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An Examination of How the Canadian Military's Legal System Responds to Sexual Assault

by

Elaine Craig*

ABSTRACT

Although the Canadian military has been conducting sexual assault trials for over twenty years, there has been no academic study of them and no external review of them. This review of the military's sexual assault cases (the first of its kind) yields several important findings. First, the conviction rate for the offence of sexual assault by courts martial is dramatically lower than the rate in Canada's civilian criminal courts. The difference between acquittal rates in sexual assault cases in these two systems appears to be even larger. Since Operation Honour was launched in 2015 only 1 soldier has been convicted of sexually assaulting a female member of the Canadian Armed Forces by Canada's military legal system. (One other conviction was overturned on appeal and is pending before the Supreme Court of Canada.) In addition, plea bargains in which accused individuals can avoid *Criminal Code* convictions by pleading guilty to military specific discipline offences like drunkenness, conduct to the prejudice of good order and discipline, and disgraceful conduct have been used in some cases involving aggressive sexual attacks. Sanctions for even these serious sexual attacks involved fines and reprimands. Last, the decisions of military judges in some cases suggest a critical failure to recognize the Canadian military's culture of hostility to women documented in the Deschamps Report. Together these findings raise the following question: regardless of the outcome of the current constitutional challenge to courts martial proceedings in Canada (in *R v Beaudry*), should the military's legal system continue to maintain jurisdiction over sexual assault cases?

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INTRODUCTION

In 2015 close to 1000 Regular Force members of the Canadian Armed Forces (CAF) experienced sexual assault, according to Statistics Canada.¹ That same year the Honourable Marie Deschamps released a report following an external review of the CAF's response to sexual misconduct in the military. Her report concluded that an underlying sexualized culture exists in the CAF, which is hostile to women and conducive to sexual assault.² She found that sex is used in the military to enforce power relationships and punish women; that fear of negative repercussions for one's career progression prevents many CAF members from reporting incidents of sexual assault; and that there is a broadly held perception among people in the lower ranks of the military that those in the chain of command condone or ignore inappropriate sexual conduct - that allegations of sexual misconduct are disregarded or dismissed with little if any sanction for offenders.³ Researchers have similarly documented the perception among women in the Canadian military that allegations of sexual misconduct will be dealt with inadequately by the CAF, and that reporting such experiences may be damaging to one's own military career.⁴

¹ Statistics Canada, *Sexual Misconduct in the Canadian Military: 2016*, by Adam Cotter (Ottawa: Statistics Canada, 28 November 2016), online: <https://www150.statcan.gc.ca/n1/pub/85-603-x/85-603-x2016001-eng.htm> [Statistics Canada, 2016]. A follow-up survey by Statistics Canada in 2018 found similar rates of sexual assault in the military, with 1.6% (or 900) regular force members and 2.2% (or 600) reservists reporting that they had experienced sexual assault in the previous 12 months: Statistics Canada, *Sexual Misconduct in the Canadian Military, 2018*, by Adam Cotter (Ottawa: Statistics Canada, 22 May 2019), online: <https://www150.statcan.gc.ca/n1/en/catalogue/85-603-X2019002> [Statistics Canada, 2018].

² Canada, Department of National Defence, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, by Marie Deschamps (Ottawa: Department of National Defence, 2015) [Deschamps Report].

³ *Ibid.*

⁴ See e.g. Ritu Gill & Angela Febraro, "Experiences and Perceptions of Sexual Harassment in the Canadian Forces Combat Arms" (2013) 19:2 *Violence Against Women* 269 at 276; KD Davis & V Thomas, "Chief land staff gender integration study: The experience of women who have served in the combat arms" (1998) (Personnel Research Team Sponsor Research Report 98-1) Ottawa, Ontario, Canada: National Defence Headquarters.

Deschamps' external review was instigated by the CAF in response to the 2014 publication of articles in *L'Actualité* and *Maclean's* magazines exposing rates of sexual assault in the Canadian military that were dramatically higher than those reported by the military itself.⁵ These media investigations also revealed a radical discrepancy between the number of sexual assaults perpetrated by members of the CAF and the number of charges of sexual assault prosecuted by the CAF's military justice system.⁶ In addition to the disturbing statistics they revealed, these journalists told the tragic stories of numerous women whose careers were ruined and lives unraveled not only by the sexualized violence they experienced while members of the CAF, but also by the way the military either negatively responded or failed to respond to these experiences.⁷

The Canadian military can be characterized as what is sometimes referred to as a total institution. Erving Goffman defined a total institution as “a place of residence and work where a large number of like-situated individuals... together lead an enclosed formally administered round of life.”⁸ The Deschamps Report described this characterization of the military in the following way: “members of the military live, work, train and socialize together within a closely regulated environment, largely set apart from the rest of society”.⁹ As part of this total institution, the CAF maintains its own two tiered justice system. The first tier involves less formal, summary proceedings administered by the chain of command. The second, or higher, tier of the military justice system involves trial by court martial. The military has its own judges, prosecution service and its own military defence lawyers. Prior to 1998, complaints related to

⁵ Noémi Mercier & Alec Castonguay, “Crimes sexuels: le cancer qui ronge l’armée canadienne”, *L'Actualité* (22 April 2014); Noémi Mercier & Alec Castonguay, “Our Military’s Disgrace”, *Maclean's* (5 May 2014).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Erving Goffman, *Asylums* (New York: Anchor Books, 1961) at 27.

⁹ Deschamps Report, *supra* note 2 at 13.

CAF members that involved sexual assaults, and which occurred in Canada, were normally investigated by civilian police, and all charges for such allegations were prosecuted before the civilian courts. This changed in 1998 when the military was granted shared jurisdiction over the offence of sexual assault.¹⁰

Like the external review conducted by Deschamps, the impetus for expanding the jurisdiction of the military's legal system to include charges of sexual assault was a response, at least in part, to mainstream media coverage documenting the prolific problem of rape in the Canadian military.¹¹ In 1998 *Maclean's* magazine published three cover stories - "Rape in the Military,"¹² "Speaking Out on Sexual Assault in the Military,"¹³ and "Of Rape and Justice"¹⁴ - examining the horrific experiences of sexual trauma endured by women in the Canadian military.

The issue of sexual assault in the Canadian military continues to receive a great deal of attention. As part of its response to the Deschamps Report, the CAF has adopted numerous initiatives under the mantle Operation Honour to address the problem of sexual misconduct in the military - not within its legal system specifically but more broadly in terms of cultural change

¹⁰ Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 36th Parl, 1998, c 35. See *National Defence Act*, RSC 1985, c N-5, s 70 [*National Defence Act*]. In late 2018, as a consequence of a challenge under the *Charter of Rights and Freedoms* which at the time of writing had been heard by the Supreme Court of Canada but not yet decided (*R v Beaudry*, 2018 CMAC 4 [*Beaudry*]), the military appears to have stopped conducting its own sexual assault trials. See *R v Spriggs*, 2019 CM 4002.

¹¹ Senate of Canada, Senate Standing Committee on Legal and Constitutional Affairs, *Evidence (Bill C-25)*, 36-1 (6 October 1998) at 15:30 (Hon Arthur Eggleton), online: <https://sencanada.ca/en/Content/SEN/Committee/361/lega/34evb-e> [Testimony of Eggleton]; See also Colonel (ret) Michel Drapeau, "Sexual Assaults in the Canadian Military: Is the Military Making Headway?" (April 30 2018), testimony before the Senate National Security and Defence Committee available at <http://mdlo.ca/wp-content/uploads/2018/04/April-30-2018-Is-the-Cnd-Military-making-headway-002.pdf> citing 3 cover stories published in 1998 by *Maclean's* magazine examining the degree of sexual violence in the military.

¹² Jane O'Hara, "Rape in the Military", *Maclean's* (23 May 1998), online: <https://www.macleans.ca/news/canada/rape-in-the-military/>.

¹³ Jane O'Hara, "Speaking Out on Sexual Assault in the Military", *Maclean's* (1 June 1998), online: <https://www.macleans.ca/facebook-instant-articles/speaking-out-on-sexual-assault-in-the-military/>.

¹⁴ Jane O'Hara, "Of Rape and Justice", *Maclean's* (14 December 1998), online: <https://www.macleans.ca/news/canada/of-rape-and-justice/>.

within the organization, and support for survivors.¹⁵ In 2017, an 850 million dollar class action lawsuit was filed on behalf of former CAF members against the CAF on the basis of the Canadian military's discriminatory and sexualized culture and its failure to properly respond to the sexual assault and sexual harassment that this culture produces. In May 2018, the federal government tabled legislation (Bill C-77) that would, among other important changes, incorporate a Victims' Bill of Rights into the military justice system. Shortly afterwards Canada's Auditor General released a report identifying serious deficiencies with the military justice system generally in terms of inefficiencies and unnecessary delays.¹⁶ The military's court martial proceedings in sexual assault cases constitutes one aspect of a much broader issue. Nevertheless, an examination of the *legal* response to sexualized violence by the CAF remains an important, and to date missing, part of understanding this issue.

For the purposes of this study all reported military judicial decisions involving charges of sexual assault were examined. However, unless otherwise stated the findings are based on an assessment of decisions released between 2015 and 2018. Media focus and public dialogue on the issue of sexualized violence in both the military and civilian contexts have increased substantially since 2015.¹⁷ Several policy initiatives and legal reforms regarding sexual assault were adopted during this time period.¹⁸ As noted, the Deschamps Report was released in 2015

¹⁵ See "Operation Honour", Department of National Defence, online: <https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/operation-honour.html>.

¹⁶ Auditor General of Canada, *Report 3 – Administration of Justice in the Canadian Armed Forces*, (Ottawa, Office of the Auditor General, 29 May 2018), online: http://www.oagbvg.gc.ca/internet/English/parl_oag_201805_03_e_43035.html [Report 3].

¹⁷ See e.g. Dana Phillips, "Let's Talk About Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse" (2017) 54:4 Osgoode Hall LJ 1133; Jaques Gallant, "Twitter conversation about unreported rape goes viral", *Toronto Star* (31 October 2014), online: <https://www.thestar.com>; Simon Houpt, "Jury's still out on media's role in Ghomeshi case", *Globe and Mail* (25 March 2016), online: <https://www.theglobeandmail.com/news/national/jury-still-out-on-medias-role-in-ghomeshi-case/article29397973/>.

¹⁸ See e.g. Ontario, *It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment* (Ontario: Queen's Printer for Ontario, 2015), online: <https://dr6j45jk9xcmk.cloudfront.net/documents/4593/actionplan-itsneverokay.pdf>.

and Operation Honour was launched in 2015. Increased focus on the issue combined with policy developments and efforts at law reform suggest that 2015 to 2018 is an appropriate timeframe for this case study.

The remainder of this article proceeds in four parts. Part I will demonstrate the gap in critical examination and knowledge of court martial proceedings involving charges of sexual assault. Part II will show that, despite claims to the contrary by military officials, the rates of conviction for the offence of sexual assault appear to be dramatically lower in the military system than in the civilian legal system. Part III will examine the role that plea bargaining plays in sexual assault cases disposed of through the military legal system. Plea bargains in which accused members of the CAF can avoid *Criminal Code* convictions by pleading guilty to military specific disciplinary offences are widely relied upon and have even been used in cases involving aggressive sexual attacks. Part IV will consider reported cases involving charges of sexual assault that have been tried by courts martial, the majority of which, since 2015, have resulted in acquittals. The concluding section of the article will identify unanswered questions and issues that require further research.

I. The CAF's Sexual Assault Cases Have Not Been Studied

While academic research studying sexual assault in the civilian legal system is robust,¹⁹ there has been no legal scholarship examining the prosecution of sexual assault by the Canadian military's legal system. For decades legal scholars have published detailed, in depth

¹⁹ See e.g. Constance Backhouse, *Carnal Crimes* (UBC Press: Vancouver, 2008); Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 *Alta L Rev* 743; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 *CJWL* 397; David Tanovich, "'Whack No More': Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2015) 45:3 *Ottawa L Rev* 495; Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1996) 9:1 *CJWL* 148; Christine Boyle, *Sexual Assault* (Carswell: Toronto, 1984).

examinations of the civilian body of caselaw interpreting and applying the law of sexual assault in Canada.²⁰ In contrast, there have been no published studies providing analysis and critique of the sexual assault caselaw produced by Canada's military courts. Nor have any of the numerous external reviews of the military's legal system focussed on its sexual assault cases.²¹ When confronted with the statistics and allegations gathered in 2014 by journalists from *L'Actualité* and *Maclean's*, then Director of the Military Justice Strategic Response Team, LCol. André Dufour, reportedly stated "I think we have a good system in place that gets results."²² To support his assertion, Dufour pointed to three independent reviews of the military justice system conducted in 1997, 2003, and 2011: "There's nothing in these reports about sexual assaults, and no indication there's anything wrong with the system."²³ It is true that none of the three former judges (Brian Dickson, Antonio Lamer and Patrick LeSage) who conducted these reviews made any mention of sexual assault in their reports. It is equally true that these reports provide no indication that the reviewers specifically considered the issue of sexualized violence in the

²⁰ *Ibid.*

²¹ An external review of military justice and the military police was completed in 1997: Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Presented to the Minister of National Defence on March 14, 1997, by the Right Honourable Brian Dickson, Lieutenant-General Charles Belzile, and Bud Bird (Ottawa: Department of National Defence, 1997). Following the federal inquiry into the misconduct of the Canadian Forces in Somalia (Canada, Department of National Defence, *Dishonoured Legacy: the Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Canadian Government Publishing, 1997)) legislation was passed in 1997 mandating an external review of the courts martial system every five years. Two such reviews have been undertaken: Canada, Department of National Defence, *Report of the First Independent Review by the Right Honourable Antonio Lamer of the provisions and operation of Bill C-25 An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c 35* (Ottawa: Department of National Defence, September 2003); Canada, Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G MacKay, Minister of National Defence*, by The Honourable Patrick J LeSage (Ottawa: Department of National Defence, 2011). In addition in 2008 and 2009 the Bronson Consulting Group was commissioned by the Director of Military Prosecutions and the Director of Defence Counsel Services respectively to conduct an external review of the way in which military prosecutions and defence services were conducted (See Andrejs Berzins & Malcolm Lindsay, *External Review of the Canadian Military Prosecution Service* (Ottawa: Bronson Consulting Group, 2008); Andrejs Berzins & Malcolm Lindsay, *External Review of Defence Counsel Services* (Ottawa: Bronson Consulting Group, 2009). None of these reviews examined sexual assault proceedings specifically.

²² Mercier & Castonguay, *supra* note 5.

²³ *Ibid.*

Canadian military. This omission is most significant with respect to the latter two reviews, which were conducted after the military had been granted shared jurisdiction over sexual offences. There is no indication in either the 2003 Lamer Report or the 2011 LeSage Report that, in assessing the military's legal system, these reviewers turned their minds to the conduct and adjudication of sexual assault trials by the Canadian military. In other words, although these reviews were conducted during an era in which, for the first time, sexual assault trials had become a significant proportion of the courts martial caseload, and despite the features which make sexual assault different from other types of offences, their reports made no mention of these proceedings or how the military was handling them. These features would include the legacy of discriminatory stereotypes that infused sexual assault law, different evidentiary considerations (such as rules related to the introduction of evidence of other sexual activity), and the relationship between law and the social context which gives rise to such high rates of sexualized violence and low rates of reporting.²⁴

The mandate of Madame Deschamps' 2015 review was to consider and make recommendations regarding the adequacy of the military's "policies, procedures and programs in relation to sexual misconduct and sexual harassment".²⁵ Yet even this purportedly comprehensive assessment of the CAF's response to sexualized violence was explicitly directed not to consider the military's legal system. Limitations placed on the scope of Deschamps' review included that she "shall not review" any decision of a court martial or summary trial, any decision of a military judge, any decision with respect to the laying or prosecuting of charges, and "any matter related to the JAG [Judge Advocate General] in respect of his superintendence

²⁴ See Boyle, *supra* note 17; Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012).

²⁵ Deschamps Report, *supra* note 2 at 4.

of the administration of military justice in the CAF”.²⁶ As such, her report made “no comment with respect to court martial or summary trials”.²⁷ In describing the objectives of and purpose for ordering the Deschamps Report then Chief of Defence Staff General Tom Lawson stated:

I want to understand the full scope of any problems, and I want to resolve them, so I've called for engagement on this issue *at every level of the organization*....I've ordered an internal review of our workplace programs and policies, and I have committed now to conducting an external, independent review into how the Canadian Armed Forces deals with issues related to sexual misconduct and sexual harassment.

As findings emerge from these reviews, *I'll consider all options* to resolve any problems that we identify, including making improvements to Canadian Armed Forces policies, procedures, programs, and education. (emphasis added)²⁸

Given such a breadth of inquiry and objectives, it is difficult to understand the justification for excluding the CAF's legal system from the scope of this review of the Canadian military's response to sexual misconduct.²⁹ Indeed, even without such an explicitly broad articulation of its objectives it would be difficult to understand how one could adequately review the military's response to sexual misconduct, including sexual assault, without considering its legal system. When asked about the limited scope of her mandate, Madame Deschamps said: “[t]here is a review process that is provided by the statute of the military justice system. There is a report that was handed to me in the fall of 2014, the LeSage report. I understood my mandate as looking at

²⁶ *Ibid* at 5.

²⁷ *Ibid* at 67.

²⁸ House of Commons, Standing Committee on National Defence, *Evidence*, 41-2, No 27 (27 May 2014) at 11:00 (General Tom Lawson), online: <https://www.ourcommons.ca/DocumentViewer/en/41-2/NDDN/meeting-27/evidence> [Testimony of Lawson].

²⁹ Deschamps' review was ordered by the Chief of Defence Staff General Tom Lawson. In an effort to ensure independence, the Judge Advocate General (who oversees the administration of military justice) reports to the Minister of Defence rather than the Chief of Defence Staff. However, it seems implausible to accept that the military's legal system was explicitly excluded from the mandate of this review simply because of this reporting structure. Presumably the external review could have been ordered by the Minister of Defence or jointly authorized by the Chief of Defence Staff and the Minister of Defence.

what goes on upstream.”³⁰ The statutory reviews she was referring to were the ones done by former Justices Dickson, Lamer, and most recently, Lesage. As already noted, none of these reviews appear to have devoted any specific consideration to the military legal system’s response to sexual assault. Given its particularity as an offence³¹ and its endemic rates in the military context, the failure to address sexual assault in these reports suggests a significant deficiency in these statutorily mandated reviews. Pointing to these reports to justify the limitations placed on Deschamps’s review of the military’s response to sexual misconduct is not a compelling explanation for excluding the military’s legal system from the scope of her mandate.

To date the only reported review of the military’s legal system that has specifically considered its conduct of sexual assault cases was a comprehensive internal review of the courts martial system ordered by the Judge Advocate General in 2016. While the mandate for this review was not focussed on sexual assault, as part of its work the Review Team consulted with, and reported on its consultations with, military sexual trauma survivors.³² In addition to highlighting possible weaknesses with the courts martial system generally, the Review Team’s draft interim report concluded that victims of military sexual trauma do not have the same rights and protections as civilian complainants and that the effectiveness and legitimacy of the courts martial system would increase if these victims had rights and access to resources at least equal to

³⁰ Senate of Canada, Standing Senate Committee on National Security and Defence, *Evidence*, 41-2, No 60 (25 May 2015) at 15:35 (Hon Marie Deschamps), online: <http://www.ourcommons.ca/DocumentViewer/en/41-2/NDDN/meeting-60/evidence>.

³¹ *Supra* note 24.

³² The Review Team filed a draft interim report with the JAG on July 21, 2017. Department of National Defence, *Court Martial Comprehensive Review – Interim Report*, by The Court Martial Comprehensive Review Team (Ottawa: Department of National Defence, 17 January 2008), online: <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/court-martial-comprehensive-review.html>.

those available in the civilian system.³³ There is some evidence to suggest that the military initially attempted to conceal this interim report.³⁴

When the interim report was released publicly in January, 2018 the Judge Advocate General (JAG) announced that no further work would be done by the Review Team in light of forthcoming external reviews. She recharacterized the report as a “discussion paper” and asserted that it represented the views of its authors, not those of the JAG or the Office of the JAG.³⁵ The external reviews she was referring to were the 2018 Auditor General’s report which was released in the spring of 2018 and the next statutorily mandated review under the *National Defence Act*, which has yet to be commenced.³⁶ The Auditor General reported several deficiencies with the current courts martial system, primarily related to inefficiencies and delay.³⁷ His report did not direct specific attention to the military’s conduct of sexual assault cases. He also excluded from its consideration the overall strategy and approach to deal with inappropriate sexual behaviour in the Canadian Armed Force. This was the subject of a second 2018 report which, like Deschamps’ review, focussed on the issue of sexual misconduct in the military but did not consider the courts martial system’s sexual assault cases.³⁸

Simply put, while the prevalence and consequences of sexual assault in the Canadian military are profound and the CAF has been conducting sexual assault trials for over twenty years, from an academic perspective very little is known about them. This raises the obvious

³³ *Ibid* at 222.

³⁴ See David Pugliese, “Canadian military claimed a report didn't exist — even though it 'clearly' did”, *National Post* (16 January 2019), online:

<https://nationalpost.com/news/canadian-military-claimed-a-report-didnt-exist-even-though-it-did>.

³⁵ Judge Advocate General Commodore Geneviève Bernatchez, “Covering Letter to the Court Martial Comprehensive Review Interim Report” (17 January 2018).

³⁶ *Report 3, supra* note 16.

³⁷ *Ibid*.

³⁸ Auditor General of Canada, *Report 5 – Inappropriate Sexual Behaviour – Canadian Armed Forces* (Ottawa: Office of the Auditor General, 20 November 2018), online: http://www.oag-bvg.gc.ca/internet/English/parl_oag_201811_05_e_43203.html.

question: what does an analysis of the military justice system's sexual assault cases reveal? As will be explained in the sections to follow, a closer look at the sexual assault cases disposed of by the courts martial system in recent years yields three important findings: i) despite claims suggesting otherwise, the military's conviction rate for sexual assault appears to be strikingly lower than civilian conviction rates; ii) plea bargaining in sexual assault cases dispensed with through the courts martial process almost never results in a *Criminal Code* conviction or serious penalty for the accused; and iii) in those reported cases which do proceed to trial the rate of acquittal appears to be higher than in the civilian system and the reasons for decision in some cases suggest a problematic failure on the part of some military judges to properly account for the context in which military sexual trauma arises.

II. Military Convictions for Sexual Assault Appear to be Strikingly Low and Acquittal Rates at Trial Remarkably High

Following the 2014 revelations in *Maclean's*, top military officials were called before the Standing Senate Committee on National Defence to discuss the issue of sexualized violence in the Canadian Armed Forces.³⁹ In their testimony these officials made certain claims about the military's legal system and its response to allegations of sexualized violence. Then Chief of Defence Staff General Tom Lawson testified that "there is evidence, both among our neighbours to the south and in Canada, that military justice prosecutes these [sexual misconduct] allegations more aggressively than parallel civilian justice systems."⁴⁰

³⁹ Senate of Canada, Standing Senate Committee on National Defence, *Evidence*, 41-2, No 27 (27 May 2014) at 11:00, online: <https://www.ourcommons.ca/DocumentViewer/en/41-2/NDDN/meeting-27/evidence>.

⁴⁰ Senate of Canada, Standing Senate Committee on National Security and Defence, *Evidence*, 41-2, No 27 (27 May 2014) at 11:00 (General Tom Lawson), online: <https://www.ourcommons.ca/DocumentViewer/en/41-2/NDDN/meeting-27/evidence>. (He did not provide a source or citation for this evidence.)

When asked what assurances he could give even the “lowest ranking” person who comes forward with a complaint that “it would be taken seriously and with the full force of the law”, former Judge Advocate General Major-General Blaise Cathcart testified:

I can give full assurance, as a superintendent of the administration of the military justice system, that our system is the equal and, in some cases, better in terms of resource availability for both victims and accused than the civilian side. Our standards and the way in which the investigators work, and the police, the judges, are exactly the same as a civilian court would be using.⁴¹

Speaking about the military legal system more generally, in a pre-retirement interview he provided on May 7, 2017, Major-General Cathcart stated: “In many ways I would say it’s certainly the equal — and in some cases objectively better — than the civilian justice system.”⁴²

In testimony before the Standing Senate Committee on National Security and Defence on June 11, 2018, current Chief of Defence Staff General Jonathan Vance asserted that the overall conviction rate for sexual *misconduct* has been 87 per cent since the start of Operation Honour (which was launched in 2015 in response to the alarming findings in the Deschamps Report).⁴³ He testified that “this puts our conviction rates higher than any other civilian justice system for *both sexual assault* and lesser offences, speaking to both the effectiveness and necessity of our military justice system.”⁴⁴

These claims raise important questions regarding the Canadian military’s sexual assault cases. Is the military’s legal system prosecuting and adjudicating sexual assault cases in a

⁴¹ Senate of Canada, Standing Senate Committee on National Security and Defence, *Evidence*, 41-2, No 27 (27 May 2014) at 11:45 (General Blaise Cathcart), online: <https://www.ourcommons.ca/DocumentViewer/en/41-2/NDDN/meeting-27/evidence> [Testimony of Cathcart].

⁴² Cristin Schmitz, “Canada’s Outgoing Judge Advocate General Fires Back at Critics”, *Lawyer’s Daily* (7 May 2017), online: <https://www.thelawyersdaily.ca/articles/3115>.

⁴³ Senate of Canada, Standing Senate Committee on National Security and Defence, *Evidence*, 41-1, No 29 (11 June 2018), at 13:34 (General Jonathan Vance), online: <https://sencanada.ca/en/Content/SEN/Committee/421/secd/29ev-54156-e> [Testimony of Vance]; See also Miranda Brumwell, “Gen. Jonathan Vance Discusses SMRC and Operation Honour”, *Canadian Military Family Magazine* (18 June 2018), online: https://www.cmfmag.ca/duty_calls/gen-jonathan-vance-discusses-the-smrc-and-operation-honour/.

⁴⁴ *Ibid.*

manner that is comparable (or in some sense superior) to the civilian criminal legal system? If the military's legal system is comparable or superior to the civilian one in terms of responding to allegations of sexual assault, what explains the widely held perception among non-commissioned members of the Canadian military that sexual misconduct will not be appropriately addressed by the CAF?⁴⁵

A preliminary approach to resolving these questions requires an examination of the sexual assault cases that have been adjudicated by military courts in Canada. In other words, it is useful to consider these officials' claims concerning the military's legal system in light of Canadian courts martial caselaw. Of particular relevance is the military's sexual assault caselaw between 2015 (when the Deschamps Report was released and Operation Honour was launched) and 2018 (when the military temporarily stopped prosecuting sexual offences pending the Supreme Court of Canada's decision in *R v Beaudry* on the constitutionality of the courts martial process). Unless otherwise indicated, the findings described in this study are based on military judicial decisions involving charges of sexual assault that were released between 2015 and 2018.

Does the caselaw indicate that our military justice system prosecutes allegations of sexual assault "aggressively" (accepting that it is unclear what this means), as suggested by General Lawson?⁴⁶ Is it accurate to assert that conviction rates for "both sexual assault and lesser offences are higher [in the military's legal system] than in any other civilian justice system", as stated by General Vance?⁴⁷ In fact, based on a review of the military's reported judicial decisions between 2015 and 2018, the Canadian military justice system secured a conviction for

⁴⁵ Deschamps Report, *supra* note 2; Gill & Febraro, *supra* note 4.

⁴⁶ Testimony of Lawson *supra* note 28.

⁴⁷ Testimony of Vance, *supra* note 43.

the offence of sexual assault itself (rather than sexual misconduct more broadly) in only four cases – an average of one sexual assault conviction per year.⁴⁸

Conviction rates refer to convictions that arise either because of a guilty plea or because of a finding of guilt at trial. The conviction rate for the offence of sexual assault disposed of through court martial proceedings in Canada (either by plea bargain or trial) over this four-year period was approximately 14 per cent.⁴⁹ If convictions for lesser included *Criminal Code* offences such as assault are included, the conviction rate during this period was approximately 28 per cent.⁵⁰ These figures are markedly lower than the conviction rate in cases disposed of in Canada's civilian criminal court system. For example, the conviction rate for sexual assault and lesser included offences disposed of in Canada's civilian criminal courts during this same time period was between approximately 42 and 55 per cent.⁵¹

⁴⁸ The Office of the Chief Military Judge maintains a digital database (<https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/en/nav.do>) in which courts martial decisions are published. Sexual assault decisions prior to 2009 are generally not available in this database. For the purposes of this study all reported cases involving sexual assault charges have been reviewed. Findings with respect to conviction rates, plea bargains and sentencing, unless otherwise indicated, are based on cases released between January 1, 2015 and December 31, 2018. There were four convictions for the offence of sexual assault during this period.

⁴⁹ There were 29 reported cases disposing of sexual assault charges during this four year period. There were nine reported cases disposing of charges of sexual assault in 2018 (and two further cases in which charges were withdrawn pending the outcome of the appeal in *Beaudry*, *supra* note 10), nine in 2017, six in 2016 and five in 2015. In four of these 29 cases the accused either pled guilty to sexual assault (*R v W(TS)*, 2018 CM 2004 [*W(TS)*]) or was convicted at trial (*R v Cooper*, 2018 CM 2013 [*Cooper*]; *R v Wilks*, 2017 CM 1008 [*Wilks*]; *Beaudry*, *supra* note 10), resulting in a conviction rate of 4/29 or approximately 14% for the offence of sexual assault.

⁵⁰ There were three convictions for the lesser included offence of assault (*R v Gobin*, 2018 CM 2007 [*Gobin*]; *R v Laferrrière*, 2016 CM 3016 [*Laferrrière*]; *R v Scott*, 2015 CM 1005 [*Scott*]). In one case the accused was acquitted of sexual assault but pled guilty to criminal harassment (*R v Ryan*, 2018 CM 2018 [*Ryan*]). If convictions for lesser included *Criminal Code* offences are included in the calculation of the military's conviction rate during this four year period the conviction rate was approximately 28% or 8/29 (four convictions for sexual assault and four convictions for these lesser included offences.) In one further case, seemingly in response to *Beaudry*, *supra* note 10, the prosecution withdrew four charges of sexual assault and instead proceeded with four charges of conduct to the prejudice of good order and discipline (*R v Taylor*, 2018 CM 2029). In *Ryan*, 2018 CM 2033 the military judge determined that a trial date would be set after an interlocutory decision in *Beaudry* to determine whether to suspend the declaration of invalidity regarding the constitutionality of courts martial proceedings in cases where an accused would, in a civilian context, have a right to a jury trial.

⁵¹ Statistics Canada, *Adult Criminal Courts, number of cases and charges by type of decision* (Ottawa: Statistics Canada, 2019), online: <https://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=3510002701&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.8&pickMembers%5B2%5D=3.1&pickMembers%5B3%5D=4.1&pickMembers%5B4%5D=5.2>. (Note that this figure includes convictions for included offences and so would be lower if one excluded these convictions.)

The discrepancy between acquittal rates in the two systems for those cases that go to trial is also marked. An acquittal rate refers to the number of cases in which, following a trial, the accused was acquitted of all charges presented to the court. The acquittal rate in sexual assault cases in Canada's civilian system of cases that went to court is approximately 8 to 10 per cent.⁵² In Canada's military legal system the acquittal rate in reported sexual assault cases that went to court either for a guilty plea or trial between 2015 and 2018 was approximately 31 per cent.⁵³ Since the launch of Operation Honour in 2015, nine of the military's 14 sexual assault trials have resulted in acquittals on all charges.⁵⁴ While the disparity between these acquittal rates does not reveal the full picture in terms of case outcomes, because it does not account for differences in the rates at which sexual assault cases disposed of in court in the two systems end with stays, dismissals, and withdrawals, the discrepancy between the number of trials that result in acquittals in the two systems is striking.

Moreover and as will be explained further below, since 2015 (the year Operation Honour was launched) courts martial proceedings have resulted in a conviction for sexual assault in only

The conviction rate for sexual assault cases that proceeded to Canada's civilian courts between 2009 and 2014 was 55%: Statistics Canada, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014* (Ottawa: Statistics Canada, 26 October 2017), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.htm> [Statistics Canada, 2017].

⁵² Statistics Canada, 2019, *supra* note 51.

⁵³ Between 2015 and 2018 there were 29 reported cases disposed of by courts martial. Fourteen of those went to trial of which nine were acquitted of all charges for an acquittal rate of 31% for all sexual assault cases disposed of through court martial and 64% of those that went to trial. Between 2010 and 2018 there were 56 reported court martial cases involving sexual assault charges. There were 29 trials. In 14 of these trials the accused was acquitted of all charges: *R v Nordstrom*, 2018 CM 4011 [*Nordstrom*]; *R v MacIntyre*, 2018 CM 4014 [*MacIntyre*] (acquitted by a General Courts Martial); *R v Obele Ngoudni*, 2017 CM 4019 [*Obele Ngoudni*]; *R v Buenacruz*, 2017 CM 4014 [*Buenacruz*]; *R v Cadieux*, 2017 CM 3008 [*Cadieux*] (overturned on appeal 2018 CMAC 3); *R v Jackson*, 2017 CM 3001 [*Jackson*]; *R v Whitehead*, 2016 CM 3007 [*Whitehead*]; *R v Lloyd-Trinque*, 2015 CM 3001 [*Lloyd-Trinque*]; *R v Thibeault*, 2015 CM 3004; *R v Morel*, 2014 CM 3026; *R v Gagnon*, 2014-08-22 (acquitted by a General Courts Martial); *R v McCarty*, 2014 CM 3026; *R v Youden*, 2013 CM 4002; *R v LeBlanc* 2012 CM 3005.

⁵⁴ *Nordstrom*, *ibid*; *MacIntyre*, *ibid*; *Obele Ngoudni*, *ibid*; *Buenacruz*, *ibid*; *Cadieux*, *ibid*; *Jackson*, *ibid*; *Whitehead*, *ibid*; *Lloyd-Trinque*, *ibid*; *Laferrière*, *supra* note 50.

two cases - *R v Beaudry*⁵⁵ and *R v Wilks*⁵⁶ - of what might be described as a ‘typical’ sexual assault allegation in which the complainant was a woman. (The conviction in *Beaudry* was overturned by the Court Martial Appeals Court on the basis of a *Charter* challenge which is now pending before the Supreme Court of Canada.⁵⁷ *Wilks* involved a medical technician who was convicted of sexual assault for groping several women during physical exams.⁵⁸) As noted, there were only two other convictions for the offence of sexual assault during this four year period: one involving a CAF member who pled guilty to sexual assault for molesting his 12 year old step daughter (after sexually explicit pictures of her were inadvertently found on his computer by military police);⁵⁹ and one involving a gay male sailor who was convicted of performing non-consensual fellatio on a heterosexual male shipmate with whom he had been drinking.⁶⁰

There is, of course, no such thing as a ‘typical’ sexual assault. The term is being used here to connote cases involving allegations of non-consensual sexual touching in which the complainant was a woman, the accused was male, and the central issues in the case involved credibility and/or consent or mistaken belief in consent.⁶¹ With the exception of *Wilks* and *Beaudry* (in which, as noted, the original conviction was overturned), in every other court martial proceeding in the past four years which would fit this description the accused was either acquitted of sexual assault at trial⁶² or pled guilty to a non-*Criminal Code* offence under the *National Defence Act*, such as “behaved in a disgraceful manner”⁶³ or “conduct to the prejudice

⁵⁵ *Beaudry*, *supra* note 10.

⁵⁶ *Wilks*, *supra* note 49.

⁵⁷ *Beaudry*, *supra* note 10.

⁵⁸ *Wilks*, *supra* note 49.

⁵⁹ *W(TS)*, *supra* note 49.

⁶⁰ *Cooper*, *supra* note 49.

⁶¹ In *W(TS)*, *supra* note 49 consent was not an issue because the complainant was not old enough to legally consent.

⁶² In one case, *Laferrière*, *supra* note 50, the accused was acquitted of sexual assault at trial but convicted of the lesser included offence of assault. In one case, *Scott*, *supra* note 50, the accused pled guilty to assault.

⁶³ *National Defence Act*, *supra* note 10, s 93.

of good order and discipline”,⁶⁴ or in two cases was convicted of the lesser included *Criminal Code* offence of assault.⁶⁵ In the cases involving guilty pleas to these military specific, non-*Criminal Code* offences, the sexual assault charges against the accused in those cases were stayed or withdrawn. In other words, pending a reversal of the Court Martial Appeals Court decision in *Beaudry* by the Supreme Court of Canada, since Operation Honour was launched in 2015 only one member of the Canadian Armed Forces, a medical technician who conducted inappropriate physical exams, has been convicted through courts martial proceedings of sexually assaulting a female member of the Canadian military. If the *Beaudry* conviction is upheld by the Supreme Court that number will be two.

What explains the significant discrepancy between top military officials’ claims regarding the military legal system’s treatment of sexualized violence and the startlingly low rate of conviction for the offence of sexual assault revealed by the reported courts martial caselaw? Some of the claims, such as General Vance’s assertion that conviction rates for *both* sexual assault and lesser offences are higher in the military legal system, appear to be simply inaccurate. As demonstrated, conviction rates for charges of sexual assault and lesser offences in the civilian system are dramatically higher than in courts martial proceedings. Other aspects of this discrepancy can be understood by paying close attention to terminology. Whether it is General Vance’s statement that the conviction rate for sexual *misconduct* since launching Operation Honour is 87 per cent or the 70 per cent rate of guilty findings for sexual *misconduct* reported by

⁶⁴ *Ibid*, s 129.

⁶⁵ *Scott*, *supra* note 50 (pled guilty to assault); *Laferrière*, *supra* note 50 (acquitted of sexual assault but convicted at trial of the lesser included offence of assault). In *Ryan*, *supra* note 50, the accused pled guilty to criminal harassment. This case involved a female complainant and a male accused but did not fit within the ‘typical sexual assault’ paradigm described above. It was a case of unwanted communication engaged in by the accused with respect to the complainant, his ex-girlfriend. The fourth conviction for a lesser included offence during this time period was in *Gobin*, *supra* note 50, which did not involve a female complainant.

the JAG in her 2017-2018 annual report⁶⁶, these figures refer to a much broader category of harmful sexual behaviour than that which is captured by the offence of sexual assault.

The *National Defence Act* creates a *Code of Service Discipline* that applies to all military personnel.⁶⁷ The *Code of Service Discipline* combines under the term ‘service offences’ both *Criminal Code* offences (such as sexual assault and assault) and military specific disciplinary offences (such as ‘ill-treatment of a person who by reason of rank was subordinate’, ‘drunkenness’, ‘conduct to the prejudice of good order and discipline’, and ‘disgraceful conduct’).⁶⁸ The *National Defence Act* grants military tribunals jurisdiction over both types of offences. Recall that there are two tiers to the military justice system in Canada: the courts martial process, which has jurisdiction to prosecute the offence of sexual assault, and the more informal summary tribunal process which adjudicates less serious offences.⁶⁹ The summary process occurs at the unit level, without lawyers or judges, and is presided over by a member of the chain of command. These summary tribunals are frequently used to resolve allegations of harmful or inappropriate sexual behaviour. The CAF defines harmful or inappropriate sexual behaviour as:

“behaviours that are inconsistent with the Profession of Arms” and may include such behaviour as unacceptable language or jokes, actions that devalue members on the basis of their sex, sexuality, or sexual orientation, accessing, distributing, or publishing in the workplace material of a sexual nature, offensive sexual remarks, exploitation of power relationships for the purposes of sexual activity, unwelcome requests of a sexual nature, verbal abuse of a sexual nature, or the publication of an intimate image of a person

⁶⁶ Department of National Defence, *Judge Advocate General Annual Report 2016-2017* (Ottawa: Office of the Judge Advocate General, 2017), online: <http://www.forces.gc.ca/en/about-reports-pubs-military-law-annual-2016-17/index.page>.

⁶⁷ *National Defence Act*, *supra* note 10.

⁶⁸ *Ibid.*

⁶⁹ The structure of this two tiered process is currently under re-consideration. Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, online: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-77/second-reading> [Bill C-77], which had reached third reading at the time of writing, would re-design the military legal system in Canada by re-naming ‘summary trials’ as ‘summary hearings’ and changing the nature of less serious service offences to make them more akin to administrative charges (called service infractions under the Bill) rather than criminal offences.

without their consent, voyeurism, indecent acts, sexual interference, sexual exploitation, and sexual assault.⁷⁰

Most infractions of the *Code of Service Discipline*, including those for harmful and inappropriate sexual behaviour, are addressed through the summary process.⁷¹ In these circumstances the charge typically laid is ‘conduct to the prejudice of good order and discipline’ pursuant to section 129 of the *National Defence Act*. This is a military specific disciplinary offence, a conviction for which does not always result in a criminal record⁷² and never results in an order under the *Sexual Offender Information Registration Act* requiring that the offender be included in the National Sex Offender Registry.⁷³

As noted, summary tribunals do not have jurisdiction over the offence of sexual assault. Thus, where charges of sexual assault have been laid the matter must be resolved through the courts martial process (or referred to the civilian criminal justice system). In nearly all of the cases since 2015 in which a CAF member was charged with sexual assault, they were also charged with a non-*Criminal Code* service offence pursuant to the *National Defence Act* – most commonly this charge was either drunkenness,⁷⁴ conduct to the prejudice of good order and discipline,⁷⁵ or disgraceful conduct.⁷⁶ Nearly all courts martial guilty findings for sexual *misconduct* involve plea bargains in which the accused pleads guilty to either the section 129

⁷⁰ Department of National Defence, *Judge Advocate General Annual Report 2017-2018* (Ottawa: Office of the Judge Advocate General, 2018) at FN 10, online: https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/jag/jag-annual-report-17-18.pdf.

⁷¹ See e.g. *ibid.*

⁷² *National Defence Act*, *supra* note 10, s 249.27(1)(2). Whether a conviction under section 129 will result in a criminal record, and whether such a conviction is treated as a conviction for a criminal offence, depends on the type of sanction imposed.

⁷³ *Sexual Offender Information Registration Act*, SC 2004, c 10.

⁷⁴ *National Defence Act*, *supra* note 10, s 97.

⁷⁵ *Ibid*, s 129.

⁷⁶ *Ibid*, s 93.

offence of ‘conduct to the prejudice of good order and discipline’ or the section 93 offence of ‘disgraceful conduct’ and in exchange the sexual assault charge is withdrawn or stayed.⁷⁷

When military officials assert conviction rates of 87% (as General Vance recently did) or 70% (as Judge Advocate General Commodore Geneviève Bernatchez recently did) they are referring to rates of conviction for sexual *misconduct* - the overwhelming majority of these guilty findings are not for the offence of sexual assault nor any other *Criminal Code* offence.⁷⁸ The discrepancy between actual conviction rates for sexual assault by the Canadian military’s legal system and the claims of top military officials is explained by a combination of what appears to be inaccuracy (in the case of claims about military conviction rates for the offence of sexual assault) and a lack of distinction made between guilty findings for non-*Criminal Code* sexual *misconduct* and *Criminal Code* convictions for sexual offences (and lesser included *Criminal Code* offences). The former involves a much broader spectrum of behaviour including inappropriate jokes, sexual harassment, and the use of inappropriate language, and is frequently resolved through the more informal, unit level summary process.

III. Plea Bargaining in Courts Martial Proceedings: Reprimands and Fines

In only one case since 2015 has an accused pled guilty to the charge of sexual assault, and in that case the prosecution had photographs of him committing the sexual assault.⁷⁹ The

⁷⁷ In 2015 all of the courts martial sexual assault cases which resulted in guilty findings involved plea bargains for non-*Criminal Code* disciplinary offences. In 2016 four of the six guilty findings involved plea bargains of this nature. In 2017, all but one involved plea bargains of this nature and in 2018 all but two. The accused pled guilty to a *Criminal Code* offence in only three cases involving charges of sexual assault during this period. In *Ryan*, *supra* note 50, the accused was charged with sexual assault and criminal harassment. He pled guilty to criminal harassment and received a severe reprimand and a \$2,500 fine. In *Scott*, *supra* note 50, the accused was charged with sexual assault and conduct to the prejudice of good order and discipline. He pled guilty to the lesser and included offence of assault and received a severe reprimand and a fine of \$2000. In *W(TS)*, *supra* note 49, discussed *supra* note 61, the accused pled guilty to sexual assault.

⁷⁸ Indeed, the *National Defence Act*, *supra* note 10, s 249.27(1) specifically stipulates that, depending on the sentence imposed, an individual who has been convicted of conduct to the prejudice of good order and discipline has not been convicted of a criminal offence and will not have a criminal record. It is a disciplinary offence.

⁷⁹ *W(TS)*, *supra* note 49.

fact that the vast majority of the military legal system's sexual assault cases are disposed of through plea bargains involving convictions for military specific non-*Criminal Code* disciplinary offences means that an assessment of the military legal system's sexual assault cases requires closer consideration of these plea bargains.

In several of the plea bargained cases since 2015, sexual assault charges were laid in response to conduct which would fall on the lower end of the spectrum of sexually assaultive behaviour, such as grabbing the complainants' buttocks while dancing together;⁸⁰ wrapping an arm around the complainant's shoulders while asking for "a blow job";⁸¹ or grabbing the complainant's buttocks while engaging in a consensual hug.⁸² In these cases the accused avoided a conviction for sexual assault by pleading guilty to a disciplinary offence – most frequently disgraceful conduct or conduct to the prejudice of good order and discipline. This is arguably the appropriate outcome in these types of cases, many of which would likely not have resulted in sexual assault charges in the civilian legal system.

In some cases accused individuals pled guilty to these same disciplinary offences and received the same types of sanctions (typically a severe reprimand and a small fine) for sexually assaultive behaviour that is much more severe. Unfortunately, in courts martial proceedings the severity of the sexually harmful behaviour does not appear to inform the type of offence pleaded or sanction imposed. In other words, even in cases involving significantly harmful sexual

⁸⁰ *R v Bernier*, 2015 CM 3015 (pled guilty to conduct to the prejudice of good order and discipline (s. 129 of the *National Defence Act*) sentenced to a severe reprimand and a fine in the amount of \$2000.00).

⁸¹ *R v Morgado*, 2017 CM 4012 (pled guilty to behaved disgracefully (s. 93 of the *National Defence Act*); sentenced to a reprimand a fine of \$1500.00).

⁸² *R v Riddell*, 2017 CM 1014 (pled guilty to behaved disgracefully (s. 93 of the *National Defence Act*); sentenced to a severe reprimand and a fine \$1800.00).

behaviour, if a plea of guilty is entered it will be for a disciplinary offence such as conduct to the prejudice of good order and discipline, not a charge of sexual assault.⁸³

In some cases it seems highly problematic that sexual assault charges were stayed in exchange for pleading guilty to a non-*Criminal Code* disciplinary offence like conduct to the prejudice of good order and discipline or disgraceful conduct. To be clear, resolving cases involving very minor incidents by relying on convictions for non-*Criminal Code*, military specific disciplinary offences is arguably a positive practice.⁸⁴ However, it is problematic that in more serious cases an accused can avoid a sexual assault conviction by pleading guilty to a military specific, disciplinary offence such as disgraceful conduct, drunkenness, or conduct to the prejudice of good order and discipline. While cases of this nature were in the minority, that it occurs at all is concerning. Resolving more serious allegations of sexual assault through reliance on non-*Criminal Code* disciplinary charges seems highly unlikely to disrupt the widely held perception⁸⁵ that the CAF does not respond adequately and justly to the sexualized violence prolific within its ranks.

Consider, for example, the case of *R v Brunelle*.⁸⁶ Brunelle engaged in repeated acts of non-consensual sexual contact over a period of several hours beginning at a local pub where a group of classmates had gathered to socialize and drink. The first incident involved a forced kiss on the complainant's mouth: "he announced he would kiss J.L.P. hard on the mouth, and did so, uninvited, while they were sitting at the table."⁸⁷ After returning to Gagetown Base the

⁸³ For a discussion of this trend in plea bargaining in military sexual assault cases e.g. Tim Dunne, "The Unremitting Problem of Sexual Crimes in Canada's Military", *Lawyers Daily* (6 December 2017), online: <https://www.thelawyersdaily.ca/articles/5242/the-unremitting-problem-of-sexual-crimes-in-canada-s-military-tim-dunne>.

⁸⁴ Although given the differences in procedural fairness granted to accused in the military's summary proceedings it may be an issue from a defence perspective at that level.

⁸⁵ Deschamps Report, *supra* note 2 at ii.

⁸⁶ *R v Brunelle*, 2017 CM 4001 [*Brunelle*].

⁸⁷ *Ibid* at para 13.

complainant stood in the foyer of the accommodations building with Brunelle while he waited for a taxi. Without warning, the accused, who was drunk and had rested his head on her arms while they waited, shoved both his hands down the complainant's pants. She pushed him away, stating "I'm done, get in the cab" and then walked away.⁸⁸ Instead of respecting her direction to leave her alone, Brunelle followed her down the hallway, came up behind her and again forced his hands down her pants. She began yelling for help from her course mates and then ran down the hallway to her room. He chased her down the hall and before she could lock the door to her room from the inside, followed her into her room and shoved his hands down her pants for a third time. She again pushed him away and yelled at him. After he left the room she immediately went to one of her course mates, visibly upset; she reported the attack to the military police shortly afterwards.⁸⁹

This was an aggressive and repeated sexual assault on a colleague as she tried to escape him and called for help. Second Lieutenant Brunelle pled guilty to disgraceful conduct contrary to section 93 of the *National Defence Act*. In exchange, he was not charged with sexual assault.⁹⁰ His sentence was composed of a severe reprimand and a fine of \$3000.00, payable in monthly \$300 installments. Brunelle was 34 years old when he sexually assaulted the complainant.⁹¹ In delivering his sentence, one of the mitigating factors highlighted by Judge Pelletier was Brunelle's "strong potential for success and advancement in military service" as evidenced by his ability to succeed in performing his military duties even under these "trying

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ More typically an accused would be charged with both sexual assault and a disciplinary offence. The plea bargain would involve withdrawing or staying the sexual assault charge. Oddly, in this case the accused was not charged with sexual assault. The sentencing judge noted, at para 27, "[a] reasonable person would also know that the prosecution has agreed to the substitution of a charge of disgraceful conduct to a sexual assault charge as part of an agreement by the accused to plead guilty to that charge and avoid a trial...."

⁹¹ *Brunelle, supra* note 86 at para 15.

circumstances” - by which he was referring to Brunelle’s military performance while this case was ongoing.⁹² Following the outcome of this proceeding Brunelle likely would have been subject to administrative review to determine whether he should remain in the military. Information as to whether he was discharged from the military is unavailable.

Conversely, Judge Pelletier also noted that the complainant is still “reluctant to participate fully in all that military life has to offer by virtue of her fear of being hurt again”.⁹³ The incident left J.L.P. in emotional turmoil. It shattered her belief in the camaraderie, trust, and mutual care she thought was present among members of the CAF. Years after the attack she remained afraid to trust her colleagues and anxious that she would be hurt when she was forced to attend social events as part of her military duties.⁹⁴ Her military career does not appear to have emerged from this incident relatively unscathed.

Women who have been sexually assaulted by fellow members of the CAF frequently identify these experiences of sexualized violence, and the inadequate response of the CAF to them, as the catalyst that stunted, if not ended, their military careers.⁹⁵ The outcome for the accused and the impact on the complainant in *R v Chapman* exemplifies the profound unfairness of this circumstance.⁹⁶

While in Cyprus as part of a decompression program following deployment to Afghanistan Chapman knocked on the complainant’s hotel room door at approximately 3:00am. Chapman was her superior (in rank). He gained entry to her room by falsely stating that he was unable to sleep in his own room because his roommate was there with a woman and thus he

⁹² *Ibid* at para 21.

⁹³ *Ibid* at para 18.

⁹⁴ *Ibid* at para 14.

⁹⁵ See e.g. “Amended Statement of Claim Class Action in class action against the Canadian Armed Forces” (5 April 2017), online: <https://ravenlaw.com/armed-forces-class-action/> [“Statement of Claim”].

⁹⁶ *R v Chapman*, 2016 CM 4019 [*Chapman*].

needed to use the complainant's spare bed. Once in the room he repeatedly asked to get in bed with her, which she refused. He then forced himself on her, kissed her, groped at her breasts and attempted to initiate sexual intercourse.⁹⁷ She told him to "get the fuck out of the room" and got him off her bed.⁹⁸ He promised he would leave her alone if she let him sleep in the spare bed. She agreed, following which he again attacked her, kissing her face and trying to grab her breasts. Although panicked, she managed to fight him off by pushing him towards the door, with him pushing back away from the door. Chapman left only after the complainant, while pushing him forcefully, threatened to call the military police.⁹⁹

The complainant was shaken and terrified following the attack. She was diagnosed with severe post-traumatic stress disorder as a consequence of the sexual assault. She left the military and has had to undergo intense treatment to address her symptoms, which precluded her from working as a civilian.¹⁰⁰ Chapman pled guilty to disgraceful conduct and received a sentence of reduction in rank and a fine of \$2,500.00 (which amounted to slightly more than two weeks of salary for him).¹⁰¹ According to a statement of claim filed in 2017 on behalf of the complainant, Chapman remains a member of the Canadian Armed Forces.¹⁰²

In both *Brunelle* and *Chapman* Judge Pelletier identified the following as a mitigating factor: "He has also allowed the victim to have a voice at the sentencing hearing, thereby demonstrating his consideration to what she has had to go through as a result of his actions."¹⁰³ In the civilian criminal justice system victims of crime have the statutory right to present a victim

⁹⁷ See e.g. "Statement of Claim", *supra* note 95.

⁹⁸ *Chapman*, *supra* note 96 at para 13.

⁹⁹ *Ibid.*

¹⁰⁰ See *Chapman*, *supra* note 96 at para 16 and "Statement of Claim", *supra* note 95.

¹⁰¹ *Chapman*, *supra* note 96 at para 27.

¹⁰² "Statement of Claim", *supra* note 95.

¹⁰³ *Brunelle*, *supra* note 86 at para 21; *Chapman*, *supra* note 96 at para 17.

impact statement at sentencing.¹⁰⁴ Inexplicably, the *Canadian Victims Bill of Rights* does not currently apply to court martial proceedings.¹⁰⁵ While the *National Defence Act* has now been amended to grant complainants the ability to provide victim impact statements this change was not in force when Brunelle and Chapman were sentenced.¹⁰⁶ It seems problematic for a military judge to point to an accused's magnanimity in 'allowing' his victim to have a voice at the sentencing hearing given that if the matter had proceeded in civilian court the victim would have a statutory right to inform the sentencing judge of the impact on her caused by the sexual assault.

The *National Defence Act* creates an escalating scale of punishments available to military judges. In increasing level of severity they are: minor punishment, fine, reprimand, severe reprimand, forfeiture of seniority, reduction in rank, detention, dismissal from Her Majesty's Service, imprisonment for less than two years, dismissal with disgrace from Her Majesty's service, imprisonment for two years or more, and imprisonment for life.¹⁰⁷ The sentences imposed on the accused in *Brunelle* and *Chapman* were at the very low end of this scale. Reprimands, for example, have no concrete consequence beyond their pronouncement. While the severity of sanction is by no means the only, or even the most important, criteria by which to assess whether a just outcome was achieved, it is nevertheless important in the context of these plea bargains to consider the nature of these sentences.

The *National Defence Act* requires military judges to impose sentences that are proportionate to the gravity of the offence.¹⁰⁸ This requirement reflects a "fundamental principle

¹⁰⁴ *Canadian Victims Bill of Rights*, SC 2015, c 13 at s 15.

¹⁰⁵ Amendments to the *National Defence Act* proposed in Bill C-77 would change this but only in cases in which the accused was facing a sentence of incarceration.

¹⁰⁶ *National Defence Act*, *supra* note 10, s 203.6(1).

¹⁰⁷ *National Defence Act*, *supra* note 10, s 139.

¹⁰⁸ *Ibid*, s 203.2.

of sentencing”¹⁰⁹ – that there ought to be a readily apparent connection between the severity of the sanction and the degree of moral culpability and social and legal recognition of the harm caused and denounced. By repeatedly indicating that the sanction of a fine and reprimand or reduction in rank is commensurate with the gravity of the offence in cases like *Brunelle* and *Chapman*, the military’s legal system sends the wrong message to women (and men) in the CAF. One of the primary justifications offered in support of permitting the military to operate its own parallel legal system is the claim that the need for military discipline necessitates the ability to impose stricter punishments. The Supreme Court of Canada accepted this justification in *R v Généreux*:

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. (...) Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Discipline to allow it to meet its particular disciplinary needs.¹¹⁰

Similarly, then Minister of Defence Arthur Eggleton’s argument in support of granting military courts concurrent jurisdiction over sexual offences was that the detrimental impact of sexual assault on the morale and cohesion of military units demanded tougher penalties and that the military’s legal system would be more likely to offer these stricter sanctions.¹¹¹ Imposing modest fines, reprimands, and reductions in rank for repetitive acts of sexual aggression is not consistent with either the overall justification for having a courts martial system articulated in *Généreux* or the purported purpose of granting Canadian military courts concurrent jurisdiction over sexual assault in particular.

¹⁰⁹ *Ibid.*

¹¹⁰ *R v Généreux*, [1992] 1 SCR 259.

¹¹¹ Testimony of Eggleton, *supra* note 11: “We cannot afford to have sexual assault occur. In many respects, the penalties may well be tougher when we deal with it. It needs to be tougher for the cohesion of the unit.”

In addition to the issue of severity of sanction, there is also the issue of parity of sanction. A basic principle of sentencing establishes that like offences be treated alike.¹¹² In *R. v. Mensah*, the accused received virtually the same sentence as in *Brunelle* (a severe reprimand and a \$2500.00 fine) for failing to report a consensual, personal relationship with someone in his chain of command.¹¹³ In *R v Euper* the accused received a more severe sentence than in *Brunelle* and virtually the same sentence as in *Chapman* (a reduction in rank and a \$1500.00 fine) for making sexually suggestive comments and on one occasion hugging the complainant, and on another briefly rubbing her shoulders.¹¹⁴ In *R v Riddell* the accused was sanctioned with a severe reprimand and a fine of \$1800.00 for grabbing the complainant's buttocks during a consensual hug.¹¹⁵ Repeatedly imposing the same minimal sanctions for aggressive sexual assaults as are imposed for administrative breaches like failing to disclose a personal relationship or relatively minor incidents of non-consensual touching is problematic. The outcome in cases like *Chapman* and *Brunelle* sends the message that violating the sexual integrity of a fellow member of the CAF is not a serious infraction in the Canadian military.

Unfortunately, this message is amplified by some of the commentary in courts martial sentencing decisions - statements that minimize the severity or culpability of sexually harmful behaviour. For example, referring to the impact on the complainant in *Chapman*, Judge Pelletier commented:

[s]he does not attribute all of the symptoms she experienced and continues experiencing to the actions of the offender but I agree with her views on the importance that one's disgraceful actions may have on those affected by this behaviour. What might seem as

¹¹² *R v Arcand*, 2010 ABCA 363. This principle is instantiated in section 203.3(b) of the *National Defence Act*, *supra* note 10.

¹¹³ *R v Mensah*, 2017 CM 3018.

¹¹⁴ *R v Euper*, 2018 CM 2012.

¹¹⁵ *R v Riddell*, 2017 CM 1014.

“no big deal” by an offender or bystander at the time may have a profound impact on someone else.¹¹⁶

The incident in *Chapman*, like *Brunelle*, was an aggressive, repetitive sexual assault that ended only because the complainant managed to physically fight her attacker off. It minimizes, if not trivializes, the offence to refer to it simply as disgraceful behaviour, even if the choice of language is a function of the offence to which the accused pled guilty (disgraceful conduct). This is one of the difficulties with using these military specific, non-*Criminal Code* offences to respond to what are serious sexual assaults. In terms of social legibility and the expressive and norm setting function that a legal system is intended to serve in denouncing harmful sexual behaviour a conviction for disgraceful conduct is not remotely the same as a conviction for sexual assault. Judge Pelletier’s gratuitous and puzzling suggestion in *Chapman* that the offender or an unidentified “bystander” might characterize the conduct as “no big deal” compounds the problem.

Similarly, in delivering his sentence in *Brunelle* Judge Pelletier noted that there could be no “suggestion to the effect that the behaviour admitted to by the offender is somehow akin to offences frequently committed by junior personnel getting intoxicated during breaks from stressful career courses.”¹¹⁷ This is also a problematic statement. Was Judge Pelletier suggesting with this comment that it would be less culpable for a younger man to chase a classmate down a hallway repeatedly thrusting his hands down her pants as she screamed for help? Was he

¹¹⁶ *Chapman*, *supra* note 96 at para 7. Judge Pelletier appears in this passage to be referring to the complainant’s concession that not all of her ongoing mental health symptoms stemmed from the sexual assault. In her statement the complainant indicated that the sexual assault occurred at a time when she was already vulnerable. While this explains why Judge Pelletier may have made this statement it does not explain or justify the minimizing nature of his characterization of the wrongful behaviour.

¹¹⁷ *Brunelle*, *supra* note 86 at para 15.

suggesting that a combination of alcohol and exam stress might rationalize this type of aggressive sexual attack?

Commentary in courts martial sentencing decisions that minimizes military sexual trauma is likely to reinforce the perception that the CAF does not take seriously, or respond adequately to, sexualized violence. While in both of these cases Judge Pelletier suggested that the conduct was serious, the type of conviction, the sentences imposed, the fact that the outcome of the courts martial did not result in the accused's dismissal from the CAF and some of the commentary in the decisions were inconsistent with this characterization. It is of very modest significance to assert that sexually violative conduct constitutes an extremely serious offence with serious implications if the actual outcome and consequences suggest the opposite.

Responsibility for these sentences does not lie exclusively with the military judge. With plea bargains come joint sentencing recommendations – recommendations which receive a high degree of deference from the judge. In assessing the response of the military's legal system to sexual assault, and in particular its reliance on guilty pleas to non-*Criminal Code* charges in exchange for withdrawing the sexual assault charge, we must ask: why are military prosecutors agreeing to plea bargains of this kind in cases like *Brunelle* and *Chapman*?

IV Sexual Assault Trials Conducted by Courts Martial

What happened in the cases, since Operation Honour was adopted, in which charges of sexual assault were not stayed or withdrawn in exchange for pleading guilty to a non-*Criminal Code* service offence? In the vast majority of these cases, the vast majority of which involved female complainants, the accused was acquitted.

The reported decisions of courts martial judges since 2015 indicate that there have been 14 military trials involving charges of sexual assault during this time period.¹¹⁸ Twelve of these trials involved female service members as complainants and male service members as accused.¹¹⁹ Of the 12 sexual assault cases involving female service members as complainants that have gone to trial in the military courts since 2015 only two have resulted in convictions for sexual assault – *Beaudry* and *Wilks*, discussed above. In the other ten trials the accused was acquitted of sexual assault.¹²⁰ (In one of these ten trials the accused was acquitted of sexual assault but convicted of the lesser included offence of assault.¹²¹) Before considering these acquittals one might ask, why focus on female complainants, and female service members in particular?

It is important to consider the military's sexual assault trials involving female members of the CAF in particular for two reasons. First, as is the case in the civilian context, women are much more likely to be sexually assaulted and the sexual assaults that they experience are more severe than those experienced by their male counterparts. In both the 2016 and 2018 Statistics Canada surveys on sexual misconduct in the CAF, Regular Force women members reported rates of sexual assault in the previous 12 months that were four times higher than their male

¹¹⁸*Nordstrom*, *supra* note 53; *MacIntyre*, *supra* note 53; *Cooper*, *supra* note 49; *Gobin*, *supra* note 50; *Obele Ngoudni*, *supra* note 53; *Buenacruz*, *supra* note 53; *Cadieux*, *supra* note 53; *Wilks*, *supra* note 49; *Jackson*, *supra* note 53; *Whitehead*, *supra* note 53; *Laferrière*, *supra* note 50; *Beaudry*, *supra* note 10; *Lloyd-Trinque*, *supra* note 53; *Thibeault*, *supra* note 53.

¹¹⁹ The two cases involving male complainants were *Cooper*, *supra* note 49 and *Gobin*, *supra* note 50.

¹²⁰ *Nordstrom*, *ibid*; *MacIntyre*, *ibid*; *Obele Ngoudni*, *ibid*; *Buenacruz*, *ibid*; *Cadieux*, *ibid*; *Jackson*, *ibid*; *Whitehead*, *ibid*; *Lloyd-Trinque*, *ibid*; *Laferrière*, *ibid*. Nine of these ten trials were presided over by a military judge alone. These are referred to as Standing Courts Martial. *R v MacIntyre*, *ibid*, the tenth trial, proceeded as a General Courts Martial, which involves a military judge as the trier of law and a panel of five military members as the triers of fact. The nine Standing Courts Martial resulted in reported decisions. As with civilian jury trials, there is no reported decision from a General Courts Martial. The five panel members in *R v MacIntyre* were all men. Aly Thomson, "Military panels should have gender parity, advocate says after N.S. acquittal", *CBC* (29 June 2018), online: <https://www.cbc.ca/news/canada/nova-scotia/military-panels-gender-parity-sexual-assault-acquittal-1.4727703>.

¹²¹ *Laferrière*, *supra* note 50.

counterparts.¹²² Moreover, according to this survey, women in the military are 18 times more likely than men to report being the victim of a violent sexual attack.¹²³

Second, the rates of sexual assault against women in the military are higher than in the general population¹²⁴ and have been connected to the military's culture.¹²⁵ In 2015 over 27% of female service members reported experiencing at least one incident of sexual assault over the course of their military career.¹²⁶ For women who had been in the military for more than 15 years the rate was 37.7%.¹²⁷ The Deschamps Report highlighted the connection between rates of sexualized violence in the military and "an underlying sexualized culture in the CAF that is hostile to women."¹²⁸ In addition, historically the legal response to sexual assault generally in Canada has been plagued by a set of problematic stereotypes about women that informed the rules of evidence, the treatment of complainants at trial, and the substantive legal definition of concepts such as consent.¹²⁹ The legacy of these discriminatory assumptions about women and sex undoubtedly continue to have an impact on the application and interpretation of sexual assault law by both military and civilian courts.¹³⁰ Put simply, sexual assault is a gendered

¹²² Statistics Canada, 2018, *supra* note 1; Statistics Canada, 2016, *supra* note 1 at 11. In the 12 months preceding the 2016 survey 4.8 percent of women members and 1.2 percent of male members reported having experienced sexual assault.

¹²³ *Ibid* at 15.

¹²⁴ *Ibid* at 11.

¹²⁵ Deschamps Report, *supra* note 2.

¹²⁶ Statistics Canada, 2016, *supra* note 1. Given the alarming rates of sexual assault reported by women in the Canadian military, one should ask why there have been so few charges and even fewer trials prosecuting this offence. The answer to this question is complex. It involves factors such as underreporting (which is also a severe problem in the civilian context), conclusions by the military police that a high number of complaints are unfounded (in September, 2018 the CAF reopened numerous sexual assault investigations that were originally designated as 'unfounded' and closed), and the fact that (an unknown) percentage of cases may be referred by the military to civilian prosecutors.

¹²⁷ *Ibid*.

¹²⁸ Deschamps Report, *supra* note 2 at i.

¹²⁹ *Supra* note 19.

¹³⁰ *Ibid*.

offence. In assessing the military legal system's conduct of sexual assault trials it is critical to focus on proceedings involving women complainants.

Recall that since commencement of Operation Honour in 2015 courts martial proceedings have resulted in only two convictions for sexual assault of a female service member (and one of those two convictions was overturned on appeal and is currently before the Supreme Court of Canada¹³¹). In the other ten trials, all of which were presided over by two specific judges, the accused was acquitted of sexual assault. Are there insights about the Canadian military's conduct of sexual assault trials to be gleaned from the ten cases, since Operation Honour, in which male service members have been acquitted of sexually assaulting female service members? Can these insights explain the strikingly low rate of conviction for this offence by Canada's courts martial system?

With such a small sample of cases, and given the preliminary nature of this research, it is difficult to draw definitive conclusions to explain the military's low conviction rate. However, a preliminary analysis of this caselaw does produce two insights. First, it indicates that further study of the Canadian military's sexual assault caselaw is critically needed. Second, it suggests that in some of these decisions the assessment of evidence appears to be underpinned by, or infused with, assumptions on the part of the military judge that reveal a lack of awareness of, or refusal to recognize, the social context in which these allegations are brought. Relatedly, the reasoning in some cases raises the prospect of a problematic reliance, by the military judge, on empirically unsound assumptions about Canadian military culture. Consider, for example, the decisions in *R v Obele-Ngoudni* and *R v Buenacruz*.

¹³¹ *Beaudry*, *supra* note 10.

In *R v Obele Ngoudni* the complainant was a reservist in the 35th Combat Engineer Regiment assigned to an all-male section of paratroopers deployed to Poland. She was the only woman, the only reservist, and the only non-paratrooper. She injured her ankle shortly after the section arrived in Poland, during a forced march. She alleged two incidents against Master-Corporal Obele Ngoudni, both occurring after she had injured her ankle. She alleged that on one occasion, while walking with a cane, Obele Ngoudni approached her from behind and delivered a severe kick to her buttocks between her anus and tailbone, which he seemed to minimize by laughing, and suggesting that it had not been a strong blow. She testified to a second incident in which Obele Ngoudni pushed a piece of metal against her anus while she was bent down to pick up a drill.¹³²

Obele Ngoudni was acquitted on the basis that the prosecution had failed to meet its standard of proof. The two primary weaknesses in the prosecution's case identified by Judge Pelletier related to the timing of the alleged incidents and an explanation for the accused's behaviour. It is Judge Pelletier's reasoning regarding the latter which is of concern.¹³³ In terms of the latter, he concluded that the complainant's version of events raised doubts about their likelihood of occurring for the following reasons: i) that the prosecution had not presented any evidence of any context that could provide a starting point for this otherwise irrational act, especially given the fact that Master Corporal Obele Ngoudni had received multiple briefings and presentations on the importance of exemplary behaviour in light of concerns about the issues of harassment and

¹³² *Obele Ngoudni*, *supra* note 118.

¹³³ In terms of timing, the complainant gave a range of dates for each incident. The accused's evidence regarding the timing of these incidents was aimed at establishing a timeline for his whereabouts during this period of his deployment in Poland. His timeline established that he was in the same location as the complainant for a portion of the date range she offered regarding the first incident (*ibid* at para 30). His evidence was that he was not in her location during the date range she offered for the second incident. Judge Pelletier indicated in his decision that he would be remiss to resolve this case based solely on the technical question of dates.

sexual misconduct in the CAF; and ii) that kicking a “wounded sister” is an act of great malignity that is contrary to any notion of acceptable behaviour within the Canadian Armed Forces.¹³⁴

First, the evidence that Judge Pelletier appears to have accepted did not support his conclusion that the prosecution failed to provide any evidence of a context that would support the complainant’s allegations. Indeed, far from lacking ‘any evidence of any context’ to explain these acts of violence, there was a great deal of contextual evidence relevant to the complainant’s allegations that was ignored in Judge Pelletier’s reasons.

Judge Pelletier states in his decision that the only context the prosecution presented was that the complainant was the only woman, the only reservist, and the only member of the section who was not a paratrooper, but that this evidence was not followed by any evidence that these differences may have led to acts of discrimination or improper or even unfair treatment by her colleagues.¹³⁵ In fact the complainant, who he found to be a frank, calm, and objective witness, offered significant evidence of precisely the kinds of social dynamics which give rise to gender based harassment, discrimination, and attack. While she did testify that her integration into the unit was unproblematic, she also testified that the atmosphere in the section deteriorated after she injured her ankle. She testified to a previous altercation with the accused during a demolition exercise. She recounted incidents in which vulgar, sexual jokes were made by other members of the section in her presence.¹³⁶ She indicated that she had spoken to the section’s resource person

¹³⁴ This is a translation of the decision, which was written in French. This might explain the awkwardness of this phrasing. *Obele Ngoudni, supra* note 118 at para 33: “Tel que mentionné par l’avocat de la défense, les gestes allégués, surtout le premier incident où le caporal-chef Obele Ngoudni aurait asséné un violent coup de pied par derrière à une consœur blessée qui se déplaçait avec peine à l’aide d’une canne, constituent un geste d’une grande méchanceté qui est contraire à toute notion de comportement acceptable au sein des Forces armées canadiennes (FAC).”

¹³⁵ *Ibid.*

¹³⁶ *Ibid* at para 2.

for harassment and sexual misconduct about her situation and that ultimately, after the issues with the accused, she filed a harassment complaint against a number of the members of this otherwise all male section. She informed the Court that she was transferred to another section after this complaint was filed. She testified that she did not originally complain about either of the alleged incidents perpetrated by Obele Ngoudni because she did not trust her chain of command, who she identified as her immediate supervisors within the section.¹³⁷ Her evidence very much suggested the type of context in which exclusionary and discriminatory gender based treatment seems to flourish.

There was also evidence of this problematic context from defence witnesses. For example, the section commander testified as to his perception of the complainant's performance and attitude while on deployment. In his estimation she failed to perform her duties and keep up during physical exercises, refused to accept help, relied on medical issues to avoid fitness exercises, and blamed more experienced soldiers in front of the troop when her failings were revealed.¹³⁸ Other members of the section, several of whom were the subjects of her harassment complaint, also testified for the defence. They too reported deficiencies in her job performance. Some of them also confirmed that vulgar, sexual jokes were exchanged among members of the section (but could not confirm whether she was present for any of these exchanges).¹³⁹

Rather than a lack of any evidence of any context that could rationalize Obele Ngoudni's alleged acts of aggression towards the complainant, on Judge Pelletier's own account of the evidence the record was replete with indications that there were problems with the complainant's integration into this all-male military section. His conclusion that there was no evidence of a

¹³⁷ *Ibid* at paras 3–4.

¹³⁸ *Ibid* at para 7.

¹³⁹ *Ibid* at para 8.

context that would support her narrative of events and thus a conviction would require him to conclude that Obele Ngoudni had inexplicably and gratuitously kicked her and poked her in the anus was wrong.

A second related and problematic aspect of the reasoning he relied upon to support the acquittal was his conclusion that kicking a “wounded sister” would be an act of great malignity that is contrary to any notion of acceptable behaviour within the Canadian Armed Forces.¹⁴⁰ Inappropriate sexual jokes, women members’ distrust of the chain of command, and gender based exclusion and ostracization from the unit were all factors contributing to the CAF’s culture of hostility towards women identified in the Deschamps Report.¹⁴¹ In 2016, 31% of women members of the CAF reported being personally targeted by sexualized or discriminatory behaviour in the workplace or involving military members in the previous 12 months.¹⁴² These behaviours included unwanted sexual touching and insults and exclusion based on their sex. In 2018, 28% of women in the Regular Force reported having experienced this type of sexual harassment in the previous 12 months.¹⁴³ It is not necessarily that Judge Pelletier should have taken judicial notice of the relationship between male dominated workplaces and the sexual harassment of women, or of the CAF’s culture of hostility towards women, or of the connection between this culture and the rate of sexual assault in the CAF. But to draw the opposite conclusion because the type of seemingly unprovoked abuse alleged by the complainant in this case is antithetical to the values of the CAF is deeply problematic and empirically unsound. To do so in the face of admitted evidence demonstrating precisely the social dynamics which

¹⁴⁰ *Ibid* at para 33.

¹⁴¹ Deschamps Report, *supra* note 2 at ii, iii, 60: “there is a sexualized culture in the CAF, particularly among members of lower rank. This sexualized culture is manifested through the pervasive use of language that is demeaning to women, sexual jokes and innuendos, and low-level harassment (*ibid* at 13).

¹⁴² Statistics Canada, 2016, *supra* note 1 at 5.

¹⁴³ Statistics Canada, 2018, *supra* note 1 at 4.

produce the type of gendered violence alleged in this case is even worse. As Madame Deschamps noted in her report, “there is a significant disjunction between the aspiration of the CAF to embody a professional military ethos which embraces the principle of respect for the dignity of all persons, and the reality experienced by many CAF members, day-to-day.”¹⁴⁴

Judge Pelletier relied upon a similar assertion about the Canadian military’s culture to support an acquittal in the case of *R v Buenacruz*.¹⁴⁵ The accused in *Buenacruz* was charged with the *Criminal Code* offences of sexual assault and obtaining sexual services for consideration. He was a warrant officer and the complainant was a corporal at the time of the incident. In addition to the *Criminal Code* offences *Beunaacruz* was also charged with disgraceful conduct and conduct to the prejudice of good order and discipline. Judge Pelletier acquitted him of all charges.¹⁴⁶

There was a significant gap in age and military experience between the accused and the complainant. *Buenacruz* was her superior in rank, was the training officer for the unit and thus had some involvement in assigning future career courses, was friends with her direct supervisors and was decades older. The complainant alleged that he approached her at the end of the workday in April, 2016 and asked to speak to her regarding a very personal favour. She alleged that he asked her if he could pay her to have sex with him. She testified that she told him she “didn’t know, maybe...”.¹⁴⁷ She explained that she said this because she was uncomfortable, had respected him as a superior, just wanted to get out of the situation, and was afraid of the

¹⁴⁴ Deschamps Report, *supra* note 2 at 12.

¹⁴⁵ *Buenacruz*, *supra* note 118.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid* at para 14.

impact he could have on her career and work duties given his role as the training warrant officer for the unit if she outright declined his solicitation.¹⁴⁸

On a date a few weeks later she received four phone calls within a two hour period from Buenacruz – who before that day had never called her. Some from phones on the military base and others from a pay phone. The first and second calls she ignored and when she picked up the third call he hung up. On the fourth call, which she answered, Buenacruz asked her if she wanted to meet up the next day to which she indicated she didn't know, that she was busy. In response, he told her to meet him the next day at 10 am in a parking lot behind a shopping mall. The call lasted approximately one minute. On cross-examination she insisted that he told, not asked, her to meet him behind the mall the next day. She testified that she agreed to do so because she felt she had no other option, that she could not refuse without “pissing him off”, and that she was scared of what he could do to her in terms of work duties and career.¹⁴⁹ They did meet the next day in the parking lot. She performed oral sex on him. He ejaculated in her mouth. She testified that she did not, at any point, want to have sexual contact with him.¹⁵⁰

The accused testified that she initiated the conversation about performing oral sex on him, that he jokingly suggested he would have to pay her for a ‘blow job’ and that the sexual activity which ultimately occurred was consensual.¹⁵¹

Like in *Obele Ngoudni*, the complainant testified to inappropriate jokes or unwelcome gendered comments by members of her artillery unit (including in her case those above her in her chain of command). She described, for example, an incident in which her supervisor told her in front of the entire troop that girls do not become women until they have a baby and that women

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid* at para 15.

¹⁵⁰ *Ibid* at para 8.

¹⁵¹ *Ibid* at paras 18–21.

cannot lead. According to her this Sergeant knew that she had suffered a miscarriage and was unable to have children when he said this to her.¹⁵² Like in *Obele Ngoudni*, the complainant's evidence in *Buenacruz* was that she was ostracized by her predominantly male unit. She testified that subordinates did not comply with her directions, presumably implying that, like in *Obele Ngoudni*, there was a perception among unit members that she lacked the capacity to perform her duties competently.¹⁵³ When she joined the unit of approximately 500, at age 22, she was one of approximately ten women. Like the complainant in *Obele Ngoudni* she did not trust her chain of command, had filed multiple complaints against male members of her unit, and was eventually re-assigned.¹⁵⁴

The prosecution's theory in *Buenacruz* was that:

...Corporal XX was and still is, to a large extent, an outcast in the Artillery, and was especially seen as such by the leadership at 1 RCHA in 2016. That made her vulnerable in the eye of Warrant Officer Buenacruz, a much older man in a position of power who decided to prey on Corporal XX to obtain sexual favours he could not get from his wife. Should a complaint be made against him, Warrant Officer Buenacruz could safely be certain that no one would believe what she had to say in another of her complaints over his word as a respected senior non-commissioned officer within his unit.¹⁵⁵

There are several problematic features of the reasoning supporting an acquittal on all charges in *Buenacruz*.¹⁵⁶ In an effort to elucidate the similarities between aspects of the reasoning in this case and in *Obele Ngoudni* this discussion will focus on only one: Judge Pelletier's conclusion

¹⁵² *Ibid* at para 12.

¹⁵³ *Ibid* at paras 12–13.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid* at para 24.

¹⁵⁶ For example, his reasoning with respect to the allegation that Buenacruz had communicated for the purposes of offering consideration in exchange for sex was problematic. He concluded that on the complainant's evidence alone, Buenacruz's communication was intended to determine whether the complainant would be willing to perform oral sex in exchange for money rather than to set a price and other details and as such he was not satisfied it constituted communication for the purpose of obtaining sexual services for consideration (*ibid* at para 93).

that consent to the sexual conduct at issue in this case was not induced by an abuse of trust, power or authority contrary to section 273.1(2) of the *Criminal Code*.¹⁵⁷

This provision of the *Criminal Code* stipulates that “no consent is obtained...where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.”¹⁵⁸ While he agreed that the accused was in a position of authority over the complainant, Judge Pelletier found that the prosecution had proven neither an abuse of that authority, nor that the complainant had been induced to consent.

Consider first his conclusion that the prosecution failed to prove that the complainant was subjectively induced to consent. Whether a complainant was induced to participate in the sexual activity by the accused’s abuse of his position is to be determined subjectively, with reference to the complainant’s subjective state of mind in relation to the consent.¹⁵⁹ The surrounding circumstances may provide an evidentiary basis for consideration by the trier of fact in determining whether consent was vitiated by the operation of section 273.1(2)(c).¹⁶⁰ A circumstance the trier of fact may consider to be relevant to this assessment is the vulnerability of the complainant.¹⁶¹

Judge Pelletier found that the complainant’s assertion that she did not know what to do and that she was afraid of what Buenacruz could do to her career was not credible.¹⁶² In addition to stating that he was not convinced that Buenacruz initiated the sexual advances, he based his finding that she was not induced to consent largely on the conclusion that the complainant was

¹⁵⁷ *Criminal Code*, RSC 1985, c 46.

¹⁵⁸ *Ibid.*

¹⁵⁹ *R v Long*, 2015 ONSC 4509 at para 46 [*Long*].

¹⁶⁰ *R v Snelgrove*, 2018 NLCA 59 at paras 24–25 [*Snelgrove*].

¹⁶¹ *Ibid.*

¹⁶² *Buenacruz*, *supra* note 118 at para 70. He also determined that it was not an objectively reasonable belief which is not the correct legal test for this issue. The test is based on the impact of the abuse of authority on the complainant’s actual state of mind. Although Judge Pelletier made this finding that he couldn’t conclude that her belief was objectively reasonable his analysis appears to have been focussed subjective factors (*ibid* at paras 70–73).

“not the type of person...who would feel she had little choice but to go along with sexual activity with a superior” because she was “familiar with the complaints mechanism available to members of the CAF.”¹⁶³ He pointed to harassment complaints she had filed against other members of the unit for sexist comments prior to the incident with Buenacruz, to her response to sexualized and discriminatory statements made about her online by members of the unit following her complaint against Buenacruz, and to her awareness of the Deschamps Report to support this conclusion.¹⁶⁴

Consider this point further. Evidence of her awareness of the military’s complaints system, an awareness she possessed because she was (like the complainant in *Obele Ngoudni*) unfortunate enough to have allegedly experienced multiple forms of discrimination and harassment from multiple members of her almost exclusively male unit, was relied upon to conclude that she was “not the type of person” who would believe she had no options.¹⁶⁵ Instead of recognizing her ostracization from the unit, her testimony that superiors had made sexist and insensitive comments towards her, her awareness of the culture of hostility towards women in the CAF documented in the Deschamps Report, and online sexual harassment of her by other members of the unit in response to her complaint against Buenacruz, as evidence of her incredible vulnerability, these factors were used to conclude the opposite.

His determination that there was no abuse of authority was equally problematic. First he applied the wrong legal test to this aspect of his reasoning. He concluded that “there were no threats, promises or allusions of favourable treatment made by Warrant Officer Buenacruz.”¹⁶⁶ To establish that the sexual contact was non-consensual under this provision the prosecution must show that “there was a power imbalance between the parties” and “that the accused used

¹⁶³ *Ibid* at para 71.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid*.

¹⁶⁶ *Ibid* at para 67.

this imbalance to apply some subtle form of pressure on the complainant to consent”.¹⁶⁷ The “threshold is not a high one”.¹⁶⁸ It does not require coercion.¹⁶⁹ The key question is whether the accused exploited the power imbalance to secure an apparent consent to the sexual activity.¹⁷⁰ The provision is “engaged when an accused abuses, that is, misuses or makes improper use of his position of trust or authority, thereby inducing, that is, persuading or enticing the complainant to consent to sexual activity.”¹⁷¹ It “addresses the kinds of relationships in which an apparent consent to sexual activity is rendered illusory by the dynamics of the relationship between the accused and the complainant, and by the misuse of the influence vested in the accused by virtue of that relationship.”¹⁷² Contrary to Judge Pelletier’s reasoning, it does not require evidence of threats or *quid pro quo* promises.

Buenacruz took no steps to ensure that the complainant was aware that she did not have to engage in sexual activity with him by virtue of his rank. He called her four times in less than two hours on the day before the incident. According to the complainant he approached her at work. (Judge Pelletier reasoned that even if he had accepted the complainant’s evidence that the accused was the one to approach her to solicit sex, while she was at work, this would not demonstrate an abuse of his position.)¹⁷³ The accused told her to attend the parking lot behind the shopping center the following day. Again, the threshold is not high. It requires evidence of subtle pressure. Judge Pelletier’s conclusion that Buenacruz had not abused the power dynamic in this relationship did not appear to place any weight on these facts.

¹⁶⁷ *Long*, *supra* note 159 at para 45.

¹⁶⁸ *Ibid* at para 43.

¹⁶⁹ *R v Lutoslawski*, 2010 ONCA 207 (aff’d 2010 SCC 49) at para 12 [*Lutoslawski*].

¹⁷⁰ *Ibid* citing with approval *R v Makayak*, 2004 NUCJ 5 (Nun CJ) at para 70.

¹⁷¹ *Snelgrove*, *supra* note 160 at para 24.

¹⁷² *Lutoslawski*, *supra* note 169 at para 12.

¹⁷³ *Buenacruz*, *supra* note 118 at para 67.

Even more problematic, in concluding that Buenacruz had not abused his authority Judge Pelletier suggested that even if he had ordered her to attend the parking lot the test would not have been satisfied:

nevertheless...in my view, an order by a superior to attend at a given place and time with a view to provide sexual favours would be unlawful, hence non-enforceable in law....[S]uch an order would be manifestly unlawful, hence could be ignored. In fact, if such an order was obeyed, it could expose the subordinate to sanctions...These are basic propositions of military law. There are very few members of the CAF who would consider an order such as this one to require obedience, the same way as there are very few members of the CAF who would consider that they have no option but to comply with a demand of that kind that is not formulated as an order.¹⁷⁴

There are at least two significant failings in this part of Judge Pelletier's reasoning. First, the logical implication of his analysis is that consent will never be vitiated in circumstances in which a junior woman in the military is ordered to perform a sexual act by her superior. According to him, if a directive of this nature is issued as an order it is an unlawful one and she should know, as a member of the CAF, not to follow it and that she may face sanctions if she does comply. Conversely, if a directive of this nature is not formulated as an order she should know, as a member of the CAF, that she has the option not to follow it. The logic of blame reflected in this type of reasoning echoes the paradox for women posed by rape myths about consent: women who genuinely do not want to be raped will fight their attacker off; women who fail to successfully fight their attacker off actually 'wanted it'. Either way, in both lines of reasoning, women bear responsibility for the sexual contact that occurred.

The second difficulty is that, like his decision in *R v Obele Ngoudni*, underpinning Judge Pelletier's reasoning are assumptions about Canadian military culture that are empirically unsound. For example, on what basis does he assert that "very few members of the CAF" would

¹⁷⁴ *Ibid* at para 73.

feel they have no option but to comply with a sexual demand or order by their superior? The 2016 Statistics Canada report on sexual misconduct in the CAF found that “half (49%) of women who were victims of sexual assault in the past 12 months identified their supervisor or someone of a higher rank as the perpetrator”.¹⁷⁵ Nearly half of the 26% of women members of the Regular Force who reported being the target of sexualized behaviour (the majority of which was perpetrated against them by members who were their supervisors or higher in rank) in the previous year indicated that this experience made them fearful.¹⁷⁶ In the 2018 survey 130 women members of the Regular Force reported having been sexually assaulted by a supervisor or someone of a higher rank.¹⁷⁷ In the course of her consultations Madame Deschamps received “numerous comments about dubious relationships between members of different rank in which participants questioned whether the lower ranking (usually female) member had been induced into the relationship, or where consent was not truly genuine.”¹⁷⁸ Her report also highlighted research indicating that the hierarchical nature of military culture and the emphasis “on values of obedience, conformity and respect for superiors” creates the circumstances in which abuses of power flourish.¹⁷⁹ Judge Pelletier’s unsupported assertion that very few members of the CAF would feel they need to comply with a sexual demand or solicitation issued by their superior was speculative and is inconsistent with the research and data that is available.

¹⁷⁵ Statistics Canada, 2016, *supra* note 1 at 5.

¹⁷⁶ *Ibid* at 35.

¹⁷⁷ Statistics Canada, 2018 *supra* note 1 at 15 (this was a decline from 2016 when the percentage was 52%.)

¹⁷⁸ Deschamps Report, *supra* note 2 at 18. Deschamps did report that members were less likely to report incidents of *quid pro quo* harassment than they were to suggest negative impacts as a consequence of the overall culture of sexism in the CAF (*ibid* at 16).

¹⁷⁹ *Ibid* at 19 citing LM Cortina & JL Bergdahl, “Sexual Harassment in Organizations, A decade of Research in Review” in Stewart R Clegg & Cary L Cooper, eds, *The Sage Handbook of Organizational Behaviour* (London: Sage Publications, 2008) 469 at 474; Helena Carreiras, *Gender and the Military Women in the Armed Forces of Western Democracies* (London: Routledge, 2006) at 53; CM Hunt et al “Reviewing sexual harassment in the workplace – an intervention model” (2010) 39:5 *Personnel Review* 655 at 659.

This consideration of the Canadian military's sexual assault trial decisions, which is the first of its kind, is preliminary and part of a broader initial examination of the CAF's legal system in the context of sexual assault cases. Given the small number of trials that have been conducted in the past four years, and the fact that all nine of the acquittals since Operation Honour occurred in trials presided over by only two judges, it would be premature to draw definitive conclusions about this body of caselaw. Instead this first look at these trial decisions should be understood as compelling evidence of the need for further inquiry and research. As suggested in the concluding section to follow, this study may raise more questions than it answers.

Conclusion

Contrary to former Judge Advocate General Major-General Blaise Cathcart's assertion, the courts martial system and civilian criminal courts in Canada are not "exactly the same" in terms of resources, standards and personnel.¹⁸⁰ For example, the Auditor General's 2018 assessment of the courts martial system concluded that because of their system of frequent rotation, military prosecutors and defence counsel do not develop the necessary expertise and experience to effectively perform their duties.¹⁸¹ The rate of conviction for sexual assault through courts martial proceedings is dramatically lower than in the civilian system. The nature and outcome of plea bargaining in the military system differs in important ways from the civilian system. As explained, the vast majority of plea bargains in military sexual assault cases do not result in a *Criminal Code* conviction or *SOIRA* order and do result in remedies, such as reprimands and the equivalent of job demotions, that are unknown in the civilian system. The pool of judges

¹⁸⁰ Testimony of Cathcart, *supra* note 41.

¹⁸¹ *Report 3*, *supra* note 16.

available to preside over sexual assault cases is substantially smaller in the military legal system. Four judges have presided over all of the sexual assault trials conducted by the military since 2015. As noted, the same two judges presided over the nine trials that resulted in acquittals and were also the presiding judges in many of the cases involving plea bargains and subsequent sentencing decisions issued in sexual assault cases during this period. The variety of perspectives and collegial learning and informal checks and balances that may be facilitated when there is diversity within the membership of a particular court may be less likely to occur in a court with only four judges. The type of ‘cross-pollination’ more likely to occur on more diverse benches might be particularly important in the area of sexual assault law given the role that entrenched social assumptions about women and gender have historically played in the adjudication of these cases. The unique cultural and institutional context in which the military legal system operates also suggests a need for further research. To summarize, there are indeed important differences between the military legal system’s response to sexual assault and the civilian criminal legal system in Canada. These differences and their impacts on the prosecution and adjudication of sexual assault in particular have not been adequately studied.

The military’s jurisdiction to prosecute sexual assault cases is currently under consideration. The Supreme Court of Canada’s decision in *R v Beaudry* will determine whether it is constitutional to prosecute individuals for the offence of sexual assault through the courts martial system.¹⁸² If the Court upholds the military’s jurisdiction over sexual assault or if changes to the courts martial system to make it *Charter* compliant in response to a ruling in *Beaudry* are made so that the military can maintain jurisdiction of sexual assault, a number of further research

¹⁸² If the Supreme Court of Canada upholds the decision of the Court Martial Appeal Court in *Beaudry*, *supra* note 10, the military’s current legal system will lose jurisdiction over any criminal offence that exposes accused individuals to the possibility of a sentence of incarceration of more than five years.

questions, answers to which have not been provided in this preliminary study, should be examined.

For example, what objectives informed the decision to grant the courts martial system the authority to address sexual assault cases and are those objectives being achieved? What proportion of sexual assault cases are referred to the civilian system and on what basis? Do many CAF survivors request that their cases be transferred to the civilian system and, if so, are their requests being granted? Given military culture and the institutional setting in which these cases arise, does character evidence play a different role in sexual assault trials by court martial than in the civilian system? *Criminal Code* provisions such as those creating rules regarding a complainant's medical or counselling records, evidence of other sexual activity, or providing for testimonial aids for complainants do not specifically apply in courts martial proceedings.¹⁸³ Why aren't these protections explicitly included in the courts martial legal process and what, if any, impact does this have on complainants? Are military judges exercising discretionary authority to enforce these statutory protections for complainants or are sexual assault complainants in military proceedings less likely to benefit from the legal regime created to protect them in the civilian criminal system? Put more broadly, regardless of the outcome in *Beaudry*, should the Canadian military's legal system continue to maintain jurisdiction over sexual assault cases?

¹⁸³ If Bill C-77, *supra* note 69 passes, these protections will be available in military sexual assault trials.