



**Supporting the Troops:
FAIRNESS FOR CANADA'S SOLDIERS
Bill C-41**

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Report of the BC Civil Liberties Association on Bill C-41**

Canadian soldiers are entitled to the rights and freedoms they fight to uphold.

This report is a critical analysis Bill C-41, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*,¹ prepared by the British Columbia Civil Liberties Association (the “BCCLA”) for the House of Commons Standing Committee on National Defence. The BCCLA is a non-profit, non-partisan public interest organization committed to the protection of civil liberties and human rights throughout Canada. This report outlines the civil liberties concerns arising from procedures existing under the current *National Defence Act*,² (the “Act”) and what the BCCLA perceives to be the strengths and shortcomings of Bill C-41.

BCCLA believes that the summary trial process, which is used to try individuals for offences under the *Act* in an expedited manner, fails to meet minimum standards for procedural fairness. Despite the potential for significant criminal penalties, including imprisonment and stigmatizing criminal records,³ the summary process deprives Canadian soldiers of basic standards of fundamental justice, including the right to legal representation, the right to be tried according to the standard of guilt beyond reasonable doubt, the presumption of innocence, and the right to an impartial adjudication of one’s case. Weak trial procedures and limited mandatory training for decision makers tend to induce poor quality adjudication, false convictions and wrongful imprisonment. During deployment or active combat there may be sufficient reason to justify a departure from basic standards of procedural fairness, but absent such urgency and necessity, the rule of law and the principles of fundamental justice demand more for our soldiers.

¹ *Bill C-41, Third Session, Fortieth Parliament, 59 Elizabeth II, 2010.*

² *National Defence Act*, R.S. 1985, c. N-5. (the “Act”).

³ While there is no provision in the *Act* requiring that individuals found guilty of an offence through a summary trial under *Act* receive criminal records, there is no restriction that prevents these records from being provided to civilian records systems such as the RCMP’s CPIC system for storing criminal records. While section 4 of the *Criminal Records Act*, R.S. 1985, C-47, allows individuals convicted of service offences under the *Act* to apply for pardons a number of years after they have completed their sentences, and thus have any such documents removed from CPIC, these waiting periods are extensive and before that time individuals may still suffer the consequences of a criminal record.

The principal failing of Bill C-41 is its failure to address the clear violations of procedural fairness inherent in the summary trial system. The opportunity to strengthen this system and diminish its inherent injustice rarely knocks, but when it does, parliamentarians should answer the call and meet the challenge. Bill C-41 can be improved to strengthen the procedural weakness of the *Act* for the benefit of our soldiers and for the improvement of the administration of justice in Canada.

Giving Compliments Where Compliments are Due

The BCCLA supports many of the proposed amendments contained in Bill C-41, including those aimed at giving military judges more sentencing options and increasing the independence of the military judiciary. The BCCLA welcomes measures aimed at bringing the protections provided to defendants in the military context closer to those available in the civilian legal system. Many of the amendments in Bill C-41 increase the procedural protection provided to the accused and lessen the possibility of false convictions, and represent a step in the right direction for the military justice system from a civil liberties perspective. In our view, however, these amendments do not go far enough, and fail to adequately address the severe restrictions on civil liberties underlying the summary trial process.

Limited Exceptionalism for Military Tribunals Under the *Charter*

The BCCLA recognizes that military justice during combat or active deployment may be subject to some considerations that are not applicable in the civilian context. The need to maintain unit discipline and punish misconduct in a prompt and efficient manner may justify an expedited departure from rigorous and cumbersome procedures for trying an accused. However, these considerations do not apply in all military settings. The mere label “military” or “defence” does not justify any an unlimited degree of infringement on the civil liberties of those accused of

offences. Military tribunals do not have an exemption from the *Charter*,⁴ and individuals who join the armed forces do not check their civil liberties at the recruitment booth.

The Supreme Court of Canada confirmed that the *Charter* applies to military tribunals convened under the *Act* in *R. v. Genereux*,⁵ where it held that s. 11 of the *Charter*, which provides criminal due process rights to individuals “charged with an offence,”⁶ applies to courts martial under the *Act*. While the constitutionality of the summary trial procedure has never been addressed directly by the Supreme Court, current jurisprudence strongly supports the inference that the *Charter*, including the procedural rights in s. 11, also applies to the summary trial procedure. In *R. v. Wigglesworth*⁷ the Court stated that s. 11 of the *Charter* applies to an adjudicative process if that process is of a ‘public nature’ or if that procedure has ‘true penal consequences.’⁸ In *R. v. Genereux* the Court indicated that, because military tribunals have a public purpose and have the power to imprison individuals, they meet both of the criteria outlined in *R. v. Wigglesworth*.⁹ The summary trial process has the same ultimate purpose as the courts martial under the *Act*, and also exposes individuals to potential imprisonment. The court’s logic in *R. v. Genereux* should also apply to summary trials.

The summary trial procedure must thus abide by the procedural rights provided in s. 11 of the *Charter*, as well as the right not to be deprived of one’s life, liberty or security of the person except in accordance with the principles of fundamental justice, provided in s. 7 of the *Charter*. Any restrictions on the civil liberties of individuals being tried under a summary trial must thus be justified under s. 1 of the *Charter*.

⁴ *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. (the “*Charter*”)

⁵ *R. v. Genereux*, [1992] 1 S.C.R. 259.

⁶ *Charter*, s. 11.

⁷ *R. v. Wigglesworth*, [1987] 2 S.C.R. 1.

⁸ *R. v. Wigglesworth*, *supra*, at para. 23-24.

⁹ *R. v. Genereux*, *supra*, at page 29.

The Greater the Penalty, the More Careful the Process

Because the summary trial procedure exposes individuals to serious penalties, including imprisonment and a potential criminal record, the process must provide an accused with significant procedural protections in order to be found constitutionally valid. In *R. v. Rodgers*¹⁰ the Supreme Court of Canada indicated that the degree of procedural fairness required for a given judicial procedure under s. 7 of the *Charter* depends on the significance of the consequences of that procedure.¹¹ Basic fairness dictates that systems that impose significant penalties on individuals require increased procedural protections. As the court stated in *Suresh v. Canada (Minister of Citizenship and Immigration)*,¹² “the greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*.”¹³

Administrative judicial processes that have a lesser effect on an individual’s liberty or security of the person will generally require fewer procedural protections. Criminal or quasi-criminal procedures, which expose individuals to more deprivations of liberty and reputation, require more stringent protections. A summary trial process leading to imprisonment and a criminal record for the accused indicates the need for a high degree of procedural fairness. As the Supreme Court of Canada has confirmed in *R v. Wigglesworth*, “If an individual is to be subject to penal consequences such as imprisonment - the most severe deprivation of liberty known to our law - then he or she, in [the court’s] opinion, should be entitled to the highest procedural protection known to our law.”¹⁴

The BCCLA recognizes that the practical realities of a combat setting may sometimes weigh against limiting the degree of due process individuals receive. As noted above, an elaborate trial process may be impracticable and counterproductive during active deployment. In exigent circumstances, the BCCLA is willing to overlook the risk of injustice, even though it may carry

¹⁰ *R v. Rodgers*, [2006] 1 S.C.R. 554.

¹¹ *R v. Rodgers*, *Supra*, at paras. 47 and 53.

¹² *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.R. 3.

¹³ *Suresh*, *supra*, at para. 118.

¹⁴ *R v. Wigglesworth*, *supra*, at para. 24.

the risk of wrongful incarceration, in order to maintain order and discipline. On the battlefield, we cannot afford all of the refinements and trappings of procedural fairness. But absent exigent circumstances, off the battlefield, outside active combat, we as a society need to remember that, notwithstanding their culture of toughness and invulnerability, soldiers have a very human response to incarceration and stains on their reputations.

All of this suggests that, while we should make allowance for less stringent procedural protections for the military in times of war, active combat or exigent circumstances, outside of such circumstances the requirements of procedural fairness protections accorded to individuals tried under the military justice system should be the functional equivalent of those that attend the civilian justice system. The current summary trial procedure draws no distinction between exigent circumstances and non-exigent context, and is accordingly rife with violations of procedural fairness. The civil liberties of Canadian members of the armed forces is infringed to a far greater extent than is justified by the military context. Changes to the *Act* are necessary.

Civil Liberties Concerns Raised by the Summary Trial Procedure

Summary trials are a type of service tribunal used to try members of the Canadian forces who are accused of wrongdoing in an expedient, informal manner. They are the main alternative to courts martial, which more closely match the civilian judicial process and generally require more time and expense to try an accused. Summary trials are the principal method through which individuals in the military are tried. They make up roughly 95% of service tribunals convened each year under the *Act*, while courts martial are used to try the remaining 5% of cases.¹⁵

Summary trials can be used to try an accused charged with almost every offence under the *Act*, aside from particularly serious offences such as mutiny and certain seditious offences, and can also be used to try individuals for offences under other Canadian statutes¹⁶ such as the *Criminal*

¹⁵ Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Forces, A Review From 1 April 2008 to 31 March 2009. (“2009 JAG Report”) at page 126.

¹⁶ *National Defence Act*, s. 130(1).

*Code*¹⁷ and the *Controlled Drugs and Substances Act*.¹⁸ While certain minor offences, such as drunkenness and being away from a post without leave, can only be tried by way of summary trial, in other cases an individual charged with an offence under the *Act* is given the choice as to whether to be tried by summary trial or court martial.¹⁹ It is to be inferred that individuals charged with an offence may be daunted or intimidated by the more complex nature of proceedings before courts martial. A majority of those charged with disciplinary violations under the *Act*, especially those charged with minor offences, do not choose to avail themselves of their right to be tried through a court martial.

Although there is a formal requirement that accused persons have an opportunity to speak with legal counsel before making an election, it is clear from the context that accused persons are encouraged to make relatively quick elections and it doubtful that the waiver of a large number of important procedural rights can be considered to be an informed waiver.

One of the most serious deficiencies of the summary trial procedure is the fact that most accused lack adequate representation. Individuals being tried by summary trial do not have the right to be represented by a lawyer, and may be prevented from doing so even if they arrange for counsel at their own expense.²⁰ The *Act* does require that an accused be provided with an “assisting officer,”²¹ who can assist with many aspects of the process, including preparing an accused person’s case and making submissions on their behalf at the trial. However, assisting officers are not required to have any legal training, or any previous experience with the summary trial process. They are generally other officers in the accused’s unit, and are appointed for the role under the authority of the presiding officer at a summary trial, which in itself presents a conflict of interest. Many assisting officers therefore lack sufficient training and experience to provide an accused with effective representation.

¹⁷ *Criminal Code*, R.S.C. 1996, c. 46.

¹⁸ *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

¹⁹ *Queen’s Regulations and Orders for the Canadian Forces, Volume II-Chapter 108*, Art. 108.17(1). (the “*Regulations*”)

²⁰ *The Regulations*, Art. 108.14, Note (B).

²¹ *The Regulations*, Art. 108.14(1).

The 2007 JAG Annual Survey of the Summary Trial Process reveals troubling trends:

- Approximately 5% of persons tried by summary process reported that they were not offered an election to court martial.²²
- Only 76% of persons tried indicated that they had been given their choice of Advising Officer.
- 49% of persons tried reported that their Advising Officer did not explain to them their right to speak with military defence counsel.
- 70% of persons tried reported that the Advising Officer did not assist them with examining witnesses during the trial.
- Fewer than ½ of persons tried reported receiving key documents such as Investigation Reports and Military Police Reports.
- Over 66% of persons tried reported that the summary trial process was unfair. 16% of respondents believed that their guilt was predetermined.

Justice Antonio Lamer's 2003 report on the functioning of the military justice system in Canada cites questions regarding the competence of assisting officers as a significant concern with the summary trial system, stating that "based on my discussions with Canadian Forces members and submissions that I have received, there seems to be a widespread belief that assisting officers still do not have proper training and expertise to assist the accused."²³ The Judge Advocate General report on the effectiveness military justice system for the period between 2007 to 2008 also notes

²² *Judge Advocate General Annual Research Program, Survey on the Summary Trial Process, 2007*, pp.2-3. The figure of approximately 5% is inferred from reports that 38% of accused respondents to the survey stated that they were not offered an election, of whom 87% were not charged with an offence entitled to an election.

²³ The First Independent Review by the Right Honorable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35, at page. 60.

that “concerns over assisting officer training are consistently raised”²⁴ each time individuals who come into day-to-day contact with the system are surveyed regarding its effectiveness.

The procedure through which summary trials are performed also raises serious concerns. The trials are brief and superficial in nature, favoring expediency at the expense of procedural protections for the accused. While the accused is granted some basic rights such as the opportunity to question witnesses and present evidence,²⁵ the military rules of evidence, which apply in courts martial, do not apply in summary trials.²⁶ There is also no requirement to apply the rules of evidence and procedure generally applicable in a civilian criminal courtroom. Such rules serve an important purpose, ensuring that an accused person receives a fair trial and preventing false convictions. The lack of such rules and procedural safeguards in the summary trial procedure severely limits the quality of the justice provided under the process and increases the likelihood of false convictions.

Summary trials must be conducted by a ‘presiding officer,’ who is usually the accused’s commanding officer or someone delegated to act on their behalf.²⁷ The presiding officer essentially fulfills the duties of a judge, and is responsible for presiding over the trial, deciding on the accused’s guilt or innocence, and imposing a sentence. The fact that a commanding officer may try an accused is a serious concern. An accused’s commanding officer may have had significant contact with the accused before the trial, which could serve to significantly bias their decision. Such concerns regarding the inherent unfairness of being tried by one’s superior officers have been raised repeatedly in surveys conducted by the Office of the Judge Advocate General assessing the effectiveness of the summary trial system,²⁸ and represent a significant source of dissatisfaction with the current system.

²⁴ Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Forces, A Review From 1 April 2007 to 31 March 2008, (“2008 JAG Report”), at page. 30.

²⁵ *The Regulations*, Art. 108.20.

²⁶ *The Regulations*, Art. 108.20(1).

²⁷ *The Act*, s. 163.

²⁸ 2009 JAG Report, at page. 25.

Presiding officers are also first and foremost military officers, who generally lack judicial experience, and are provided with little training for their duties. It is questionable whether they thus have the skills or experience necessary to effectively preside over trials in a fair manner and effectively apply the legal concepts they are required to, which may lead to flawed decisions. For instance, in summary trials a finding of guilt must be based on the standard of guilty beyond a reasonable doubt,²⁹ the same standard that applies in the civilian criminal courts. However, it is questionable whether presiding officers, who are not judges and do not have significant legal training, have the necessary judicial skills and experience to adequately assess whether an accused is guilty beyond a reasonable doubt.

There is also concern with the quality of the guidance given to presiding officers in how to apply the relevant legal principles. In what may be an acknowledgement of the difficulty that presiding officers may have enforcing the beyond a reasonable doubt standard, the *Regulations* attempt to provide guidance for presiding officers in this regard, noting that: “A reasonable doubt should not arise where, based on a fair and impartial consideration of all the evidence, the presiding officer has a decided and firm conviction that the accused is guilty.”³⁰ A ‘decided and firm conviction that the accused is guilty’ is not enough by itself to sustain a conclusion that an accused should be found guilty beyond a reasonable doubt³¹, implying instead that a subjective belief in the guilt of the accused is enough for a finding of guilt. There is thus cause to question whether the officers presiding over summary trials under the *Act* are applying legal concepts such as the beyond a reasonable doubt standard appropriately in practice.

The inadequate evidentiary and procedural protections afforded by the summary trial system, as well as the concerns with the training and experience of presiding officers, cast serious doubt on whether individuals will receive a fair assessment of their guilt, and increase the likelihood that accused individuals will be found guilty when such a finding is unwarranted. It is notable that only roughly 6% of summary trials result in the acquittal of the accused, with over 90% resulting

²⁹ *The Regulations*, Art. 108.20(7).

³⁰ *The Regulations*, Art. 108.20, Note (B).

³¹ *R. v. Starr*, 2000 SCC 40; *R. v. Lifchus*, [1997] 3 S.C.R. 320

in a finding of guilt.³² These concerns are compounded by the fact that presiding officers in summary trials are not required to maintain an official transcript of the trial proceedings, making it difficult for individuals who were treated unfairly to appeal their conviction or otherwise seek redress.

Despite the limited protection afforded to accused individuals, and the resulting high potential for false convictions, the *Act* allows for significant penalties to be imposed against those found guilty of an offence following a summary trial. The presiding officer in a summary trial can impose imprisonment for up to 30 days, a reduction in rank, a fine, and a reprimand.³³ There is also potential for a civilian criminal record for the accused.

Summary trials raise serious constitutional issues. Summary trials lack many of the procedural safeguards of the civilian justice system, including the right to be represented by counsel and rules regarding the admissibility of unreliable evidence. The fact that incarceration may result from such a flawed process is significantly problematic, and likely represents a breach of s. 7 of the *Charter*, which gives persons the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. In *Suresh* the Supreme Court of Canada held that the principles of fundamental justice include, at the very least, common law principles of procedural fairness.³⁴ Additionally, as we have already discussed the potential for imprisonment means that individuals tried under the current system are entitled to a high degree of procedural protections. While the courts have yet to directly address the issue of whether the protections provided by the summary trial system meet these requirements, it is highly likely that the significant flaws in the summary trial process, including the fact that the process exposes individuals to potential imprisonment without providing them a right to be represented by counsel, will lead to a finding that the summary trial procedure does not provide individuals with an adjudicative process that respects the principles of procedural fairness. A person sentenced to imprisonment through a summary trial may thus make a case that

³² 2009 JAG Report, Annex E, at page. 129.

³³ *The Act*, s. 163.1(3).

³⁴ *Suresh v. Canada*, *supra*, at para. 113.

their conviction and imprisonment infringed their s. 7 *Charter* rights, and could be successful in appealing their conviction through the court system.

It is notable that currently the *Regulations* state that imprisonment should only be ordered in the most serious of cases, essentially as a last resort,³⁵ and indeed every year only roughly 35 summary trial cases (around 2% of the total) result in imprisonment.³⁶ Removing imprisonment from the array of potential sentences in a summary trial will not significantly curtail effective discipline in the majority of cases. If a case is serious enough to justify imprisonment, it is serious enough for a court martial.

Summary trials may also result in the imposition of a civilian criminal record. A criminal record, even for a minor offence, can seriously disrupt the life of an individual by restricting their ability to find employment or travel. There is no indication that the civilian criminal record will clarify that the process leading to a conviction is significantly less reliable than the civilian criminal process.

Imposing a criminal record on an individual as a result of a summary trial conviction is also unfair because the military and civilian approaches to sentencing are fundamentally different. Civilian criminal courts have significantly more freedom in deciding on sentences than military disciplinary authorities such as presiding officers in summary trials do. For instance, justices in the civilian courts do not have to consider the effect that an accused's actions have had on unit discipline or morale, and can thus lend greater weight to factors such as the rehabilitation of the accused and other considerations that may mitigate the seriousness of an offence. The civilian courts also have access to more sentencing options, such as community service and alternative measures programs which can be imposed in order to rehabilitate the accused without also leading to a criminal record. Presiding officers in summary trials may have a different focus. They are military officers, not judges, and their primary concern is likely to be unit discipline and deterring future violations, not the effect the sentence they impose will have on an accused in the civilian world. Indeed they are required by law to take such additional considerations into

³⁵ *The Regulations*, Art 108.20, Note (H).

³⁶ 2009 JAG Report, Annex E, at page. 132.

account.³⁷ While there may be some justification for such an approach to sentencing in the context of military discipline, it is fundamentally unfair that the consequences extend beyond the military context and result in a civilian criminal record for the accused.

The Inadequate Remedies of Bill C-41

While Bill C-41 contains significant proposed amendments to the *Act*, these amendments are largely intended to change other aspects of the military justice system, and few of the proposed amendments affect the summary trial procedure. The main proposed changes in Bill C-41 that do affect summary trials are:

- An amendment requiring that an individual be charged with an offence under a summary trial within 6 months of the date that the alleged offence occurred (s.35).
- An amendment allowing service tribunals (including summary trials) to impose absolute discharges as a sentence (s.62).
- An amendment stating that persons convicted of certain minor offences under the *Act* would no longer be deemed to be convicted of a criminal offence indicating their conviction will not result in a civilian criminal record. This proposed amendment would also apply retroactively to those who have already been convicted of an offence under the *Act*, resulting in the removal of those convictions from their criminal records (s.75).

The BCCLA supports these proposed changes, however we believe that they fail to fully address the serious civil liberties violations identified in this report. The proposed amendments do not give a person being tried through a summary trial a right to effective representation, nor do they

³⁷ See *The Regulations*, Art. 108.20, Note (F), which outlines the factors presiding officers must take into account on sentencing. Many of these factors are tailored to the military context. For instance Note (F)(i) asks presiding officers to consider that “the deterrent effect of the sentence on the offender and other members, *bearing in mind that one of the purposes of summary proceedings is the maintenance of military discipline at both the individual and unit level.*” (emphasis added)

contain any language removing imprisonment from the possible sentences that can be imposed in a summary trial, nor do they remedy any of the other harmful aspects of the summary trial procedure. These amendments thus represent positive but small changes to the summary trial system that fail to adequately address the significant unfairness that the system can result in. More changes are necessary to fully address the significant concerns raised by the summary trial procedure.

Conclusion and Recommendations

The procedure through which summary trials are performed under the *Act* violates the civil liberties granted to all Canadians in significant ways, allowing members of the armed forces to be tried, imprisoned and stigmatized for criminal and other offences without a right to counsel or the benefit of many aspects of due process. The summary trial procedure also allows for an accused to be tried by their commanding officer, who may be biased by their previous contact with an accused and may lack the training and experience required to conduct a fair trial. Despite these grave procedural flaws, summary trials can subject defendants to imprisonment and result in civilian criminal records. There is no justification for imposing such serious consequences on individuals through a procedure so severely flawed.

The BCCLA recommends that the following amendments be made to the *Act* in order to remedy the problems outlined in this report:

- a) The *Act* should be amended to remove imprisonment from the list of permissible sentences that may be imposed through a summary trial. This would allow the charging officer to elect either a court martial proceeding if the alleged offence has a 'public dimension' sufficient to justify imprisonment or a summary trial process if the matter is exclusively or predominantly a matter of unit discipline.
- b) The scope of the proposed amendment in s.75 stating that convictions for certain minor offences in summary trials should not result in criminal records should be

expanded to state that no accused individual should receive a criminal record after being convicted of an offence through a summary trial.

- c) The *Act* should be amended to require that training be provided to assisting officers regarding the summary trial process so that they may be better prepared to represent individuals accused of offences.
- d) The *Act* should be amended to require that, when practically feasible, an accused should not be tried by one's direct superior officer or any other officer who may have had extensive contact with the accused previous to the trial.