**OPINION:** MILITARY JUSTICE

# Falling out of step? Canada's military justice system has opportunity to strengthen bond between Canada and England

Our National Defence Act was based on military traditions handed down from the Crown. However, even the British Crown has unequivocally recognized that the Code of Service Discipline, as it stands, is not in conformation with contemporary human rights values.

BY MICHEL W. DRAPEAU

OTTAWA—This summer, the Conservative Government made two landmark, albeit cosmetic, changes that sought to close the gap between our ties with our mother-land: the reintroduction of the titles 'Royal' to both the Navy and the Air Force, and more recently with a pronouncement that a portrait of the Queen of Canada will now hang in Canadian embassies. I endorse both changes.

Another tie to the monarchy is our system of military justice which is deeply rooted in the English tradition. In recent years, the U.K. made substantial changes to its military justice system to bring it more in line with the nation's contemporary values and, as importantly, to bring it in sync with their civilian criminal justice system. Canada has yet to contemplate similar changes. Given that we share a common legal heritage and a common set of values, Canada should consider emulating some of these changes to our own military justice system.

Truth be told, the core features of the National Defence Act have been static for decades. Yet, there are precedents indicating the urgent need to bring our military justice on par with civilian society standards. This includes a reflection on how our Code of Service Discipline deviates from the Canadian Charter of Rights and Freedoms. To determine this standard, all that our Parliament needs to do is look at the United Kingdom, and the recent impressive legislative reforms that have been made there. In short, they took the following actions to amend its military judicial process to ensure that it more closely reflect the provisions of the European Convention of Human Rights.

The Judge Advocate General (JAG) was stripped of his legal advisory and prosecutorial function. The office of the JAG was civilianized and moved to the Ministry of Justice. The Prosecution function was civilianized and moved to the Ministry of the Attorney General. An appeal court was formed to hear appeals of summary trial verdicts and sentences.

I know of no legal or operational reasons as to why similar changes should not be incorporated in Canada's military system of justice since our Charter of Rights and Freedoms is, in most respects, analogous in values to the ECHR.

### The Office of the Judge Advocate General (JAG)

Recent U.K. reforms have transformed the entire organization of the JAG. The JAG is now a civilian and is part of the Department of Justice. He is appointed by Her Majesty the Queen. The lord chancellor appoints individuals to the judicial offices of vice judge advocate general or assistant judge advocate general. Also, to ensure complete independence from the military, the JAG no longer provides legal advice to the military chain of command.

In Canada, none of this is replicated, bringing into question the independence of the JAG. For example, in Canada, the JAG is the legal adviser to the Governor General, the minister of National Defence, the Department of National Defence and the Canadian Forces in matters relating to military law, including military justice. He also has general supervision over both the Office of Military Prosecution and the Office of Defence Counsel services. Moreover, contrary to his rather omnipotent title indicating a multiplicity of functions, the JAG has no judicial function. It's a good thing because he has no judicial status.

On the other hand, in the U.K., the JAG, (presently, His Honour Judge Jeff Blackett, a senior judge) deals only with trials of Service men and women in the Royal Navy, the Army and the Royal Air Force for serious offences (or on election of the accused), which are heard in a standing court known as the Court Martial created by the Armed Forces Act 2006. His principal duties include the following: To act as the presiding judge in the services criminal jurisdiction and leader of its judges, thereby supervising the jurisdiction; to specify judges to conduct specific trials at Court Martial, Service Civilian Courts or Summary Appeal Courts.

### The JAG and the Common Law

In the U.K., the case of Cooper v. U.K. [2003] the ECHR 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 not so in Canada. The judge who presides over a court martial is a military officer, with a military rank. (Ironically, sometimes the judge is of a rank lower than that of the accused. This begs the questions why does the judge have any military rank?) All that needs to be done to emulate what has occurred in the U.K. is to amend the NDA so that judges at court martial now be civilians.

### Prosecuting authority

In the U.K., an independent office known as the Service Prosecution Authority (SPA) was created under the Armed Forces Act 1996 by merging the prosecuting authority of each of the three services. The role of the SPA is to review cases referred to it by the Service Police and the chain of command, and, where appropriate, to prosecute that case at court martial or Service Civilian Court. The SPA act as respondent in the Summary Appeals Court and represents the Crown at the Court Martial Appeal 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 Canadian Forces 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. Like many others, I apprehend a conflictual situation.

### Legal advice to military members

Service members in Canada 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, recently Colonel Michael Gibson, deputy JAG, has stated 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 demonstrate a constructive denial to these rights.

The U.K. has altered its position. Currently, legal assistance and advice is provided to servicemen and members of the service community stationed outside the U.K. in 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.

### Legal advice court martial

Once served with prosecution papers, U.K. Armed Forces personnel may apply for legal aid, with a view to being represented by either 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 reassessed 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 of Defence Counsel Services who reports to the JAG. At present, there are a total of (only) four uniformed lawyers at the directorate of Defence Counsel Services 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. A tall task performed by a very small number of lawyers.

### Service of civilians

In the U.K., civilians and dependants of service personnel serving abroad may be tried for minor offences by a Service Civilian Court or by a Court Martial for more serious offences. The Service Civilian Court is constituted of an all-civilian board acting as a jury. In court martial cases, the Judge Advocate (a civilian) sentences alone. 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. Consider that if the same Canadian civilian was tried by a civil criminal court, he would be judged not by five but 12 of his peers.

### Summary trials

Summary trial systems, in both the U.K. and Canada, are meant to be deal with disciplinary and criminal matters summarily 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 U.K., an accused who is dissatisfied with the outcome of a summary hearing has the right of appeal to the Summary Appeal Court which is a new court set up in 2000. It consists of a Judge Advocate and two military 'lay' members (officer or warrant officer) outside the relevant chain of command. A case before the Summary Appeal Court 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.

In Canada, there is no such 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 by the European Court of Human Rights as being non-compliant with the ECHR.

### Non-judicial summary proceedings

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

Consider that in the U.K., 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. 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. 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. TMAAs are not recorded on an individual's service record. Lawyers and civilians would not be involved in this form of discipline.

### Conclusion

Our National Defence Act was based on military traditions handed down from the Crown. However, even the British Crown has unequivocally recognized that the Code of Service Discipline, as it stands, is not in conformation with contemporary human rights values. Now that government has ordered an independent review of the operation of the National Defence Act, in particular, the military justice system, this presents an opportunity for strengthening the bond between Canada and England and for Crown and country. Above all, however, it permits government to further cement its bonds of trust with our brave men and women in uniform by providing them with a better and fairer military justice system.

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