

OPINION

JUDGE ADVOCATE GENERAL

Time to rebrand JAG as CF legal adviser

And it's high time for Canada to truly dust off the National Defence Act and make substantive changes to bring it more in line with the Charter of Rights and Freedoms and universal human rights standards. A good start would be a reform of the summary trial system.



BY MICHEL W. DRAPEAU

OTTAWA—Paradoxically, Bill C-15, which amends the National Defence Act, sanctions, *inter alia*, the growth of military judges and the continuance of the outmoded summary trials system. The proposed growth of military judges is, in fact, a featherbedding in contradiction with the Prime Minister's sensible directive to reduce the 'tooth-to-tail' ratio of the Canadian Forces. This does nothing to improve the image of the military justice system. On the other hand, the summary trials system is allowed to survive unscathed despite being decried as being unconstitutional by a mounting chorus of dissent and protest by an impressive number of Parliamentarians, legal scholars, and legal practitioners in Canada.

All of this while a wide body of jurisprudence from the European Court of Human Rights (See: *Findley 1997; Hood 1999; Morris 2002, Cooper 2003, Grieves 2003, Thompson 2004*) has labelled summary trials proceedings as lacking the attributes of a fair, independent, and impartial tribunal which has, in turn, sparked a global move to civilianize military justice systems.

Plus ça change, plus c'est pareil

Acting as the *eminence grise* for drafting and shepherding Bill C-51, the Office of the Judge Advocate General (JAG) has been fighting 'tooth and nail' for increasing the existing military judicial structure and maintaining an outmoded system of justice which deprives our citizens in uniform of rights enjoyed by other Canadians. However, if nothing else, this debate has highlighted the paramount role played by the JAG in the administration of military justice and the development of its governing legislation. It is apropos, therefore, to throw a spotlight on this public official.

To be fair, the fact that the Canadian Forces, in general, and the JAG, in particular, are resistant to change and are jealously guarding the distinctive aspects of the military justice system is not atypical of a military organization.

In modern times, however, this attitude, coupled with a lack of introspection, can lead to an unwelcome outcome for Canada and our citizens in uniform. This may result, for instance, in this quintessential institution falling further behind contemporary societal norms by failing to follow necessary evolutions of military justice taking place in many other common law jurisdictions such as the United Kingdom, Ireland, Australia and New Zealand. It would also make Canada

impervious to a trend in these countries, and many others, such as Austria, Belgium, Czech Republic, Denmark, Finland, Germany, France, Lithuania, and the Netherlands, to civilianize the military criminal law structure. A process which has facilitated the incorporation of the institutions and norms of civilian legal systems into the otherwise closed environments of the military and increased the exposure of the military leadership to civilian legal culture. Something which is actually lacking in Canada.

Not surprisingly, the military tends not to be proactive in causing foundational changes to the military justice system. Assuming such resistance as par for the course, Parliamentarians should heed the caution expressed by a prominent jurist at a recent meeting of the Standing Committee on National Defence during its review of Bill C-15. Overturning the relentless objections of the military, he provided many examples over the past decade where the Court Martial Appeal Court had to step in to declare unconstitutional key aspects of the military criminal justice system.

Power configuration of the JAG: multifold and conflictual

Our JAG has been conferred a plenipotentiary mandate over the administration of our military criminal justice system. He has monopolistic authority for providing advice to all stakeholders in the military criminal justice system on practices, procedures, developments, and reforms. He monitors the functioning of the military criminal justice system and he advises government on its efficiency and effectiveness and proposes changes to the National Defence Act. Contrary to most common-law jurisdictions, our JAG holds a military rank and he is situated organizationally within National Defence Headquarters.

This multi-layered jurisdiction is enhanced further by his omnibus and misleading title, judge advocate general. It's an awkward appellation since the JAG is not a judge. He has been stripped of that function many years ago. In reality, if he were a judge, the JAG would lack all the pre-requisites for assuming that mantle. Why?

First, the JAG lacks any security of tenure. He holds office during pleasure for a term not exceeding four years. Second, the JAG lacks the requisite independence from other branches of government. He is part and parcel of the 'executive' branch and he also reports to a political minister. Third, the JAG can neither be, or be perceived to be, objective nor impartial as a judicial officer. First and foremost, the JAG acts as the legal adviser to the governor general, the minister of National Defence, DND, and the CF. His advisory function requires him to be loyal and partisan to the interests of both DND and the CF as an institution



Defence Minister Peter MacKay. It's also time to civilianize and move the Office of the JAG, the Office of the Chief Military Judge and the Director of Military Prosecutions away from the military. These steps would go a long way towards improving the military criminal justice system and making it respectful of our citizens in uniform, argues Michel Drapeau.

Photograph by Steve Gencelle, The Hill Times

as well as the chain of command. The exercise of this advisory function presents situations where the JAG is, or may be perceived to be, in a conflict with his quasi-judicial role. This is why in most civil societies and, increasingly, in the militaries of common-law jurisdictions these functions are necessarily kept separate and apart.

Let me now briefly review these two functions, advisory and judicial.

JAG's advisory function, the raison d'être

The advisory function of the Canadian JAG is a most important one, because in the execution of this role, the JAG and his delegates instruct the CF chain of command on all matters of CF administration. In time of peace as in time of war, the CF legal adviser provides advice to commanders and lower echelons of command in all service and discipline matters; supervises legal instructions provided to the CF in the exercise of their training and operational functions; and instructs the chain of command in legal matters. As legal advisers, the approximately 150 military lawyers now serving in the Office of the JAG, act as servants to DND and the CF. Fundamentally, there is nothing wrong with this as, arguably, a similar role is played by all lawyers in the Department of Justice.

JAG's judicial function, an anachronism

As the legal adviser to the Canadian Forces, the JAG acts as an effective conduit for the chain of command to influence the evolution of legislation pertaining to the military justice system. To assist him in this specific role, the JAG employs a full-time deputy JAG who acts as a policy 'architect' for causing the drafting of legislation affecting the military justice system, and marshalling same before the applicable Parliamentary committees.

As importantly, on a day-to-day basis, the JAG also has general supervision of both the director of Military Prosecutions (DPM) and the director of Defence Counsel Services (DDCS)—who respectively assume the prosecution and the

defence of a criminally accused person before a court martial. I will discuss these two functions below. Of note also, currently the JAG has responsibility over the selection and career management of the military lawyers posted to these two directorates which performs key prosecutorial and defence functions within the military justice system.

Military prosecution service

The DPM acts under the general supervision of the JAG (s. 165.17 of the NDA). As discussed, the JAG, in its advisory capacity, 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 chain of command. To address this, in the U.K., a truly independent body known as the Service Prosecution Authority (SPA) was created in 1996. The role of the SPA is to review cases referred to it by the military police and/or the chain of command, and to prosecute that case in court. For good measure, the SPA also operates under the general superintendence of the Attorney General and is therefore fully independent of the chain of command.

Defence counsel services

The DDCS acts under the general supervision of the JAG (s. 249.2 of the NDA). Trial representation to an accused person as well as legal advice to a person subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry are provided at public expense by CF lawyers employed within the DDCS. On the other hand, in the U.K., soldiers 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 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.

Civilianization of JAG judicial, prosecution functions

Recognizing that the multiplicity of roles played by the then U.K. JAG presented a situation of conflict, in 1948 the British Secretary of State for War moved to alter his status. Since then the U.K. JAG is a High Court judge and he is no longer part of the U.K. Department of Defence. He is part of the Royal Courts of Justice Group of Her Majesty's Courts Service. The U.K. JAG is responsible for the conduct of proceedings at courts martial; appointing civilian judges to preside over military tribunals; monitoring the military criminal justice system; and, providing guidance to all stakeholders in the military criminal justice system on practices and procedures, developments and reforms. To square the circle so as to ensure complete independence from the military, the U.K. JAG also no longer provides judicial advice to the military chain of command.

It is because of this perception of a conflict of interest that many common law jurisdictions (Ireland, Australia, New Zealand) follow suite and civilianized the judicial function of the JAG. There is equal compelling reasons for Canada to follow that trend. This would require that the JAG and its quasi-judicial functions be civilianized and moved outside the realm of the Department of National Defence.

Conclusion

It is high time for Canada to truly dust off the National Defence Act and make substantive changes to bring it more in line with the Charter of Rights and Freedoms and universal human rights standards. A good start would be a reform of the summary trial system. Another meaningful reform would be to rebrand the JAG as the CF legal adviser and strip him of all his judicial or quasi-judicial functions. The second step would be to civilianize and move the Office of the JAG, the Office of the Chief Military Judge and the as well as the Director of Military Prosecutions away from the military. These steps would go a long way towards improving the military criminal justice system and making it respectful of our citizens in uniform.

The Canadian civil judiciary is free from the control of the executive. The time has also come to recognize that the Canadian military criminal justice system must also be untrammelled by the CF chain of command in the exercise of its functions. Decisions of questions of law and legal rights of our citizens in uniform should no longer be an attribute of the military mind and command.

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