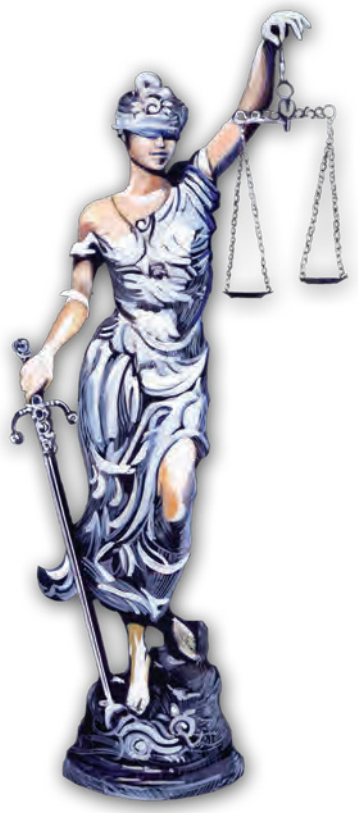
LAW & ORDER

Can a leopard change its spots?

The National Defence Act and the CAF's resistance to change



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The military justice system, governed by the National Defence Act, and supplemented by the Queen's Regulations and Orders (QR&O), the Defence Administrative Orders and Directives (DAOD), the Canadian Forces Administrative Orders (CFAO) and a multitude of manuals including *inter alia*, the Canadian Forces administrative law manual, and the Canadian Forces Health Services Health Info Guide, is unnecessarily complex and, at times, contradictory.

> *"The perception of having the chief military judge being junior in rank to an accused, say a brigadier-general or major-general, is, to say the least, incongruous if not incompatible with the accepted notion of independence of a trial judge."*

Even with this entanglement of law, orders, directives, and manuals, there are many titles ascribed to several procedures within the military justice system that are just plain misleading. Some are minor, some are major, all are confusing, particularly to members of the civil society, including civilian jurists. To help ensure clarity, many of these titles need to be changed. We will now consider two specific examples: the Summary trial system and the title of Judge Advocate General.

SUMMARY TRIALS

Black's Law Dictionary, the authoritative century-old reference of choice for the language of law, defines *trial* as a formal judicial examination of evidence, and determination of legal claims in an adversary proceeding. In common parlance, a trial may be defined as the determination of a person's innocence or guilt, by due process of law.

Summary trials are not trials. Despite that a commanding officer, or a delegated officer, at summary trial has the ability to examine facts, decide on issues of law and sentence a CF member to detention for up to 30 days — a conviction that will result in a criminal record — there is no due process. How come? First off, there is

no right to be represented by legal counsel. Secondly, there are no rules of evidence which, in a real trial, would limit the admissibility of evidence to ensure that an accused has a trial based only on the most reliable evidence available.

At a proper trial, guilt or innocence is not based on rumour, speculation or reputation; an accused is tried solely on evidence related to the matter in issue. This is not so at a summary trial, where hearsay evidence is readily relied upon.

There are also no records of proceeding at summary trial and, perhaps most importantly, there is no right of appeal. To this we ask: What fundamental elements of a trial are present at summary trial?

The fact that a criminal record will result from some of the convictions at summary trial, despite that little procedural safeguards are available to an accused, may be unconstitutional. In our opinion, this aspect of the summary trial process is in need of urgent reform. We believe that Canadian society at large has an interest in knowing that fundamental rights, freedoms and protections are recognized and protected by military trials.

In May 2013, retired Justice Gilles Létourneau, appearing before the Senate Committee on Constitutional and Legal Affairs, stated his belief that summary trials, in their current form, are "unconstitutional" and in need of procedural "safeguards" as have been implemented in the United Kingdom via a decision of the European Court on Human Rights, a supra-national and international court established by the European Convention of Human Rights (which is almost identical to our very own Charter of Rights and Freedoms).

In our opinion, summary trial shortcomings can be easily resolved by making two reforms. Firstly, summary trials should be renamed as "disciplinary proceedings" because this is what they were designed to be — no more, no less. Secondly, any charge warranting detention (the loss of liberty) or the imposition of a criminal record should *automatically* be referred to a court martial, where full procedural rights (including right to counsel, etc.) as guaranteed under the Charter of Rights and Freedoms are provided.

In Europe, the European Court of Human Rights has considered the question of constitutionality of summary trials and has decided that their system, which was identical to our system, was in clear and unequivocal contravention of the rights owed to serving service persons. In reaction, the UK immediately created reforms allowing for an appeal mechanism from summary trials, where a right to counsel and rules of evidence are available. The summary trial system in the UK has now been decriminalized, and there are mandatory referrals to courts martial for matters where imprisonment (or detention) may be contemplated. Australia followed suit. Ireland followed suit. New Zealand followed suit. And in France and Germany, they have eliminated summary trials altogether. Now, a member serving in the military of these countries relies exclusively on civilian courts.

In case a reader wonders whether a civilian court can handle such trials with a military nexus, the answer is a resounding yes. To demonstrate the ability of a civilian court to hear a military matter, one has to look no further than the trial of Sub-Lieutenant Paul

Delisle, a Canadian sailor who sold secrets to Russia and who was tried by a judge and jury in Nova Scotia's Supreme Court.

THE JUDGE ADVOCATE GENERAL

The title "Judge Advocate General" (JAG) is another obvious misnomer. The role of judge advocate general, in Canada, was stripped of that judicial function as a result of a 1998 comprehensive amendment (Bill C-25) to the National Defence Act, which created the office of the chief military judge and the office of the director of military prosecutions.

One wonders why, after the passage of 15 years, the JAG has not seen fit to amend his title to reflect his current, more limited function: that of "CF Legal Advisor."

Since 1998, the chief military judge, not the JAG, is the supreme judicial authority within the Canadian Forces. Why? All persons subject to the Code of Service Discipline — including the chief of the defence staff, the vice chief of the defence staff, the judge advocate general, the roughly 150 or so military lawyers, the provost marshal, the director of military prosecution, as well all other CF officers and non-commissioned members — are subject to the judicial authority of the chief military judge, if and when they were to appear before his court.

Aside from semantic problems, there may be other structural problems within the military system of justice. Currently, by law, the chief military judge cannot exceed the rank of colonel. Yet, as matters now stand, the current JAG is a major general, despite being in judicial terms very much junior to the chief military judge. Not only that, the chief military judge is also junior in rank to every officer wearing a general/admiral rank epaulette. Yet, he alone is the supreme legal authority in the military justice system. This gives the appearance that the authority of the chief military judge is undermined through rank, which is not true.

In an organization like the Canadian Armed Forces, which is dependent and reliant on a chain of command power structure, we find it unusual that the supreme authority in the military justice system may be subject to orders of persons who may be tried in his court. The perception of having the chief military judge being junior in rank to an accused, say a brigadier-general or major-general, is, to say the least, incongruous if not incompatible with the accepted notion of independence of a trial judge.

From this, one obvious question arises: How can the administration of justice operate effectively, and maintain the perception of independence, when its senior officials, including the chief military judge, are subordinated to over 100 members of the chain of command? In our opinion, it cannot, as, from this observation, there is at least a perception of lack of independence.

That said, this matter of perception, real or otherwise, can be overcome easily with two simple reforms:

Firstly, as a matter of urgency, the JAG should be rebranded by removing the title of "judge" from judge advocate general — after all, again, he is not a judge! This will also remove any confusion about who is the supreme authority in the military justice system — it is not the JAG, it is the chief military judge. The judge advocate general, therefore should be rebranded "CF Legal Advisor" because, plain and simple, that's what he is.

Secondly, the chief military judge should not wear a rank. It is that simple! This simple reform would involve simply granting the chief military judge the same title as all judges in Canada: "judge." Removing military rank from the chief military judge would also help to ensure that the perception of independence is maintained within this position because the chief military judge would no longer be subordinate to the chain of command.

CIVILIANIZATION OF MILITARY TRIBUNALS?

Typically, the military, at home and abroad, is resistant to (any) change and is highly protective of the control they hold over their system of justice. This should come as no surprise. Consider that, as noted above, it wasn't until 1998 that the death penalty was stricken from the National Defence Act — 16 years after the passing of the Canadian Charter of Rights and Freedoms.

What is surprising, however, is the argument presented in favour of maintaining the status quo.

In an appearance before the Standing Senate Committee on May 29, 2013, considering amendments to the National Defence Act, one military academic made the following remarkable statement: "It is hard to imagine how a judge could properly make the kind of evaluations that need to be made in a military trial unless he or she had military experience … [because they] do not have an appreciation of the social context. That is why it would be an ill-founded move to civilianize the trial judges in our system of military justice."

This statement captures the prevalent attitude in favour of resisting the worldwide movement towards civilianization of the military justice system — meaning to have civilian judges presiding at court martials — '*if you weren't there, you can't possibly understand*.' To be clear, by worldwide we mean most European nations including Germany, France, the United Kingdom, Ireland and several other common law nations such as Australia and New Zealand.

In our view, this "you couldn't understand unless you were there" attitude has no place in modern jurisprudence, as notions of justice, rule of law, fairness, transparency and equity should be universally applied to all Canadian citizens, regardless if, at the time of an alleged offence, they were wearing a uniform — such as members of the Royal Canadian Mounted Police, peace officers, firefighters, paramedics, police officers, or members of the Canadian Armed Forces.

In our view, long established common law rights should be equally prevalent in both military and civilian society, and it is through this lens that offences should be adjudicated. The absurdity of the statement the only military can judge military was highlighted by the Honourable Gilles Létourneau in his appearance before the same standing Senate committee, when he stated that, this statement, taken to its logical conclusion, would then mean that only murderers can try murderers, and rapists, rapists.

Thus, the notion that only those with "like" experiences are able to judge through the appropriate lens is absurd. Indeed, it is contrary to our current system of justice, whereby decisions at court martial may be appealed to the Court Martial Appeal Court, a division of the Federal Court of Appeal, which is heard before three *civilian* members of the Bench.

CONCLUSION

The world over, and more particularly our western allies, are rightly moving to update their systems of military justice. Most of them have completed significant upgrading to demilitarize theirs courts during the past two decades, or more. Canada, however, remains at a standstill.

Instead of lazing back and accepting our outdated system of military justice, perhaps it is time to get with the times, dust off the National Defence Act and its supporting entanglement of rules, orders, directives and manuals, have a long, serious look at long-needed reforms, and bring our system of justice up to speed with contemporary international norms. A good start would be to modernize the current summary trial system to bring it in line with our, now, more than 30-year-old Charter. Secondly, civilianize the military bench and give the chief military judge the task of superintending the military justice system. This would be a judicial and not an advisory function. Thirdly, and by the same token, there is an urgent requirement to recalibrate the role of the JAG by rebranding him as the CF Legal Advisor, which, incidentally, has already been done in the UK armed forces, several decades ago.