

CANADIAN MILITARY LAW ANNOTATED

by Justice Gilles Letourneau and
Colonel (ret'd) Michel W. Drapeau

Toronto: Thomson/Carswell, 2006
1787 pages, \$185.00

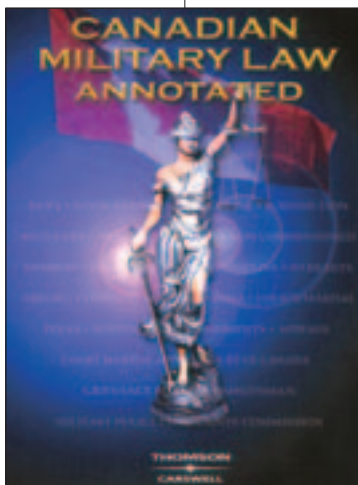
Reviewed by Martha McDougall

Last year, Justice Gilles Letourneau and Colonel (ret'd) Michel W. Drapeau published Canada's first book on military law, entitled *Canadian Military Law Annotated*. A very large book, it attempts to fill a huge void in the literature on military law.

One need only look at the bibliography to get a sense of the lack of current literature on the subject of military law. As Professor Chris Madsen points out in his book on the *history* of military law, *Another Kind of Justice* (1999): "A glaring need exists for wide public circulation of decisions from Canadian military courts and of general information on military law." The question is: "Does this book fill the void that exists in Canadian literature?" The answer is that it is a start.

As the title indicates, the book is an annotation of, or commentary upon, the laws that regulate the military in Canada. Its longest section, Part II, annotates the *National Defence Act* (Chapter 2) by providing ample commentary, facts, and case law after each section of this statute. Part II also provides commentary upon the *Visiting Forces Act* (Chapter 3), describes and comments upon legislation implementing into Canadian domestic law the international prohibitions against crimes against humanity and war crimes (Chapter 4), then comments upon and provides a table of contents for the Geneva Conventions, the international laws of armed conflict (Chapter 5).

Parts III and IV of the book are similar to Chapters 3 to 5 of Part II – they provide more commentary and facts related to these instruments than they perform legal annotation. Part III reproduces the Court Martial Appeal Court Rules of Practice and Procedure (Chapter 6) and the Military Rules of Evidence (Chapter 7), while Part IV reproduces the NATO Status of Forces Agreement (Chapter 8). The fact that the book does not annotate or provide case law for the Military Rules of Evidence is particularly unfortunate, given that there is a great amount of jurisprudence that is relevant to these Rules. And counsels who appear before courts martial would greatly benefit from an annotated version of these rules of evidence.



A major strength of the book is that it makes military law accessible to the layperson. Those totally unfamiliar with military law will now have some guidance on the workings of the Department of National Defence and some of the rules that govern members of the military. The book describes – mainly in its lengthy Introduction (Chapter 1) – several offices (such as the Communication Security Establishment, the Canadian Forces Ombudsman, and the Military Police Complaints Commission, to name a few) that are either related to, or directly controlled by, the Department of National Defence, or the Canadian Forces. Another important service provided to the reader is extensive information about rules that are not in the *National Defence Act*. For example, throughout its longest chapter on the *National Defence Act*, the authors pair sections of the *National Defence Act* with their corresponding regulations (known as the *Queen's Regulations & Orders, or QR&Os*) and occasionally with their corresponding orders (the most important written orders being the Canadian Forces Administrative Orders, or CFAOs, and Defence Administrative Orders and Directives, or DAODs).

This pairing of the statute to regulations and orders is particularly important since the regulations are for the most part exempt from publication in the *Canada Gazette*, and have, thus far, been less accessible to civilians. As for orders, they may be statutory instruments (as defined in the *Statutory Instruments Act*), but they are not regulations subject to the rules of publication. While the book does not, for the most part, reproduce the text of the actual regulations, it does explain the contents of the various QR&Os it cites.

Another example of how the book (Chapter 2) makes military law more accessible is its explanation of the interplay between Canadian military law and Canada's *Criminal Code*. This question of how military members and persons subject to the military Code of Service Discipline are also subject to criminal code offences is key to understanding Canada's military law. In very broad terms, the *National Defence Act* deems an offence under the *Criminal Code* or other federal legislation to be a service offence under the *National Defence Act* – thus making the *National Defence Act* the legislative authority for the prosecution of ordinary crimes in the military.

There are, of course, many other differences for members of the military who are accused of crimes, a fact that makes doctrine on military law all the more important. That the *National Defence Act* regulates not only criminal activity but also disciplinary matters (non-criminal

BOOK REVIEW ESSAYS

activity) is an important line of demarcation between the law that applies to members of the Canadian military, and the law as it applies to civilians. Persons subject to the Code of Service Discipline can be brought to justice (to courts martial and summary trials) not only for crimes but also for breaches of discipline.

Interspersed throughout these pages are many references to history. The best is the history of the Canadian military found in the Introduction or Part I. Other historical references include a history of the right of petition, or the right to lodge a grievance, a legislative history of military statutes both before and after Confederation, a brief history of the Judge Advocate General's office, the origins of courts martial, the history of reprimands, the history of dismissal from the military, the historic purchase of the status of officer, as well as a history of the laws of armed conflict. The book scatters this information throughout its many pages – thus making access to it more difficult than if it had been made into one chapter – but this is valuable information nonetheless.

While the book is effective, it has both minor and major shortcomings. Editing is an issue. For example, the page references to Chapter 5 on page 1397 (dealing with the *Geneva Convention Act*) are wrong. As well, the organization of the book makes the reader struggle to find information – thus, the importance of the page references provided here. The book would have benefited greatly from headings on the top of each page, indicating what section of the statute the text is discussing. Further, the extensive pages of commentary and related provisions, including charts, facts, and figures, cause the reader to lose track of the section being examined.

More importantly, the book fails to examine many substantive issues that would have been of great value to anyone interested in the administrative legalities of the military. Generally, the book does justice to the Code of Service Discipline, but it does not do justice to issues not related to the Code. For example, while dismissal may be one of the harshest penalties available to a military judge, the book does not explore the release of a member from the Canadian Forces. Apart from the useful reproduction of the tables of QR&O 15.01 on release, the book makes no mention of the many legal cases on administrative release that some would equate with dismissal, since both sanctions mean the termination of service. A book on military law that does not mention the trilogy of cases (*St. Thomas* [1993] FCA, *Husband* [1994] FCA and *Robinson* [1994] FCA) on the release of members, due to breaches of universality of service (Section 33 of the *National Defence Act*) commits a substantive error.

After referring to this text, a reader could be forgiven for equating the *National Defence Act* with the Code of

Service Discipline. To be fair, most of the sections of the *National Defence Act* consist of the Code of Service Discipline, given that only statute may create penal sanctions. There is, however, an important body of law that deals with the rights and obligations of a member of the Canadian Forces on matters such as enrolment, release, and administrative discipline that has no basis in the Code of Service Discipline. This corpus of law, military administrative law, is almost completely forgotten in this tome.

It is by exception that the book examines some matters, such as the military grievance system. But even in these pages, the book does not provide enough information or case law on a legal question (with a huge body of case law) about when a member may bypass the grievance system. Providing more of an explanation of what constitutes an adequate alternative remedy to the grievance system for a member of the military would have been useful to the reader. It is no surprise, therefore, that the book also neglects to explore – other than referring to active service in Section 32 – a key question of operational law, namely, how Parliament calls the Canadian Forces to active service.

Some simple things could have improved this book. While it does provide references to relevant QR&Os, and it has a section on the legislative framework of the military, there is little detail about the legal hierarchy to QR&Os, as opposed to CFAOs, DAODs, and other instruments, such as CBIs (Compensation and Benefit Instructions) and CANFORGENs. This massive work should have indicated how a regulation (a legislative instrument) differs from an order/instruction (not a legislative instrument), where its readers could locate QR&Os (they are available for inspection at JAG offices across the country as well as online), CFAOs (available online at <http://www.smafinsm.forces.gc.ca/admfincs/subjects/cfao/intro_e.asp>), and DAODs and where to locate other instruments – such as the CF Dress Instructions, CBIs, and CANFORGENs.

Lawyers or members of Canada's legal community have not had access to military law in any systematic way since obligatory military law courses were dropped from the curriculum of law schools in the 1950s. This means that the legal community does not possess a textbook on Canadian military law. Both Justice Letourneau and Michel Drapeau are to be commended for their efforts to produce one. Let us hope that others will fill the gaps left by this first effort.

Martha McDougall is an Executive Member of the National Military Law Section of the Canadian Bar Association.