadian troops.

While few hardships will deter a legal officer from giving his opinion wherever it may be desired (or dreaded), this did not mean that legal officers have to be thoroughly miserable when providing legal services in the field. In 1970, Captain Brian Murphy was assigned to provide the legal services in Norway during an exercise involving Canadian troops. He found his quarters to be less than palatial when he was put in an ordnance tent with a sleeping bag and a brown sheet. No mattress. To a former air force supply officer, this just would not do.

A subtle complaint to the responsible Sergeant resulted in a suggestion that if he ordered one from Sears they might deliver. The exercise was 250 miles north of the Arctic Circle. The Sergeant should never have underestimated an uncomfortable legal officer with Murphy's background. Captain Murphy pointed to the Canadian helicopters on the flight line and asked how they got there. In a Hercules aircraft, obviously. "What were the propeller blades packed in?" Murphy inquired. The Sergeant did not know. Off they went to the hangar, which was full of mattresses that had been used to protect the helicopter blades. From that day forward the Sergeant always listened attentively when D.B. Murphy had a suggestion as to how to improve their creature comforts.

The traditions that began in the fifties with Brigadier-General Lawson were carried on through the tenures of Brigadier-Generals McLearn, Simpson and Wolfe. After a hard day of discussions and presentations at the annual conference, more informal gatherings occurred. The odd poker game might develop in the wee hours of the night after the mess dinner. In one case, a new legal officer, who shall remain unnamed, engaged in such an enterprise until eight o'clock the next morning. He was supposed to write two Bar examinations later the same day.

One should not scoff at the relaxing effects of no sleep and lively competition. He got his two best marks on those exams.

Outside of Ottawa, legal officers were still going about the business of keeping their clients out of trouble and dealing with those members who did not. In Europe, the Senior Legal Adviser Europe for much of the seventies was Colonel Roland (Rollie) Barnes. He was a man of definite ideas as to how the European operation should run. The office consisted of himself, an Assistant Judge Advocate General, and three other legal officers. Each of the junior legal officers was responsible for providing legal advice to specific units stationed in Europe. That same legal officer would prosecute any courts martial arising from that unit if there was no unusual circumstance, such as a conflict of interest, that would interfere. The officer would also defend at courts martial that did not come from one of his or her units. Colonel Barnes himself would act as the Judge Advocate for most of the General and Disciplinary Courts Martial and as the President or Presiding Judge at the majority of Standing and Special General Courts.

At the end of 1978 the Branch was invited to provide legal advice in a new area—materiel. Up until then the Department of National Defence had received its legal services for the negotiation and purchase of new equipment from Justice lawyers at the Department of Supply and Services. However, with several major purchases in the wind at the time, the Materiel organization at National Defence Headquarters felt it needed some in-house counsel as well. Major Frederick C. (Fred) Blair was called up from the Trenton office to take over as the new Director of Law/Materiel.

The directorate was immediately immersed in the complexities of international military purchasing. There was a typical sequence of events. Someone would identify a need for equipment, whether it was a type of combat clothing or a new fighter aircraft. Perhaps a soldier would point out a design flaw in a current piece of equipment or an organization tasked with keeping the Forces combat ready would determine that a vehicle or vessel would end its useful life by a certain period and would need to be replaced. Once any necessary research and development was completed on the exact nature of the requirement, the Department would solicit bids to develop and produce it from those firms in the trade. The bids would be reviewed, a winner selected and the contract awarded. There would also be a requirement to administer the contract until it was completed and then finalize it by resolving any outstanding issues.

The legal officers in the Materiel directorate tried to ensure they were involved from the earliest stages of the procurement process on the theory that it was easier to make sure something was done right in the first place than to fix it afterward. Considering the value of the contracts involved, this type of caution was well warranted. For instance, the Canadian Patrol Frigate programme lasted from the initial development stage in 1979 until the delivery of the final ship in

1996. The total cost was approximately ten billion dollars. There were few aspects where legal assistance was not needed. Everything from negotiating and writing the contract to resolving disputes during the administration of the contract required legal advice. This directorate continued to expand over the next two decades as the senior decision makers involved with procurement grew to appreciate the value of its services.

The Human Rights Era

The latter years of the seventies presaged the major issues of the eighties. Human rights, access to Federal Government records and the protection of personal information held by the Government were hot topics. The *Canadian Bill of Rights* was still in force and available as a basis for challenging federal legislation and policies. Four new laws came into force in the late seventies and early eighties that would result in numerous changes to the policies applicable to Federal Government institutions: the *Canadian Human Rights Act* (CHRA) (1978), the *Canadian Charter of Rights and Freedoms* (1982), the *Access to Information Act* (1983), and the *Privacy Act* (1983). The Legal Branch soon became expert in these laws due to the number of Department of National Defence's and Canadian Forces' policies that were attacked using this legislation.

In 1980 one of the Forces' drug cases, *MacKay v. The Queen*,³ ended up before the Supreme Court of Canada based on arguments under the *Canadian Bill of Rights*. The appellant in that case was a soldier who had been charged with seven charges of trafficking in a narcotic and one charge of possession of a narcotic. The charges were laid under the *National Defence Act* section that incorporated offences against other laws of Canada, including the *Narcotic Control Act* offences of trafficking in and possession of a narcotic, as offences against the Code of Service Discipline. He was tried and convicted by a Standing Court Martial. On appeal, MacKay alleged that the system of courts martial violated the *Canadian Bill of Rights* by denying him "a fair and public hearing by an independent and impartial tribunal." He also alleged that it denied him his equality rights because he was tried by a military tribunal for an offence against a civilian statute. The majority opinion of the Court, however, supported the court martial system as it existed. Speaking for the majority, Mr. Justice Roland Ritchie stated:

The complaint in this regard centred on the submission that the appellant was deprived of a hearing by an independent and impartial tribunal because the president of the Standing Court Martial was unsuitable for that task as he was a member of the Armed Forces albeit of the Judge Advocate General's Branch.

It should I think be observed that the Court which tried the appellant was established by the Governor in Council (s. 154(1)) and the president, who was appointed by the Minister of National Defence, was an officer whose rank

indicates that he had had some years of military service and whose position with the Branch of the Judge Advocate General bespeaks familiarity with military law. An officer such as this whose occupation is closely associated with the administration of the law under the *National Defence Act* and whose career in the army must have made him familiar with what service life entails would, with all respect to those who hold a different view, appear to me to be a more suitable candidate for president of a court martial than a barrister or a Judge who has spent his working life in the practice of non-military law.

The majority also stated that there was no violation of the equality provisions if the legislation is enacted for the purpose of achieving a valid federal objective. Courts martial met this test. Mr Justice Ritchie could speak with some experience about courts martial considering his time in the Legal Branch during the Second World War.

Despite this seemingly strong support by the majority, the decision that was to have a greater future impact was the concurring opinion of Justice (later Chief Justice) Dickson and Justice McIntyre. While agreeing with the need for a unique military court system and the appropriateness of a military officer acting in a judicial capacity at a court martial, they were of the opinion that deviations from equality should be limited. Mr. Justice McIntyre stated:

As a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the *Canadian Bill of Rights*, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective.

Justice McIntyre then went on to accept the rationale for the existence of courts martial under this test. However, he pointed out that the rights of military personnel should be affected as little as possible considering the requirements of military discipline and the efficiency of the service. The McIntyre formula with respect to the jurisdiction of military tribunals over offences was the one most frequently cited by the lower courts in the years to follow.

Although the *Canadian Bill of Rights* itself did not have a major impact on the way in which the military was run, the *Canadian Human Rights Act*⁴ was another matter entirely. The Canadian Forces were forced to examine closely a large number of long-standing traditions in light of its prohibitions on discrimination. The CHRA is federal legislation governing the actions of those enterprises that are subject to federal, as opposed to provincial, laws. This category included Federal Government departments and organizations, such as the Department of National Defence and the Canadian Forces, as well as federally regulated industries like banks. It prohibited discrimination on the basis of race, national or ethnic origin,

colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon had been granted.⁵ The provision that was to have the greatest impact on the Forces and the Department of National Defence was the ban on making employment decisions based on a prohibited ground of discrimination.⁶ This opened the door to challenges on policies such as working on the Sabbath, retirement ages and medical standards. The new employers' liability for harassment based on one of the prohibited grounds of discrimination⁷ was also a ripe field for challenges to determine the circumstances under which the employer would be liable for the actions of its employees.

Because of its size, the Forces were a microcosm of Canadian society in general. Any problems that existed in civilian life were likely to be found in the Forces' culture. Also because of its size, the Canadian Forces made an inviting target for challenges under the CHRA to policies that might have widespread application elsewhere in society. As Canada is not a militaristic country by nature, media and public sentiment in individual cases were more likely to favour the underdog challenger than the military leviathan. An advantage of using the CHRA to initiate a challenge was the support given by the Canadian Human Rights Commission. It provided investigators and lawyers, paid for witnesses to attend hearings and generally put the complainant on the same financial level as the Forces. While it took until the early eighties for the human rights litigation against the Forces to get into high gear, the huge increase in challenges to military policies after the passage of the Act resulted in whole new organizations within National Defence to deal with the issues involved. This included changes within the JAG organization itself.

The position of the Forces with respect to the CHRA was to change those policies and practices that did not meet the Act's standards but defend against challenges where the policy or practice was warranted and there were reasonable arguments showing that it complied with the Act. The Act was designed to balance the rights of the individual with the rights of society and included restrictions on the individual's rights where the societal interests took precedence. If restrictions imposed on individual rights fell within the specified limitations then human rights were being properly protected and the Act was not being breached. The vast majority of the cases that went before Human Rights Tribunals and the courts involving the Forces resulted from a differing view between the Canadian Human Rights Commission and the Canadian Forces on the proper interpretation of those provisions authorizing restrictions.

Because the cases that eventually reached the tribunal stage were forcefully argued and often appealed by the losing side, the military cases helped to clarify the human rights law on a considerable number of major issues. JAG officers played a major role both in discussions on modifying Forces policies to comply with the Act where they did not already and in preparing and presenting the evidence and arguments during litigation where the law appeared to support the Forces' posi-

tion. The Act was beneficial to the policy decision-making process of the Forces and the Department because it required that personnel decisions be backed up by proof of the facts on which the decisions were founded. This shifted the focus of policy makers from "common sense" and stereotypes or their own opinions to the accumulation of scientifically based evidence on which a reasoned decision could be grounded. As a result, they could have greater confidence in the appropriateness of the decisions in light of the needs of the organization and the individuals. It focused the legal advice from JAG as well. No longer could advice or preparations for a case rely solely on testimony from military officers with operational experience. There also had to be expert evidence stemming from scientifically conducted testing before restrictive policies could withstand a human rights challenge.⁸

This was a relatively new area for the Legal Branch. When human rights issues started to develop, the responsibility for providing advice to Forces and Departmental authorities and acting as instructing counsel for the Department of Justice was given to the Directorate of Law/Advisory. This was a generalist directorate that provided advice in pretty well any area that was not already covered by another JAG directorate. As the CHRA also included provisions for the release and protection of government information and personal information held by the government, this same directorate dealt with the legal aspects of this new area of information law. By 1984 the workload involving human rights and access to information had developed to the point that those issues dominated the directorate's time and other work was being neglected. A new directorate was formed that was devoted to these areas—the Directorate of Law/Human Rights and Information.

Human Rights Tribunals

The first major issue to hit the human rights tribunal stage was that of sexual harassment. Mrs. Bonnie Robichaud was employed as a cleaner by the Department of National Defence at Canadian Forces Base North Bay starting in 1977. A year later she won a lead hand competition and commenced six months of probation in the position. In that position she was subjected to sexual advances by her supervisor, Mr. Brennan. After some problems at work, she alleged discrimination on the basis of sex and took her complaint to the Canadian Human Rights Commission. Because the CHRA was in its infancy at this time, most of the legal interpretations of the Act had yet to be resolved. One of the main ones was whether sexual harassment constituted discrimination on the basis of sex. Another was the liability of employers where employees violated the CHRA. The case went through the tribunal stage up through a Review Tribunal, the Federal Court of Appeal, and finally to the Supreme Court of Canada. Department of Justice and JAG lawyers were involved at each stage trying to get the law clarified. The case would go on in various permutations for over ten years.

When the Supreme Court rendered its decision there was no doubt that under Canadian law sexual harassment constituted harassment on the basis of sex. Furthermore, the Court made it clear that it is extremely difficult, if not impossible, for an employer to escape liability for the discriminatory actions of its employees. The best it could hope for in most cases was to be subject to minimal remedies against it if the employer had been diligent in trying to prevent the discrimination. Employers had to be proactive in creating policies against harassment and making sure they were known and enforced. The JAG legal advice reflected this need.

In the mid-eighties human rights cases involving the Canadian Forces rather than the Department of National Defence started to hit the tribunal stage with a vengeance. They were unique in the type of preparation required. The military lawyers worked closely with the Department of Justice counsel in the Civil Litigation Section. Besides the usual need for reviewing possible evidence and interviewing witnesses on the specific subject of the complaint, there was a need to develop evidence on the roles of the Forces and its members. As few tribunal members had military experience, it was essential to provide the tribunal with information on the unique aspects of military service as compared to civilian employment.

The first major issue involving the Forces was that of women in combat. The policy up to the late 1970s was to restrict the role of women to non-combat occupations. When the CHRA was passed, military authorities decided to test this policy in scientific evaluations of combat support positions to determine if those restrictions were justified or if the roles available to women should be expanded. After the results of these tests were evaluated, combat support roles were opened to women. The next round of studies would have involved combat positions themselves such as infantry, armoured and artillery. These studies were preempted by four challenges brought to the Canadian Human Rights Commission in 1985 alleging the policies discriminated on the basis of sex.⁹

At the tribunal hearings the Forces were not arguing that women definitely could not be permitted in combat occupations. Because women were not permitted in combat in most nations, there was little empirical data as to whether the perceived problems were real or just the result of stereotyping. The types of potential problems included whether women had the upper body strength and endurance needed for some of the combat occupations, the effect on unit cohesiveness and morale of romantic relationships, privacy issues, etc. The Forces were arguing that they should be given time to complete the testing that had been undertaken so that there would be empirical data on which to base a decision. During the extensive tribunal hearings themselves, the participants were taken for a day cruise on a destroyer and tours of a supply ship and a submarine to show the living conditions. Unfortunately, no army demonstrations were available in the limited time the tribunal allowed for the tours. The visits must have had an impact. Al-



JAG Conference, 1981

though the tribunal decision ordered all combat positions opened to women within ten years, it specifically exempted positions in submarines because of privacy considerations.

One of the most significant Canadian Forces policies in terms of human rights challenges was the "Universality of Service Principle." The basic principle stated that all members of the Forces are soldiers, sailors or airmen or airwomen first, and occupational specialists second. Unlike civilian jobs where a person could rely on the terms of a contract or labour legislation to limit the types of work, the conditions under which work will be done and hours of work, members of the Forces were considered to have unlimited liability. This meant that they could be sent anywhere to do any duty under any conditions, including conditions that might result in serious injury or death (for example, battle). They could also be required to perform duties other than those they would normally do in their trades. One result of this concept was the imposition of medical and fitness standards for Forces' members to ensure they could carry out basic military, as opposed to occupational, duties when required. To provide members with the minimum military skills, all members were required to undergo basic training, including military lawyers.

Not all members of the Forces, or persons attempting to enrol, understood or agreed with this principle. The result was a number of challenges alleging discrimination on the basis of disability. These covered the medical gamut, particularly diabetes, epilepsy and asthma.

The Canadian Human Rights Commission was of the opinion that persons in the military should be treated like others in a civilian job. The idea of all members being fit to perform general military duties was not acceptable. Because of this fundamental disagreement in philosophy between the Forces and the Canadian Human Rights Commission, few cases involving disabilities were settled without

at least a tribunal hearing. The matter was finally resolved in 1994. The Federal Court of Appeal had supported the military's position in a trio of cases¹⁰ and the Supreme Court of Canada refused to hear an appeal by the Commission.¹¹ This meant that the Federal Court of Appeal's decision stood as the law on the subject. Once this aspect of the law was clarified, the Commission proceeded to settle the vast majority of complaints against the Forces based on disability and a significant part of the workload of the human rights directorate at JAG disappeared.

The end of the eighties saw another change in the human rights field. For the first time the Forces recognized that members in common law relationships should be entitled to many of the benefits that only married members had enjoyed to that point. This resulted from a decision by the Federal Court of Appeal in 1988 in a case where two members complained that they were not eligible for married quarters because they were in a common law relationship.¹² Therefore, they alleged, they were discriminated against on the basis of marital and family status. The matter first went to a human rights tribunal hearing. The tribunal decided that common law relationships did not qualify as a marital status and dismissed the complaint. However, the Federal Court of Appeal decided that the tribunal had not dealt with the proper question and sent it back for rehearing. The decision was not a major surprise to the legal officers involved as the trend in the law in this area was pointing to eventual legal recognition of these relationships.¹³ Based on the Federal Court of Appeal's analysis, the Forces decided not to go back for a re-hearing. Instead, it changed its policies and settled the case.

Access to Information Challenges

People are curious about others but resentful if others pry into their own affairs. That is human nature. They also are understandably interested in the information that their governments hold about them personally as well as that on which government decisions are based. In the late seventies the Federal Government opened the door on these issues. The first attempt to address all these conflicting needs was the privacy provisions of the CHRA.¹⁴ However, in 1983 the law was expanded dramatically with the passage of the *Access to Information Act*¹⁵ and the *Privacy Act*.¹⁶ Forces' policies that restricted access to personal information such as performance evaluation report narratives had to be examined and changed, as did others relating to the protection of information used in the decision making process in National Defence. In addition, there were frequent situations where legal advice was needed because the provisions of one Act appeared to be in conflict with the other. Information law joined human rights as one of the most rapidly expanding areas requiring JAG advice.

New Leader

In 1982 it was Major-General Wolfe's turn to retire. Colonel Frank Karwandy got the nod as his replacement and the promotion to Brigadier-General that went with it.

Frank Karwandy was born in Neidpath, Saskatchewan, on September 16, 1927. The uniformed life called him early, with an initiation in the Army Cadets in high school followed by a stint with the Militia in the Armoured Corps in 1945-46. The Second World War had just ended and the Forces were still seductive to the nation's youth. In 1947 the future General was off to the halls of higher learning in the Arts at the University of British Columbia. After completing two years he applied to the Law School at the University and again succeeded.

Having enjoyed his Militia experience, Karwandy applied in 1950 to join the Canadian Officers Training Corps program, once again in the armoured classification. Besides providing an opportunity to determine if he wanted to make the military a career, this plan also paid for his last year's tuition and gave him a small salary. On graduating with his LL.B. degree in 1952, the young Second Lieutenant was sent directly to join his regiment, the Lord Strathcona's Horse (Royal Canadians), in Calgary as an Armoured officer. Karwandy was put to work helping to do the regimental training for the Korean Special Service Force. Realizing that field operations were not for him, Lieutenant Karwandy decided to complete his articles and applied to the Army for a posting back to Vancouver

to do so. With the Korean conflict still ongoing, the Army did not easily give up any combat personnel. As a compromise, Karwandy found himself as the Officer in Charge of the Transit Depot in Vancouver for two years while his request was under consideration. Finally the Army relented and he completed his articles with the firm of Hean, Wylie and Hyde. In May, 1956, he was called to the Bar of British Columbia. Lieutenant Karwandy was then transferred to the General List and seconded to the Office of the JAG in Ottawa for six months probation. The six months turned into two years in Ottawa in the International Section under the guidance of Squadron Leader Tony



Brigadier-General Frank Karwandy, C.D., Q.C.

Cobus. As an additional duty, Karwandy was loaned to naval Captain Jack Dewis to assist in handling the military vote during elections. However, when a federal election was called he had just come down with a severe case of tonsillitis and Dewis was stuck with the election duties himself.

One of Lieutenant Karwandy's more interesting duties was prosecuting a claim before the Japanese War Claims Commission. A War Claims Fund had been set up to compensate for losses due to the actions of the Japanese Army during the Second World War. Two Canadian regiments that had served in Hong Kong were seeking compensation for the loss of regimental non-public funds when the Japanese overran that territory. Brigadier-General Karwandy argued the merits of their claims and carried the day. The regiments received their compensation. The Commission was not without controversy as the funds had apparently come from the expropriation of the property of Japanese Canadians interned during the war.

In 1958 the Army base at Gagetown, New Brunswick, needed a legal officer on staff. Captain Karwandy spent the next three years in Fredericton and Gagetown before taking over in Edmonton for a five year stint. The Cuban Missile Crisis added considerable excitement to that tour as there was a Strategic Air Command refuelling facility in Edmonton. This was followed by a posting to the more exotic climes of Europe in 1966. General DeGaulle was in the process of evicting the NATO military forces from France and Major Karwandy ended up doing one of the last, if not the last, courts martial at the Royal Canadian Air Force station at Marville. After a year in the Assistant Judge Advocate General's office in Halifax from 1969 to 1970, Lieutenant-Colonel Karwandy was sent to head the Claims Section in Ottawa. Since he had few to no assistants and the volume of work was numbing, he leapt at the opportunity to take over as Assistant Judge Advocate General at Canadian Forces Base Winnipeg when it came open in 1973. Soon after, Air Command Headquarters was formed at the Base. In an unusual display of service hauteur, the Chief Administrative Officer for the new headquarters came over to interview Lieutenant-Colonel Karwandy to determine if he was suitable to be the legal adviser to the headquarters. As the Assistant Judge Advocate General happened to have a pilot's license and the interviewer did not, there were no difficulties with obtaining the appropriate blessing to provide advice to the Command.

The promotion to Colonel in 1977 was a bolt out of the blue. There had been no indication or expectation that this was pending. The Commander of Air Command merely called him over and gave him his fourth stripe. With the promotion came a posting back to Ottawa again, this time as Deputy Judge Advocate General/Advisory. In 1982 lightning struck a second time when the Chief of the Defence Staff, General Ramsey Withers, called him over to inform him he was to be the next JAG. Four years at the helm during the early years of the human rights surge in the eighties made for an active tour. In 1986, Brigadier-General Kar-

wandy passed the torch to Brigadier-General Martin and began his retirement leave, officially retiring in 1987.

Charter Developments

While a regal visit is always an occasion for pomp and ceremony, the Queen's visit to Canada in 1982 was to result in a significant evolutionary change in Canadian law. For one thing, the last apron string to the British Parliament was gently untied and Canada now had the full authority to amend its constitution without any need for British enabling legislation. Just as fundamental was the approval of the *Canadian Charter of Rights and Freedoms* that formed part of the constitutional amendments.

The Canadian Forces understood that the constitutional status of the *Charter* would override inconsistent provisions of the *National Defence Act* and any subordinate regulations or orders. Legal officers had been involved in the drafting of the *Charter* itself to ensure that factors essential to maintaining effective armed forces for the country were taken into account. As a result, when the *Charter* came into force it contained a specific allusion to the existence of a separate military justice system in an exception to the general right to a jury trial.¹⁷ The two principal parts of the *Charter* that were likely to have the most significant impact were the legal rights as they affected military justice and the equality rights as they applied to personnel policies. The main equality rights section did not come into force until 1985 so the original concentration was on modifying the military justice system to ensure it complied with the legal rights.

To evaluate the potential impact of the *Charter* on the Forces, a committee under the direction of Brigadier-General (later Major-General) Frank Norman was set up to examine what changes would be required to meet the new standards. Several legal officers, including Colonel (later Brigadier-General) Robert L. Martin and Colonel Gordon Waterfield, were members of this committee.

Over the course of the next few months all of the disciplinary provisions were evaluated to determine which were at risk of violating the *Charter* and what amendments would be required to satisfy the *Charter* standards. This evaluation resulted in several amendments to the *Queen's Regulations and Orders for the Canadian Forces*. Changes were made to the authority of military commanders to conduct searches and seizures, the ability of persons arrested or detained to contact legal counsel, etc. These had practical consequences for the Branch as well. For instance, the Senior Legal Adviser Europe at the time, Colonel Alan Mitchell, recognized the need for additional legal officers to provide round-the-clock legal services so that those Canadians arrested and charged with offences under the *National Defence Act* in Europe could reasonably exercise their right to consult counsel. Due to language differences as well as differences in the law, German lawyers just could not fill the requirement. Despite these early changes, it was

not until the courts started deciding *Charter* challenges that there could be any certainty as to where adjustments had to be made and whether legislative action was warranted.

The first decisions of the Court Martial Appeal Court started to nudge the military justice system more toward that of the civilian courts. One issue concerned the detention of members while they waited for their appeals from court martial convictions to be heard. Prior to the *Charter* coming into force, there was no right to be released from incarceration during this period and some members had completed their sentences only to have the conviction overturned when the appeal was finally heard. In *Re Hinds v. R.*¹⁸ the court determined that members of the armed forces have the right to bail pending an appeal to the same extent as all citizens. This led to an amendment to the *National Defence Act* to provide for the court martial to grant bail pending appeal as long as certain requirements were met. However, even those requirements had to meet *Charter* standards. In 1987 the Court considered an appeal from a sailor who had been sentenced to 12 months incarceration for assault and aggravated assault during a barroom brawl while he was in Scotland.¹⁹ He wanted bail pending his appeal but the court martial refused him. One of the provisions governing release pending appeal required the person to establish that it "would cause unnecessary hardship if he were placed or retained in detention or imprisonment."²⁰ The *Criminal Code* had no such provision. In finding that the requirement violated the member's right to reasonable bail under the *Charter*, the Court stated: "We see no reason to treat a serviceman differently from other Canadians."

These cases, among others, made it evident that the military justice system would need to be altered in a number of ways if it was to meet the *Charter* requirements. How radical a change was required did not become evident until the early nineties when the Court Martial Appeal Court and the Supreme Court of Canada shut parts of the system down until it was corrected.

The JAG Identity

Another milestone in the creation of a distinctive Legal Branch persona came in May 1982. The Branch received official recognition of its right to a musical standard of its own. Despite the sometimes stuffy impression that the public may have of lawyers, the Branch would have none of it. A lively Gilbert and Sullivan tune, "When I, Good Friends, Was Call'd to the Bar," made its debut as the official march of the Legal Branch. Now whenever the marches of the former branches of legal officers would be played at mess dinners, all legal officers could rise together to toast their own. Fortunately for the dignity of the Branch, it has been singularly successful in avoiding a parade of its members during which they would actually have to march past a reviewing stand to the strains of this rousing number.



As mentioned earlier, the JAG crest was approved in 1969. It served as a pattern for later JAG symbology such as the uniform lapel pins that showed Branch affiliation. But it is difficult to fly a plaque from a pole and salute. In the early eighties the Branch realized it still did not have the full panoply of symbols that a military branch required. The cry

went up for a JAG flag. After much ado, it, too, was approved by the Chief of the Defence Staff, General Theriault, in October, 1984. However, it still took several years before the flag was flown. National Defence would not provide the funding for the necessary silk screening and production of copies. Eventually the JAG, Brigadier-General Martin, requested that members of the Branch make a donation so that copies of the flag could be produced. Both Regular Force and Reserve members of the Branch responded to the call. The Branch flag was finally raised by Chief Justice Dickson of the Supreme Court of Canada in 1989. It has flown proudly all over the world ever since.

Thanks to Commander William Fenrick, the Legal Branch also became involved in the publishing business. Commander Fenrick was the Director of Law/Training in the mid-eighties. He was also a noted and prolific author on military law subjects, particularly those relating to international law and naval warfare. He wondered why the Legal Branch did not have its own journal so that members of the Branch and guest contributors would have a Canadian forum for discussion of military law issues. After convincing the JAG of the merits of such a publication, he was appointed as Editor and the first volume was issued that same year. Unfortunately, the publication languished after two more issues due to the limited number of officers in the Branch and the lack of time available for writing.

Continuing Trials

Disciplinary problems continued to be a rich source of business in the eighties. While drinking and driving offences formed a large part of the court martial work in Europe, there was still a wide variety of other offences to try. Soldiers tried to import narcotics or were trafficking them, dependents stole from the local Canex store and fights led to assault charges. One of the most serious incidents occurred in 1988 when Corporal Christian Pepin, a soldier with the Royal 22nd Regiment (Van Doos), fled to Hungary with his girlfriend. This was during the days of the Cold War and Hungary was still a Communist country and a member of the Warsaw Pact. While this was serious in itself, Pepin then killed his girlfriend

while in Hungary. The Hungarian authorities arrested him and, in an unusual display of cooperation, handed him back over to the Canadian military authorities in Germany for trial with assurances that the Hungarian witnesses would attend to testify at the trial. Pepin was charged with first degree murder. When the time for the trial arrived, however, the crucial Hungarian witnesses did not show. Pepin pleaded guilty to the less-serious charge of manslaughter and received a sentence of five years imprisonment.

In Canada, the trials ranged from the mundane to the bizarre. Drugs were still a principal focus and the majority of Canadian cases involved possession or trafficking charges. Another case having international ramifications occurred in 1984. A Canadian warship based in Esquimalt, B.C., paid a twenty-four hour visit to Guam. Despite the brevity of the visit, four Canadian sailors managed to get themselves into serious trouble. They were found next to a stolen car that had been demolished and marijuana cigarettes were found nearby. They were arrested and thrown in jail to await trial. The ship was obliged to sail back to Canada minus four crewmembers. Lieutenant-Commander Jim Price, the Deputy Judge Advocate in Victoria, was sent out to deal with the situation. Guam was not part of the United States and therefore the treaties that would normally have governed the situation did not apply and Canada had no diplomats there. Price left with \$20,000 U.S. in hand and an offer to hold a court martial in Guam if civilian jurisdiction was waived and charges were justified.

A notice handed out on the plane said persons carrying more than \$10,000 had to disclose this on arrival or face ten years in jail with no parole. Lieutenant-Commander Price duly complied. Suspiciously, the immigration official's first question was: "Where are you staying tonight?" He diplomatically avoided the question and deposited the money in the hotel safe immediately on arrival. In the meantime, the sailors had been released into U.S. military custody. After discussions with the judge and prosecutor and compensation to the owner of the car, the charge was lowered to taking the vehicle without the owner's consent, a misdemeanour and the sailors were given the equivalent of an absolute discharge. The sailors had to refund the compensation paid to the car's owner and, not surprisingly, their careers ended abruptly soon after their return.

Other cases in the eighties saw an officer charged for stealing controlled drugs under her care, a cashier charged with stealing funds entrusted to her, a Military Policeman charged with stealing funds from a deposit lock up in the police station, two soldiers charged with grave robbery, a member charged with arson for burning down a building in which he went back to sleep after setting the fire, a naval officer charged for failing to stop lobster poaching, and numerous other cases of greater or lesser seriousness.

Changing of the Guard

Another changing of the guard took place in 1986. Brigadier-General Karwandy finished his four-year term as JAG and Colonel Robert L. (Bob) Martin took over as the senior legal adviser to the Department and Forces as well as the leader of the Legal Branch. Brigadier-General Martin was a native of the small village of, appropriately, Martins in the "Republic of Madawaska," New Brunswick. Born on December 31, 1932, Martin attended school in Van Buren, Maine, until Grade 7 as there was no school close by in New Brunswick. After completing high school in his home province, Bob Martin set his sights on higher education. He was accepted as a freshman at St. Thomas University in Chatham, N.B., in 1949. There he got his first taste of military life when he joined the Canadian Officers Training Corps in the infantry. While this led to a number of interesting summer jobs, including time in Europe as a Second Lieutenant, it also convinced him that the infantry would not be his career choice. He earned his B.A. in 1953 and went on to complete his Bachelor of Civil Law at the University of New Brunswick in 1956. After finishing his articles, was called to the Bar of New Brunswick that same year.

When Brigadier-General Martin decided to make a career out of the armed forces in 1957 there was no room with the JAG organization so he enrolled in the Personnel Administration Branch of the Royal Canadian Air Force. As with all air force officer recruits at that time, he was sent to London, Ontario, for basic

training in the skills of an officer and a gentleman. The air force then decided his abilities could best be put to use in Montreal. Soon after he was sent on a posting to Paris for two years. While there he managed to attend the University of Paris during the 1959/60 academic year to study Public International Law at the same time that he was carrying out his military duties.



Brigadier-General R.L. Martin, O.M.M., C.D., Q.C.

It was not until 1961 that Brigadier-General Martin had the opportunity to switch to the Legal Branch. Even on joining, he did not work in the JAG organization right away. His first posting was to the air force Directorate of Personnel Administration. The legal section in that directorate provided advice

on Boards of Inquiry, applications for redress of grievance and other personnel issues. A year and a half later he got into the litigation side of things in the Claims Section at JAG Headquarters. The 1965-66 school year saw Squadron Leader Martin off to the Royal Canadian Air Force Staff College in Toronto for a year of upgrading in the skills needed by a senior military officer. Staff College was followed by a stint in Quebec City. Then it was back to Ottawa for a series of appointments as the Director of Law/Pensions and Estates, Advisory, Operations and Military Justice in that order. These postings were not exactly boring as he acted as a military legal adviser during the Montreal Police Strike of 1969, the October Crisis in 1970 and the Kingston Prison Riot in 1971 and he was employed as a military judge.

One of his more fascinating duties was providing legal advice on the use of the Forces during the 1976 Olympics in Montreal. The Munich massacre of Israeli athletes during the 1972 games had made the Canadian officials responsible for the games extremely sensitive on the subject of security. Part of the preparation was a trip to Munich to be briefed by the German authorities on their security systems and problems. Except for the catastrophic breach of security with respect to the Israelis, the level of criminal activity during the games was well below normal due to the increased police and army presence. The lessons from Munich were put to good use and the Montreal games avoided a similar fate. Lieutenant-Colonel Martin had been awarded the Order of Military Merit in January of that same year for his outstanding work for the Forces. On promotion to Colonel in 1977, Martin became the Assistant Judge Advocate General for the Eastern Region for a few months before coming back to Ottawa to replace the retiring Colonel Beaupré as the Chief Judge Advocate in 1978.

Like other Canadian citizens, members of the Canadian Forces and their dependants have a right to vote in elections taking place in their ridings in Canada. To ensure that they could do so wherever they might be stationed, the Government had passed regulations called the "Special Voting Rules" that set out the procedure for voting by military members. From 1972 to 1985, Martin was the expert on those rules in the Canadian Forces. Under the title of "Permanent DND Coordinator for the Special Voting Rules" he ran the Forces' voting whenever a federal or provincial election was held. This involved travelling around the country and overseas giving briefings to the officers designated as Deputy Returning Officers, as well as ensuring the system for getting the votes directed to the proper ridings went smoothly.

Colonel Martin left the JAG fold in 1980 when he took on the responsibilities of the Director of Personnel Legal Services. For the next five years, Colonel Martin presided over a virtually independent legal firm. It was good practice for his next position.

In 1985 it was widely suspected that Colonel Martin would be appointed the next JAG when he was sent to the National Defence College for a year. This course was for senior officers who are expected to be the future top leaders of the Forces. On November 10, 1986, the suspicions proved true when he was appointed JAG by the Governor in Council. The following January he was made a Queen's Counsel. The academic high point for the General came when the University of St. Thomas recognized its esteemed alumnus by granting him an honorary Doctor of Laws degree at its May, 1989, convocation ceremonies. Brigadier-General Martin retired from the position of JAG on November 10, 1990.

Updated Reserves

The JAG Reserve also changed in the eighties. Up until the early part of that decade, the JAG Reserve was still an ad hoc type of organization even though it had improved considerably in the seventies. It was top heavy with 1 Colonel (or equivalent), 9 Lieutenant-Colonels and 10 Majors. Furthermore, as indicated by the rank distribution, it was mainly composed of more-senior, and older, legal officers and lacked the age distribution necessary to fill in behind retiring officers. As a result, the organization and administration of the Reserve would have been unlikely to have met the Forces' requirements for a rapid expansion in a time of crisis. In 1982 a concerted effort was made to reorganize the JAG Reserve along more functional lines. It took until the end of October, 1983, to finalize the new structure and obtain NDHQ approval.²¹

The role of the revitalized JAG Reserve followed that of the Reserve Force generally. It was stated as follows:

The role of the Res F is to enhance the war deterrence capability of the Canadian Forces and to support the Regular Force (Reg F) in ongoing peacetime tasks and activities.²²

The JAG Reserve had both wartime and peacetime missions specified. In war it was to augment Regular Force legal resources and provide a base for further mobilization. In peacetime it was to prepare for war missions and provide legal advice to Primary Reserve commanders, commanding officers and staff. Its members were also to provide assistance in the training of Primary Reserve personnel in military law and the law of armed conflict. Another of its major tasks was to provide a pool of trained legal officers to augment Regular Force legal resources in peacetime (primarily in the area of courts martial). As a further advantage of having legal officers with one foot in the military camp and the other in the civilian legal community, JAG Reserve officers helped maintain contact with each Provincial Bar and the various legal associations such as the Canadian Bar Association.

To meet its missions, the Legal Branch Reserve was organized on a regional basis similar to the Regular Force legal officer organization. In addition, the estab-

lishment was increased from 20 to 42 with provision for 1 Colonel, 6 Lieutenant-Colonels, 22 Majors, and 13 Captains. The 6 Lieutenant-Colonels were to be "Area Legal Advisers" in the six regions.²³ For matters relating to the performance of their duties in providing legal services they were to be responsible to the local Assistant Judge Advocates General while they reported directly to the JAG in other areas such as recruiting and training. The "District Legal Advisers" were under the command of these Area Legal Advisers.

A considerable number of new officers were recruited into the JAG Reserve and they made their presence felt. Some were relatively young and new to the military experience or the law while others had years of practice in both areas. There was a mix of members with private practices and others who worked for federal or provincial governments. Both male and female lawyers responded to the call.

In 1987 Captain(N) Marin left the JAG Reserve and returned to naval operations as a senior adviser with a promotion to Commodore. Commander Walter Goodfellow deservedly put up his fourth stripe and settled into the Deputy Judge Advocate General/Reserve's chair.

Decade's End

By the end of the eighties the Legal Branch had spread into virtually every area of the law that affected National Defence. The Regular Force portion of the Branch included six regional head offices in Lahr, Halifax, Montreal, Trenton, Winnipeg, and Victoria that served the headquarters of the operational clients. Subordinate offices in each region gave advice directly to the unit level. At National Defence Headquarters in Ottawa, the JAG was supported by three Deputy Judge Advocates General at the Colonel level: Advisory, Military Justice and Legislation. The Director of Personnel Legal Services, who was in the Assistant Deputy Minister (Personnel) organization, the Chief Judge Advocate and the Senior Legal Adviser Europe were also Colonels. Under the three deputies there were directorates for providing general legal advice (Advisory), reviewing and drafting legislation and providing advice on financial regulations (Legislation, Regulations, Orders & Finance), international law (International), dealing with the legal side of human rights issues and information law problems (Human Rights & Information), advising on pensions and military estates (Pensions & Estates), contracts (Materiel), negotiating claims by and against the Crown (Claims), supervising court martial prosecutions (Prosecutions & Appeals), and providing and supervising counsel for court martial defences and administering training for the Branch (Defence & Training). There were also legal officers on postgraduate training, French language training and serving at the Supreme Headquarters Allied Powers in Europe.

For the Legal Branch, the seventies and eighties were a time of expansion into new areas of the law. It was an exciting period of constitutional and legislative

developments that would forever change the standards under which the Forces had to live. It was also a time of organizational renewal with the development of the Branch Reserves, increases in establishment and new faces constantly gracing the annual mess dinner. At the time it seemed like the Branch was always working to maximum capacity, but the definition of maximum capacity continued to change as the years went on. Unknown at the time, these years were but the calm before the storm of the nineties.

Chapter 6. Pride, Shame and Change

Some of the most dramatic changes in the geopolitical landscape took place during the last decade of the millennium. The Berlin Wall had just crumbled, the USSR broke apart, the Warsaw Pact died, Eastern European nations embraced independence and democracy, civil wars wound down in Central America, the Middle East peace process showed progress, and there was renewed hope in the world that a more peaceful era was at hand. The decreased tension between US and the remnants of the former USSR lowered the level of international stress to a point where global conflict was unlikely. Despite this hopeful scenario, a number of regional conflicts were just warming up. Iraq had fought a bloody war with Iran and then invaded Kuwait, civil war still raged in Afghanistan, India and Pakistan both exploded nuclear weapons, Yugoslavia disintegrated, and civil wars raged in Africa.

Many of the international developments involved new roles for JAG lawyers. The international community was showing increased aggressiveness in dealing with atrocities or dictatorial power grabs. In a large part, this was due to the willingness of the only remaining superpower, the United States, to lend its military muscle to the international community when these crises arose. However, Canada also continued in its traditional role of promoting human rights throughout the world and was willing to provide whatever military support it could to back up its position. The result was Canadian troops deployed to the corners of the world with a frequency that severely challenged the capabilities of the Forces.

The increased deployment of legal officers with the contingents created a higher profile for the Legal Branch in the nineties. This was particularly true after the Somalia deployment and its aftermath showed commanders the potential for institutional and personal jeopardy if legal advice was not available or not followed. In the nineties the Office of the JAG became involved in more operations than at any time since the Second World War. As Dr. Stephen Harris, the Chief Historian for the Directorate of History and Heritage, observed, this was the decade when the Legal Branch became operationally relevant.¹ The Branch also had to deal with the challenge of significant changes to the military justice system and its own organization.

Summer of Unrest

The first year of the decade gave a taste of things to come. In the summer of 1990 a territorial dispute between the municipality of Oka, Quebec, and the local native band became violent. The municipality wanted to develop a golf course on the land that was also claimed by the Kanésatake Mohawks. To prevent development of the land, the natives erected barricades on the roads in March. On July 11, police officers of the Sûreté de Québec attempted to dismantle the barri-

cade and one of the officers was killed. Natives from the Kahnawake Reserve put up sympathy barricades on the Mercier Bridge leading to Montreal. As the situation escalated, the Quebec government requested the assistance of the Canadian Forces in aid of the civil power. In mid-August the Forces replaced the Sûreté de Québec at the barricades. At the end of August there was an agreement to take down the barricades on the Mercier Bridge. The military forces then advanced on the remaining barricades and a number of Mohawk warriors, women and children (plus reporters) retreated to a detoxification centre. The standoff ended on September 26 when the holdouts left the centre.

Legal officers in Ottawa and the Quebec regional office entered the fray as soon as it became apparent that the matter might involve the Canadian Forces. They had to give briefings on the possible application of the aid of the civil power provisions of the *National Defence Act* and the possible application of the federal *Emergencies Act*. As matters progressed, they set up procedures for dealing with the inevitable claims that would arise from the operation, provided guidance on the duties and powers of the soldiers as peace officers, issued instructions as to when searches and seizures could legally be conducted and became involved in court challenges to the conduct of the Forces during the standoff. A group of reporters went to Federal Court seeking to force the military to let their food and reporting supplies go through the lines separately from the supplies to the natives, arguing that failure to do so infringed on freedom of the press under the *Charter*. The court dismissed the action on the basis that the reporters had no more rights than the general public under circumstances of this nature.²

A considerable amount of the legal work came after the surrender. Part of the agreement that led to the surrender required those taken into custody to be held by the military rather than the provincial police. The province had to approve the specially created military detention facility as a provincial detention centre, there were negotiations to confirm military control over the facility and the rules for the facility had to be drafted in conjunction with the provincial correctional services. The whole episode was a tense but valuable experience for the legal officers involved. The Deputy Judge Advocate in the region who was involved in the front line legal work, Major Mario Dutil, was awarded the JAG Commendation for his efforts.

Persian Gulf War

The news that Iraq had invaded Kuwait on August 2, 1990, was the signal for a significant shift in the priorities of the Office of the JAG. Before the Gulf War, Canada had not been involved as a combatant in an armed conflict since the end of the fighting in the Korean War in 1953. Operations law and training of military members in military law had taken a back seat to the issues that grabbed the headlines such as major military equipment purchases and human rights challenges. This second-class status of operations law changed abruptly with the noti-

fication from the Government that Canada had committed itself to providing fighting forces to the coalition's effort to free Kuwait. Like the rest of the Forces, the Legal Branch had to shift into high gear to deal with this unexpected crisis.

Besides the operational preparations that were required to ready the Canadian Forces to engage in combat, there existed the need to ensure they were doing so on a sound legal basis. Was there need for a declaration of war? How should Parliament properly be informed and consulted? What additional legislation might be required to support and maintain the forces? What legal advice would the commanders in the field need on site and how would it be provided? The issues just multiplied as the preparation went on. The Branch realized that it needed to concentrate more resources on the core areas of military law in future so that the Forces would be properly prepared to deal with sudden operational deployments.

On August 10, the Prime Minister announced that Canada would be sending two destroyers and a supply ship to help enforce the UN approved economic sanctions against Iraq.³ Enforcing the sanctions required surveillance, monitoring and possibly interception of all inward and outward maritime shipping. The Canadian Task Group, under the command of Commodore Ken Summers, was to join ships of other UN contributors in performing the necessary surveillance and interdiction. The name of the deployment was "Op Friction." After some major scrambling to update the systems on the ships, the Task Group departed Halifax on August 24. Lieutenant-Commander John Maguire of the Office of the JAG was aboard the flagship, H.M.C.S. *Athabaskan*, when the Task Group sailed.

It was not only the Navy that was to be involved in the campaign and require legal assistance. On September 14, 1990, the Prime Minister announced that Canada was increasing its contribution to the forces in the Persian Gulf by sending a CF-18 fighter squadron to be based in Qatar. The "Van Doos" (Royal 22nd Regiment) from the Canadian base in Lahr, Germany, provided the security. This part of the Gulf War operation received the tag of "Op Scimitar." With this air support went another member of the Legal Branch, Major Joe Holland.

Although legal officers often participated in military exercises, deploying to the Persian Gulf was still an education in the distinction between an exercise and the real thing. Lieutenant-Commander Maguire had his eyes opened on the subtleties of media relations on the way over when a CBC reporter misunderstood an explanation he gave on the need for an order placing or maintaining the deployed forces on "active service." It made the headlines back in Canada. After the facts were clarified, the controversy died. The Task Force finally reached the Persian Gulf on September 26 to begin its operational patrols.

At the end of October, a joint naval-air force headquarters was established in Manama, Bahrain, with Commodore Summers appointed as the Commander. Lieutenant-Commander Maguire was switched to this headquarters on its forma-

tion. His work, however, preceded the actual setting up of the headquarters as he was a prime actor in locating the appropriate accommodations and reviewing the necessary lease agreements and contracts. The air force contingent during the deployment was based in Qatar at two locations called Canada Dry 1 & 2. Canada Dry 1 was at the airport complex while Canada Dry 2 was located in former migrant workers' quarters. The title of the air force contingent was the "Canadian Air Task Group Middle East" (CATGME).

During the deployment the legal officers were involved in almost all the areas of the law that can affect military forces. These included advice on discipline, negotiating Status of Forces Agreements, reviewing Rules of Engagement, helping draft Standard Operating Procedures for boarding vessels, and drafting contracts and leases. There was a myriad of legal inquiries to handle as well, mainly related to the interpretation of regulations or orders. Legal aid on subjects such as powers of attorney and wills continued as a regular source of business. An occasional motor vehicle accident required legal input to resolve. Human rights issues, such as ensuring female members of the Forces would be permitted to drive in Qatar, had to be addressed. On the professional side, there was a constant need for liaison with the legal advisers to other coalition forces. Inevitably, there was always a dignitary of some sort visiting and this frequently resulted in the legal officer being required to give a briefing.

Fortunately, disciplinary problems were infrequent. Over the first five and a half months there were only about thirty charges laid under the Code of Service Discipline within the Task Force and later the joint headquarters, and only one of those was a serious offence. Local authorities arrested twenty-four Canadians, mostly in Gibraltar while the ships were in transit to the Middle East. Only one arrest resulted in a charge. Likewise, the legal work with the air force contingent did not have a major disciplinary component. Alcohol was not allowed except at private house parties and everyone was either too busy or too tired to get into too much trouble. Instead, the duties concentrated on the operational law and on developing co-ordination with other coalition force members.

While military lawyers are knowledgeable in military law, Canadian civil and criminal law and a certain amount of international law, this is usually insufficient to meet the needs for foreign deployments. One of the first things a competent military lawyer does, either in preparing for a mission or as soon as possible after entering the country, is learn the local laws. During the Persian Gulf operations this meant learning Islamic law and legal principles in addition to the specific local laws that might impact on the Canadian Forces. All of the military lawyers did this by obtaining books on the subject and trying to establish personal contact with local lawyers and justice authorities. One of the biggest problems initially in Qatar was the number of Canadians running afoul of the local law by taking photographs. Prohibited subjects included mosques, government buildings (i.e. anything with a flag), unmarked VIP quarters, anything associated with the Emir,

and women unless their permission was obtained. Major Holland determined the local rules on the subject and had them published immediately.

As with all military campaigns, there had to be at least one "Catch 22." In Qatar it was the subject of smoking. The Canadians imported their prohibition about smoking inside buildings. Unfortunately, the Qataris prohibited smoking outside buildings. The solution was a typical Canadian compromise and a demonstration of air force practicality. Four trailers were formed into a square so that those inside were not visible. The top was then covered with a camouflage net. With this configuration the smokers were technically neither inside nor outside. Even a Catch 22 can have a latch if you work at it.

In January 1991, Lieutenant-Commander Guy Phillips took over from Major Holland after a month of sharing the workload. Soon after, on January 16, the coalition's Operation Desert Shield ended and Operation Desert Storm began. Once the missiles started flying, discipline problems in Bahrain decreased even further as the ships were at sea and the personnel on land were restricted in their movements due to the possibility of terrorist attacks. The Americans reported a reduction of 90% in discipline problems compared to pre-deployment. The missile attacks were not all one way. SCUD missiles from Iraq also started to land in the vicinity of Bahrain and Qatar once the shooting war got under way. The legal work in other areas increased as the legal officer had to attend the daily operations briefings, provide advice on operations law and the law of armed conflict, as well as continue with advice on legal aid, human rights, claims against the Forces and all the other areas of law that were clamouring for attention.

At the beginning of February 1991, Major Dominic McAlea arrived in theatre and started the handover procedure to replace Lieutenant-Commander Maguire who finally departed a week later. Captain Andrew van Veen was also sent to Bahrain to work with Major McAlea. The legal duties continued to be much the same. Although both lawyers in Bahrain provided whatever legal services were required, Major McAlea generally acted as the J5 Legal, giving advice to the headquarters,



Major D. McAlea at Canadian HQ in Bahrain

while Captain van Veen provided the majority of the advice to the line units. Both attended the "morning prayers" (daily operations briefings). They taught the law on the use of force, created use of force guidelines, settled claims, dealt with leases and contracts, assisted with personnel issues, and even advised on pay problems. There were continuing problems with the Status of Forces Agreement that had to be addressed as well as some difficulties concerning Canadian Forces members travelling in Saudi Arabia. A couple of Canadians were the subjects of criminal investigations by the local authorities. Alcohol was usually the problem.

An issue that frequently arises in war zones is the policy on "souvenirs" that Canadian Forces members might acquire from the battlefield. These might be discarded weapons of enemy troops, personal items or any other abandoned material. Because of the dangerous, and sometimes illegal, nature of such items if returned to Canada, the military lawyers drafted a policy prohibiting the collection of souvenirs and requiring all items taken from the battlefield to be given either to the Intelligence Section or to museums. There were also a number of questions concerning prisoners of war. "C" Company, part of the Canadian security forces provided by the army, ran a prisoner of war compound and a large number of Iraqi soldiers passed through Canadian hands.

Surprisingly, disciplinary cases increased in January and February in Qatar. Legal questions arose concerning powers of search and inspection, the implications of refusing inoculation for the plague and the seizure of documents for the purpose of handwriting analysis. There were also a number of incidents of the negligent discharge of weapons. In one case, just after the Commanding Officer of the "Desert Cat" Squadron had come through the main gate of Canada Dry 1 with Lieutenant-Commander Phillips, three rounds were inadvertently fired from the automatic weapon covering the gate entrance. There were cases of extortion, uttering threats, redecorating a TV with a pick handle and drunkenness, all of which needed legal advice. The change in policy from allowing no alcohol to permitting two beers a day seems to have been one of the main causes of the increase in disciplinary difficulties. The legal officer also had to deal with the claims for vehicle accidents. It seems the guards at the front gates would never quite open the gates all the way and the vehicle drivers had a bad habit of trying to squeeze through an area that was narrower than the vehicle's width. As with all the other legal officers who had deployed, legal aid continued to be a steady source of work.

After the Iraqi defeat, the Canadian participants in the war were gradually returned home, including the legal officers. Although the deployment was an arduous one, from the professional perspective it was one none of the legal officers would have missed.

Although the need for Canada to become involved in an armed conflict again was tragic, it did have some positive results. The Canadian Forces and the Legal Branch learned a considerable number of lessons from this deployment. One of the welcomed conclusions by the leadership of the Forces was the need for military lawyers with operational deployments. There was likely an initial perception on the part of operational personnel that the inclusion of lawyers would just bog the operation down in technicalities and interfere with the effective accomplishment of the mission. However, the actions of the military lawyers in Operation Friction led the Commander, Commodore Summers, to state in his after action report that:

The decision to include legal officers as part of OPERATION FRICTION was one of the best administrative decisions of the operation. Their expertise in providing advice on Status of Forces Agreement negotiations, the legal disposal and purchase of items, regular military administrative and disciplinary matters, to developing rules of engagement and their interpretation in international law was invaluable.⁴

He recommended that legal officers be an integral part of any CF large scale operation and said they must be included as part of the headquarters staff. So began the increased deployment of lawyers with the troops to theatres of operations that would grow exponentially during the nineties.

Legal officers would continue to play a role in the Middle East operations through the end of the decade. Whenever a Canadian ship was deployed as part of the force enforcing the UN embargo on Iraq, a legal officer would accompany the ship for at least part of its tour. In early 1998 when an air force squadron and H.M.C.S. *Toronto* went to the Middle East in anticipation of possible military action for Iraq's refusal to permit UN weapons inspectors do their job, Captain Colin Carson of the JAG's office worked out of Kuwait City for three months to support the units and those other Canadian forces performing Iraq-related missions. The watch on Iraq was ongoing at the turn of the century.

Change at the Helm

The first year of the decade also included another change in the Branch leadership. Brigadier-General Martin retired and on November 10, 1990, Commodore Peter Richard Partner became the tenth Canadian Judge Advocate General. Commodore Partner had an English heritage, having come into this world on May 11, 1933, at Alston, Cumberland County, England. There he attended prep school until the age of 11 when his father was offered the position of Principal at Prince of Wales College in St. John's, Newfoundland. While his father ran the school, young Peter completed his high school education. In 1950, his father was offered a position as head of a school in Tanganyika, Africa. Instead of trekking off again, Partner stayed in Newfoundland to study for two years at Memorial College (now University). He got his first taste of the military when he joined the



Commodore Peter R. Partner, C.D.

University Naval Training Division that same year. Over the next few years this resulted in summer assignments aboard a destroyer (H.M.C.S. *Crescent*), a frigate (H.M.C.S. *La Hulloise*) and at the naval base in Halifax, H.M.C.S. *Stadacona*.

From Memorial, the future Commodore earned a scholarship to Dalhousie University. After three years of an Arts degree he combined his fourth year with his first year of law school. The result was a B.A. in 1954 and an LL.B. in 1955. He articulated with the firm of Hart & Cox of Halifax for six months and completed the final three months with the Department of Justice in Ottawa. In the fall of 1955 he was called to the Bar of

Nova Scotia at the ripe old age of 22.

In the course of his articles at Justice, Partner had become acquainted with some members of the Legal Branch of the Forces and so he decided he wanted to join. However, in 1956 the Branch was still only recruiting into positions provided by the three services. As there was no naval position available, he joined the Royal Canadian Air Force instead. Basic training in London, Ontario, led Flying Officer Partner to a posting as the Assistant Command Legal Officer at Training Command Headquarters in Trenton for the next year and a half. During this time he received a promotion to Flight Lieutenant. His next tour was in Oakville with the headquarters of the Canadian Army Central Command from 1958 to 1961 which was followed by the inevitable Ottawa posting.

The organization he first worked for in Ottawa was the Directorate of Personnel Administration. This Air Force directorate was responsible for such things as administering applications for redress of grievance, reviewing appeals on court martial sentences and reviewing Boards of Inquiry. With the integration of the three services during his tour, this directorate disappeared and was replaced by the tri-service Directorate of Personnel Legal Services. The name changed but the work was the same, and so were most of the people.

In 1966, the Forces finally posted Squadron Leader Partner out of Ontario when it sent him to Tanzania to finish the work that Major Jack Wolfe had started. He

worked on the remaining volumes of regulations for the Tanzanian forces and then tackled the administrative orders necessary to carry all of the legislation and regulations into effect. One of his more satisfying duties during this time was instructing a young Tanzanian officer by the name of Godfrey Mangenya in the principles of law. This officer would later become the Tanzanian Judge Advocate General. Partner returned to Canada in 1968. On his return to Ottawa from Tanzania, now-Major Partner (thanks to the unification change in rank titles) took over as head of the Contracts Section and later, after promotion to Lieutenant-Colonel, the Advisory directorate. In 1974 he was off on another foreign tour with a six-month stint at the NATO Defence College in Rome, followed by appointment as Assistant Judge Advocate General Europe in Lahr, Germany. Here a lot of the work was disciplinary. Several major courts martial took place during his four years in the post. One of the most interesting duties resulted from the absence of the Senior Legal Adviser Europe for an extended period in Ottawa. Lieutenant-Colonel Partner had to take over his duties with respect to the semi-annual Sending States conferences. These meetings would deal with the issues common to the six countries with forces in Germany. After a unified position was reached, the issues would be raised with the host nation. While he was there, the Commander of the Canadian Forces in Europe recognized Lieutenant-Colonel Partner's work by awarding him the Canadian Forces Europe Commendation.

In 1978, Lieutenant-Colonel Partner had his first tour west of Ontario when he took over as the Assistant Judge Advocate General Prairie Region, in Winnipeg. On promotion to Colonel in 1982, it was back to Ottawa as Deputy Judge Advocate General/Advisory. In 1986, he became the Director of Personnel Legal Services, returning to run the organization that he had worked for twenty years earlier. On November 2, 1990, came the promotion to Commodore followed by the appointment as JAG on the 10th of that month.

In his time as JAG, Commodore Partner worked to cement the good relations between his Office and those of his American and British counterparts and oversaw the rapid revamping of the court martial system after the Supreme Court of Canada declared the existing system unconstitutional. Commodore Partner was not to complete his full tour, though. In 1993 Brigadier-General Simpson had been working for the UN in Vienna and was about to finish his tour with the UN Relief and Works Agency for Palestinian Refugees. He encouraged Commodore Partner to apply for his position of Chief of the General Legal Division with the Agency. Partner did and soon moved to Austria where he worked for the next three and a half years. Three quarters of the time he was the Chief of the General Legal Division and for the final portion his position was that of Senior Officer Human Resources. When the Agency moved its headquarters to Gaza in 1996, Commodore Partner decided to return to Canada and retire, turning down an offer for a position with the UN in New York in the process.

The Charter and Courts Martial

While the *Canadian Charter of Rights and Freedoms* had affected the system of military justice in various ways since its passage in 1982, it had its greatest impact in the nineties. The Court Martial Appeal Court and the Supreme Court of Canada examined how the court martial system brought military personnel to trial and found the system wanting. Not surprisingly, it was the Court Martial Appeal Court that first intimated that all was not well with the existing system. In November 1990, that court shut down the system of Standing Courts Martial in a decision known as *R. v. Ingerbrigton*.⁵ The Court considered that the military judges themselves did not meet the standards of independence required by the *Charter*. For approximately the next six months, only the more complex General and Disciplinary Courts Martial could try service personnel until the regulations could be changed to meet the Court's objections.

Probably the most significant *Charter* case concerning the military justice system was *R. v. Généreux*.⁶ In September, 1988, Corporal Généreux of CFB Valcartier was charged with three counts of possession of a narcotic for the purpose of trafficking and one charge of desertion. Several attempts to delay the trial pending a challenge to the court martial process were dismissed by the Federal Court. Généreux was found guilty at trial of two counts of trafficking, one of simple possession and one of absence without leave. His appeal as to the legality of the findings and the legality of the sentence was rejected by the Court Martial Appeal Court with one judge dissenting. Généreux appealed to the Supreme Court of Canada and the court rendered its decision in February, 1992.

The challenge was twofold: first, the court martial was not an independent and impartial tribunal as required by the *Charter*; and second, his equality rights under the *Charter* were violated by charges under the *Narcotic Control Act* being tried by court martial in his case when a civilian would have been tried by the ordinary criminal courts. In other words, the issues were virtually identical to those decided under the *Canadian Bill of Rights* in the *MacKay* case mentioned in the previous chapter. However, the constitutional status of the *Charter* had resulted in a much more activist court where legislation was being challenged. With the *Charter's* heavy artillery to support judicially mandated change, the *MacKay* analysis was no longer persuasive.

The Supreme Court decided that the General Court Martial did not qualify as independent under the *Charter* because it did not meet the three criteria for independence. The Judge Advocates needed to have greater security of tenure by having a fixed period of appointment rather than just being appointed on an *ad hoc* basis for each trial. In addition, the system for Judge Advocates had to be changed to ensure that the executive could not interfere in their salary and promotion possibilities. Finally, the military executive had to be removed from the decision as to who would sit on a court martial and the JAG had to be removed

from the appointment of Judge Advocates in light of his relationship with the executive. The Court also decided that the system was not protected as "a reasonable limit prescribed by law." This is a defence included in the *Charter* that can justify a law even if it otherwise violates a *Charter* standard.

The Court rejected the argument that G  n  reux's equality rights had been violated. It would not accept that military members could only be tried by civilian courts for offences against civilian laws. It recognized the need for distinctly military courts to deal with disciplinary offences even under such circumstances.

The decision of the Court was not a complete surprise. The *Ingerbrigton* decision in 1990 had already pointed out many of the danger areas concerning military judges in relation to Standing Courts Martial. As a result, a number of regulations had been amended to correct the deficiencies, but they were not yet in place at the time the *G  n  reux* trial was held. The Court noted this and, by inference, indicated that the amendments met a number of their objections. Some of the issues raised by the Court could only be corrected through amendments to the *National Defence Act* itself, though. As a result, the court martial system was shut down from the date of the decision, February 13, 1992, until the appropriate amendments were passed by Parliament and brought into force on June 4th that year. Passage of these amendments was notable both for the relative speed with which the amendments were drafted and passed after the Supreme Court decision and the fact that these were the first direct amendments to the *National Defence Act* since 1959.⁷ These amendments led to a significant shift in the organization of the JAG office and the relationships between military judges and other officers of the Legal Branch.

One of the changes corrected a long-standing imbalance. For the first forty-three years of its existence, only the accused could appeal to the Court Martial Appeal Court. The prosecution had no right of appeal. This was in keeping with the paternalistic philosophy that the Forces, with its greater resources, should get it right the first time. Otherwise it might seem more like persecution than prosecution. However, as the legal rights of the individual expanded and the consequences of incorrect court martial decisions in favour of an accused became more serious, this philosophy changed to the civilian one of balanced rights of appeal. When the *G  n  reux* decision was released and the system had to be shut down until appropriate amendments were made, the decision was taken that this was the time to insert a right of appeal by the prosecution as well. Since 1993 the military appeal system has taken on most of the characteristics of the civilian system of appeal used for a criminal conviction.

On the very day that the Supreme Court of Canada released its decision in the *G  n  reux* case, a court martial in Germany handed down its decision in one of the most serious cases to come before such a court in years. While courts martial did not have jurisdiction over cases of murder or manslaughter committed in Can-

ada, this restriction did not apply where the offence was committed outside the country. The case was not only noteworthy because of its facts. It also resulted in further changes to the court martial system as a result of a later Court Martial Appeal Court ruling on the procedure used to try one of the alleged offenders.

On April 27, 1991, three members of the Forces stationed in Lahr were at a downtown bar. The patrons were allowed all they could drink for 50 Deutches Marks that night. Master Corporal Christian J.A.G. Deneault, Corporal J.A.F. Leclerc and Private J.F.E. Laflamme had had their share. Late in the evening Deneault expressed the desire to kill an English person. He claimed to belong to a gang whose purpose was to kill people who speak English or who were black. Laflamme selected a victim, the nineteen-year-old son of a Warrant Officer who was also stationed in Lahr. Deneault went to the bar and got a knife from another serviceman.

When the intended victim left the bar, the three followed for about half a kilometre. They started insulting him. Then Deneault ran up behind him, pushed him behind a low hedge and stabbed him several times with the knife he had picked up at the bar. Deneault left but Laflamme stayed and stabbed him again with a large jack-knife. The victim's father lived nearby and soon after came to the scene of the stabbing. His son died in his arms.

Deneault, Laflamme and Leclerc were tried separately for the killing. Deneault had been charged with first degree murder but was convicted at the General Court Martial of second degree murder. He was sentenced to life imprisonment with no eligibility for parole for fifteen years. On appeal, a new trial was ordered by the Court Martial Appeal Court on the basis that the process for appointing the members of the court was unconstitutional. As a result, the system for appointing members had to be amended before any retrial, or any other trials of this nature, could be held. Deneault was convicted of second degree murder on the new trial, but the Court Martial Appeal Court substituted a finding of guilty of manslaughter on a second appeal. It also substituted a sentence of six years and eight months imprisonment for the life sentence the court martial had awarded. Laflamme was convicted of manslaughter and the three-year sentence of imprisonment awarded by the court martial was increased to nine years by the Court Martial Appeal Court. Leclerc was acquitted at his court martial.

While it is usually the accused that is the centre of attention at a court martial, in one case in 1991 the bizarre activities of the defence counsel caught the spotlight. A Corporal was being court martialed in Toronto on one charge of assault and another of drunkenness resulting from an incident in 1990. The victim of the assault, a civilian, was going to be called as a witness by the prosecution. The defending officer appointed for the case was Captain Ross Hainsworth, a Regular Force legal officer. Captain Hainsworth interviewed the victim in his (Hainsworth's) hotel room on an evening before trial. During the course of the inter-

view Captain Hainsworth asked the victim to sign a statement setting out a different set of facts and offered him evidence that he would not otherwise be able to obtain that would allow him to sue the Crown based on a new story saying that he had tripped. Hainsworth estimated the victim could recover between forty and one hundred thousand dollars and wanted to be paid a percentage of the award for his work in discovering the evidence. When asked why he would help a civilian sue his employer, Hainsworth said the police investigation was not thorough and his client was innocent.

The victim had his own lawyer and the next morning he told the lawyer of the conversation with Captain Hainsworth. Subsequently, Hainsworth invited the victim and his lawyer out to dinner. At dinner Captain Hainsworth again made his proposal. Captain Hainsworth wanted ten percent of the award for his hard work and to pay off his client's legal expenses. (This was a surprising justification as all legal services for a defendant at a court martial are free when defended by a military defending officer.) The victim and his lawyer immediately informed the prosecutor of the discussions. The victim was later called to the stand and gave his original story. Captain Hainsworth was charged with two offences and pleaded guilty at his court martial to a charge of fraud on the government. He was sentenced to a reduction in rank and a severe reprimand. But this was hardly the end of the story.

Soon after Captain Hainsworth's trial, the court decision in *R. v. Généreux* came down. It had determined that the type of court martial that had tried Hainsworth did not meet the requirements of the *Canadian Charter of Rights and Freedoms*. As a result, the prosecution, with the consent of the defence, went to the Court Martial Appeal Court and obtained an order for a new trial. In the meantime, Captain Hainsworth had been released from the Forces and was in the process of being disbarred by the Law Society of Upper Canada (Ontario). It took over two years to get the retrial done due to errors in the prosecution and Hainsworth going into hiding. Eventually he pleaded guilty to the original charge and was sentenced to dismissal from the Forces.

Other types of cases lent some variety to the court martial mosaic. In the late '80s and the '90s, the type of court martial offence shifted away from drugs to the sins of greed, lust, violence and the failure of leaders to lead properly. Whether it was the consumerism of society in general or just an improved ability to detect "white collar" crime, the percentage of fraud and theft cases increased dramatically in relation to the total number of courts martial. The increased emphasis on human rights also had an impact. Charges were now being laid for sexual and other types of harassment. On the other hand, the percentage of drug cases decreased. It was unusual to see an officer being court martialed before the 1980s. They made up a minuscule percentage of the trials held each year. This changed with a vengeance in the 1990s. The Forces began charging officers, including senior officers, who failed to meet the standards expected of members in their positions.

One quarter of those tried by court martial in the 1998-99 fiscal year were officers.

New Roles

In addition to an increase in operational deployments in the nineties, the Legal Branch also became active in a number of areas where it had previously had limited involvement. One of the new responsibilities first arose in 1988 and continued through the nineties. The military arm of the North Atlantic Treaty Organization (NATO) was in need of a knowledgeable military lawyer to provide advice and services at the nerve centre of the organization, the Supreme Headquarters Allied Powers in Europe (SHAPE) in Mons, Belgium. Canada accepted the tasking and the Office of the JAG sent over Lieutenant-Colonel Michel Crowe as the first in a series of legal officers to fill the position.

Changing the most fundamental tenets of a society can be traumatic, disruptive and confusing. In the early nineties the former communist countries of eastern Europe had to face just such circumstances. For forty-five years they had been subjugated to Moscow and lacked democratic institutions. With the fall of the Berlin Wall and the disintegration of the Warsaw Pact, they now had to adapt their policies and institutions to a new philosophy. To help with the transition, they asked the Western nations for assistance.

Many nations provided expertise in the multitude of disciplines where advice was required. While the US and Western European nations provided the majority of assistance in helping the armed forces of these new democracies during the transition phase, Canada also did its share. Part of its contribution was a plan called the Military Training Assistance Plan. This involved sending teams of military experts to the Eastern European countries that requested assistance. Several of these teams were composed of legal officers whose purpose was to discuss the regulation and functioning of armed forces in a democracy. The Eastern European countries were struggling with some of the basic concepts applicable to such armed forces, including the extent to which restrictions could be imposed to maintain discipline. From 1992 to 1994 teams of legal officers travelled to Poland, Hungary, Romania, the Czech Republic and Slovakia under the plan. Hungary, Poland and the Czech Republic must have benefited to some degree from these visits—they later became members of NATO.

The Eastern European countries were not the only ones in transition. Central America had long been a hotbed of civil war, death squads and atrocities. In the early nineties the countries in this region were attempting to come to grips with their problems and end the cycle of violence. One organization that was actively encouraging these developments was the Inter-American Commission for Human Rights. This body had been established by the Organization of American States to promote human rights in the Americas. In 1992 the Commission ar-

ranged for a series of presentations to the armed forces of Guatemala, Nicaragua and El Salvador on the subject of human rights and armed forces. Canada was asked to contribute members to the panel and two officers from the Office of the JAG were sent. Over the next several years Canada continued to receive requests for participation in various conferences relating to legal issues concerning the military forces in Central and South America and the Legal Branch filled the requirement.

Requests for assistance from foreign governments seldom serve just a single purpose, or even the purpose stated. A prime example was China's overtures to Canada in the early 1990s. After the Tienamen massacre of 1989, that country had been an international pariah as far as military cooperation with Western nations was concerned. Furthermore, its "Most Favoured Nation" trade status with the US was coming up for review and Beijing was making a strong bid to host the 2000 Summer Olympics. These factors were probably involved in China's invitation to have the JAG visit to discuss contemplated changes in its military law with the legal officials of the People's Liberation Army. JAG officials discussed the request with the Department of External Affairs. Despite misgivings at the operational level of that department, it was ultimately agreed that a lower ranking officer would be sent in conjunction with a representative of the Canadian Bar Association (CBA) who would hold discussions with the civilian legal authorities at the same time. The costs would be born by Canada and the CBA so as not to be seen to be accepting benefits from the Government of China or to incur any apparent obligations for a return invitation to Chinese military officials.

In May 1993, Mr. Justice Robert Wells of the Newfoundland Supreme Court and Colonel R.A. McDonald, Deputy Judge Advocate General/Legislation, flew to Beijing. This was the first visit of a Canadian military officer to China since the Tienamen Square massacre.⁸ Unfortunately, the discussions were relatively brief and not particularly productive. The local officials at the Canadian Embassy were justified in their scepticism of any meaningful results coming from the visit. The Chinese continued to press for increased interaction and it was easy to infer that they wished a return invitation for a Chinese military lawyer to Canada. Such an invitation may well have added some legitimacy to a claim that if Canada was willing to reopen military ties with China then the United States should too. No return invitation was forthcoming. Not surprisingly, once the issues of trade status with the U.S. and the location of the 2000 Olympics were resolved, the Chinese pressure for increased contact with Canadian military lawyers wilted.

Besides taking on new duties, the Branch gave up a long-standing one in 1993. That summer the Canadian Forces Europe Headquarters in Lahr closed and Canada started the repatriation of its forces that had first deployed over forty years earlier. With the closure of the Headquarters came the end of the Senior Legal Adviser Europe position. Captain(N) W.A. Reed returned to Canada as

did all but two of the remaining legal officers. Lieutenant-Colonel A. Johnston took control of the remaining Canadian legal staff for the year they remained at the Lahr air base. When that closed, he continued on as Assistant Judge Advocate General Europe at the air base for early warning aircraft in Geilenkirchen. A contingent of Canadians was stationed there and a number of complex legal issues concerning the Canadians' departure from Lahr still needed to be resolved, particularly with the German government. Lieutenant-Colonel Johnston had a Deputy Judge Advocate and a secretary to assist him. However, the era of the much-desired posting to a foreign country (except on operational deployments) had ended for the majority of legal officers.

From Military Judge to JAG

Another transition took place in 1993 with the appointment of Colonel Pierre Boutet to replace Commodore Partner as JAG. Born in Montreal, Pierre Boutet moved to Rimouski, Quebec, with his family when he was only one year old. After completing high school, the future General thought that a career as an engineer might be as good as any other. A couple of years at the University of Ottawa convinced him that he should select another line of work. He went back to Quebec and completed a B.A. at Laval followed by law school at the same university. He also had time to become the Captain of the Alpine Golf Club as well as a member of the Laval golf team while he was at it.



Brigadier-General Pierre Boutet, C.M.M., C.D.

Articling at the firm of Amyot, Lasage and Associates was another education in itself. The firm had close ties to the Quebec Liberal Party and Mr. Boutet ended up on several occasions as a legal adviser to the party on election procedures. Neither politics nor a civilian law practice held enough interest, however, for a lifetime career. In November 1973, at thirty-two, he joined the Canadian Forces.

Captain Boutet finished the rigors of basic training in 1974. He was posted to the advanced English course at the language school in St. Jean, Quebec, after a few months in Ottawa. Then it was off to Lahr, Germany, as an Assistant Deputy Judge Advocate. Prosecuting and defending at courts martial were

the mainstays of his European time. In keeping with the system in Germany, he was responsible for providing advice to certain units, particularly the Royal 22nd Regiment ("Van Doos"), as well as the duty of prosecuting any courts that arose from those units. He would also defend cases that came up in the units that were the responsibilities of the other legal officers. This intense grounding in courts martial would be of great benefit for the rest of his career as Captain Boutet was destined to spend a large part of it in the courtroom. In addition to the discipline side of the house, Captain Boutet sweated over the normal legal officer duties of settling claims, providing legal aid, etc. For one of his three years he was the only francophone legal officer stationed at Lahr, and his workload showed it.

In 1977, after a promotion, Major Boutet was given his own office to run for the next three years when posted as the Deputy Judge Advocate at Valcartier, Quebec. Once again, however, no legal officer is immune from the National Defence Headquarters tour. In 1980, Boutet was tagged as the new Director of Law/Advisory. Although the workload was heavy, it was not the only assignment he was given. The Branch also needed competent bilingual military judges and, in 1981, this responsibility was added to his duties. Colonel Martin was the expert in the Special Voting Rules that governed voting by members of the Canadian Forces and he needed an assistant. Lieutenant-Colonel Boutet was given this job as well. For a good part of the eighties he assisted Colonel Martin and then replaced him in running the Forces' voting system during elections.

In the summer of 1983 the part time task of military judging became a full time occupation. He travelled the court martial circuit dispensing justice until posted as the Assistant Judge Advocate General in Winnipeg in 1986. That trek west was a brief one because Lieutenant-Colonel Boutet became Colonel Boutet the following year. He was back in Ottawa running the judges' team as the Chief Military Trial Judge. In this position he pushed strongly for greater independence for military judges in order to ensure that they could meet the standards set out in the *Canadian Charter of Rights and Freedoms*. As the developing court decisions demonstrated, he was right on target.

In April 1993, Colonel Boutet's promotion and selection as the next JAG had already been announced and he had given up the Chief Military Trial Judge position to become a Deputy Judge Advocate General until the handover date. The day before the promotion was to take effect, the Chief of the Defence Staff, Admiral Anderson, called him in and told him he was to join the Admiral, in uniform, at a press conference that day. The Somalia crisis was in full swing and the Admiral wanted Boutet to handle any legal questions that might arise. Colonel Boutet informed him that it would be difficult to attend in uniform as he had already sent his uniforms to the tailor and had the rank changed to Brigadier-General in anticipation of the promotion that was to take effect the next day. Anderson's response was eminently practical: "Congratulations, you're now a Brigadier-General."

After five years of leading the Legal Branch during some of the most trying times in the Branch's history and gaining the respect of both his clients and his subordinates, Brigadier-General Boutet surrendered the burdens of the office to his successor, Brigadier-General J.S.T. Pitzul. He was seconded to the Department of Veterans Affairs in 1998.

Somalia

The name "Somalia" is etched in the mind of every member of the Canadian Forces and is instantly recognizable by virtually every Canadian who lived through the nineties. The Canadian Forces' involvement in the mission to that country in 1993 caused a basic re-examination of how Canadians saw themselves and what Canadians were capable of doing. We lost our innocence and belief that we were always the good guys. It also resulted in fundamental changes to the military justice system and the organization of the Legal Branch. Therefore, this mission deserves a more-detailed discussion than others might, despite its brief duration.

The mission did not start well. In 1992 the United Nations had intended to send a force to oversee a free and fair referendum in the Western Sahara. The people of the area would be voting on its status *vis-à-vis* Morocco once an agreement on the referendum had been reached between Morocco and rebels fighting for the territory. The Canadian Airborne Regiment (CAR) was the designated Canadian force for the Western Sahara operation, called Op Python. The unit trained extensively for the mission. Due to circumstances in the Western Sahara, the mission was eventually cancelled. Instead, the CAR was tasked with taking on a mission to Somalia that was then in the planning stages.

The new mission was to be part of the United Nations Operation in Somalia (UNOSOM). The Canadian portion was designated Op Cordon. The objective was to provide armed escorts for the distribution of humanitarian relief in a country where civilian government authority had basically ceased to exist. Hundreds of thousands of Somalis were dead and many more were in danger of dying of starvation unless these relief supplies could be distributed. However, the armed militia of political warlords and the local bandits in the country were pirating the supplies and terrorizing the relief workers. The armed escorts would hopefully enable the supply distribution to continue so as to avoid a more-massive catastrophe. To be included in the mission were the supply ship H.M.C.S. *Preserver* and an air transport detachment operating out of Nairobi. By the time that the UN mandate was decided upon, though, conditions had already changed.

The northern area, including Bossaso where the Canadian ground forces were expected to be located, had normalized to a degree but the security in the rest of the country had deteriorated. The United States offered to lead a military mission

designed to stabilize the political infrastructure of the country and restore a secure environment for the distribution of humanitarian aid. This stabilization phase was to be followed by a more-classic UN peacekeeping mission to provide continuing security for the distribution of supplies. The American proposal was considerably different from the original mandate in that it would involve the military forces in a peace enforcement role rather than merely defending those distributing humanitarian supplies. The UN accepted the American offer and Canada agreed to provide forces to the coalition that the Americans would lead. Canada was to be involved in the initial peace enforcement end of the operation rather than the follow on peacekeeping operation. The UN sponsored coalition went by the name of the United Task Force (UNITAF). The Canadian contribution received the appellation Op Deliverance.

The revised operation included the Canadian Airborne Regiment Battle Group (CARBG), H.M.C.S. *Preserver*, an air transport detachment and a joint force headquarters. The Battle Group included the Canadian Airborne Regiment, a squadron from the Royal Canadian Dragoons, troops from 2 Combat Engineer Regiment, a flight of Huey helicopters from 427 Squadron, and elements of 2 Field Ambulance and 2 Service Battalion. These forces were, for the most part, based in Belet Huen a little more than 300 kilometres north of the capital, Mogadishu. The air transport detachment operated out of Nairobi, Kenya. H.M.C.S. *Preserver* was anchored at Mogadishu. The Canadian Joint Force Somalia Headquarters and the mission commander, Colonel Serge Labbe, were also located in Mogadishu. The military lawyer assigned to the mission was Captain Marc Philippe whose office was set up at the Joint Force Headquarters.

Captain Philippe arrived on scene on January 1, 1993. His primary duty was to act as the legal adviser to the Force Commander, Colonel Labbe. As a matter of practice, he provided legal advice to all of the units involved in the mission. This included trips to Nairobi to provide legal aid to the air force personnel there, visits to H.M.C.S. *Preserver*, and journeys to Belet Huen.

While the discipline problems at the headquarters in Mogadishu were minimal, such was not the case with Belet Huen. In particular, 2 Commando of the Airborne Regiment was having an extremely high incidence of negligent discharge of weapons. Some twenty cases occurred in the early part of the mission, suggesting problems with discipline among the soldiers of that Commando. In an attempt to curb this problem, high fines were awarded in each case, but the problem was not solved. This unit was to prove to be a source of shame—for the mission, the Canadian Forces and the nation as a whole—that overshadowed all of the excellent work done by the Forces in Somalia. It would also lead to the disbandment of the Canadian Airborne Regiment itself.



Capt Philippe and Capt Abbott in Somalia

During the early part of the mission, the legal officer's role was what one would expect on an operational deployment. He provided legal aid to the various units, gave advice on disciplinary matters, interpreted orders and regulations, and handled claims by and against the Forces. Unlike most military missions, there

was no need to negotiate a Status of Forces Agreement with national authorities. There were no national authorities with whom to negotiate and no political faction was strong enough to enforce any such agreement against the others. According to Captain Philippe, he did offer to brief the troops in Belet Huen on operational law matters. As the unit had been briefed in Canada prior to deployment, the offer was declined. He also assisted in an attempt to get a civilian justice system operating in Belet Huen again so that local officials could deal with criminal offences properly. Unfortunately, the local officials were satisfied with the system as it was functioning then and his efforts were wasted.

Life in Mogadishu was not boring. Violence was always in the air. For instance, on January 25th, three Somalis with machine guns opened fire on the camp. They got away long before any effective capture operation could be mounted. People were getting shot or mugged in the streets of the city on a regular basis throughout the mission. All Canadian personnel were required to be armed.

From February 22 to March 10, Captain Philippe returned to Canada on leave. No replacement was sent from Canada for this short period. Unfortunately, matters started to deteriorate significantly just at that time.

Although there were a number of incidents of Forces members being involved in violent situations involving Somalis, two major events were the focus of the most notoriety. One related to the death of one Somali and the wounding of another on March 4, and the other to the torture and death of Shidane Arone on the 16th of that month.

The Engineers' compound in Belet Huen had been having problems with security. There had been numerous break-ins and thefts. On March 4, the Commanding Officer of the Canadian Airborne Regiment, Lieutenant-Colonel Mathieu, sent his Reconnaissance Platoon to assist with security. The platoon's leader, Captain Rainville, was not satisfied with suggestions for things like extra lighting.

Instead, he created a plan that involved setting up some supplies in view of the road that went by the compound, then splitting his platoon into three detachments where they could cover the supplies and anyone approaching them. That night, two unarmed Somalis approached the compound. When told to halt, they ran off. One of the Somalis was wounded by a shotgun blast but the other kept running. He was shot by another of the platoon's detachments, got up to run, and was shot again, fatally. One of the Canadian military doctors who examined the body of the dead Somali stated that the wounds were consistent with the man having been "dispatched" while on the ground. He later used the term murder.

The sequence of events that followed later led to allegations of a cover-up as well as considerable concern in Ottawa. National Defence Headquarters put pressure on the Joint Force Headquarters for more information on the incident. As a result, the Canadian mission commander, Colonel Labbe, ordered further reports and investigations over the next several days, not all of which were sent on to Ottawa. This information included the indications that the Somalis had been enticed to the camp and then trapped. It also included the strong language used by the doctor in describing the possible way the fatal wounds had been inflicted.

The Acting Chief of the Defence Staff, Vice Admiral Larry Murray, had been delaying sending Military Police investigators to Somalia until he received the final report of Colonel Labbe. In the meantime Shidane Arone had been killed. That event took over as the main focus of concern and Military Police investigators were sent over to investigate the slaying.

The mission assigned to 2 Commando of the Airborne Regiment in Belet Huen was to provide security in the town itself. Other units provided different security and support services in the surrounding area. There had been numerous attempts by thieves to infiltrate the Canadian compounds in and around Belet Huen, including the 2 Commando compound. On the evening of March 16, a sixteen year old, unarmed Somali civilian, Shidane Arone, was captured by members of 2 Commando in an abandoned U.S. Seebees compound next to the 2 Commando compound. The policy with respect to prisoners captured during the night was to hold them overnight, treat them as if they were prisoners of war, and hand them over to the local authorities in the morning. A small sandbagged bunker with a corrugated roof was used as the detention facility for such prisoners. When he was captured, Arone was taken to the bunker and placed in the custody of Master Corporal Clayton Matchee and Private Kyle Brown who were in charge of the front gate security during that shift.

Earlier that day the commander of 2 Commando, Major Seward, had told his platoon leaders that they were authorized to capture and "abuse" any infiltrators. One of the platoon leaders, Captain Sox passed this information down to his four section commanders, all Sergeants. Although three of the section commanders either did not pass on the abuse order or prohibited abuse by their men, one did

pass it on. Sergeant Boland mentioned the order to Master Corporal Matchee that evening after Arone had been captured.

Over the course of the evening, Master Corporal Matchee, with involvement by Private Brown, proceeded to torture Shidane Arone. By midnight Arone was dead. Numerous members of 2 Commando either heard his suffering or were aware that he was being beaten, but no one stopped it. Two days later Major Seward ordered Matchee arrested on suspicion of the murder of Arone. The next day Matchee attempted to commit suicide by hanging himself from one of the beams in the roof of the detention bunker. He was resuscitated by emergency medical staff and evacuated, first to Mogadishu, then Germany and eventually to Canada.

By March 19th the Military Police investigators had been given the order to go to Somalia. JAG legal officers Lieutenant-Colonel Peter Tinsley and Major Kirby Abbott were also sent over to prepare for any prosecutions that might result and to help ensure the investigation methods would meet the standards for introducing evidence in court. Captain Louis MacKay from Eastern Region went to provide on-site defence counsel services.

Although the reason for the deployment of the military lawyers and Military Police investigators was the Arone killing, the March 4th incident raised its head again. While Lieutenant-Colonel Tinsley was in Nairobi he found a note under the door of his hotel room. It was from the military doctor who had made allegations of murder with respect to that incident. After a short meeting with the doctor, Lieutenant-Colonel Tinsley arranged for him to be interviewed by the head Military Police investigator. He also alerted the Acting JAG, Captain(N) Fred Blair of the situation. A legal review of the reports coming from Somalia on that incident had already resulted in a recommendation for a Military Police investigation. With Captain(N) Blair passing on the information about the doctor's allegation, plus the same information arriving via a different route, the Military Police sent over a second team of investigators to look into the March 4th incident.

Lieutenant-Colonel Tinsley and Major Abbott spent almost three weeks in Africa. Much of the time was spent in Nairobi reviewing videotapes of interviews the investigators had conducted. Once all the evidentiary groundwork was completed, they returned to Canada and prepared a plan for the prosecutions.

For Captain MacKay the order to proceed to Somalia came as quite a surprise. One moment he had been at home looking forward to the weekend and twenty-four hours later he was winging his way across the Atlantic on an operational mission of unknown duration and involving the most serious types of offences possible.

There were a number of difficulties in providing defence counsel services in Somalia. From the initial reports it seemed that there was only one person who

would need this assistance, Master Corporal Matchee. By the time Captain MacKay reached Somalia, Matchee had attempted suicide and been evacuated out of the country. However, within a week of his arrival, four other members of 2 Commando had been arrested. Captain MacKay had to be very careful with any information he obtained from these accused and any advice he gave as their legal interests may well be different. If he tried to act as counsel for all of them he could place himself in a conflict of interest. His concerns were realized when he talked to the first client and the client, understandably, proceeded to tell him his version of the facts. Captain MacKay was tainted as far as being able to give legal advice to the others once this happened. To resolve the problem, he and the officer in charge of the directorate for defending officers in Ottawa, Lieutenant-Colonel Denis Couture, arranged for a system of secure satellite links that the accused could use to talk to legal counsel in Canada.

Captain Philippe was also kept busy for the rest of the deployment. Investigators, military lawyers and a Board of Inquiry were all in theatre at various times looking into the problems. In addition to his normal duties, Captain Philippe acted as liaison for the legal officers who had been sent over.

His tour finally ended in June of 1993 as the mission was closing down and his final memory of Somalia was fitting. As Captain Philippe was waiting to board the Hercules aircraft to take him to Nairobi on his way home, he heard a blast of heavy gunfire from the city. A tracked vehicle from the Pakistani contingent came roaring up to the airport. Blood was all over the vehicle. Pakistani wounded were offloaded for transportation to emergency medical facilities. Apparently they had been ambushed in the city. Approximately twenty-three Pakistani troops were killed that day.

The courts martial, inquiries and other fallout from this mission were to take up a significant portion of the time of the Legal Branch for the next five years. The events of March 4th and 16th resulted in nine courts martial. The prosecutions highlighted one of the major weaknesses of the court martial system. Normally, the commanding officer of a unit was intimately involved in the processing of charges and forwarding them to an appropriate authority for consideration for court martial. When the charges against the accused soldiers were initiated, though, the commanding officer, Lieutenant-Colonel Mathieu, was under investigation himself for his actions during the deployment. Therefore, there could be the appearance that he was in a conflict of interest as he might try to pass the blame to his troops by his involvement with charges against them. Despite legal advice expressing this concern, Lieutenant-Colonel Mathieu was allowed to forward the charges to higher authority for court martial action. At trial, this issue was raised by the defence as a plea in bar of trial, in other words, a reason why the trial should not be allowed to proceed. The Judge Advocate accepted the argument and stopped the court martial. The charges had to be reconsidered by a commanding officer who did not have a conflict of interest.

A second problem arose concerning the possibility of bias on the part of the officer who convened the court martial. Once again legal officers foresaw the problem but the commander involved refused to refer the matter to another authority. This caused further delays when the situation had to be corrected later.

The person alleged to have been the principal actor in the torture and death of Shidane Arone, Master Corporal Clayton Matchee, was judged unfit for trial in April, 1994, as a result of brain damage from his suicide attempt. The charges were still outstanding at the end of the decade, in case he is ever judged fit to stand trial. The other person in the bunker, Private Kyle Brown, was charged with second degree murder and torture. Lieutenant-Colonel Peter Tinsley, the Assistant Judge Advocate General for Central Region, led the prosecution. A civilian lawyer, Patrick McCann, presented the defence. The Judge Advocate was Lieutenant-Colonel Jerry S.T. Pitzul, who would later become the JAG.

The evidence was graphic. During the torture of Shidane Arone, Private Brown had taken pictures, allegedly at the direction of Master Corporal Matchee. These, combined with the evidence of other witnesses and Private Brown's own testimony, gave a reasonably complete picture of the events of that night. On March 16, 1994, the first anniversary of Arone's death, Private Brown was found guilty of manslaughter and torture. He was sentenced to imprisonment for five years and dismissal with disgrace from Her Majesty's service. The Court Martial Appeal Court rejected his appeal and the Supreme Court of Canada declined to hear any further appeal.

The others who were tried faced a variety of charges ranging from torture to negligent performance of duty. The courts were a mixed bag of convictions and acquittals. Lieutenant-Colonel Mathieu, the Commanding Officer, was charged with negligent performance of duty for allegedly giving orders on the use of deadly force that were contrary to the official Rules of Engagement. This charge resulted from the March 4th incident where the two suspected thieves were shot, one fatally. He was acquitted on the first trial and again on a new trial ordered by the Court Martial Appeal Court. Captain Rainville, the platoon leader during the March 4th incident, was acquitted of charges of unlawfully causing bodily harm and negligent performance of duty.⁹

As to the courts martial resulting from the Arone killing, Major Seward, who had given the order that prisoners be "abused," was convicted of negligent performance of duty. He was sentenced to a severe reprimand. The Court Martial Appeal Court increased this to three months imprisonment when the prosecution appealed the sentence. Captain Sox, who passed on the "abuse" order to his Sergeants, was also convicted of negligent performance of duty. He was reduced in rank to Lieutenant and given a severe reprimand. Sergeant Gresty, the duty officer the night Arone was killed, was acquitted of two charges of negligent performance of duty. Sergeant Boland, who was on guard duty in the bunker where

Arone was tortured and said "just don't kill him" on leaving the bunker, pleaded guilty to negligent performance of duty and not guilty to torture. The torture charge was stayed and he was sentenced to ninety days detention. The Court Martial Appeal Court raised this to one year when the prosecution appealed the sentence. Private Brocklebank, who watched some of the beating and handed Master Corporal Matchee his pistol, was acquitted of charges of torture and negligent performance of duty. The Court Martial Appeal Court upheld the acquittals.

In addition to the disciplinary investigations and courts martial resulting from the Somalia deployment, three major inquiries were also instituted. Major-General Tom de Faye headed the first one, a Board of Inquiry established under the *National Defence Act*. To help ensure that the inquiry was objective and would not be seen as a whitewash, a civilian member was added to the five-person panel. The regulations governing the composition of such boards had to be amended to permit this as only military personnel were previously eligible. The legal adviser was a JAG officer, Lieutenant-Colonel Kenneth Watkin.

The de Faye Board of Inquiry was handicapped from the start by a recent ruling by the Nova Scotia Court of Appeal concerning the inquiry into the Westray Mine disaster. The Court had ruled that an inquiry into matters that were the subject of ongoing criminal proceedings or police investigations would breach the *Charter* rights of an accused or suspect. As a result, the Board had to be broken into two parts. The first would look into those areas not under criminal or disciplinary investigation. The second, which would only take place after the criminal investigations and any resulting trials were completed, would examine the remaining issues.

The Board started its work on May 3, 1993. Between that day and July 19th it interviewed seventy-nine witnesses, travelled to Somalia to observe conditions first hand, obtained 1,270 pages of testimony and 117 exhibits, and completed its 141 page Phase I report. Besides acting as the legal adviser to the Board, Lieutenant-Colonel Watkin also contributed to the report itself. The inquiry resulted in at least twenty-seven recommendations on matters within the purview of this initial phase.¹⁰ The topics covered such issues as operational doctrine, leadership, organization, training, cultural sensitization, Rules of Engagement and the ethos of the particular unit involved in the problems.

Despite the rapid action by the de Faye Board of Inquiry, pressure by the press and political opponents convinced the Government that a more thorough and independent inquiry was needed. The *Inquiries Act*¹¹ provided a vehicle for such an investigation. A Commission of Inquiry was established with a panel lead by a judge of the Federal Court of Appeal, the Honourable Mr. Justice Gilles Lévesque, who was also a member of the Court Martial Appeal Court. The other two Commissioners were the Hon. Mr. Justice Robert Rutherford and a

reporter, Mr. Peter Desbarats. The inquiry would bask in controversy and dominate the headlines of the nation for the next two years before it was terminated, and even its termination would herald a controversy of its own.

Between March and May of 1995 a joint Department of Justice-JAG legal team was organized to coordinate the involvement of the Federal Government, including National Defence, in the Inquiry. Headed by Mr. Peter Vita of Justice and Lieutenant-Colonel Kim Carter of JAG, the job of the team was to represent the interests of the Government of Canada, the Canadian Forces, and those members of the Canadian Forces who could be represented without creating a conflict of interest. This involved pulling together evidence, interviewing witnesses, bringing witnesses to the Inquiry counsel for interviews, assisting in obtaining documents, creating visual aids, etc. The team also assisted counsel in other court cases arising out of the Somalia affair.

The Inquiry itself first retraced the ground covered by the de Faye Board of Inquiry and then proceeded into new territory in accordance with its terms of reference. Unfortunately, several detours occurred that deflected the Inquiry from its main purpose and considerably lengthened the expected completion date for its report. A full review of the Inquiry hearings and the surrounding events is well beyond the scope of this history and will have to await another day. The proceedings were lengthy, fractious, and ultimately incomplete. The reasons are for others to analyze. It is indisputable, though, that the Inquiry held the attention of the Legal Branch and created much of its workload for the duration of the hearings and for a considerable time afterward.

The Somalia Inquiry made forty-five recommendations that, among other things, set out a blueprint for a significantly modified military justice system. These included changes to the classification of charges, safeguards on the exercise of a commanding officer's discretion, changes to the chain of command, training, and powers of Military Police, elimination of the Judge Advocate General and replacement with two new independent organizations, and the creation of an Inspector General to oversee the military justice system.¹² Many of the recommendations overlapped those of the Special Advisory Group discussed below and are reflected in the 1998 changes to the *National Defence Act*. A number, including the elimination of the JAG and the creation of an Inspector General, were not accepted.

The legal officers actually dealing with the Inquiry itself were only the tip of the iceberg as far as JAG involvement was concerned. There were constantly new legal issues rearing their heads that needed immediate attention. It was only a question of what would be the crisis of the moment. When Captain(N) Reed returned to Ottawa with the closing of the office in Lahr in the summer of 1993, he found himself immediately thrust into a lead role in coordinating the legal advice in the Somalia affair.

The Minister of National Defence, the Honourable Doug Young, established the third inquiry, called the Special Advisory Group on Military Justice and Military Police Investigation Services, on January 17, 1997. It was headed by the former Chief Justice of the Supreme Court of Canada, the Right Honourable Brian Dickson. It also had military and civilian input from retired Lieutenant-General Charles Belzile and Mr. J. W. (Bud) Bird. The particular purpose of this inquiry was to come up with timely and practical recommendations on how to improve the military justice system and the Military Police investigation process.

Within two months, the Special Advisory Group had received eighty-nine written submissions, held public hearings across the country and provided a report containing thirty-five recommendations on improvements to the military justice system and Military Police operations. The recommendations related to the investigation of offences, the summary trial system and punishments, the court martial system and the duties of the JAG. These included statutory clarification of the JAG's responsibilities, an annual JAG report to the Minister and Chief of the Defence Staff which would be made public, the creation of an independent Director of Prosecutions, the separation of the prosecution and judicial functions from the provision of legal advice to a member of the Forces, JAG certification of officers to conduct summary trials, the creation of an independent Office of the Chief Military Trial Judge, changes to the composition of courts martial and the way in which sentences are determined, and amendment of the JAG review procedure for courts martial.¹³ The Minister accepted all of the recommendations.

Military Justice Changes

As a result of the various Somalia inquiries and the Minister's decision to accept all of the recommendations of the Special Advisory Group, the JAG organization took on the task of developing amendments to the *National Defence Act* to implement these recommendations. There were also a number of outdated provisions that had been sorely in need of change for years, if not decades. These, too, were addressed. A new, temporary organization called the National Defence Act Amendment Team was created under the leadership of the Deputy Judge Advocate General/Legislation, Colonel Alan Fenske, to accomplish this mission. As with the development of the original Act, the detailed work to bring the statute up to date was gruelling. The Act itself was only the first part. Once it had been redrafted, all of the regulations and orders that used the Act as their authority had to be either created from scratch or redrafted to comply with the changes. It took the better part of three years and the work of almost a quarter of the legal officers in the Branch to get the job done. In December, 1998, Parliament passed the amendments to the Act.

The 1998 amendments tried to maximize the independence of military judges. They had both the organization and the powers that one typically expects of ci-

vilian judges. The title was changed from the traditional "Judge Advocate" to the more descriptive "Military Judge." Unless they got into trouble that would warrant action against a judge or reach retirement age, military judges are securely ensconced in their positions for five years and were eligible to be reappointed. They also had a separate pay scale established in Treasury Board regulations.

One of the problems with the old system of Judge Advocates was the *ad hoc* nature of their appointments. Because they were still legal officers performing some other function when not sitting on a court martial, it was difficult to ensure that they would not become involved in situations that would compromise their judicial independence or impartiality. As a result of changes to regulations that took place in 1993 after the *Généreux* decision, military judges were no longer legal advisers to military commanders. To cement their independence and impartiality, the new *National Defence Act* provisions restricted the employment of military judges to judicial duties or other duties that were not incompatible with their judicial duties.

The final strands of the umbilical cord from military judges to the Office of the JAG were cut. The military judges no longer formed a part of that organization. The Chief Military Judge, Colonel Guy Brais, had his own unit. As icing on the cake, the position of Chief Military Judge was included in the *National Defence Act* so that it rested on a solid statutory base.

The organizational changes were only a part of the redesign of the military judges' legal attire. A military judge was also much more powerful when presiding over a court martial. Where previously a panel of officers on a court martial could ignore the legal advice of the Judge Advocate (although at their peril), that door was closed. The military judge now had the last say on the law. Another of the major difficulties with the old court martial process was sentencing. For General and Disciplinary Courts Martial, the panel had to determine the sentence where there was a finding of guilt. As each panel was different, there was no significant level of experience among the officers in performing this role. The argument that the officers on the panel would have a better idea of the needs of discipline for the unit involved was no longer persuasive. The panel was chosen randomly from all three elements of the armed forces. An air force officer would have no more knowledge of the disciplinary needs of an artillery battalion than would a military lawyer. The result was inevitably a maze of sentences in which even the most intrepid legal navigator would soon be lost. This flaw, too, was repaired by the *National Defence Act* amendments. The military judge would now award the sentences at both General Courts Martial and Disciplinary Courts Martial.

The independence of military courts martial was further solidified with other changes to the system. A Court Martial Administrator provided for under the *Na-*

tional Defence Act managed the selection of members of General and Disciplinary Courts. The Administrator was under the supervision of the Chief Military Judge. The panel members were selected electronically at random by the Administrator from a worldwide list of eligible members. In addition, the court martial panels themselves were no longer restricted just to commissioned officers. Warrant Officers, who are not commissioned, also became eligible for appointment when the accused was a non-commissioned member.

The way in which military offences were prosecuted also received consideration by the Somalia Inquiry and the Special Advisory Group. Both indicated there should be an independent prosecution directorate. Several options were considered as to how to implement these recommendations. In the end, a whole new system for prosecuting military offences was designed. The new Director of Military Prosecutions gained the authority to determine what charges would go forward for court martial. Each region also had its own Regional Military Prosecutor cell with a separate chain of authority from that of the regional JAG organization.

One of the responses to the Somalia Inquiry and Special Advisory Group recommendations was the creation of a Defence Counsel Study Team to evaluate different ways by which defence counsel services could be provided in the CF. The Study Team analyzed seven different possibilities involving civilian or military lawyers. After all of the advantages, disadvantages and costs were considered, and a poll of Canadian Forces members was conducted as to the preferred option, the Study Team made twenty-eight recommendations, including the selection of a Regular Force defence counsel organization. Most of the recommendations were accepted and were reflected in the amendments to the *National Defence Act* and regulations.

After the necessary implementing regulations were drafted and passed, the new organizations for military judges, prosecutors and defence counsel were up and running as of September 1, 1999.

The court martial process was not the only part of the military justice system that received an overhaul. The summary trial system was also updated to ensure that the authorities responsible for its functioning were knowledgeable in the system and its standards. Before an officer could conduct a summary trial, he or she had to undergo training and be certified by the JAG as meeting the requisite standards. One of the major activities in the Branch in 1999 was conducting Presiding Officer's courses across the country and in foreign locations where troops were deployed. The 1999 plans were for 1,694 officers to be trained in this way. Further continuing education courses would also be needed.

To help the military justice system keep pace with changing legal standards in Canada, and to catch any problems with the system before they get out of hand,

four committees were set up to help the JAG oversee the system. The members ranged from the Minister of National Defence and senior military members to non-commissioned members, judges and legal officers, depending on the committee. They covered all types of input the JAG would need to keep the system functioning fairly and effectively.

All in all, the Somalia experience was one of mixed blessings. The Forces, and the Canadian people, were shamed by the actions of a small group of soldiers. The army leadership, and that of the rest of the Forces, got a strong message about the need to ensure stringent leadership standards were maintained at all levels of the organization. The military justice system received microscopic scrutiny with several resulting improvements. From the Legal Branch perspective, the events and subsequent inquiries helped to focus the Branch back on the basics of military law and highlighted the areas where it had not been doing enough to provide advice, services and training. It was a hard lesson.

Human Rights

Operational deployments and their consequences were definitely the major focus of the Legal Branch in the nineties. The human rights issues that arose in the eighties, however, had not all been resolved. One of the principal concerns was the question of service by homosexuals. Throughout the history of the Canadian Forces, known homosexuals had not been accepted in its ranks. This was in keeping with the dominant morality in Canada at the time. But times change. Starting in the 1960s there was an increasing movement to end discrimination on the basis of homosexuality. The changes came slowly and not without considerable resistance. Even when the *Canadian Human Rights Act* (CHRA) was passed in 1977 and the *Canadian Charter of Rights and Freedoms* was finalized in 1982, homosexuality was still too controversial a topic to include it as a protected ground of discrimination. In the late eighties, the movement to prohibit discrimination on this basis had developed a sufficiently large level of support in society that the courts started to take notice. The Canadian Forces were also reviewing the exclusionary policy and had instituted an interim policy in 1987 that would permit a member who had engaged in homosexual activity to remain in the Forces, but under severe career restrictions, if he or she did not agree to a release.¹⁴

A former member of the Canadian Forces had wanted to challenge this policy under the CHRA, but that Act did not include sexual orientation as a prohibited ground of discrimination. The case was taken to the Ontario courts on the basis that sexual orientation was protected from discrimination under the equality provisions of the *Charter*. Therefore the CHRA itself had to be read as if it was included. In 1991 the trial court,¹⁵ and in 1992 the Ontario Court of Appeal,¹⁶ agreed with this position and ordered that the CHRA be read as if sexual orientation was an included category. In the meantime, another former member had

launched a suit under the *Charter* itself. The JAG and Justice lawyers preparing the case had been evaluating potential evidence literally for years. In September 1992, after discussions with the JAG and other officials, the Chief of the Defence Staff, General de Chastelaine, decided that the time had come to change the policy. The *Charter* case was settled¹⁷ and the restrictions on service by homosexuals were lifted. Canada was one of the first NATO countries to do so. By the end of the century, this change in policy had not created any apparent problems in operational effectiveness.

Balkans Conflict

Despite the title of this section, the Balkans situation was not one conflict stretched over a period of years. There were a number of distinct military campaigns and operations. Due to their proximity in time and the fact that most of the major players were, or are, part of the territory of Yugoslavia, these campaigns are all discussed in this section. Historically, Yugoslavia was an incendiary mix of rival ethnic groups, each nursing its own hatreds and grievances. Following the death of its undisputed leader, Marshal Josip Broz-Tito (generally known as Tito), in 1980, Yugoslavia entered an era of turmoil.

In 1987 Slobodan Milosovic became the head of the League of Communists of Serbia and built a power base on the concept of Serbian nationalism and Serbian dominance in Yugoslavia. In 1989 he abolished the autonomy of two independent regions, Vojvodina and Kosovo, as Serbians were afraid of being overwhelmed by other ethnic groups in those areas. In 1990 multiparty elections were held in Yugoslavia. Although Milosovic was elected President in Serbia, other ethnic nationalists won in the other republics and the disintegration of Yugoslavia began. First Slovenia and then Croatia proclaimed independence from Belgrade's authority. These were followed by declarations of independence by Macedonia and Bosnia-Herzegovina. Finally, the remnants of the Socialist Republic of Yugoslavia (Serbia and Montenegro) renamed itself the Federal Republic of Yugoslavia.

The creation of these new countries created massive problems on the diplomatic front. When Croatia first declared its independence in 1991, the Yugoslav National Army (JNA) tried to prevent it through force of arms. Despite efforts by the European Community during most of 1991 to stop the fighting, it carried on with vigour. The territory claimed by Croatia had a sizeable Serbian population. The Serbs declared themselves independent from Croatia and purported to establish the Republic of Serbian Krajina (Krajina) that encompassed thirty percent of the Croatian territory. From 1991 until 1995 the Croatian Serbs held *de facto* control over the territory.

In September 1991, the UN first got involved through a Security Council Resolution expressing concern about the fighting in Croatia and imposing an arms em-

bargo on Yugoslavia because of the involvement of its troops in the fighting.¹⁸ Fighting and negotiation continued until February 21, 1992, when the UN Security Council established the United Nations Protection Force (UNPROFOR) for the purpose of creating the conditions for peace and security required for negotiations to resolve the overall dispute.¹⁹ UNPROFOR Headquarters was located in Zagreb, the capital of Croatia. As with virtually all UN missions, Canada sent a contingent to provide military support. Lawyers of the Office of the JAG were off to another hot spot.

Bosnia also had a large proportion of Serbian residents and they had never agreed to the declaration of independence. On April 7, 1992, they proclaimed their own independent state called the Serbian Republic of Bosnia-Herzegovina. Their territorial claim included most of the territory of Bosnia. The Balkans ballet had another dancer. Unfortunately for the local people, and the world, these separations did not come peacefully. In Bosnia, the Bosnian Serbs launched attacks throughout the country at the beginning of April, 1992. In a matter of weeks they controlled an estimated 70 per cent of Bosnian territory. In June, 1992, Croatia signed a military cooperation agreement with Bosnia and two days later Bosnia declared itself to be in a state of war.

Op Justice

Despite the fact that Croatia, Bosnia and the FRY had all agreed to be bound by the applicable Geneva Conventions and even broader laws concerning the protection of the sick and wounded, civilians, cultural and religious property, etc., all of the participants in these conflicts frequently ignored such laws and agreements. The results were the massive mistreatment of prisoners, rape and policies of "ethnic cleansing." The UN and European Community could not ignore the humanitarian disaster. On October 6, 1992, the UN established the United Nations Commission of Experts to investigate and gather evidence concerning war crimes and crimes against humanity committed in the territory of the former Yugoslavia.

The Commission was composed of five lawyers from different member nations of the UN. One of the experts appointed was a Canadian, Commander William J. (Bill) Fenrick of the Office of the JAG. His special task on the Commission was to act as the on-site *rapporteur* during the investigations. In other words, in addition to the work that involved all of the Commissioners, such as analysis and writing the Commission's report, he was the one who would go into the field and actually supervise the investigations. The mandate of the Commission was unique. Unlike previous investigations of war crimes, neutral nations rather than parties to the conflict were conducting this investigation. In addition, the investigation was taking place while the conflict was ongoing rather than after hostilities had ceased.



The Sarajevo Op Justice Team
 Back row, from left : Maj Van Veen, Sgt Lamothe,
 WO Murray-Ford, MCpl McCoomb, LCol Carter, PO Ross
 Front row: Maj Boutin, Cdr Fenrick

The Commission members initially planned to investigate an alleged mass grave-site. A reconnaissance trip by Commander Fenrick, Lieutenant-Colonel Kim Carter of the JAG's office and Captain Serge René of the Military Police in March of 1993 showed them that they had insufficient resources to evaluate the site and would be unable to get the required political approvals in the near term. In the meantime, Canada had offered a war crimes investigation team composed of military lawyers and Military Police investigators to help the Commission with its mandate. In light of the difficulties encountered by the reconnaissance team, the Commission decided to change its initial investigative efforts to concentrate on the Sarajevo and Dubrovnik areas. Later, a third set of investigations were ordered with respect to the suspected mass graves in Croatia.

For the Canadians, the Sarajevo investigation was the beginning of an operation known as Op Justice. Commander Fenrick was the Commission representative for the mission while Lieutenant-Colonel Carter was the team leader for the Sarajevo portion. The rest of the team included lawyers from the JAG and Military Police investigators.²⁰ The Sarajevo investigation was broken down into three basic themes: the interview of alleged rape victims, investigating a mortar attack on a soccer game and conducting a tactical analysis of the siege under the laws of war. The rape victim interviews ran into problems due to the modesty of the victims and the lack of hard evidence to connect the crime to a particular individual. The team investigating the soccer field incident had a little more to go on as the

crater was still there. A trajectory analysis could be done to pinpoint the location from which the shell had been fired and the type of shell involved. No evidence was obtained from the Serbian forces besieging the city as they were doing their talking with their guns. Even the local authorities were not always easy to deal with and the teams had to make sure they obtained all the evidence available as there were no saints evident in the conflict. After making personal observations and collecting the available evidence, Major Andrew van Veen joined with Commander Fenrick to write the tactical analysis of the battle.²¹

In October, 1993, there were further investigations carried out under the Op Justice banner. One involved the investigation of mass graves. The other was concerned with potential war crimes in the battle for Dubrovnik on the Dalmatian coast of Croatia in 1991. The Dubrovnik portion was headed by Lieutenant-Colonel Dominic McAlea and included three other investigators. After three weeks of conducting interviews, touring damage sites and reviewing voluminous documentation, they prepared a comprehensive seventy-eight page report that was submitted to the Commission for consideration.²² Besides providing a chronicle of the death and destruction, it recommended that specific follow up investigations be conducted to further develop evidence of war crimes by specific individuals.

For the mass graves probe, Major Joseph Holland was the team leader and Major Patrick Olson was the site leader at one of the investigation sites. After consultations with Commander Fenrick and other cooperating agencies in Zagreb, the first team ended up in the "Medac Pocket" to investigate possible war crimes during a Croatian offensive in September 1993. From interviews, information from Canadian and UN sources, and evaluation of the physical evidence, the team determined that there had been some murders committed, but not a sufficient number to indicate a pattern that could result in responsibility being placed on the commanders of the Croatian forces. The destruction of the buildings was another matter. Every house in the area had been blown up from the inside, not from battle damage. Dead animals had also been thrown in the wells to contaminate them. In the team's opinion, responsibility could be assigned to the leadership and it was. The "mass grave," which was the focus of the second team's investigation, turned out to be a series of defensive positions that had been dug by troops. That is not to say there was no substance to the reports of atrocities. A significant number of bodies were found in the nearby area.

It is often the little things that are the most telling. The depth of ethnic hatred in Bosnia and Croatia was exemplified by a dog. Major Olson sent his reports from a communications facility run out of a small house by the Dutch War Graves Registration Service. The house had belonged to a family of Serbs who had been "ethnically cleansed." Whenever he would go into the house a small, scrawny and bandaged dog would try to get out. When Major Olson asked why the dog

was not let out, the Dutch troops told him the dog would be beaten and stabbed whenever it went out—it was a Serb dog.

Op Justice was only a brief exercise in the lengthy involvement of the Canadian Forces and legal officers in the Balkans. However, it did accomplish a considerable amount in that short period. Besides obtaining specific evidence of war crimes, it demonstrated that investigations of such crimes could be done even though the conflict was ongoing.

UNPROFOR

The first Canadian legal officer actually posted to the Balkans was Lieutenant-Colonel Margaret Ann Macdonald who filled a position at UNPROFOR Headquarters in Zagreb, Croatia. Lieutenant-Commander Holly MacDougall was the first JAG lawyer to hit the ground with the Canadian Contingent itself. In November, 1992, she arrived at Camp Polem in Daruvar, Croatia, to the one star opulence of a tent shared with the camp's comptroller and pharmacist. There was no hot water in the tent and the ice had to be cracked on the water basin in the morning. This strip of canvass was to qualify as home until mid-January.

The legal officer's clients included the two Canadian battalions, known as CAN-BAT 1 & 2, plus two other Canadian units. Many of the duties were the standard ones for any Deputy Judge Advocate: disciplinary advice, legal aid, contracts with the local suppliers, and claims. There were also the operational law issues. These were immediate issues with potentially fatal consequences if mishandled. Although the army commanders had originally been somewhat cool to the inclusion of a military lawyer position with the contingent, by mid-January they had come to realize its value and were recommending that one be maintained in future.

Even settling claims had its dangers. The first time Lieutenant-Commander Vance Wirth, Lieutenant-Commander MacDougall's replacement, did so, the claimant insisted on following the local tradition of sharing a glass of the local moonshine. The translator insisted that he had to accept or it would be a grave insult. After this near-death experience, Lieutenant-Commander Wirth ensured from then on that the translator actually closed the deal.

If it looked like the mission or trial could not be carried out because insufficient Regular Force legal officers were available to handle the deployment or to participate in the court martial, a member of the Reserves would often be asked to volunteer. Bosnia was no different. The Branch was hard pressed to find a candidate for the legal officer rotation with the Canadian Contingent of UNPROFOR in early 1994. Even though Lieutenant(N) Peter C. (Guy) Killaby had a thriving criminal law practice in Brampton, Ontario, he closed it and put on his uniform.

A total of seven legal officers endured the tribulations of the UNPROFOR legal officer tour before the mission completed its mandate. At the beginning of 1996 there was a transition from UNPROFOR to a new mission called the Implementation Force (IFOR). This was a UN approved multinational NATO force whose role was to help ensure the proper implementation of the Dayton Accords that had been agreed to by the parties to the Bosnian conflict. Canadian troops remained as part of this force and a legal officer also remained to advise the Canadian contingent. Three legal officers completed tours with this mission before it ended. In January, 1997, the mandate changed once again to that of a stabilization force, appropriately called SFOR. The sixth legal officer deployed for a tour with this mission was still on scene at the change of the millennium.

Kosovo

In 1997, virtual anarchy hit Kosovo with the collapse of its civil government. Civilians were being slaughtered by both sides because of their ethnic origins. The increasingly vicious conflicts were between the Yugoslavian Army and the Kosovo Liberation Army (KLA), an armed group of ethnic Albanians fighting for the independence of Kosovo. In 1998 NATO stepped in and demanded an end to the killings. The FRY was threatened with air strikes if it did not comply with NATO demands for the removal of its troops from Kosovo and acceptance of a NATO peacekeeping force in the region. After failed peace attempts, the NATO bombs started to fall on March 24, 1999.

At the end of June 1998, the Canadian Forces had instituted Op Echo. Six CF 18s from 425 Squadron in Bagotville, Quebec, with associated pilots, ground crews and command and control personnel, were sent to the air base at Aviano in northern Italy. Officially, the role of the Canadian aircraft was to provide support to the UN personnel in Bosnia in case they were attacked. It was also a precautionary deployment in case NATO decided to use air strikes to try to resolve the crisis in Kosovo. About 130 Canadian Forces members were deployed, including the first legal officer assigned to the deployment, Major Kirby Abbott.

The role of the legal officer at Aviano was principally that of a law of war adviser. Before the bombing campaign this included advice on the Rules of Engagement for the flights over Bosnia, as well as a legal review and analysis of options for the use of air power in any campaign that might develop against the FRY. There were also the usual Deputy Judge Advocate functions to be performed such as legal aid, liaison with the military lawyers and officials of the other participating countries and occasional advice on disciplinary incidents.

Once the bombing started, the legal advice changed to concentrate on specific targets to ensure they were valid objectives under the laws of armed conflict and to determine whether the likely collateral damage to civilians and other property would be sufficiently minor to meet legal standards. The Canadian Government

also increased its commitment from six to twelve aircraft. This provided the squadron with the capability to conduct missions on a twenty-four hour basis. JAG headquarters decided to send a second legal officer over to provide the needed services. Major Peter Barber replaced Lieutenant(N) Sheila Archer who was finishing her tour (and who returned home with a Commander's Commendation for the work she had done). The recently promoted Lieutenant-Commander Geneviève Bernatchez joined Major Barber to split the duty shifts and to provide around-the-clock advice.

The legal officers were crucial to each mission being flown. The legal advice was being given directly at the tactical level. The legal officer would meet with the pilot who was to lead a particular mission and go over the target information. They would discuss the potential issues under the law of armed conflict, such as collateral damage mentioned earlier. By the end of the air campaign this type of advice had been given for approximately 160 targets. When the air campaign was broadened and targets like bridges and refineries were selected rather than just military sites, the task of giving this advice became increasingly difficult as the danger to civilians rose and the military character of the site became less obvious.

On June 4th the air campaign ended successfully and the forces in Aviano were gradually reduced. Despite the wind-down, the Forces kept a presence in Aviano in case hostilities resumed and legal officers continued to be rotated in to fill the legal position that was retained in the contingent.

The end of the air campaign was only the beginning of duty for other legal officers. In anticipation of the deployment of NATO forces into Kosovo, Major Ed Gallagher had been sent to Macedonia with the troops that Canada was contributing for that phase of the Kosovo operation. When they went into Kosovo, so did he. The first month was almost like wartime operations with the Rules of Engagement being the focus of the legal advice. There was also a need for guidance on the powers of arrest of civilians and their treatment on the way to detention, negotiations with farmers for the use their land, and discussions with the UN on who actually owned the land they were negotiating over. Fortunately, disciplinary problems were few. As of the end of December, 1999, the Canadian Forces were still actively involved in the Balkans, including Kosovo, with no end in sight.

Other Operations

While the Gulf War and the Balkans operation are probably the most widely publicized conflicts in which JAG lawyers played a part, they were not the only trouble spots to which legal officers were sent. Others included Rwanda, Haiti, East Timor, Turkey and Honduras.

Rwanda

Rwanda is composed of two major ethnic groups, the Hutus and the Tutsis. In 1973, the government of Rwanda was overthrown in a military coup. Due to government repression of the minority Tutsis, a rebel group called the Rwandese Patriotic Front was formed that battled the government for the next twenty years. In 1993, the government and the Rwandese Patriotic Front entered into an agreement to end the civil war. In an attempt to relieve some of the suffering in Rwanda and to assist in establishing political stability, the Security Council of the UN established the United Nations Assistance Mission in Rwanda (UNAMIR) in October of that year.²³ However, in April, 1994, the President of Rwanda was killed when the airplane in which he and the President of Burundi were passengers was shot down as it prepared to land in Kigali. There were signs soon after that extremist Hutu factions were about to take drastic action. The on-scene commander, Canadian Brigadier-General (later Lieutenant-General) Romeo Dallaire, warned the UN but the Security Council failed to authorize any effective action. In a massive genocide, over 800,000 Rwandans, mainly Tutsis and moderate Hutus, were slaughtered by Hutu government forces and militia factions between April and July of 1994. The Rwandese Patriotic Front continued to battle the Hutu forces and finally routed them in July of that year. With this victory came a mass exodus of hundreds of thousands of Hutus to the neighbouring countries of Zaire, Uganda, Tanzania, Kenya, and Burundi. Massive refugee camps were full of starving and diseased people. When the UN Security Council modified the mandate of UNAMIR to meet this changed situation (UNAMIR II),²⁴ Canada offered to send a military contingent as part of the mission. The deployment was called Op Lance.

Major Luc Boutin was sent as the legal adviser to the contingent. His role was to provide any needed advice with respect to discipline within the Canadian troops, give legal aid as needed, help with administrative legal problems, and generally help the contingent with legal issues. About a month after 1 Canadian Division Headquarters and Signal Regiment arrived as part of the UN contingent, Canada also sent over a field ambulance unit to the Goma Refugee Camp. Op Passage was a Canadian, not a UN, controlled operation. Both the contingent and the field ambulance had soldiers of the Canadian Airborne Regiment (CAR) to provide security. Unfortunately, the problems that the CAR had with discipline in Somalia also continued on a more minor scale in Rwanda. In one incident in Kigali, members of the unit who had been drinking decided to take target practice on the dead dogs. In Goma, the first night after the troops had been allowed beer, two members who had drunk too much decided to go through a "blood brother" ceremony. While the cuts they made were not all that serious in themselves, the two had to be returned to Canada because the sanitary conditions in the camp made it highly likely that the cuts would become infected with nasty, and potentially fatal, diseases.

Although Major Boutin was sent over as the legal adviser to the Canadian UN contingent, he also ended up as the legal adviser to the UN headquarters and the Canadian field hospital as neither had its own lawyer. Among other things, he prepared guidelines for recording evidence of war crimes and crimes against humanity. He also had to deal with the Rules of Engagement for the two different Canadian missions. These rules regulated when and how Canadian troops could use force in dealing with situations in the country. Major Boutin returned to Canada in December when the Canadian deployment was winding down.

At the end of 1996 Canada agreed to lead a multinational force to aid the approximately 250,000 refugees in eastern Zaire who had fled from the Rwandan conflict. The deployment was known as Op Assurance. Major Jean-Guy Perron, who had just returned to Canada on leave from his duty with the Canadian UN contingent in Bosnia, volunteered to go as the legal adviser. After arriving in Kigali, he was immediately involved in developing a Status of Forces Agreement between Rwanda and the Multinational Force. However, Rwanda was not the only country involved. The Multinational Force would also be operating in Uganda and other nearby nations. Major Perron was ordered to Kampala, Uganda, to negotiate a Status of Forces Agreement with that country. After briefing the Canadian High Commissioner, the Ugandan Minister of Foreign Affairs and the Multinational Force Commander, Lieutenant-General Baril,²⁵ he started negotiations with Ugandan officials at 10:00 A.M. on December 2nd. In what must have been a world record, the terms were settled, Major Perron had drafted the agreement and everything was signed by the appropriate representatives by 4:30 that afternoon. Much to Major Perron's relief, Colonel Bruno Champagne arrived from JAG Headquarters on December 4th and the two lawyers got to work on a variety of legal issues, such as contract negotiations and disciplinary chains of command. The mission was winding down and both officers returned to Canada on December 17th to end another instalment of the JAG story.

Haiti

Civil unrest in 1986 led to the downfall of "Baby Doc" Duvalier as the dictator of Haiti. For the next four years the country was ruled by the military. When elections were held in 1990, a former Catholic priest, Jean-Bertrand Aristide, became the first democratically elected President. His term was brief. The army and the police overthrew Aristide and set up another military government. Aristide fled to Canada. Originally it appeared that the matter could be resolved peacefully. For two years the Organization of American States and the United States put political and economic pressure on Haiti to return Aristide to power. Finally, the UN imposed an oil and arms embargo. After the failure of an agreement under which Aristide would be returned to power in the fall of 1993, the UN expanded the embargo on Haiti to cover almost all aspects of trade and travel except for humanitarian and media activities. When this did not convince the military to reinstate Aristide, a UN authorized multinational force (MNF) led by the U.S.

seized control of the vital points in Haiti, the military regime capitulated and President Aristide was once again in control. After the MNF stabilized the political situation to a degree, the Americans transferred control to the United Nations Mission in Haiti (UNMIH).²⁶ The American commander of the multinational force remained as the UN Commander for the first part of the mission. Elections were held in 1995. At that time, the Haitian armed forces were disbanded and a Haitian National Police Force was created to maintain law and order in the country.

Over the next two years Canadian military forces formed part of the UN headquarters and field organizations established to stabilize the country and improve the professionalism of its police forces. Beginning in February, 1995, Canada sent a number of military lawyers to Haiti to provide legal assistance to the UN Headquarters and the Canadian contingent there. The legal officer's responsibilities at the headquarters involved typical deployment duties. They included developing and conducting training in Rules of Engagement, implementing the Status of Forces Agreement for the military personnel, providing legal advice on investigations, handling claims, interpreting election laws and giving legal aid on occasion. The first Canadian JAG lawyer at the headquarters, Major Marc Philippe, helped create a criminal legal aid process for the country and made a number of other contributions to the revitalization of the legal system. For his efforts Major Philippe was awarded the United States Army Achievement Medal and was given a Certificate of Appreciation by the Haitian government.

Conditions in the country gradually improved. One of the most satisfying observations made by Major Philippe's successor, Major Michel Tremblay, was the improvement in the professionalism of the Haitian police during his tour. When he first arrived it would take two days for them to show up at the scene of a traffic accident. They would likely not show up at the scene of a murder at all for fear of their own safety. When he left, the police response was down to a matter of hours.

The mission of the Canadian contingent operating under the UN leadership was called Op Pivot. A series of legal officers, starting with Major Hugues Coulombe, filled the JAG billet. One of the initial legal problems was the difference between the Rules of Engagement applicable to the Canadians and those followed by the Americans and other UN contingents. Canada had stricter limitations on the use of deadly force than these others. In one example, an American Captain who was in charge of four or five Canadian military engineers saw a theft take place and tried to catch the thief. When he could not, he ordered the Canadians to shoot the culprit. The Canadians declined, citing the limitations in their Rules of Engagement that prohibited shooting someone who was running away and of no immediate danger to the Canadians or those under their protection. The lessons of Somalia had been learned. Dealing with Rules of Engagement problems like



Major V. Joshi (right) at an orphanage in Haiti

this was to be one of the prime sources of work for the Canadian Forces legal officers.

Legal aid also kept a steady stream of work flowing. The legal officers did liaison visits with the local university and its faculty, the police force, the UN civilian police contingent, and even the local jail. The first part of the Canadian operation involved mainly air force personnel whose mission was to provide logistic and transport services to the other UN contingents. The role of the Canadian Contingent shifted significantly in early 1996. At the end of March, Canada took over the command of the UN mission from the Americans. With this change came a change in the role of the Canadian Contingent. It switched from running the logistics and transport operation to providing security. The air force personnel departed and the army came in. There were quite a few disciplinary problems involving alcohol. In one case nineteen soldiers were found drinking off the camp contrary to the camp orders and the leaders of the group were charged.

By July of 1996 the country had calmed down considerably. There were still incidents, mostly caused by former members of the Haitian military who were not happy with the way things were going. Besides providing legal advice and services during the day, some legal officers would go out on night patrols in order to better understand the conditions under which the units were operating. Legal officers were involved in everything from the discovery of murders to, in one case, acting as the chef at a dinner for the President of Haiti. The normal duties for the legal officers, however, had not changed to any great extent.

Many of the legal officers spent their off-duty time doing charitable work. This included helping to paint a school, trying to improve the conditions in the Haitian jails and helping out the local orphanages. One of these officers, Major Vihar Joshi, received an unexpected recognition on his return to Canada. In a ceremony before the assembled officers and staff he was given the JAG Commendation for his efforts to help the orphans. The Canadian helicopter detachment in Haiti had written to the JAG concerning Major Joshi's outstanding charitable work. Like many legal officers, and other Canadian Forces personnel, Major Joshi had tried to do his bit to ease some of the suffering in the world without any expectation of recognition or reward and the commendation came as quite a surprise.

East Timor

After Portugal's withdrawal from the administration of East Timor in 1974, Indonesia invaded. In a UN sponsored vote in August 1999, the East Timorese decided to start a transition toward independence from Indonesia but militias in favour of integration with Indonesia commenced a campaign of violence. Unable to stop the militias, the Indonesian Government accepted international assistance. Australia led a multinational force called the International Force for East Timor (INTERFET) to restore peace and security and to support the UN organization that had overseen the vote for independence. Canada was among the nations that sent military support, including elements from all three services, on an operation called Op Toucan. In keeping with the policy of including one or more legal officers with each deployment, Major Sylvain Fournier headed for East Timor with the Canadian contingent.

While the working conditions were difficult, the types of work were similar to those for other deployments—there were complications in establishing the status of Canadian troops in the area, a major conflict developed concerning a contract for vehicles, lectures were given on the Rules of Engagement, there were a few discipline, claims and legal aid cases to handle, and the Law of the Sea had to be addressed due to a geographical anomaly in East Timor. At the start of the new millennium, this deployment was still an ongoing story as the force was still performing its mandate and Major Fournier was still on site.

Disaster Assistance Response Team

One of the most satisfying roles for Canadian Forces' members is helping others in need. A special organization, called the Disaster Assistance Response Team, was established in 1996 for just this purpose of providing a rapid response with personnel and materiel to areas in dire need at home or abroad. The Team went into action twice in the late nineties: once to help with the aftermath of the devastating Hurricane Mitch in Honduras in November, 1998, and a second time to help with the relief effort for the massive earthquake in Turkey in August, 1999.

Included on the Team establishment was a legal officer to deal with the contracts, claims and other legal complications that arise whenever forces were deployed.

Fish Fight

Although Canadian forces were patrolling the hot spots of the world in an attempt to bring peace, all was not that peaceful at home. In 1994-95 things got tense with a NATO ally, Spain, over an ugly fish called a turbot. One of the unresolved issues in the years of international conferences on the law of the sea was the control over "straddling stocks." These are commercial fish that move freely between the area controlled by a coastal nation and the high seas. Foreign fleets were fishing on the "Nose and Tail" of the Grand Banks just outside Canada's 200 mile limit for fisheries jurisdiction. Canada was concerned about conservation of the straddling stocks of turbot and managed to convince the North Atlantic Fisheries Organization to drastically reduce the quota for the European Union fleet that was mainly composed of Portuguese and Spanish vessels. The European Union filed an objection and unilaterally set its own quota six times higher. To a Newfoundlander like the Fisheries Minister, Brian Tobin, this was a challenge that could not be ignored.

The rhetoric heated up and the options got more dangerous. Eventually, the Federal Government decided to extend its domestic fisheries legislation beyond the 200-mile limit to cover the straddling stocks. It imposed a sixty-day moratorium on fishing the turbot. It also threatened to arrest any vessels caught fishing contrary to the Canadian imposed limitations. When Spanish fishing vessels continued to ignore the Canadian warnings, ships from the Department of Fisheries and Oceans went out to arrest them. One Spanish vessel, the *Estai*, was caught after it cut its net loose and tried to escape.

While all of this was developing, numerous Federal Government departments were involved in developing Canada's position, including the Department of Justice and National Defence. JAG officers were occupied with providing advice on the legalities of the situation and the limitations on the use of force. Partly as a result, the naval vessels that were aiding in fisheries patrols kept well away from the scene of the arrests to avoid the creation of any military confrontations. Eventually, after more incidents, political posturing from both sides and photo ops, the parties managed to reach an agreement.

Last JAG of the Millennium

Another change in leadership occurred in 1998 when Brigadier-General Jerry Pitzul succeeded General Boutet. This future JAG was born in the Rosemont area of Montreal to a third-generation family of Romanian Canadians. Jerry Pitzul grew up in the city's multi-ethnic enclave of Park Extension and attended

the High School of Montreal, a mega-school with students from every ethnic background. His potential for leadership showed up early when he ran for, and won, the presidency of the student council.

There was no real family history that might explain Brigadier-General Pitzul's choice of a military career. Like many who don the uniform, it was a combination of circumstances that led him to the pinnacle of the Legal Branch. After one year at Loyola, he was accepted at College Militaire Royale (CMR) in St. Jean, Quebec, for his preparatory year and soon realized he had found his niche. Although initially weak in academics due to his concentration on sports, Cadet Pitzul managed to balance the two by his second year and ended up with first class academic honours from his second to his fourth years.

Ever since he was a youngster, Jerry Pitzul wanted to be a lawyer. As this was not an option at CMR, he enrolled in the Air Operations Branch, training in the Air Traffic Control occupation during the summers. When he graduated, the Air Traffic Control occupation was in a state of flux and the career managers were encouraging officers finishing university to do something else. Lieutenant Pitzul applied for a scholarship to go on postgraduate training for an M.B.A. and an LL.B. That fall he was at Dalhousie University.

The years 1976 to 1979 were some of the most enjoyable for the future General. The first year was spent in the M.B.A. program followed by three years at Dal-



Brigadier-General Jerry S.T. Pitzul, C.D.

housie Law School. He completed his articles with Frank Mason of Spencer & Co. and was called to the Bar of Nova Scotia in 1979. Then it was into the real world of military law at the Assistant Judge Advocate General's office in Halifax under the guidance of the veteran Lieutenant-Colonel Jim Fay. As was normal in the early eighties in Halifax, the job entailed a lot of general legal advice to commanders, some legal aid and an abundance of courts martial. With this experience under his belt, in 1981 Captain Pitzul was posted to Edmonton to take over his own office as Deputy Judge Advocate. The Edmonton posting was an interesting one, covering everything from the prosecution of a bartender at the Junior Ranks Mess who had

a predilection for putting LSD in patron's drinks to dealing with the legal consequences of a Hercules crash that killed seven people. In 1983 the future General was promoted to Major.

The inevitable Ottawa tour came next. He would serve for the rest of his military career there. In 1984, Major Pitzul took over the job of reviewing sentence appeals in the Directorate of Personnel Legal Services. After three years outside the JAG fold, he was promoted to Lieutenant-Colonel and posted to head the Prosecutions and Appeals Directorate at JAG Headquarters. While there he was fortunate in being able to work on some of the cases that would ultimately change the military justice system (for example, *R. v. Généreux*). He had also garnered enough court martial experience and respect for his abilities to be selected as a military judge in 1989.

Five years as a military judge gave Lieutenant-Colonel Pitzul a keen appreciation of the job and an enduring dislike for living out of a suitcase. The cases covered a gamut of offences from shoplifting to murder and provided a number of unique challenges. One of the most memorable was drafting and presenting the first "jury" address with respect to a charge of torture. This was in the Brown case from Somalia mentioned earlier.

Military judges also had the unique duty of conducting courts martial in the field, even where conflicts were ongoing. One such trial presided over by Lieutenant-Colonel Pitzul took place in Bosnia. The accused had hired a well know Quebec lawyer to defend him. Apparently the lawyer's partners insisted that he be insured while he was in Bosnia. Only Lloyd's of London was willing to do so at a steep premium and the premium went up drastically after ten days in theatre. Fortunately, the trial was completed within the time limit and the counsel stayed in good health so that Lloyd's was not called upon to pay on the policy.

The gypsy lifestyle of a military judge eventually lost its appeal both because of the travel involved and the hardship on his family. In November, 1994, Lieutenant-Colonel Pitzul requested and received a posting out of the judge's organization. He returned to JAG as the Special Assistant to the JAG. The next year a new and interesting challenge presented itself. Nova Scotia was advertising for a Director of Public Prosecutions. The Director was a Deputy Minister level appointment and was responsible for the administration of the independent prosecution service for the province. Lieutenant-Colonel Pitzul applied and was selected for the post. The prosecution service had a number of major problems at the time. Mr. Pitzul set about developing short and long term plans to correct them.

In 1997 Brigadier-General Boutet's term of appointment as JAG was coming to an end. The Minister of National Defence, the Honourable Art Eggleton, initiated a search for a new JAG. After interviews with the Chief of the Defence

Staff, the Deputy Minister, and the Minister, Brigadier-General Pitzul was offered the appointment. He accepted the offer, becoming the twelfth JAG for the Canadian Forces on April 14, 1998.

The New JAG Organization

Until the late 1990s, the Legal Branch continued to act as a full-service law firm for the Canadian Forces and Department of National Defence. While there were some areas, such as litigation, where Department of Justice counsel represented these organizations in court, there were few aspects of law where military lawyers were not providing advice. A majority of military lawyers were concentrated in the Ottawa area working in specialized directorates. The volume of work kept the legal officers busy, but resulted in some crucial areas languishing due to a lack of attention. One of these was operations law in a theatre of combat.

The Somalia events and subsequent inquiries were also to dramatically affect attitudes, both civilian and military, with respect to the need for legal services and the way in which they should be provided. On the military side, commanding officers and lower level supervisors had watched the television coverage of the Somalia Inquiry and had been suitably impressed with the legal and public liability that they could be facing if errors were made while they were in charge. Senior commanders had also had their eyes opened wide by these proceedings. Suddenly, previously reluctant officers were clamouring for dedicated legal advisers.

At the same time, the senior civilian leadership of the Department, and particularly the Deputy Minister, Robert Fowler, was encouraging the addition of Department of Justice counsel to the National Defence legal team. Once the decision had been taken that a mix of Justice and JAG lawyers was desirable, it was only a matter of time before the change was made. Although the actual changes in responsibility were not to come for several years, they were initiated in this post-Somalia era.

In January of 1997, the JAG was supported by an organization administered by six Deputy Judge Advocates General at the Colonel level. These deputies lead divisions entitled Operations, Advisory and Legislation, Litigation, Materiel, Personnel, and Reserves. The Deputy Judge Advocate General/Reserves was a Reserve Force officer himself, Colonel Sandy Fairbanks. There was also a sixth Regular Force Colonel, the Chief Military Trial Judge, Colonel Guy Brais. Because of the need for judicial independence, his offices were located separate from those of the rest of the Branch and the military judges were not responsible to the JAG for the performance of their duties. This structure at JAG Headquarters was to last only two years.

The senior headquarters already had legal officers stationed with them. In field units, however, the commanding officers had come to see the legal officer post as



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a valuable asset rather than a position that could be better filled by an armed soldier. The increased demand for military lawyers at the operational or garrison level came at a bad time. Canada was in the midst of a wave of government fiscal restraint and the military budget was not exempt. The need to accommodate the requests for more field lawyers could only be met by stretching the resources that were already straining at the seams. Legal Branch Reserve Force members were frequently called in to help carry the load, and did so with willingness, professionalism and competence. But the writing was on the wall—there needed to be a basic shift in the focus of the Branch back to the core areas of operations and military justice.

On September 17, 1997 General Maurice Baril was appointed as the new Chief of the Defence Staff. The Deputy Minister's position had also changed in 1995 with Mr. Fowler becoming Canada's Ambassador to the United Nations and a previous U.N. Ambassador, Ms. Louise Fréchette, taking over as Deputy Minister.²⁷ With a new leadership team came change.

Brigadier-General Boutet had the respect of all his clients at National Defence Headquarters, including the Chief of the Defence Staff and Deputy Minister. Because of this respect, he was spared the disruption of having major changes to the structure of legal services at headquarters implemented at the end of his term. It was not until after his appointment, and two short extensions, had expired in early 1998 that the reorganization was pushed into high gear.

After considerable discussion and compromise, a new legal team was put in place. The revised system for providing legal advice at National Defence included a Department of Justice legal services unit at National Defence Headquarters to deal with those areas not within the JAG's responsibilities for military law. This took a large chunk out of the areas in which the JAG directorates had previously been providing advice. The entire legislation division became the responsibility of the new Department of National Defence/Canadian Forces Legal Adviser. Litigation, human rights law, pensions, materiel law, environmental law and property law all devolved to the new Justice organization, as did labour law and civilian personnel legal issues. There was recognition, though, of a need for input from the military legal side to ensure that military needs are properly considered when advice was being provided in these areas. Therefore, approximately fifty percent of the lawyers in the new Legal Adviser's organization were JAG officers.

In an interesting twist, the new Legal Adviser appointed from the Department of Justice was Mr. Yves Côté. He had been a legal officer in the Legal Branch for a number of years prior to switching to Justice.

By the middle of 1999, the JAG organization had changed dramatically. Only two Deputy Judge Advocates General (Chief of Staff and Operations) and a Special Assistant now reported directly to the JAG. The Deputies supervised five directorates covering international law, operations, training, military personnel and military justice. The Deputy Judge Advocate General/Operations was also responsible for the nineteen field offices. Surprisingly, these changes did not herald a decrease in the number of military officers in the Branch. Although one Colonel position was lost, there was actually an increase in the legal officer establishment to cover the positions assigned to the new Legal Adviser's organization and the increases to the field offices and prosecution and defence organizations justified by the Somalia Inquiry and Special Advisory Group reports. The total size of the Regular Force membership for the Branch increased to ninety legal officers and forty Reserve Force members.²⁸ The locations of the field offices were reorganized to meet the changes going on in the Forces as a whole. Legal officers were posted to Bases that had not had a dedicated JAG representative previously, such as Bagotville, Quebec, Kingston, Ontario, and Greenwood, Nova Scotia. Unlike the devolution of responsibilities that occurred in Ottawa from the JAG organization to the new Department of Justice legal cell, JAG field legal offices continued to provide a full range of legal advice and services.

In December, 1998, the amendments to the *National Defence Act* that were developed by the Fenske team were passed by Parliament.²⁹ With respect to the JAG, these amendments were significant. The Act, rather than regulations, now spelled out the JAG's major responsibilities. He or she was recognized as the legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Forces in matters relating to

military law.³⁰ In addition, the JAG superintended the administration of military justice in the Canadian Forces and had to conduct regular reviews of the administration of military justice. He or she had to provide an annual report to the Minister and that report was to be laid before Parliament within fifteen sitting days. In a provision unique within the Act, the rank of the JAG was specified. He or she was to be at least a Brigadier-General. To ensure that the Minister of Justice and Attorney General were still able to carry out their legal responsibilities in relation to the Department of National Defence and the Canadian Forces, the Act specified that the authority of the JAG to act as legal adviser was not in derogation of their powers under the *Department of Justice Act*.³¹

The JAG was not the only military legal officer to be mentioned in these amendments. Military judges, the Chief Military Judge, the Director of Military Prosecutions, and the Director of Defence Counsel Services were all provided for statutorily. The Act also established a Court Martial Administrator position.³²

By the end of the millennium the change in focus for the JAG Headquarters from a full-service law firm for both the Canadian Forces and Department of National Defence to a more directed practice involving military matters was almost complete. The establishments for field legal offices had increased, as had the recruiting to fill those positions. JAG Headquarters was organized with divisions and directorates focused on military operations, discipline, and military personnel. Legal officers continued to serve in locations where peacekeeping was ongoing, such as Bosnia, or where commanders were directing armed operations, such as Kosovo. As it was still a time of organizational transition, areas of advice and interrelationships with the newly-arrived Department of Justice lawyers were still being worked out. The renewed Office of the JAG was set to continue providing needed expert military legal advice and services to the Government of Canada, the Canadian Forces and the Department of National Defence into the new millennium.

Conclusion

Lawyers in Canada tend to concentrate on particular areas of the law that are relevant to their practices. Unlike most of their civilian counterparts, legal officers do not play this limited role. They need to be knowledgeable in all areas where military commanders may need legal advice, from car crashes to foreign laws. A military lawyer is also the only person to whom a soldier can normally turn for advice when legal problems arise a continent away while he or she is serving the country. Like other members of the Forces, these legal officers on deployment put their safety at risk to help maintain the values of Canadian society wherever those Forces may be.

The chronology of the birth and maturation of the Office of the Judge Advocate General and its supporting Legal Branch set out in this history has tried to provide a feel for what it means to be a legal officer. There is the frequent tedium of routine legal tasks with the sudden adrenaline rush of a phone call that can send you anywhere in the world on a moment's notice. Those at JAG Headquarters must deal with the political and bureaucratic realities of a national capital while those in the field offices address the day-to-day legal issues that confront the front line commanders. The history of the Branch at the end of the century points to an ever-increasing understanding by the leadership of the Forces and the Federal Government that legal officers are an essential element in the mix of military professions.

This chronicle also attempts to emphasize the nature of the people who served in the Branch during the twentieth century. They were a collage of legal talents intent on providing sound advice and competent legal services to the client. A dedicated and able staff also supported the Branch. Mistakes were made at times, but no more than would be the case with any effective legal firm, and usually fewer. For most of its history the Legal Branch carried on in obscurity, getting the job done well. Only in the last decade of the century did the military justice system, and the JAG organization, come under public scrutiny with the events in Somalia and their aftermath. When inevitable weaknesses came to light, changes were made to correct them.

At the end of the old millennium and the beginning of the new one, the Branch entered into a phase of renewal. The focus on providing advice and service to front line units was probably more intense than it had been at any previous time. The military justice system had become an example that other military forces could well emulate. With the programs and resources that were developed by the Legal Branch, the members of the Canadian Forces had access to more information on military law and their rights and obligations than ever before. Legal officers will continue to play a major part in this educational process for the foreseeable future. For a relatively young organization in a young country, the Legal

Branch has much to look forward to, but it should never forget its past. Hopefully, a bit of that past has now been preserved.

Notes

Chapter 1

¹ For a more detailed examination of early British Military law, see, C.M. Clode, *The Military Forces of the Crown: Their Administration and Government*, (London: John Murray, Albemarle Street, 1869).

² *An Ordinance and Articles Concerning Martial Law for the Government of the Navy*, Lords' Journ. vii, as cited per note 7, p. 17 of the Journal.

³ *An Act for the Establishing Articles and Orders for the regulateing and better Government of His Majesties Navies Ships of Warr & Forces by Sea*, 1661, 13 Car. II, c. 9 (U.K.).

⁴ The naval law was consolidated in 1749 and finally replaced in 1860 by the *Naval Discipline Act*.

⁵ E.g., *The Petition of Right*, 1627, 3 Car. I, c. 1 (U.K.).

⁶ *The Bill Of Rights*, 1688, 1 W. & M., Sess. 2, c. 2 (U.K.).

⁷ *An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service*, 1689, 1 W. & M., c. 5 (U.K.).

⁸ The *Army Discipline and Regulation Act*, 1879, 42 & 43 Vict., c. 33 (U.K.), was the first consolidation of the *Mutiny Act* and the Articles of War.

⁹ *Army Act*, 1881, 44 & 45 Vict., c. 58 (U.K.).

¹⁰ *Air Force (Constitution) Act*, 1917, 7 & 8 Geo. V, c. 51, 2nd Sched., (U.K.).

¹¹ This article still exists in s. 129 of the *National Defence Act*.

¹² *Manual of Military Law*, War Office, 1914, Ch. IV, at p. 29, para. 21.

¹³ *Ibid.*, at pp. 32-33.

¹⁴ *Ibid.*, at pp. 28-29, paras. 19-20.

¹⁵ *Ibid.*, at c. 5, for a more complete discussion of the jurisdiction and composition of courts martial.

¹⁶ *Army Act*, 44 & 45 Vict., c. 58, s. 49(1)(b)(d).

¹⁷ *An Act to amend the Naval Discipline Act*, 5-6 Geo. V, c. 73, s.2.

¹⁸ *Supra*, note 12, at pp. 628-29.

¹⁹ A.F. Tytler, *An Essay on Military Law and the Practice of Courts Martial*, as quoted in, James Stuart-Smith, "Without Partiality, Favour or Affection: An account of the history and present functions of the Judge Advocate at a British Court Martial" (1963), 2 Rev. P.M.D.G. 223, at p. 232.

²⁰ General James Wilkinson concerning the trial of Captain W. Wilson, as quoted in, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775 - 1975*, (Washington, D.C.: U.S. Government Printing Office, 1975), at p. 29.

²¹ *Report of the Army and Air Force Courts-Martial Committee 1938* (Cmd. 6200).

²² *Report of the Army and Air Force Courts-Martial Committee 1946*, (Cmd. 7608).

²³ Cited in a pamphlet entitled: *A Short History of the Office of the Judge Advocate of the Fleet*, provided to the author by the British Chief Naval Judge Advocate, at p. 4 -1.

²⁴ *Ibid.*

²⁵ BR 11, App. II-5-4, Terms of Reference of the Judge Advocate of the Fleet, paras. 2-3.

²⁶ *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868, c. 40.

²⁷ *Militia Act*, 1910, s. 74: "The Army Act for the time being in Force in the United Kingdom, the King's Regulations, and all other laws applicable to His Majesty's troops in Canada and not inconsistent with this Act or the regulations made thereunder, shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia, and every officer and man of the Militia shall be subject thereto from the time of being called out for active service..."

²⁸ *National Defence Act*, S.C. 1950, c. 43.

²⁹ *Militia Act*, S.C. 1904, c. 23.

³⁰ *Statute of Westminster, 1931*, 22 Geo. V., c. 4 (U.K.).

³¹ *The Naval Service Act*, S.C. 1909-10, c. 43.

³² *Naval Discipline (Dominion Naval Forces) Act*, 1911, 1 & 2 Geo. V, c. 47 (U.K.).

³³ *Legislative History of the Office of the Chief of the Naval Staff of Canada, 1910-1928, with some Discussion of the Control of the Royal Canadian Navy by the Government of Canada*, prepared by Naval Historical Section, Ottawa, February 6, 1958.

Chapter 2

¹ *The Naval Service Act*, S.C. 1909-10, c. 43.

² *Colonial Laws Validity Act*, 1865, 28 & 29 Vict., c. 63 (U.K.).

³ Canadian Militia G.O. 166, October 24, 1911.

⁴ All promotions are taken from the Militia List, July 1919, Gradation List, Staff and Permanent Force.

⁵ William Briggs, *The Canadian Men & Women of the Time*, 2nd ed., (Toronto: 1912), at p. 1036.

⁶ For a brief discussion of the Fenian Raids, see, D.A. Morton, *A Military History of Canada*, (Edmonton: Hurtig Publishers, 1985), at pp. 88-89.

⁷ The war records are taken from the Militia List, 1913, Record of War Services.

⁸ September 1, 1915. See G.O. 129, October 21, 1915.

⁹ For a detailed analysis of the causes and conduct of the First World War, see, John Keegan, *The First World War*, (Toronto: Vintage Canada, 2000).

¹⁰ As quoted in The Honourable Mr. Justice Robert M. Dennistoun, "Canadian Military Law Overseas," [1920] C.L.J. 41 at p. 42.

¹¹ *Militia Act*, S.C. 1904, s. 74.

¹² *Some Notes Regarding the Award and Confirmation of Sentences of Death of Canadian Soldiers in the Great War, 1916 - 1918*, by the Chief of the General Staff, Militia Headquarters, Ottawa, February 16, 1922.

¹³ For discussions of the execution of Canadian soldiers in WWI, see, Desmond Morton, "The Supreme Penalty: Canadian Deaths by Firing Squad in the First World War" (1972), LXXIX *Queen's Quarterly*, at pp. 345-352; J. Putkowski and J. Sykes, *Shot at Dawn: Executions in World War One by Authority of the British Army Act*, (London: Leo Cooper, 1992); and Andrew B. Godefroy, *For Freedom and Honour?: The Story of the 25 Canadian Volunteers Executed in the First World War*, (Nepean, Ont.: C.E.F. Books, 1998).

¹⁴ Report of the Ministry: Overseas Military Forces of Canada 1918, at p. 37.

¹⁵ Memorandum DJAG 1-1-1 June 4, 1918, from DJAG Overseas Military Forces of Canada to the Minister.

¹⁶ *Ibid.*, para. 3.

¹⁷ NAC RG 25 Vol. 6-1-1962, File 842 AL.

- ¹⁸ Militia List, April 1913, Branch of the Judge Advocate General.
- ¹⁹ (1915), LI *Canada Law Journal*, at p. 120.
- ²⁰ (1917), LIII *Canada Law Journal*, at pp. 75-76.
- ²¹ NAC RG 25A-2 Vol. 319, File W16/1-W16/49, War Office Letter to High Commissioner for Canada, December 12, 1914.
- ²² Militia List, April 1913, Record of War Services, at p. 397.
- ²³ *Report of the Ministry Overseas Military Forces of Canada 1918*, London.
- ²⁴ They were Colonel J.C. MacDougall, C.M.G., Lieutenant-Colonel Maurice Alexander, C.M.G., and Colonel Robert M. Dennistoun.
- ²⁵ Headquarters Canadians Routine Order 3445, February 7, 1918, plus Appendix.
- ²⁶ P.C. 2656, October 31, 1916.
- ²⁷ NAC RG 9, Vol. III 645, File D-18-2 (Vol. 3).
- ²⁸ Militia List, July 1916, at p. 10, Branch of the Judge Advocate General.
- ²⁹ *Supra*, note 4, at pp. 48-49.
- ³⁰ PMA, Colonel Robert Maxwell Dennistoun, MG 14, B24, Box 1, Diary entry for June 28, 1918.
- ³¹ *Ibid.* Vol. 10, Diary entry for May 20, 1919.
- ³² After his term heading the training establishment at Shorncliffe, MacDougall returned to Canada as the General Officer Commanding Military District 12 and was later posted to Militia Headquarters in Ottawa.
- ³³ Colonel A. Fortescue Duguid, *Official History of the Canadian Forces in The Great War 1914-1919*, (Ottawa: King's Printer, 1938), at p. 77.
- ³⁴ *Ibid.*, at p. 139.
- ³⁵ E.g., George S. Cowan, Esquire, was granted the temporary rank of Major and appointed as the Assistant Judge Advocate General for Military District 11 in 1917. See G.O. 109, October 1917.
- ³⁶ See, e.g., Canadian Expeditionary Force (C.E.F.) Routine Orders 950-953, 963-966, 1002, 1005, 1007-8.
- ³⁷ Canadian Militia G.O. 19, February 7, 1918.
- ³⁸ P.C. 495, February 28, 1918.
- ³⁹ Routine Order 327, March 16, 1918.
- ⁴⁰ NAC RG 24, Vol. 20288, article "Man of the Week" in *The Standard* (Montreal), August 31, 1940.
- ⁴¹ P.C. 1570, June 22, 1918.
- ⁴² G.O. No. 25, June 1919.
- ⁴³ O.M. Biggar, K.C., *Canadian Patent Law and Practice*, (Toronto: Burroughs & Company (Eastern) Limited, 1927).
- ⁴⁴ *Supra*, note 40.
- ⁴⁵ General Order 49, 1918: "The direction of the administration of the Military Estates of deceased soldiers under the provisions of the "Regimental Debts Act, 1893," will be assumed by the Judge Advocate General, with an establishment as authorized hereunder."
- ⁴⁶ C.E.F. Routine Order 327, March 16, 1918, and Militia List, January 1919, at p. 10, Branch of the Judge Advocate General.

⁴⁷ NAC R.G. 150, Vol. 402, Estates and Legal Services Branch. Until November 1918, the organization was known as the Estates Branch and came under the Accountant General. See O.M.F.C. R.O. 4995, November 28, 1918.

⁴⁸ S.C. 1917, 7 & 8 Geo. V, c. 19.

⁴⁹ C.E.F. Routine Order No. 11 of January 5, 1918.

⁵⁰ NAC RG 24, Box 6645, Vol. 11: JAG submission August 23, 1920, for Annual Report of Militia Council for year ending March 31, 1920.

⁵¹ NAC RG 24, Box 6042, Vol. 2, File H.Q.240-I-54, December 12, 1918.

⁵² Letter 2MD. 30-M-16, November 30, 1918, from G.O.C. MD No. 2 to the Secretary of the Militia Council.

⁵³ Letter 6D 43-I-26, March 25, 1919 from the Colonel Commanding Military District No. 6 to the Secretary of the Militia Council.

⁵⁴ N. V. Riasanovsky, *A History of Russia*, (New York: Oxford University Press, 1963), at p. 535.

⁵⁵ Letter, Col C.P. Stacey, Directorate of History, Army HQ to Dr. W.A. Riddell, HQ 1450-1 (D Hist) December 24, 1953. While both the Canadian and British fighting troops in Siberia were placed under BGen Elmsley, the overall Allied commander was a Japanese General. Canada also sent 16 instructors into the Murmansk area to assist the Americans and British forces there.

⁵⁶ NAC RG 9, III-D-3, Vol. 5057, Reel T-1119, File 961.

⁵⁷ S.C. 1919, c. 11.

⁵⁸ Canadian Militia and Canadian Expeditionary Force Order No. 1, January 8, 1920.

⁵⁹ As quoted in an interview with Brigadier Orde with Mr. Hilliner and Mr. Goss of the Directorate of History, July 24, 1974, at p. 6.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, at p. 17.

⁶² The Legal Branch as such ceased to exist as of February 1, 1920, when Major Orde became JAG and ended up as the only remaining legal officer soon after.

⁶³ For the exact yearly figures, see, the Annual Reports of the Judge Advocate General for the period.

⁶⁴ P.C. 1341, June 15, 1921.

⁶⁵ "Report of the Judge Advocate General for the year ending March 31st, 1922," p. 1, para. 2.

⁶⁶ Memo January 5, 1923, from Lieutenant-Colonel Orde to the Chief of Staff at NAC RG 24, Vol. 6538-1, File HQC 650-18-7.

⁶⁷ *Supra*, note 59, at p. 15.

⁶⁸ Memorandum JAG to Adjutant-General February 21, 1924.

⁶⁹ *Ibid.*

⁷⁰ Other situations that could involve the use of the Forces might be disaster relief or action under the federal *Emergencies Act*. These do not fall within aid of the civil power.

⁷¹ *Constitution Act, 1867*, s. 91(1)(7).

⁷² H.Q.C. 5356, November 15, 1929.

⁷³ *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.). To complete the process it would still require making the Supreme Court of Canada the final court of appeal for criminal appeals in 1933 and for civil appeals in 1949, plus the patriation of the Constitution in 1982.

⁷⁴ *Visiting Forces (British Commonwealth) Act, 1933*, 23-24 Geo. V, c. 21.

⁷⁵ *Hansard*, March 2, 1933, at p. 2615.

⁷⁶ *Kings Regulations and Orders for the Canadian Militia 1939*, Appendix VI, Section II.

Chapter 3

¹ P.C. 6645, November 19, 1940. The order was effective as of November 7, 1940.

² RG 24, Vol. 6644, File JAG Ops & Rul Vol. 7, letter H.Q. 77-1-31 D.A.G to District Officers Commanding, November 25, 1940.

³ J.L. Granatstein, *The Generals: The Canadian Army's Senior Commanders in the Second World War*, (Toronto: Stoddart Publishing Co. Limited, 1995), at pp. 205-206.

⁴ P.C. 3429, November 2, 1939. The limitation that he exercise the powers of a Deputy Judge Advocate General were removed by P.C. 9334, December 2, 1941 when it removed the word "Deputy" from his authority.

⁵ NAC RG 24 Vol. 12766, File 29/Gen/1, memo December 31, 1940.

⁶ NAC RG 24, FB29, Vol. 12765.

⁷ NAC RG 24, Box 6645, Vol. 10, Item No. 103, HQ. S. 70-4-85 Fd 8, October 6, 1941.

⁸ NAC RG 13, Vol. 2025, File 142298.

⁹ NAC RG 24, Vol. 12766, File 29/1 Corps/1 "Duties of Legal Officers on HQ of Field Formations."

¹⁰ NAC RG 24, Vol. 12766, File 29/1 Corps/1, (JAG Legal) October 7, 1942.

¹¹ NAC RG 24, Vol. 12763, CMHQ File Block 29, File 29/Aid/1/3 322/19.

¹² Overseas Routine Order 4478, para. 8.

¹³ P.C. 149, January 13, 1940.

¹⁴ For a detailed summary of the multitude of Orders in Council and disciplinary authorities during the war, see, Lieutenant-Colonel T.M. Hunter, "Some Aspects of Disciplinary Policy in the Canadian Services, 1914-1946," Report No. 91, Historical Section, Army Headquarters, July 15, 1960.

¹⁵ P.C. 1066, April 3, 1940.

¹⁶ NAC RG 24, Vol. 12766, File 29/1 Army/1, Part XIV, para 3.

¹⁷ *Ibid.*, para. 1(b).

¹⁸ NAC RG 24, Vol. 12763, CMHQ File Block 29, File 322/2.

¹⁹ P.C. 10677, November 24, 1942.

²⁰ P.C. 9701, December 20, 1943.

²¹ Judge Advocate General report in the Annual Reports for the Department of National Defence for the years 1939-45.

²² For a list of the Permanent Presidents and Prosecutors in February 1944, see, RG 24, Vol. 6644, JAG Opinions and Rulings, Vol. 7.

²³ P.C. 3375, 1944. See G.O. 268, June 1944, and "The *National Defence Act*: Explanatory Material," NDHQ, November 1, 1950, re. s. 149.

²⁴ G.O. 269, June 1944.

²⁵ G.O. 71, March 1945.

²⁶ Annual Report of the Department of National Defence For the Fiscal Year Ending March 31, 1945, at p. 68.

²⁷ *Ibid.*

²⁸ NAC RG 24, Vol. 16544. There had also been a 1 Canadian Courts-Martial and Holding Centre formed in the field under the command of Lieutenant-Colonel E.W. Whelpton on August 15, 1944, but little information is available on its functioning.

²⁹ *Ibid.*

³⁰ JAG letter H.Q.S. 7236-70-1 & H.Q.S. 7236-70-2 (JAG), January 19, 1943.

³¹ D.M. (Army) letter H.Q.S. 7236-70-1, H.Q.S. 7236-70-2 (POW), April 8, 1943.

³² NAC RG 24, Vol. 12678, File 323/42, 120/Fraternization/1/J(DJAG), July 31, 1945.

³³ P.C. 4418, June 20, 1945.

³⁴ NAC RG 24, Vol. 5229, File 19-10-2.

³⁵ P.C. 468, January 19, 1943.

³⁶ NAC RG 13, Vol. 2025, File 142298.

³⁷ P.C. 425, January 23, 1945.

³⁸ *The Royal Canadian Air Force Act*, S.C. 1940, c. 15.

³⁹ Personnel File 0-16030 (Cossette), as quoted in research paper from E.C. Russell, Naval Historian, to Director Historical Section, National Defence Headquarters, August 12, 1965.

⁴⁰ S.C. 1944-45, c. 23.

⁴¹ P.C. 5867, September 7, 1945

⁴² NAC RG 24, Vol. 6644, JAG Ops & Rul, Vol. 7, memo H.Q. 55-1-41 (JAG), February 21, 1944.

⁴³ For a detailed review of the actions involving Canadian units on D-Day and shortly after, see, J.L. Granatstein and D. Morton, *Bloody Victory: Canadians and the D-Day Campaign 1944*, (Toronto: Letter Publishing Limited, 1994).

⁴⁴ Ian J. Campbell, *Murder at the Abbaye: The Story of Twenty Canadian Soldiers Murdered at the Abbaye d'Ardenne*, (Ottawa: Golden Dog Press, 1996), at p. 171.

⁴⁵ For a detailed look at these cases and the other war crimes trials involving Canadians, see P. Brode, *Casual Slaughters and Accidental Judgements*, (Toronto: University of Toronto Press, 1997).

⁴⁶ NAC RG 24 Vol. 21169 File CSC 1433.4.1, Pt. 1, CGS memo HQS 24-1 FD 72, April 30, 1946, and DCGS(A) memo HQ. 650-18-7 FD 44, May 6, 1946.

⁴⁷ *Ibid.* JAG memo HQ 650-18-7 f.d. 44, May 9, 1946.

⁴⁸ This did not cover all of the legal officers in the Forces, though, as others were also serving in the personnel administration organizations of the Army, Navy, and Air Force.

⁴⁹ NAC RG 24, Vol. 19207, File HQC 2140-75/4 Vol. 2 memo to AG, November 30, 1949.

⁵⁰ NAC RG 24, Vol. 5406, File HQC 65-2-2.

⁵¹ *Ibid.* Aide Memoire to Chairman, PMC, October 18, 1949.

⁵² Bill C-133.

Chapter 4

¹ Defence Forces List Canada, November, 1938.

² *National Defence Act*, Part XI.

³ *National Defence Act*, S.C. 1950, c. 43, s. 190.

⁴ This is the minimum number authorized by the *National Defence Act*.

⁵ *National Defence Act*, S.C. 1959, c. 5, s. 190.

⁶ *Statute Law Amendment Act*, S.C. 1984, c. 40, s. 47.

- ⁷ *MacKay v. The King* (1952), 1 C.M.A.R. 1.
- ⁸ JAG Monthly Letter #4, February 1, 1952.
- ⁹ For a detailed discussion of the Korean conflict and its background, see: LCol H.F. Wood, *Strange Battleground: The Operations in Korea and Their Effects on the Defence Policy of Canada*, Official History of the Canadian Army, (Ottawa: Queen's Printer, 1966).
- ¹⁰ *Ibid.*, at p. 24.
- ¹¹ Details provided by Mr. F. Figg, one of the court reporters in Japan and Korea during the conflict.
- ¹² Letter, file No. R 18-3, November 27, 1953.
- ¹³ AJAG letter 12-0, February 16, 1954.
- ¹⁴ NAC RG 24, Vol. 83-84/216 Box 2973, File 895-JAG Pt. 2, Memorandum Secretary, Personnel Members Committee, PMC, 24-1-1, 26-1-1, September 20, 1950.
- ¹⁵ NAC RG 24, Vol. 21169, File CSC 1433.4.1, Pt. 1, memo JAG C-2860-1, November 22, 1950.
- ¹⁶ NAC RG 24, Vol. 83-84/216 Box 2973, File 895-JAG Pt. 2. Memorandum JAG to PMC, July 31, 1953.
- ¹⁷ *Owen v. The Queen* (1959), 2 C.M.A.R. 103.
- ¹⁸ S.C. 1955, c. 28, s. 14, added a new section 217B to the *National Defence Act*. It stated: "Where an offence under this Act is committed outside Canada, any civil court in Canada that would have jurisdiction to try the offender for that offence if it had been committed within the territorial jurisdiction of that court may try the offender for that offence."
- ¹⁹ P.C. 1959-1027, August 13, 1959.
- ²⁰ *Edwards v. The Queen* (1958), 1 C.M.A.R. 75.
- ²¹ Provided by Capt(N) Ferne during an interview with the author in June 1999.
- ²² Memorandum JAG to Deputy Minister C.3-18 (JAG), October 5, 1960.
- ²³ Despatch No. 47, January 17, 1963, Canadian Ambassador Bonn to Secretary of State for External Affairs re requirement for first extension.
- ²⁴ JAG Monthly Letter No. 44, January 10, 1961. The terms of reference for the new position are also included with this monthly letter.
- ²⁵ *Canadian Forces Reorganization Act*, S.C. 1966-67, c. 96, s. 43.
- ²⁶ *Drybones v. The Queen*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355.
- ²⁷ *Royal Commission on Government Organization*, October 1, 1962, Vol. 2, at pp. 414-15.
- ²⁸ S.C. 1966-67, c. 96.

Chapter 5

- ¹ *Emergencies Act*, R.S. 1985, c. 22 (4th Supp.).
- ² This does not include LGen Montague, JAG Canadian Army Overseas, during the Second World War. LGen Montague's promotions were due to his position as Senior Officer, Canadian Military Headquarters rather than his legal responsibilities.
- ³ (1980), 54 C.C.C. (2d) 129.
- ⁴ S.C. 1976-77, c. 33.
- ⁵ *Ibid.*, s. 3.
- ⁶ *Ibid.*, s. 7.

⁷ *Ibid.*, s. 14.

⁸ For a discussion of this subject, see, R. A. McDonald, "Expert Testimony Before Human Rights Tribunals" (1985), 14 *The PSO Forum* 22.

⁹ The four original claimants were Isabelle Gauthier, Marie-Claude Gauthier, Katherine MacRae and Joseph Holden. However, the MacRae complaint was withdrawn and one by Georgina Brown was substituted. The three women claimed they were denied combat-related positions and the man alleged men were being discriminated against because they were required to take more risks than women because women were not allowed in combat positions.

¹⁰ *A.G. Can. v. St. Thomas* (1993), 162 N.R. 228 (F.C.A.); *A.G. Can. v. Robinson*, [1994] 3 F.C. Rep. 228 (F.C.A.); *C.H.R.C. v. Canadian Armed Forces and Husband* (1994), 21 C.H.R.R. D/279 (F.C.A.).

¹¹ *C.H.R.C. v. Canadian Armed Forces and Husband*, [1994] 3 S.C.R. vi.

¹² *Schaap v. Canada (Canadian Armed Forces)*, 12 C.H.R.R. D-451.

¹³ For a discussion of the issue, see: R. A. McDonald, Chapter 4 "Recognition of 'Common Law' Marriages by the Canadian Forces," in *Equality Issues in the Canadian Forces Under the Canadian Charter of Rights and Freedoms*, unpublished thesis, (Kingston: Queen's University, 1986).

¹⁴ *Supra*, note 4, Part IV.

¹⁵ R.S.C. 1985, c. A-1.

¹⁶ R.S.C. 1985, c. P-21.

¹⁷ *Canadian Charter of Rights and Freedoms, Canada Act, 1982*, Schedule B. The section reads as follows:

11. Any person charged with an offence has the right

f) except in the case of an offence under Military law tried before a Military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment"

¹⁸ *Re Hinds v. R.* (1983), 4 C.C.C. (2d) 322.

¹⁹ *Graham v. The Queen* (1987), 4 C.M.A.R. 383.

²⁰ *National Defence Act*, s. 211.3(a)(iii).

²¹ 1901-1 TD 1254 (DCDS), October 31, 1983.

²² NDHQ Policy Directive P26, para. 11.

²³ Atlantic, Eastern, Central, Prairie, Western, and Pacific.

Chapter 6

¹ Interview, August 2000.

² *MacLeod et al. v. Canadian Armed Forces (Chief, Defence Staff)* (1990), 38 F.T.R. 129 (F.C.T.D.).

³ HMCS *Athabaskan*, HMCS *Terra Nova*, and HMCS *Protecteur*.

⁴ After Action Report, AAR 1630-1, June 3, 1991.

⁵ *R. v. Ingerbrigton* (1990), 5 C.M.A.R. 87.

⁶ *R. v. G  n  reux*, [1992] 1 S.C.R. 259.

⁷ While there were amendments to the *National Defence Act* during this period, the amendments were always included with other legislation and not as stand-alone *National Defence Act* amendments.

- ⁸ There were Canadian military personnel stationed in Beijing on a permanent basis with the Canadian Embassy.
- ⁹ However, he pleaded guilty to other charges unrelated to the Somalia incident and was sentenced to a reprimand and \$3,000 fine.
- ¹⁰ *Board of Inquiry: Canadian Airborne Regiment Battle Group, Phase I*, Volume XI, Annex L.
- ¹¹ R.S.C. 1985, c. I-11.
- ¹² *Dishonoured Legacy: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Chap. 40, at pp. 1492-1498.
- ¹³ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, at pp. 68-73.
- ¹⁴ Sec amendment to Canadian Forces Administrative Order 19-20 of 11 February 1987.
- ¹⁵ *Haig v. Canada* (1991), 5 O.R. (3d) 245 (Ont. S.C.).
- ¹⁶ *Haig and Birch v. Canada et al.* (1992), 9 O.R. (3d) 495 (Ont. C.A.).
- ¹⁷ *Douglas v. Canada* (1992), 58 F.T.R. 147 (F.C.T.D.).
- ¹⁸ UN Security Council Resolution 713, October 8, 1991.
- ¹⁹ UN Security Council Resolution 743, February 21, 1992.
- ²⁰ The JAG representatives on the investigation teams were Lieutenant-Colonel Kim Carter, Lieutenant-Colonel Dominic McAlea, Major Luc Boutin, Major Patrick Olson, Major Andrew van Veen, and Major Joseph Holland. The Military police investigators on the teams were Captain Serge René, Warrant Officer Steve Murray-Ford, Sergeant Jean-Luc Lamothe, Petty Officer Jocelyn Ross, and Master Corporal Tammy McCoomb.
- ²¹ Cdr. W.J. Fenrick and Maj. A.J. van Veen, *The Battle of Sarajevo and the Law of Armed Conflict*, Canadian War Crimes Investigation Team Sarajevo, August 1993.
- ²² Maj. D. McAlea, *The Battle of Dubrovnik and the Law of Armed Conflict*.
- ²³ UN Security Council Resolution 872, October 5, 1993.
- ²⁴ UN Security Council Resolution 925, June 8, 1994.
- ²⁵ He was subsequently appointed Chief of the Defence Staff.
- ²⁶ UN Security Council Resolution 867, September 23, 1993. This mission was obstructed in carrying out its mandate with the ultimate requirement for Resolution 940.
- ²⁷ The Deputy Minister at the close of the decade, Mr. James Judd, was appointed on February 23, 1998, when Ms. Fréchette accepted the appointment of Deputy Secretary-General for the U.N.
- ²⁸ JAG Report (1998-99), August 4, 1999, as contained in *JAG Newsletter*, Vol. III: July-Sept. 1999, at p. 76.
- ²⁹ S.C. 1998, c. 35.
- ³⁰ The exact definition of "military law" still remained to be determined to the satisfaction of all those affected by this provision.
- ³¹ *Supra*, note 29, s. 2 (10.1).
- ³² *Ibid.*, s. 42 (165.18-165.2).

Appendix "C"

¹ NAC MG 31, Vol. E 43, File 2.

² NAC MG 31, Vol. E 77, file 1991-02-12, 7-10480.

Appendix A.

Canadian Judge Advocates General

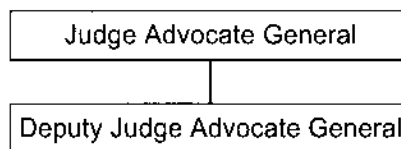
1 October 1911 - 28 February 1918	Major-General Henry Smith
28 February 1918 - 1 February 1920	Colonel Oliver Mowat Biggar, K.C.
1 February 1920 - 5 May 1950	Brigadier Reginald J. Orde, C.B.E.
5 May 1950 - 20 February 1969	Brigadier-General William J. Lawson, C.D., Q.C.
20 February 1969 - 13 August 1972	Brigadier-General Harold A. McLearn, C.D., Q.C.
13 August 1972 - 10 November 1976	Brigadier-General James M. Simpson, C.D., Q.C.
10 November 1976 - 10 November 1982	Major-General John P. Wolfe, C.D., Q.C.
10 November 1982 - 10 November 1986	Brigadier-General Frank Karwandy, C.D., Q.C.
10 November 1986 - 10 November 1990	Brigadier-General Robert L. Martin, O.M.M., C.D., Q.C.
10 November 1990 - 3 May 1993	Commodore Peter R. Partner, C.D.
3 May 1993 - 14 April, 1998	Brigadier-General Pierre Boutet, C.M.M., C.D.
14 April 1998 -	Major-General Jerry S.T. Pitzul, C.M.M., C.D.

Appendix B.

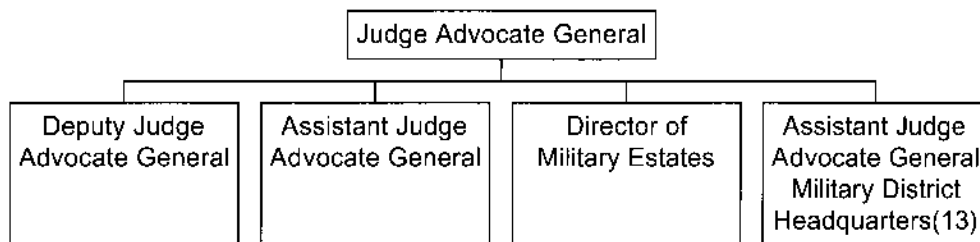
JAG Organization Charts

The following organization charts are designed to give a snapshot of the JAG organization at different points in its history. This will help to appreciate the changes that occurred over the years in the principal functions of the organization and the scope of its operations. The charts do not include those lawyers working for the personnel branches of the three services prior to integration in 1964 nor do they include the Judge Advocate of the Fleet.

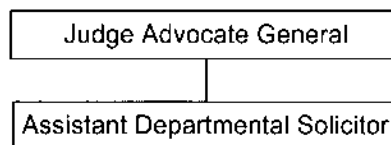
Judge Advocate General Organization December 1912



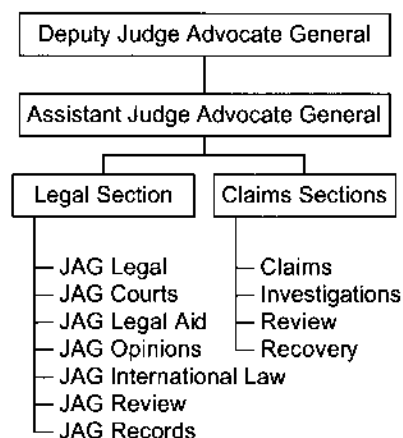
Judge Advocate General Organization March 1918



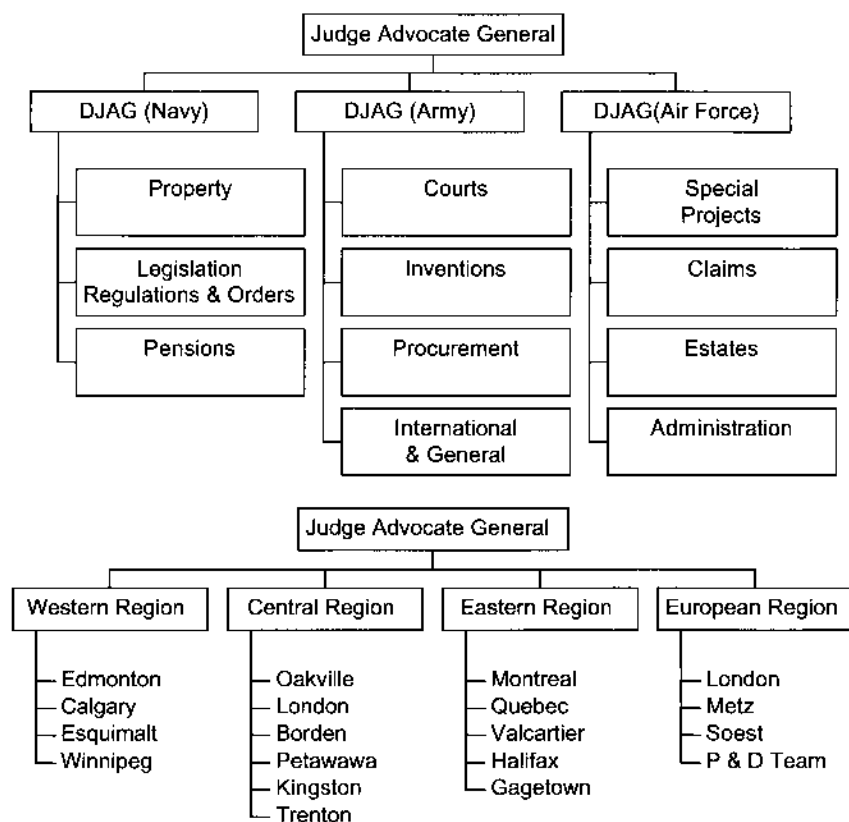
Judge Advocate General Organization August 1929



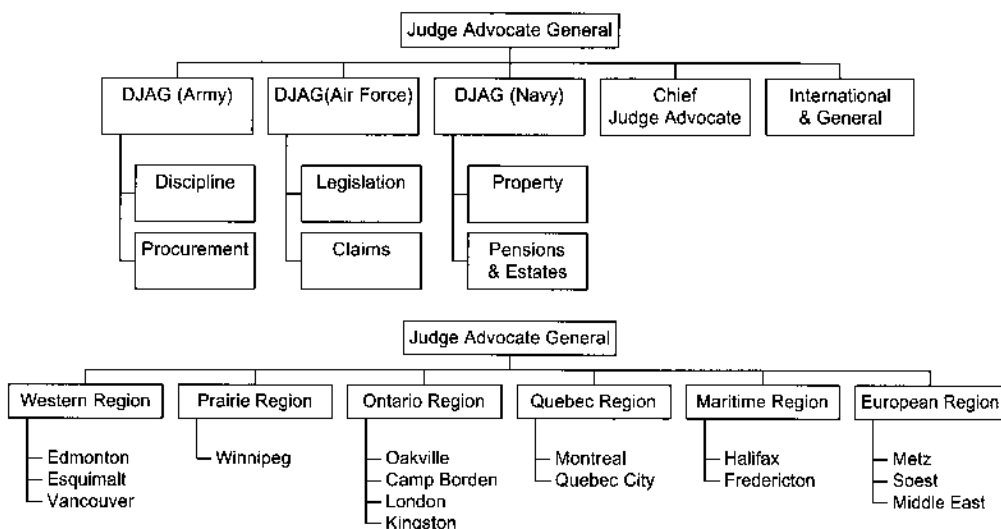
CMHQ Judge Advocate General Organization July 1942



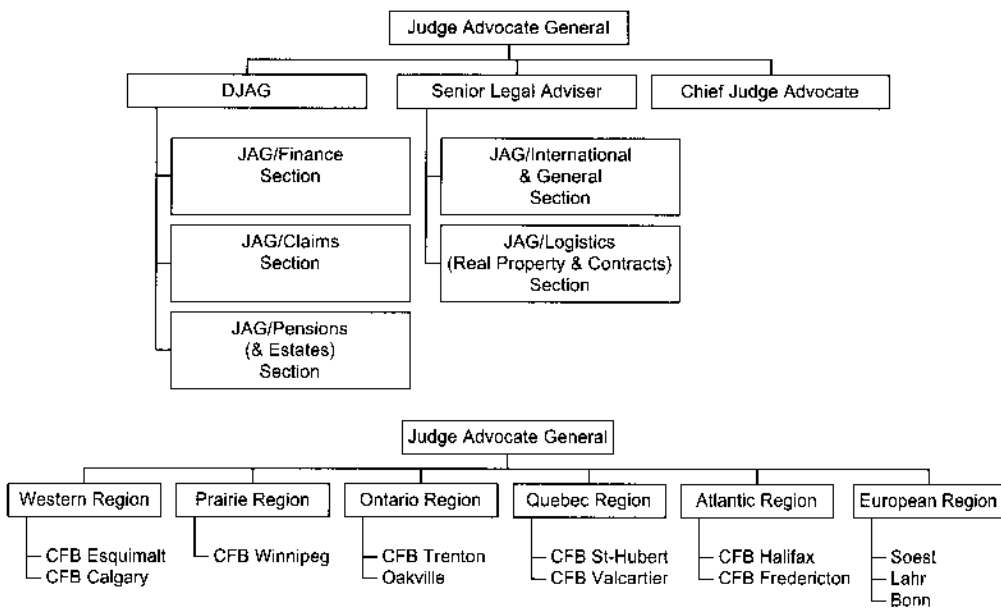
Judge Advocate General Organization November 1955



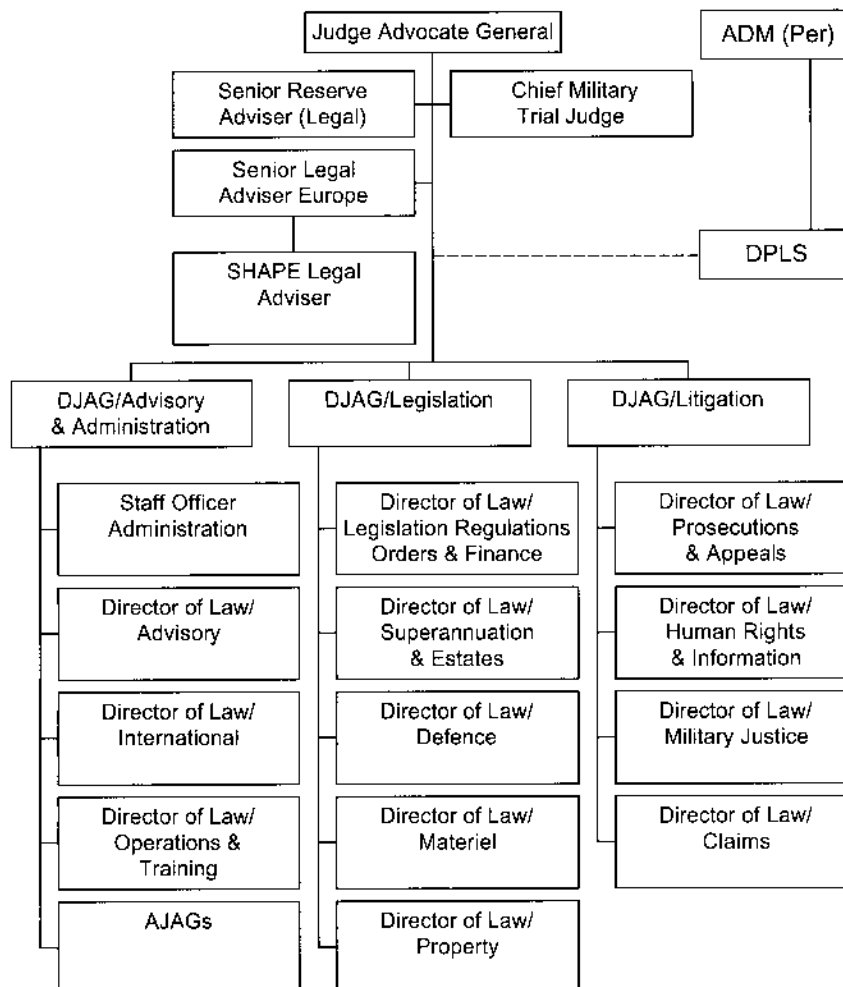
Judge Advocate General Organization April 1962



Judge Advocate General Organization January 1968



Judge Advocate General Organization February 1991



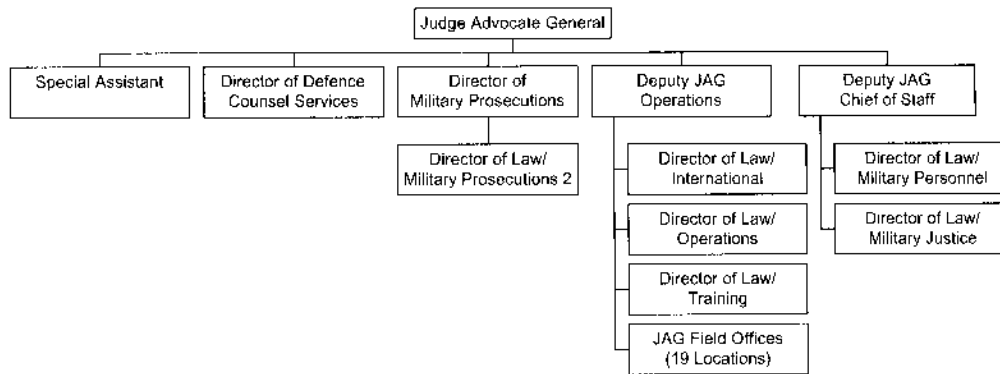
LEGEND

SHAPE – Supreme Headquarters Allied Powers Europe

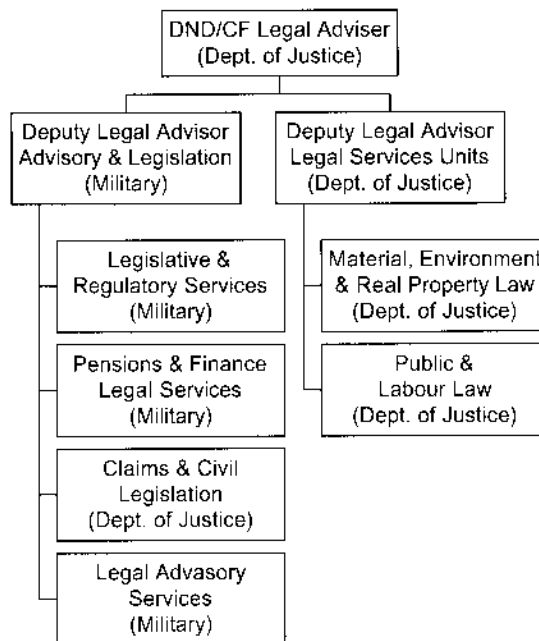
ADM(PER) – Assistant Deputy Minister (Personnel)

DPLS – Director Personnel Legal Services

Judge Advocate General Organization December 1998



DND/CF Legal Adviser Organization December 1998



LEGEND

DND/CF – Department of National Defence/Canadian Forces

Dept. of Justice – Headed by a Department of Justice Lawyer

MILITARY – Headed by a Legal Officer

Appendix C.

Faces Over the Years

To maintain the flow of a history text of this nature, one can only touch on the major events and personalities in the main body. However, a dedicated team of lawyers, court reporters and staff served with the Office of the Judge Advocate General during the twentieth century and they deserve mention as well. As only a few can be highlighted of the many who are worthy of recognition, this section concentrates mainly on those who have not been mentioned earlier in relation to the operation of the Branch.

The Lawyers

Understandably, the soul of the Legal Branch over the course of its existence has been moulded by its legal officers. Their numbers have ranged from a single stalwart in Brigadier Orde's early days to approximately 200 at the peak of Legal Branch strength during WWII. Even during those periods when the numbers stayed relatively static, the faces changed on a regular basis.

To the surprise of many, legal officers do have personal lives like everyone else. They are single, married, divorced, sometimes happy, frequently frustrated and almost always stressed. The personalities range from the serious and sombre to the eternally optimistic. Professional abilities also run the gamut from those who are competent lawyers to a surprisingly high number of truly brilliant people. Almost all could set an example of dedication to even the most conscientious civilian lawyer.

The Bench

Brigadier Henry Granton Nolan is a prime example of the high quality of officers who have served in the Legal Branch. When he was born in Calgary, Alberta, on May 5, 1895, he might have been expected to follow his father's footsteps. Paddy Nolan (Patrick J. Nolan, K.C.) was known far and wide for his skill as a barrister and his wit and humour. Brigadier Nolan not only followed those footsteps, he left larger ones of his own.

Educated in separate schools in Calgary followed by a degree at the University of Alberta, the future Brigadier demonstrated a keen mind. He was awarded the Rhodes Scholarship for Alberta and Saskatchewan in 1915 but, due to the war, was not to finish his studies for some years to come. Instead, he enrolled in the Canadian Expeditionary Force and was posted to the 49th Edmonton Battalion. Here Lieutenant Nolan served as an intelligence officer, adjutant and company commander until wounded in the offensive at Cambrai in 1918. In the meantime,

he had been Mentioned in Dispatches in 1917 and awarded the Military Cross for gallantry in 1918. In that year he was also promoted to Captain.

After the war, Nolan finished his studies at Oxford, receiving a bachelor's degree and a master's degree in law in 1921 and 1922, respectively. On being called to the Bar at both Grey's Inn in England and the Alberta Bar, he joined the firm of R.B. Bennett (who was later to become Prime Minister). In 1934 he was appointed a King's Counsel.

The Second World War saw Captain Nolan back in uniform. This time, however, he joined the Office of the Judge Advocate General. It is unlikely the Legal Branch has ever seen, or will ever see, a faster rise through the ranks. From a Captain as Assistant Judge Advocate General of Military District 13 in 1940, he rose to the position of Vice Judge Advocate General as a Brigadier in 1944. In 1945 he was made a Commander of the Order of the British Empire for his service.

The end of the war did not end his military service. He was persuaded to continue as a member of an expert review panel examining the appropriateness of the sentences of troops incarcerated for one to five years for military or civilian offences. He then went on to the Far East war crimes prosecutions.

After finishing with the war crimes tribunal, Brigadier Nolan left the military and returned to his former law firm as a senior partner. On March 1, 1956, he was appointed to the Supreme Court of Canada to fill the position made vacant by the death of Mr. Justice Estey. Unfortunately, Mr. Justice Nolan was not to reach his full potential on that court as he passed away in 1957.¹

Roland Almon Ritchie was another distinguished alumnus of the Branch. Born on June 19, 1910, in Halifax, he was educated at Trinity College School, Port Hope, Ontario, followed by degrees from the University of King's College, Halifax, and Oxford University, England. Once called to the Bar of Nova Scotia in 1934, Mr. Justice Ritchie practiced law with the firm Stewart, Smith, MacKeen & Rogers from 1934 to 1940 when he responded to the call to arms. He joined the crush of Canadian soldiers in England and from 1941 until 1943 he held the post of Assistant Deputy Judge Advocate with 3rd Canadian Division. Presumably wanting to take a more active role, he transferred as a Captain to the artillery with the 100th Battery for his 1943-44 service. On leaving the Forces in 1944, Ritchie became a partner in firm of Daley, Phinney & Ritchie in Nova Scotia and remained with the firm until his appointment to the Supreme Court of Canada in 1959.²

While Justice Nolan and Justice Ritchie are two of the most prominent members of the judiciary to have graced the list of JAG alumni, they are by no means the only ones. To list all of the members of the judiciary who have belonged to the Legal Branch in either the Regular Force or the Reserve Force would be too

lengthy for this history and undoubtedly one or more would be missed. However, the story of the Legal Branch would be incomplete without further mention of some of the former members who have ascended to the bench.

The Honourable Mr. Justice Michael J. Cloney was a well-known and respected JAG officer, one of fifteen lawyers selected to continue with the Branch when the post-WWII establishment was determined. He had been called to the Ontario Bar in 1940 and joined the Osgoode Hall Canadian Officer Training Corps (COTC) to qualify as an infantry officer. In 1942 the War came calling and the future judge commenced Active Service, although not as a legal officer. Justice Cloney served as a staff officer in Italy in 1944-45, where he also became involved as a defending officer at a series of courts martial. When back in England in 1945 he became more directly involved with the Legal Branch, serving as the Assistant Deputy Judge Advocate in Farnborough where he was assigned to defend Canadian soldiers in Magistrates courts. Justice Cloney was interviewed by Brigadier Orde in London and the JAG asked him to join the Legal Branch for six months in exchange for a quick passage home. He would remain in the Branch until 1961. In the meantime he had risen to the rank of Lieutenant-Colonel and had postings in Winnipeg, Soest, Ottawa and Oakville. On retiring, Lieutenant-Colonel Cloney was appointed as a Magistrate for Metropolitan Toronto. His title later changed to Provincial Court Judge in 1968 and subsequently to Justice of the Ontario Court of Justice. For twenty-six years Justice Cloney dispensed justice. He retired from the Bench in 1987 and spent another five years doing occasional work as a Federal Labour Arbitrator.

The Tax Court of Canada was also blessed with a former JAG officer. The Honourable Mr. Justice Reilly Watson retired from the Branch as a Major in 1969. After getting his military feet wet with the COTC while obtaining his B.A. from Loyola and his law degree from McGill, Justice Watson was called to the Bar of Quebec in 1954. He had articulated with Lieutenant-Colonel Fred Crowe of the Legal Branch while holding down the position of Staff Captain(A) at Quebec Command Headquarters. He switched to the JAG organization that fall. Over the next fifteen years he enjoyed the usual military mobility, being posted to Ottawa, Montreal, Germany, Ottawa, Montreal and Ottawa. In 1965, then-Major Watson managed to attend Osgoode Hall, article for Brigadier Lawson, and get called to the Ontario Bar. After retiring from the Branch, he spent time with the Department of Justice as the Chief Prosecutor in the Ottawa-Hull area, was awarded his Queen's Counsel by Quebec, spent four years as a Judge of the Court of Sessions of the Peace, came back to the Department of Justice for another seven years, went into private practice for a further six, and, in 1988, was appointed to the Tax Court of Canada.

His Honour Judge H.G. (Bert) Oliver, provided some western flavour to the alumni. After university, which included time with the COTC, he served in the navy until departing for Dalhousie Law School in 1947. On graduation in 1950,

he joined the Legal Branch and was first assigned to work for the Judge Advocate of the Fleet. Following a career that included postings to Halifax, Vancouver, Esquimalt, France, Edmonton and Ottawa, he was appointed as the Chief Judge Advocate in 1968. Four years later Colonel Oliver retired to work for the Law Reform Commission of Canada. In 1975, he was appointed a Provincial Court Judge in Alberta and the following year he was made the Assistant Chief Judge of the Criminal Division. Judge Oliver retired from the Bench in 1992.

A native of Gatineau, Québec, Mr. Justice Jean-Pierre (J.P.) Plouffe completed his education at the University of Ottawa. After being called to the Québec bar in 1967, Mr. Justice Plouffe enrolled in the Canadian Forces as a military lawyer. After seeing a bit of the world with postings to Ottawa, Germany and Winnipeg, he retired from the Branch in 1976 as a Lieutenant-Colonel. For the next three years Mr. Plouffe practiced law with a Gatineau law firm while also acting as an independent president (disciplinary judge) at federal penitentiaries. He was not quite finished with the Branch, though. In 1980 he was called out on Reserve service to act as a Judge Advocate at courts martial for six months. The following two years saw him directing the criminal law section of the Hull Legal Aid office. From 1982 to 1990 his title was His Honour Judge Plouffe as he had been appointed a Provincial Court Judge. He also maintained a hand in the academic world from 1980 to 1986, teaching criminal procedure at his alma mater. In 1990 came elevation to the Superior Court of Quebec. He retained his ties to the Forces over the years by occasionally sitting as a military judge at courts martial.

The Branch lost one of its best liked and most respected members in 1991 when then-Captain(N) J.S. Armand DesRoches accepted an appointment to the Prince Edward Island Supreme Court. On the social side, it also lost one of its best chefs as he had a well-deserved reputation as a gourmet cook. Mr. Justice DesRoches came from the small town of Miscouche, P.E.I., and never lost his feeling for the Island. He graduated from Dalhousie Law School in 1966 and spent a three-year stint in private practice on the Island before joining the Forces. His career included tours in Ottawa, Germany and field offices in Canada, including the position of Assistant Judge Advocate General for the Atlantic Region. Starting in 1980, he acted as a military judge on a part time basis while carrying on with his full time appointment. This role later became full time when he was appointed Chief Judge Advocate in 1985. Immediately prior to his departure from the Branch, Colonel DesRoches had been running the operational law side of the house, as well as the day-to-day functioning of the Branch itself as Deputy Judge Advocate General/Advisory and Administration. Besides sitting on the P.E.I. Supreme Court, Mr. Justice DesRoches was appointed as a member of the Court Martial Appeal Court of Canada.

The Honourable Mr. Justice Walter R.E. Goodfellow was a prominent member of the Nova Scotia Bar and for many years was also an active member of the Legal Branch Reserve. In 1987 he rose to the rank of Captain(N) and took over as

the Senior Reserve Officer (Legal), providing the JAG and the leadership of the Canadian Forces' Reserve Force with his insights into the many problems of the day. In recognition of his service to the Branch, Captain(N) Goodfellow was appointed the successor to Brigadier-General Simpson as Colonel Commandant of the Legal Branch in 1996 and continued to hold that distinction at the end of the millennium. In 1996 he also became the first Canadian to be named Chair of the Commonwealth Armed Forces Lawyers Association. His legal skills did not go unnoticed in Nova Scotia. In 1990, Justice Goodfellow was elected President of the Nova Scotia Barristers' Society. Later that same year he was appointed to the Supreme Court of Nova Scotia and later to the Court Martial Appeal Court of Canada as well. Mr. Justice Goodfellow was on a leave of absence from the latter court during his tenure as Colonel Commandant.

Other members of the Legal Branch Reserve also ended up on the Bench. His Honour Judge Robert Hyslop in Newfoundland and His Honour Judge Brian Williston in Nova Scotia are but two examples of those who have been selected to dispense justice in the courts of the land.

The Bar

For longevity working with the Branch, none can compare to Lieutenant-Colonel (Retired) Ralph MacDonald. When he completed his Second World War service in the Canadian Army, he left to attend law school. After graduation, he rejoined the Canadian Forces on February 7, 1952, in the Legal Branch. He was 29 at the time. As a result of several extensions, his long and distinguished career lasted until May 19, 1988. Lieutenant-Colonel MacDonald is probably the only member of the Canadian Forces ever to be receiving the Old Age Pension when he retired! His final years with the Branch were in the position of Director of Law/Pensions and Estates. After leaving the JAG Headquarters in 1985, he went to deal with pension issues with the Director General/Compensation and Benefits organization as a legal officer for three years until his retirement in 1988. He continued with the same organization for another ten years as a Public Servant.

Not too many legal officers have the distinguished operational background that Lieutenant-Colonel (Retired) Clive L. Rippon had. After joining the Royal Air Force in 1939, he spent the war as a pilot, earning the Distinguished Flying Cross. He claimed the reason for the decoration was merely "survival." Lieutenant-Colonel Rippon remained with the RAF until 1949 when he came to Canada to go to Dalhousie Law School. With classmates like future Legal Branch members Scott Henderson and Jim Fay, it is not surprising that he, too, ended up in the Legal Branch in 1952. By the time Lieutenant-Colonel Rippon was finished, he had total of forty-three years military experience. Much of the time was spent as a military judge. With that background, he was a natural for the job of presiding over disciplinary tribunals in the Canadian penitentiary system in British Co-

lumbia. After twenty-two years in the job, he planned to finally call it a day and retire at the end of 1999.

Two former Assistant Judge Advocates General for the Atlantic Region decided to become involved with academia on retirement. The late Lieutenant-Colonel (Retired) Clayton Hutchins made a mark as a professor at Dalhousie Law School for many years. He was awarded the class ring by the 1977 graduating class for his exemplary teaching. Lieutenant-Colonel (Retired) James B. (Jim) Fay took on part time teaching at the same law school and later at St. Mary's University after his retirement in 1982. This former Provost Officer was a long-standing military judge and was involved in the training and evaluation of military judges over the years. He took over the Atlantic Region office in 1975 and remained as the saltwater legal authority up to his retirement.

The late Colonel Gordon Waterfield was the unsurpassed master of his day where legislation was concerned. A graduate of Dalhousie Law School, he joined the Legal Branch in 1960 after six years of private practice in Halifax. Besides the usual tours with the field offices in Canada and Germany, he earned a Diploma in Legislative Drafting from the University of Ottawa in 1971. Although he did have a couple of subsequent detours, legislation was to be his vocation for the rest of his career. To the Branch's great loss, he passed away in February 1988, while still serving as Deputy Judge Advocate General/Legislation.

Lieutenant-Colonel (Retired) Brian Murphy, who became a Pension Advocate on his retirement from the Regular Force in 1987, deserves special mention for his consistent support of the Branch even after his retirement from the Regular Force. He joined the Reserves in 1988 and played a major part in establishing an effective organization in the western provinces, acting as the Reserve Area Legal Adviser from 1989 until 1993. The Branch finally lost his services the following year on his retirement from the reserves.

Not surprisingly, legal officers who do not retire completely tend to gravitate to jobs related to the legal profession once they leave the Legal Branch. This often means remaining within the government fold. For instance, Lieutenant-Colonel (Retired) Peter Tinsley switched to the Ontario Provincial Government on his retirement in 1998. He took over as the head of the Special Investigation Unit (SIU) that investigates incidents involving police officers in the province. Lieutenant-Colonel Tinsley belonged to the Canadian Forces Special Investigation Unit before going to law school and joining JAG. Although it had a similar name, the SIU within the Forces was involved in a broader range of investigations than its Ontario namesake.

Due to their knowledge of both the military and the law, former legal officers are often selected for positions with the pension system that assists disabled military members and veterans. British Columbia native Captain(N) (Retired) Harry

Ferne was appointed as a Commissioner on the Canada Pension Commission that was responsible for deciding whether pensions would be awarded to applicants and Captain(N)(Retired) Al Solomon became the Chairman of that organization. The late Colonel (Retired) Just Letellier was appointed to the Pension Review Board. Colonel (Retired) Scott Forster was appointed to its successor organization, the Veterans' Review and Appeal Board. The Bureau of Pension Advocates, whose lawyers advise applicants and represent them at hearings, is a veritable colony of former legal officers. Commander (Retired) Marv Bisal, Major (Retired) Roy Ridlington, former Captain Eric Marinici, Commander (Retired) Scott Henderson, Lieutenant-Colonel (Retired) Art Kruse and a bevy of others worked for the organization.

Undoubtedly the most prolific author of legal articles in the Branch was Commander (Retired) William (Bill) Fenrick. He had joined the Forces as a naval officer, resigned to go to law school and came back in as a legal officer. From his first posting at the regional office in Halifax, he made it clear that he was going to specialize in international law—and he succeeded. Besides his work to establish the JAG Journal and his appointment to the UN Commission of Experts dealing with war crimes in Bosnia and Croatia, Commander Fenrick managed to write a voluminous number of learned legal articles. In 1994 he received the Chief of the Defence Staff Commendation for his outstanding work. When he retired later that year, he became a senior legal adviser in the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia.

The Legal Branch Reserves have been fortunate with good leadership. Captain(N) Gerry McCracken was a regular force legal officer who changed careers in 1972 to work for the Department of Justice. He was seduced back into the Legal Branch Reserve and took over as the Senior Reserve Adviser Legal from Captain(N) Goodfellow in 1990. An excellent litigator and a very personable individual, Captain(N) McCracken was both liked and admired by all who knew him. New Brunswick claimed him back when he left Justice in 1994 and retired from his Reserve position.

At the end of the millennium the senior Reserve officer was Colonel Sandy Fairbanks who put on his fourth stripe on Captain(N) McCracken's retirement in 1994. Colonel Fairbanks was a Chief Crown Attorney with the Directorate of Public Prosecutions in Nova Scotia, living in Amherst. His father was originally in the navy before becoming a lawyer, so naturally the younger Fairbanks joined the army. In 1964, he left the Forces and went to University of New Brunswick for his Arts and Law degrees. For six years after getting the call to the Bar of Nova Scotia in 1971, he ran a private practice in Amherst. In 1977 Colonel Fairbanks joined the ranks of the Crown Attorneys. On the military side, he was purely operational from the time he joined the Reserves in 1972 until his move to the Legal Branch in 1984. He earned his parachutist wings, commanded a company of the Nova Scotia Highlanders and was a Squadron Commander with the

8th Canadian Hussars (Princess Louise's). With the JAG organization, Colonel Fairbanks was the District Legal Adviser for Eastern New Brunswick and the Area Legal Adviser for the Atlantic Provinces before his subsequent appointment as the Deputy Judge Advocate General/Reserves. He continued to hold that appointment at the end of the millennium and was awarded the Order of Military Merit in 2000.

Few members of the Canadian Forces are awarded the Order of Military Merit (OMM) for their outstanding service, so the Branch could rightly be proud when a second legal officer was awarded the honour in 2000. Captain(N) William A. (Bill) Reed was the recipient. For the last dozen years of the millennium, he set an example of hard work and dedication when overseeing the European JAG operation and its closing, and, on his return, dealing with the voluminous Somalia-related issues while running the day-to-day operations of the Branch.

Legal officers were sometimes experts in fields other than the law. For instance, computers were a second area of expertise for a number of officers, such as Lieutenant-Colonel (Retired) Jim Rycroft and Commander (Retired) Stan Blythe. Lieutenant-Colonel Rycroft received the JAG Commendation for his trail blazing work in getting the Branch computerized.

Court Reporters

One of the mainstays of the military justice system over the last fifty years of the century were the court reporters. Originally from the clerical and administrative branches of the Forces, the court reporters were posted in the past to the Office of the Judge Advocate General. By the end of the nineties they formed part of the Chief Military Judge's organization.

Once involved with courts martial, many of the court reporters stayed in the system for lengthy periods. Mr. Len Marriner probably holds the record. In 1999, he received his 50-year pin for working with the Federal Government. Twenty-six of those years were with the JAG organization as a court reporter. Mr. Marriner joined the RCAF in 1949 and went through multiple postings in Ontario as an administrative clerk. His only breaks outside the province were a posting to France and a recruiting stint in Calgary. In 1973 he came to work for JAG in his administrative clerk capacity. Although the court reporter trade was officially civilian at the time, they also used his talents to assist with court reporting. In 1980 Mr. Marriner made the change official by retiring from the Forces and starting to work as a civilian court reporter. He was still doing so at the end of the century.

Other court reporters left their indelible marks as well. The late Chief Warrant Officer (Retired) Dick Pucci, spent the last years of his career in the Edmonton legal office. Mr. Pucci had joined the army at a young age and was a veteran administrative clerk by the time he qualified as a court reporter in the early fifties.

He found himself hustled off to Japan and Korea in 1952 to help with the court martial load there. When the court reporters were civilianized in 1970, he had reached the rank of Chief Warrant Officer. He continued on without the uniform. Where new legal officers could provide the legal knowledge necessary to address a problem, Dick Pucci had the military knowledge they required to address it properly. He needed that experience in Edmonton. The office started with a small desk, a couple of orange crates, an Olivetti typewriter and a picture of the JAG. Mr. Pucci soon had it looking like a professional workplace. He was by far the senior court reporter on his retirement in 1989. Mr. Pucci passed away in 1994.

Chief Warrant Officer (Retired) Fred Figg was a colleague of Dick Pucci's in Korea. He first joined the army in 1942 as a clerk but the next year transferred to the air force to become an air gunner. He did not see action while in England and, though Chief Warrant Officer Figg volunteered for the Pacific theatre, the war ended before he got there. It was back to work for the Canadian National Railway after the war until the lure of the army called again in 1947. When sent over to Japan as a clerk during the Korean War, it turned out he was not required.



JAG Court Reporters, circa 1987

From left, rear row: Mr. Bob Martin, PO1 Pierre Gauthier, Mr. Dick Dickson, CWO Denis Gadoury, Sgt Jude Prevost, Mr. Gilles Caty, WO Doug Forget, WO Frank Bergeron, Mr. Bob Garrigan, Mr. Len Marriner, front row: Mr. Bill Cook, Mr. Denis Colville, BGen Bob Martin, Col. Pierre Boutet, Mr. Dick Pucci.

The legal officer, Major Brown, grabbed him as the Branch desperately needed court reporters there. Although he worked with the Edmonton legal office in 1956, it was working on claims rather than court reporting. It was not until 1957 while working at the legal office in London, England, that he actually qualified as a court reporter and started working as such full time. In 1970, Chief Warrant Officer Figg became Mr. Figg when the reporters were made civilians. He retired from the Branch at the end of 1978.

It seems that most of the court reporters had broken careers. Chief Petty Officer First Class (Retired) Richard (Dick) Dickson had joined the navy in 1946 as a "writer" (clerk). It was only in 1968 that the chance came up to get into the court reporting business. Mr. Figg was posted to Europe and the Esquimalt legal office needed an office manager. Mr. Dickson got the job and successfully completed his court reporter qualifications while there. He spent the next three years in the Senior Legal Adviser Europe's office in Germany before being posted back to Ottawa in 1973. After a short while he decided to leave the Department of National Defence and go to work for the Immigration Appeal Board in order to get back out west again. In 1978, when Mr. Figg retired, the court reporter position in the Esquimalt office came open. Early in 1979, Mr. Dickson took the job and stayed out west until his retirement in 1988.

Mr. Denis Colville was also in the military before switching with the others to become a civilian court reporter in 1970. He joined the Canadian Army in 1947 and came to work in Ottawa as an administrative clerk for the next nine years. His first foreign tour was to assist the Military Attaché in the Canadian Embassy in Stockholm in 1956. After returning to Ottawa in 1959 for a seven-year tour, he headed to the Supreme Headquarters Allied Powers in Europe (SHAPE) Headquarters in France and later Belgium. In 1970, Master Warrant Officer Colville returned to Ottawa, joined the JAG and became a civilian court reporter. He was a fixture in JAG Headquarters during the seventies and eighties, becoming the Chief Court Reporter. Mr. Colville retired in 1987.

The late Mr. William (Bill) Cook was like a den mother to junior legal officers. Besides keeping them up to date on what was going on in the Branch, he would always be willing to listen to problems or give a warning when someone was about to receive the displeasure of senior officers. Mr. Cook also was fast on the typewriter. Mr. Justice Armand DesRoches swears that one day when he was the Chief Judge Advocate he walked down to Mr. Cook's office with a two-page memo for him to type. DesRoches allegedly walked back to his office, sat down in his chair and looked up to see Mr. Cook standing there with the finished product! It was a sad loss to the Branch when Mr. Cook passed away in 1990.

Mr. William (Bill) Pickard is hard to classify as a court reporter or as a staff member. He started reporting courts during the Second World War in St. John, New Brunswick. After the war he went to teacher's college and taught school for

a year. In 1949 he re-enrolled and was posted to JAG headquarters in Ottawa, acting as the JAG's secretary. He spent a two-year tour with the Assistant Judge Advocate General Europe in London from 1951 to 1953 then back to Ottawa to work for Brigadier Lawson. When NORAD Headquarters was opening up in Colorado Springs, Air Marshal Slemon, the senior Canadian there, was looking for a secretary and Mr. Pickard got the job. He spent the next eight years in Colorado and was commissioned while there. His next posting was as Chief Administrative Officer at the air base in Gimli, Manitoba, from 1968 to 1971. After his return to Ottawa, he retired from the forces in 1971 and immediately came back to work as the secretary for the JAG where he remained until his retirement in 1982. At that time Captain(N) Marin was the Chairman of Canada Post and talked Mr. Pickard into working for him for the next four years. Mr. Pickard finally retired in 1986.

The first military Chief Court Reporter once the trade returned to the military fold was Chief Warrant Officer Denis Gadoury. Chief Warrant Officer Gadoury first joined the RCAF in 1961. He then performed a gamut of jobs: the entry level trials of a junior administrative clerk at Air Transport Command, dealing with financial entitlements with the Canadian Defence Liaison Staff in Washington, managing an orderly room in Yorkton, Saskatchewan, and even recruiting in Ottawa. In 1981, Chief Warrant Officer Gadoury came to JAG, spending a short stint in the Claims directorate before qualifying as a court reporter. Only three years later he was the Deputy Chief Court Reporter. In 1988 came the promotion to Chief Warrant Officer and the appointment as Chief Court Reporter. Although he retired from the Canadian Forces in 1992, he remained with the organization as a civilian court reporter.

Chief Warrant Officer Gadoury's replacement as Chief Court Reporter was Chief Warrant Officer Francis (Frank) Bergeron, a native of Sillery, Quebec. After joining the RCAF in 1959 as an administrative clerk, he first served in Halifax before managing to spend five years in Europe at Grostenquin, France, and Lahr, Germany. After various postings in Quebec and a six-month tour at Alert, Chief Warrant Officer Bergeron started training as a court reporter in 1981. He was then blessed with a second tour in Lahr before returning to St. Hubert. The appointment to the Deputy Chief Court Reporter position came in 1989, followed by a promotion to Chief Court Reporter in 1991 when Chief Warrant Officer Gadoury retired from the military. Like his predecessor, Chief Warrant Officer Bergeron began working as a civilian court reporter when he retired from the Forces in 1994.

The first female Chief Court Reporter was Chief Warrant Officer Perry Crowder. She took on the responsibilities in 1994. Chief Warrant Officer Crowder had already been a member of the RCAF for seven years when unification came about in 1968. After basic training and trades training, she had an eclectic mix of postings to Borden, Trenton, Metz, Lahr, Ottawa and St. Hubert. Next, Chief War-

rant Officer Crowder headed for North Bay with the Communications Squadron and stayed there to help recruit new members in the Forces. Her requested posting "west" resulted in a trip of 120 kilometres to Sudbury to continue with recruiting. For the next seven years it was back to Borden, first in the orderly room and then three years at the Canadian Forces Training Development Centre teaching military instructors how to teach. By successfully applying to become a court reporter in 1988 she attained two goals. Chief Warrant Officer Crowder obtained new skills and finally got a posting west when she was stationed with the JAG office in Esquimalt, B.C. A 1993 appointment as Deputy Chief Court Reporter and the appointment to the top job the following year finished off a fine career. She retired from the Forces in Ottawa in 1998 and followed the tradition of continuing as a civilian court reporter.

Like many of the court reporters, Chief Petty Officer First Class Pierre Gauthier joined the Forces young at age 17. After naval tours in H.M.C.S. *Bonaventure* and at the base in Halifax and an army tour in Europe, Chief Petty Officer First Class Gauthier ended up in Ottawa. It was not until 1986, though, that he saw the light and joined the JAG as a court reporter. After training in Toronto, the newly minted reporter was off to the active office in Lahr, Germany, for three years. One can only expect a limited amount time on foreign postings, so his next move was to the office in St. Hubert, Quebec, in 1990. Like legal officers, court reporters tend to be multi-talented. In 1992, Chief Petty Officer First Class Gauthier went back to Ottawa where he was the first to take on the job of a paralegal with the human rights directorate. In 1994 the court martial system called him back when he went to the Chief Military Trial Judge's office as the Deputy Chief Court Reporter. On promotion to Chief Petty Officer First Class in 1998, Gauthier replaced Chief Warrant Officer Crowder as the Chief Court Reporter and remained in the position at the end of the millennium.

Staff

Over the years the Office of the JAG was lucky to have a dedicated and knowledgeable staff. Fortunately, most of them also had a good sense of humour, one of the primary qualifications for working with lawyers. Because the legal offices were spread all over the country and in several foreign locales, there was a varied mixture in the makeup of the staff that always made life interesting in the Branch. The stresses of serving in the political capital of Canada and the headquarters of the Canadian Forces were constant. Ministers and Generals always need legal advice for something that started five minutes ago. The consequences of giving the wrong advice or not getting the advice to the client in time could either be embarrassing at the low end of the scale or disastrous for the Forces, the Federal Government and the nation where major issues were involved. The staff got the brunt of the pressure to get the file, find the reference, type the opinion, set up the meeting, et cetera.

Not surprisingly, JAG Headquarters had the largest staff of any office in the Branch and needed a competent administrative officer to manage the organization. Over the years there have been a number of memorable individuals. Administration in the Branch during a good part of the fifties was the bailiwick of Major Orville Magee who had originally joined to work in the Patent Section. One of his principal tasks was to develop the posting plot for legal officers each year. As this was before the age of computers, he would take a large roll of brown wrapping paper, put grid lines on it and fill in where all the officers would be going. Unfortunately, on at least one occasion he failed to inform the officer concerned that he was posted and did not realize the omission until he called to find out why the officer was not at his new posting.

Over the next decade and a half a variety of personnel filled the position, including a commissioned court reporter, Lieutenant Len Reith. Major Dave MacTavish kept the Branch headquarters functioning during the seventies. He later went on to become a senior civilian director in National Defence Headquarters.

Some officers just cannot let go of the Branch once they have been hooked. Major Harold Osborne was one. After completing his tour with JAG in 1986 and retiring from the Forces, he went back at the Directorate of Personnel Legal Services for several years.

Major Wayne Bowness, who had the task of running the administration show for five years at the end of the eighties, was liked and respected for his hard work and his empathy with people. If anything was needed to get the job done, he knew how to get it. If either staff or legal officers had a problem, he would lend a sympathetic ear and practical advice. He was an extremely good go-between for issues concerning legal officers and staff. He was also not afraid to let legal officers know, diplomatically, of problems they might not otherwise recognize in staff relations. In recognition of his excellent work for the organization, Major Bowness was awarded one of the first JAG Commendations in 1991 just prior to his posting to the Canadian Defence Liaison Staff in Washington.

Major John Richardson took on the job from Major Bowness just when the computer revolution hit National Defence. In addition to



Maj Wayne Bowness receiving the JAG Commendation from Cmdre Partner in 1991



Mr. Bill Kenney receiving the first JAG Special Recognition Award from BGen Boutet in 1993

worrying about supplies of paper, he had to keep track of thousands of dollars worth of computer equipment. He also had to deal with an increasing staff and a larger number of legal officers making constant demands on his time. Major Richardson joined the RCAF as a pilot in 1966 and flew for the next seven years. A variety of administrative positions in Ontario took up his time until he grabbed the Staff Officer Administration appointment at

JAG Headquarters. He managed to endure in this difficult job for eight years until he switched to become the Branch's business manager in the fall of 1999.

Because of the almost constant crisis atmosphere, both in Ottawa and in the field offices, anyone planning to spend a long term with the Office of the JAG had to be able to take pressure. Several did so for years. Others had had to deal with even greater stress for the duration of a particular project and still maintain an extremely high level of performance. In 1993 the JAG established the Special Recognition Award to honour officers and staff for work well done. As military officers were eligible for another form of recognition, the JAG Commendation, the Special Recognition Award was realistically for the staff.

The first recipient was the Legal Researcher for the headquarters, Mr. Bill Kenney. He had worked for the Branch for years and was the holy oracle for anyone who wanted to know where something was in the library, when something had occurred, what were the legal opinions on a subject, and seemingly anything else that had ever been recorded. Mr. Kenney's knowledge and willingness to help were invaluable to the

legal officers. The fact that he received the first Special Recognition Award showed the depth of respect everyone had for him. He retired from the Public Service in 1994.



Ms. Liz Lundy receiving the JAG Special Recognition Award from BGen Boutet in 1994

The second award went to a secretary who had been, and remained at the end of the millennium, the godmother to Legal Branch officers and the mentor for many of the staff—Ms.

Elizabeth (Liz) Lundy. Ms. Lundy started working for the Army at its headquarters in 1959. It took twenty years before the Legal Branch gained her services. A few short months with the Chief Judge Advocate's organization led to 14 years as the secretary for the Deputy Judge Advocate/Advisory. In 1994, she was selected to work for the JAG himself. As the senior secretary to the JAG, Ms. Lundy was looked up to for leadership and words of wisdom. She came to the rescue of many a JAG and legal officer when something had to be done fast and well. All admired her professionalism and competence.

The Special Recognition Award was not an ego booster for long service. While the length of service might have made the selection committee more sympathetic to the nominee, it was the quality of the service that counted. The award could be given for excellent service over a long period or for an outstanding job on one specific project. For instance, in one case the award was given to a team of three people at the Assistant Judge Advocate General's office in Trenton, Ontario. Giselle Brown, Margaret MacLellan and Victor Hartry were recognized in 1994 for the excellent, and arduous, work they had done with respect to the Somalia courts martial. Other recipients over the years included Linda Glover at the Deputy Judge Advocate's office in Edmonton, Gert Lafontaine of the Training Directorate in Ottawa, Christianne Chevalier from Valcartier, Pat Lotzer from the Calgary office and Marlene MacDonell, a Senior Claims Analyst in Ottawa. Ms. MacDonell's talents and Scottish brogue not only impressed the Branch; she also won a Deputy Minister's Merit Award in 1998 for her dedicated and exceptional service in promoting mediation and other types of alternative dispute resolution in National Defence.

Ms. Debbie-Lyn Tasheff received the Special Recognition Award in 1997. Probably the only reason the recognition was so late in coming was her involvement with the selection committee for several years that made her ineligible. Besides being extremely competent in her job, Ms. Tasheff was always one of the movers and shakers on the JAG Headquarters social scene since she joined the organization in 1983. She could be counted on to instigate some morale booster just when it was needed most. It usually involved somebody, or everybody, getting dressed up in ridiculous costumes so that nobody could take himself or herself seriously.

Ms. Kim Anderson first joined the Branch in the Ottawa Claims directorate in 1981. She was always willing to go that extra mile with a smile on her face and constantly contributed to the morale of the organization by such means as working on special events or doing the calligraphy for awards or special documents. Through the years she rose to become the JAG's secretary and remained there until she departed for Australia in 1998. Her hard work and pleasant personality were sorely missed.

Ms. Sharon Dujay was eminently suited to working in the Branch in light of her competence and helpful personality. She started out working at a radar station (Canadian Forces Station Lowther) in northern Ontario in 1982. When that closed, Ms. Dujay came to Ottawa. She originally worked for the administrative officer in JAG starting in 1986, followed by a tour with the Materiel and Litigation division. In 1991 she was sent to language training for a year. After a tour at the Deputy Judge Advocate (Ottawa) office in 1993, it was back to JAG Headquarters working for Captain(N) Reed where she remained at the century's turn. She was a major factor in keeping the Branch running smoothly.

Mr. Ewart (Thorny) Thornhill is a man who will not be soon forgotten by the Branch. He spent forty-eight years in the Canadian Forces and the Public Service. Of those, twenty-four were spent with the Directorate of Personnel Legal Services dealing with pension questions, Boards of Inquiry and Summary Investigations. Needless to say, any junior legal officer who wanted information in this area knew just whom the expert was to see. Mr. Thornhill finally retired in 1997 after receiving the JAG Commendation that year for his work.

Seeing the late Mr. Brian Shore coming down the hall was always guaranteed to raise a smile. That is because Mr. Shore always had a new joke to tell. For over thirty-five years he worked for the Government of Canada. He was an icon in the Claims Directorate for a good part of that time during the seventies and eighties. Unfortunately, Mr. Shore passed away in 1993 soon after retiring.

Ms. Bernie Miller first started as a secretary with the JAG organization in 1977 in the newly minted Materiel directorate—and she was still there at the end of the millennium. The Directorate changed hats during that period, first becoming a JAG division and more recently falling under the new Justice organization, but Ms. Miller remained to ensure that it got the job done well while still keeping its sense of fun.

The field offices were frequently blessed with outstanding staff. In the seventies and eighties Ms. Ann Snyder helped the lawyers of the Assistant Judge Advocate General's office in Halifax keep out of trouble when she could. She reminded one of Radar of *M*A*S*H* fame with her ability to anticipate a legal officer's needs and already have the job done just before the request for it came in. Unfortunately, in the late eighties the Legal Branch lost her talents to the presumably more lucrative real estate profession.

Those who served in the Trenton office will always remember the late Ms. Flo Brown. Besides being a lady of great competence in her work as the senior secretary, she had a human touch that endeared her to all who were lucky enough to know her. It was a great loss to the Legal Branch when she passed away in 1983. The Trenton office was fortunate that Ms. Giselle Brown (no relation) had been working with Flo and took over the senior secretarial position when she passed

away. She continued to keep the office running smoothly at the end of the century.

Ms. Pat Crow took over the Assistant Judge Advocate General's office in Victoria in 1983. To talk to her former bosses, you got the impression that they were only bit players to this one-woman dynamo of a secretary. Astute, knowledgeable, organized, and, above all, extremely pleasant are the adjectives they used. She knew how to deal with senior officers—she was married to one (the Captain of a destroyer). Ms. Crow finally decided to hand the office back to the legal officers when she retired in 1994.

Ms. Roma Stevenson has been the senior secretary at the Assistant Judge Advocate General's office in Winnipeg since 1970. Ms. Stevenson not only impressed the legal officers, her fellow secretaries across Canada held her in awe. If you wanted to know something, she was the source. If you wanted to know what she was doing at all hours of the day, you just called the office because she was probably doing overtime again. All those years working for lawyers and she still had a cheery "hello" to one and all.

Edmonton was also fortunate to have dedicated long-term secretarial services from Ms. Eileen (Linda) Glover. Ms. Glover worked for National Defence for over thirty years, starting with the Station Comptroller section in Gimli, Manitoba, in 1969. On her move to Canadian Forces Base Edmonton when her husband was posted in 1971, she spent five years with the Air Command Detachment there after a brief stint in the Civilian Personnel Section. However, exactly five years to the day from beginning work at Edmonton, Ms. Glover started working for Captain (later Captain(N)) William A. Reed in the Deputy Judge Advocate's office. Approximately nine bosses later, in February 1999, she began a career change by winning a competition for the new Claims Analyst position in what had become the Assistant Judge Advocate General's office. She was awarded the JAG Special Recognition Award in 1995.

It was not only in Canada that the Branch was well served. A veritable institution and legend in her own time at the Senior Legal Advisor Europe office in Germany was the Liaison Officer, Ms. Mexi Springer. The Deputy Minister of National Defence recognized the outstanding job she had done over the years with a Merit Award in 1991. Ms. Springer had been dealing with the German authorities on behalf of the Canadian military since the mid-seventies on everything from the Code of Service Discipline to banking problems. For most of those years she was acting as part of a team with the JAG Claims Officer, Ms. Gertrude Graham.

While the above recital identifies a few of those who have stood out for one reason or another in their work for the Legal Branch, it only scratches the surface. Much more could be said about each and numerous others might also be in-

cluded. However, all those who helped the Legal Branch through the years, whether listed or not, can look with pride at its accomplishments during the twentieth century and know that they all played their parts.

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