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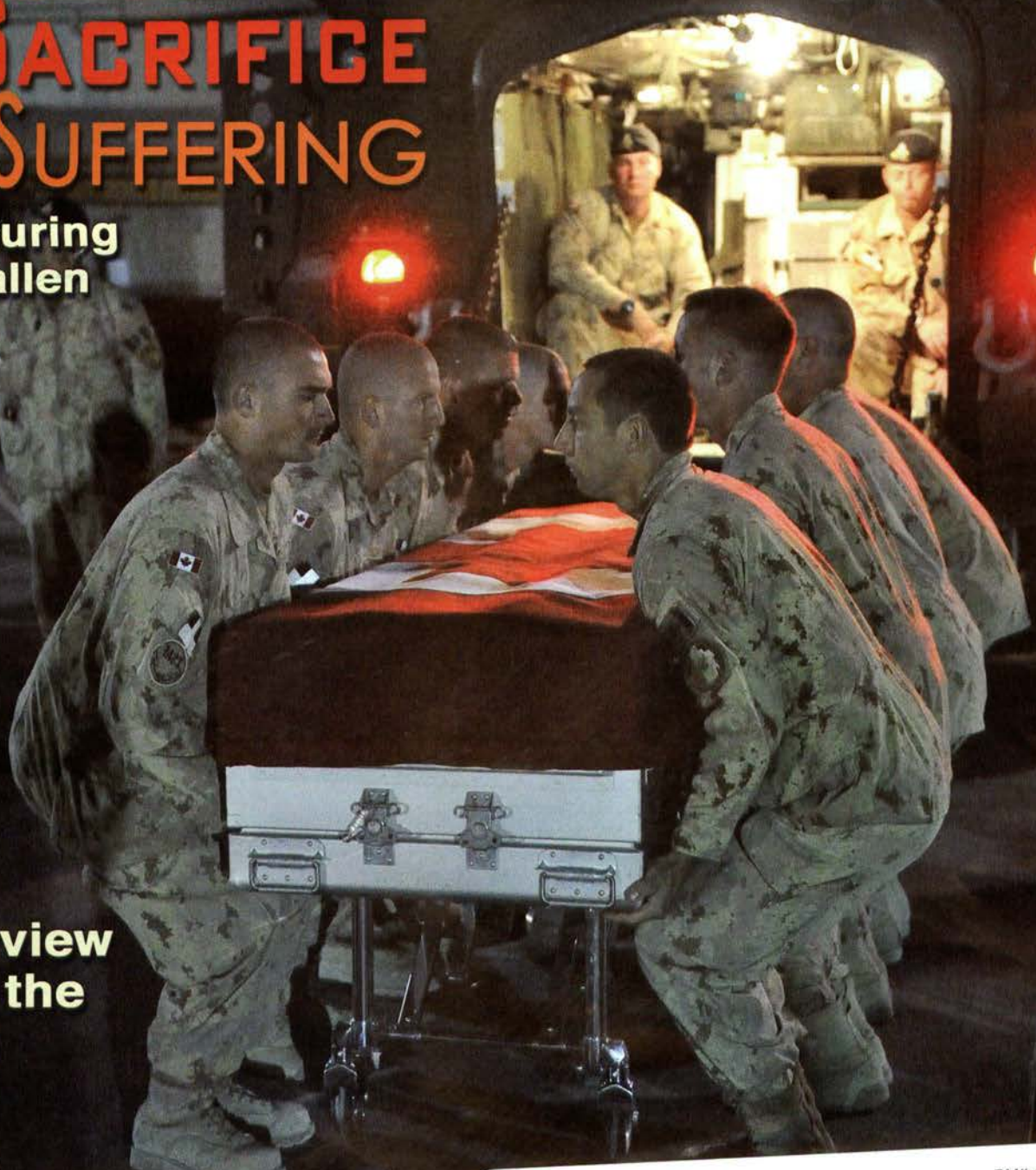

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LAW & ORDER

Canada's military justice system

Further and further behind international norms

by Michel W. Drapeau

AMENDMENTS TO THE NDA

In March 2011, the minister of National Defence announced that a review of the National Defence Act [NDA] would be conducted by Justice Patrick J. Lesage to ensure that the military justice system is not too far out of step of the civilian system and is fair overall. Then, on October 7, 2011 the government tabled Bill C-15 amending the National Defence Act to provide, *inter alia,* for the appointment of yet more military judges while giving them security of tenure until their retirement, for additional sentencing options, for the delegation of the CDS powers as the Final Authority in the Grievance Process, etc.

What is most astonishing is that this bill was tabled *before* Justice LeSage submitted his report. Furthermore, as an aside, it is beyond my comprehension that government would consider, for instance, appointing a Reserve Force Military Judges Panel when the existing four military judges are already more than sufficient to handle the current work load of less than 70 courts martial per year.

Of more significance and most debatable is the proposal under Bill C-15 for the Chief Military Judge to appoint retired members of the CF judiciary to serve "on call." This would seem to fly in the face of a recent Federal Court of Appeal decision (Felipa v Minister of Citizenship and Immigration) as incompatible with a fair and independent judiciary.

WHAT'S HAPPENING IN BRITAIN RIGHT NOW

Given that our military justice system is deeply rooted in the English tradition, it is appropriate that we keep informed of the UK's impressive legislative reforms that have been made in recent years to bring its military justice system more in line with the 1953 European Convention of Human Rights. The ECHR has had a significant impact on all 47 signatory countries (including 27 European Union member states) that have adopted its principles.

Starting with the Findlay decision, the UK amended its military judicial processes to ensure that it more closely reflects the provisions of the ECHR. First, the Judge Advocate General (JAG) was stripped of his legal advisory and prosecutorial function. Second, the JAG position was then civilianized and moved to the Ministry of Justice. Third, the prosecution function was civilianized and moved to the Ministry of the Attorney General. Fourth, an appeal court was formed to hear appeals of summary trials. These changes will be further discussed below.

Given that our Charter of Rights and Freedoms is, in most respects, analogous to the ECHR, I know of no legal, structural or operational reasons why similar changes cannot quickly be incorporated in Canada's military system of justice. Quite the reverse. I am at loss to understand why, in drafting Bill C-15, Cabinet has not seen fit to take counsel from some of our most trusted allies since, here and elsewhere, changes to a military justice system are seldom, if ever, promoted from within the military (read the JAG). Indeed, contemporary history shows that impetus for new (any?) measures to strengthen the independence of the Canadian military justice system and the principal actors within it (which would improve the

credibility of the system, the quality of the justice it dispenses and the level of discipline within the service) must necessarily come from civil government or the judiciary.

THE OFFICE OF THE JAG

The new standard. In the UK, in the seminal case of Cooper v UK [2003] the European Court of Human Rights ruled that the presence, in a court martial, of a civilian judge advocate — with legal qualifications, judicial independence, and a pivotal role in conducting the proceedings — constitutes not only an important safeguard but one of the most significant guarantees of the independence of the court martial proceedings. This is a case that has had resonance throughout Europe, from the UK to Turkey and elsewhere.

As a result, the UK JAG is now a civilian and is part of the Ministry of Justice. To ensure complete independence from the military forces, the UK JAG also no longer provides advice to the military chain of command. In the UK, the JAG has a single function. He presides over trials of service members of the RN, the Army and the RAF for serious offences (or on election of the accused). These are heard in a standing court known as the Court Martial. He also presides over the Summary (Trial) Appeal Court. [More about this later.]

This is not so in Canada. The judges who preside over courts martial are CF officers each with a military rank. There are no appeal courts for a summary trial. Also in Canada, the JAG is triple-hatted. First, he is the legal advisor to the Governor General, the minister of National Defence, DND and the CF in matters relating to military law, including military justice. Second, he has general supervision over both the Office of Military Prosecution and the Office of Defence Counsel services. Third, he is charged explicitly with the superintendence of the administration of the CF military justice system. Contrary to his title, however, the JAG has no judicial function. It begs the question: why he is referred to as the "judge" advocate general?

PROSECUTING AUTHORITY

In the UK, an independent body known as the Service Prosecution Authority (SPA) was created under the Armed Forces Act 1996 by merging the RN Prosecuting Authority, Army Prosecuting Authority and RAF Prosecuting Authority. The role of the SPA is to review cases referred to it by the service police and/or the chain of command and, where appropriate, to prosecute that case at Court Martial or Service Civilian Court. Most importantly, the SPA operates under the general superintendence of the Attorney General, and remains fully independent of the military chain of command.

In Canada, the Director of Military Prosecutions is a CF officer who reports to the JAG who, in turn, provides advice to the military chain of command on the operation and administration of the military justice system. To a casual observer, this is anything but 'independence' of the prosecuting authority from the military chain of command.

LEGAL ADVICE TO MILITARY MEMBERS

In the UK, legal assistance and advice is provided to members of the service community stationed outside the UK on any area of law apart from conveyance, landlord and tenant administration of estates and the running of a private business. Reports indicate that most of the work relates to personal injury, sale of goods and services, defence of criminal charges in foreign courts and dissolution of marriage and other family matters.

In Canada, CF members serving abroad are not entitled to receive legal advice on civil matters from service lawyers. This has been disputed by officers at the JAG. For example, Colonel Michael Gibson stated in a recent issue of *Esprit de Corps* that "Canadian Forces members serving abroad have exactly the same rights to legal counsel as any other Canadian citizen." This may be so, but it is the inability of such members to exercise these rights that demonstrates a constructive denial to these rights.

LEGAL ADVICE AT COURT MARTIAL

Once served with prosecution papers, UK armed forces personnel may apply for legal aid, with a view to being represented by a civilian or service lawyer. If it is granted, the member may have to make a financial contribution that will be assessed in the light of his or her personal financial situation. The legal aid contribution is re-assessed post-trial, to take into account the findings and sentence of the court. The member may be required to make a further contribution towards the cost of his or her defence.

In Canada, the story is quite different. Here, legal assistance is provided by the Director Defence Counsel Services (DDCS) who reports to the JAG. At present, there are a total of four uniform lawyers at the DDCS to provide trial and appellate representation to accused CF members and legal advice to a person subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry. Considering that there are no less than 150 lawyers in the JAG branch, this is indeed a miniscule number to serve the legal interests of the approximately 90,000 serving Regular and Reserve personnel.

SERVICE TRIAL OF CIVILIANS

In the UK, civilians and dependants of service personnel serving abroad may be tried for minor offences by a Service Civilian Court, and by a Court Martial Court for more serious offences. The Service Civilian Court is constituted of an all-civilian board acting as a jury. In Canada, a civilian tried by a general court martial would face a military judge, a military prosecutor, and a panel of five CF officers. Were the Canadian civilian to have a trial by a civil court, he would be judged not by five, but twelve of his peers; surely, a recipe for yet another constitutional challenge.

SUMMARY TRIALS

Summary trial systems in both the UK and Canada are meant to summarily deal with disciplinary and criminal matters by the commanding officer of the accused. There is no record of proceedings and no requirement of a commanding officer to be legally trained. Nor is legal counsel permitted to attend the proceedings.

In the UK, an accused who is dissatisfied with the outcome of a summary hearing has the right of appeal to the Summary Appeal Court (SAC). It consists of a civilian judge advocate and

two military 'lay' members (officer or warrant officer) outside the relevant chain of command. A case before the SAC is a fresh review of the relevant evidence and a reconsidering of the decision on punishment. The judge advocate presides over the hearing and gives rulings on matters of law, including practice and procedure. Decisions to grant or dismiss the appeals are made by a majority of the three members of the court. Further appeals on a point of law may be made to the High Court of England and Wales.

In Canada, there is no right of appeal from a finding at summary trial, despite that the maximum penalty that can be given is up to 30 days detention. A Victorian system of justice already declared as being non-compliant with the ECHR. A Victorian system of justice already abandoned by the UK, Australia, New Zealand, Ireland and most of the 47 countries signatory to the ECHR.

NON-JUDICIAL SUMMARY PROCEEDINGS

In the UK, all three services operate a separate system of minor administrative action (MAA) — a system of administrative discipline, distinct from their criminal disciplinary systems — for minor infringements. Examples of offences attracting minor administrative action include relatively trivial misdemeanours — a few minutes late for guard duty, poor performance in a routine task, etc. Usually, it will mean a quiet word with a superior in a relatively formal setting with a minor punishment (e.g., reduced shore leave, extra guard duty). The officer dealing could be one or several ranks above the individual concerned, but this would depend on circumstances and possibly on repetition. MAAs are not recorded on an individual's service record, but are recorded centrally within a unit.

This change allows junior commanders to deal with the lowest level of misconduct, and it has resulted in a 50 per cent reduction in the number of summary dealings in the army. This has empowered junior leaders and improved discipline without resorting to the more time-consuming summary dealing procedures, thereby removing the risks associated with convening a summary hearing. Lawyers and civilians would not be involved in this form of discipline.

In Canada, although it might exist in practice, there is no formal recognition of an alternative to formal summary proceedings.

CONCLUSION

National concern with military justice has been infrequent in Canadian history, while emphasis on discipline and obedience to orders has been consistent. The time has come to dust off the National Defence Act and make substantive changes to bring it more in line with the Charter of Rights and Freedoms. In doing so, the CF should incorporate worldwide trends aimed at modernizing military law systems, which, like ours, deviate from universally accepted human rights legislation. A good place to start would be to review the recent findings made by the International Society of Military Law and the Law of War at its 2011 conference in Rhodes on military jurisdiction, which showed Canada lagging behind in upgrading its military justice system to meet the ECHR standards or for that matter its own Charter of Rights and Freedoms.