

COMMENTARY

Canada's military justice system lagging behind that of others

BILL C-15 IS CURRENTLY MAKING its way through Parliament. Though Bill C-15 will provide some needed upgrading for the National Defence Act (NDA), it is deficient in several areas. First off, the bill totally ignores summary trials. This, despite being decried as 'unconstitutional' by a growing number of parliamentarians, scholars and legal practitioners in Canada, because summary trials lack the attributes of a fair, independent and impartial tribunal, depriving our 'citizens in uniform' of rights enjoyed by other Canadians.

If Britain, Australia, New Zealand and Ireland have seen fit in the recent past to overhaul the summary trial process when it was found to be noncompliant with universally recognized human rights, it begs the question: Why is Canada not, at the very least, considering the same sort of overhaul?

Secondly, Bill C-15 proposes to increase the number of military judges. This is mind-boggling.

SUMMARY TRIALS

There are close to 2,000 summary trials every year. Since summary trials have an average conviction rate of 97.68 per cent, this means that each year, one out of every 30 Canadian Forces members ends up with a record of conviction by a criminal tribunal.

In an address delivered on the occasion of the 25th anniversary of the adoption of the Charter, the Chief Justice of the Supreme Court of Canada reported that, in adult criminal courts in Canada in 2003/2004, an accused was found guilty in 58 per cent of the cases; 36 per cent were either stayed, withdrawn, dismissed or discharged; 4 per cent were otherwise

terminated by the Court; and 3 per cent were acquitted. These rates have remained relatively stable throughout the years.

We simply do not know if the relatively high conviction rate at summary trials speaks volumes as to the guilt of the accused, or is symptomatic of a structural or procedural deficiency. Given the sheer



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number involved, Parliament owes it to our brave soldiers to take a critical look at this process.

Although part by law of the Canadian "criminal process," summary trials are heard not by a judge, but by a member of the chain of command. This despite the fact that the verdict and sentence are imposed without any regard to minimum standards of procedural rights in criminal proceedings, such as *a right to object to being tried* by the officer presiding; *right to counsel*, the presence of *rules of evidence*; and a *right to appeal*. There is also *no record of proceedings*. This is a double standard. Consider that someone charged with a summary conviction offence in civilian court, such as Senator Patrick Brazeau, will enjoy all of these rights; so does someone appearing in a small claims court or in a traffic court. It is very odd that those who put their lives at risk protecting the rights

of Canadians, are deprived of some of these Charter rights when facing a summary trial process considering criminal wrongdoing.

MORE MILITARY JUDGES!

The current complement of four military judges handles a total of 65 courts martial per year. This means that in 2011/2012, each military judge spent roughly 4.5 days a month in court. This is by far the lowest of the lowest case load of any criminal court of record in Canada. Yet, strangely, Bill C-15 calls for the addition of a Deputy Chief Military Judge and the formation of a Reserve force military judges panel. Why but why? Who, aside from a very small handful of senior military lawyers, would qualify for these additional judicial appointments and how is such featherbedding going to ameliorate the efficiency of the military justice system? If government is intent on cutting the ratio of 'tooth to tail' then it would ask the Auditor General of Canada to conduct a wall-to-wall performance audit of the military justice system.

Bill C-15 also insists that, to be appointed as a military judge, one must have been an officer for at least 10 years. Besides reducing ever further the pool from which military judges are drawn, this limitation makes no sense. The assumption of judicial duties should have nothing to do with a record of service as a commissioned officer. Increasingly, in countries such as the UK, Australia and New Zealand, to name but a few, experienced senior civilian judges preside over courts martial.

Who, besides a very small handful of senior military lawyers, would now qualify for appointment as a military judge?

Better yet, does a military judge need

to have a military rank in the first place? This would prevent the present dichotomy in having the Chief Military Judge be the junior in rank to the Judge Advocate General (JAG), to the approximately 70 CF general officers as well as the CDS who are all subject to the Code of Service Discipline and, in the final analysis, are all subject to his judicial authority. The rank of these judges should be just that: Judge.

JAG TITLE IS MISLEADING

Lest we forget, as the legal advisor to the Canadian Forces, the Judge Advocate General has monopolistic authority for providing advice to all stakeholders in the military criminal justice system on practices, procedures, developments and legislative reforms. Therefore, he acts as an effective conduit for the chain of command to influence the evolution of legislation pertaining to the military justice system.

Does this mean that in the performance of his duties that he acts as a judge as well as an advocate and a legal advisor? Absolutely not! Why? Because he is neither a judge nor an advocate. His overarching task is that of a legal advisor. A most important and all-consuming function.

For added clarity, let me add that the JAG was stripped of his judicial function many years ago. But if he were a judge, he would lack all the pre-requisites for assuming that mantle. For instance:

He lacks any security of tenure. This is a requirement for judgeship. The JAG holds office during pleasure for a term not exceeding four years.

He lacks the requisite 'independence' from other branches of government. Another requirement for judgeship. The JAG is part and parcel of the executive branch of the military. He also reports to a political minister.

He can neither be, or be perceived to be, neither objective nor impartial as a judicial officer. Yet another requirement for judgeship. Foremost, the JAG acts as the legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence and the Canadian Forces. His advisory function requires him to be loyal and partisan to the interests of both DND and the CF as an institution 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 any judicial function. This is why, in most civil societies, and increasingly in the militaries of common law jurisdictions, these functions are necessarily kept separate and apart. (See further discussion below.)

The JAG, in its advisory capacity, provides advice to the 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 UK,

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a truly independent body known as the Service Prosecution Authority (SPA) was created in 1996. For good measure, the SPA operates under the general superintendence of the Attorney General and is therefore fully independent of the chain of command. The reverse is true in Canada.

Recognizing that the multiplicity of roles played by the British JAG presented a situation of conflict, in 1948 the UK Secretary of State for War moved to alter his status. Since then, the British JAG is a High Court judge. He is no longer part of the UK Ministry of Defence, and is part of the Royal Courts of Justice Group. The British 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 British JAG also no longer provides judicial advice to the military chain of command.

Because of this perception of a conflict of interest, many common law jurisdictions

(Ireland, Australia and New Zealand) followed suit and civilianized the judicial function of the JAG. There are equally compelling reasons for Canada to follow this trend. This would require that the JAG be civilianized and moved outside the realm of DND.

Many of the changes proposed by Bill C-15 are suggestive of a form of seclusion and isolation by the CF from the evolution of military justice taking place in many other common law jurisdictions, such as Austria, Belgium, Czech Republic, Denmark, Finland, Germany, France, Lithuania, and the Netherlands, to civilianize the military criminal law structure. This process would facilitate the incorporation of the evolving standards and norms of civilian legal systems into the otherwise closed environments of the military and increase the exposure of the military leadership to civilian legal culture — something which is lacking in Canada.

CONCLUSION

In consonance with the long established 'separation of powers' that guides our democracy, the Canadian civil judiciary is free from the control of the executive. The time has come to recognize that our military criminal justice system must also be untrammelled by the executive and the chain of command in the exercise of its functions. Because a Canadian in uniform is a Canadian citizen first, 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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