

OPINION

JUDGE ADVOCATE GENERAL



Defence Minister Peter MacKay. Deputy Judge Advocate General Michael Gibson says that Canada has had a military JAG for more than a century and the persistence of the military character of the JAG over this extended period reflects a fundamental utility.

Photograph by Jake Wright, The Hill Times

JAG leads proactive military justice oversight, responsible development and positive change

Michel Drapeau says the Judge Advocate General Office should be broken up, and rebranded. But his argument does not withstand objective scrutiny.



BY COLONEL
MICHAEL GIBSON

OTTAWA—In his March 4 article, Michel Drapeau recycles the recommendation made in 1997, in the report of the Somalia Inquiry (chaired by his current associate in other endeavours, recently-retired Justice Gilles Letourneau), in asserting that the Office of the Judge Advocate General (JAG) should be broken up, and that JAG should be 'rebranded' in a much diminished form as a civilianized Canadian Forces Legal Adviser, "Time to rebrand JAG as CF legal adviser," (*The Hill Times*, March 4, p. 13). That view was not accepted by the Government of Canada in 1997 or by Parliament when it enacted Bill C-25 in 1998. Nor should it be now.

The critique presented by Drapeau does not withstand objective scrutiny. The arguments he presents are largely comprised of bald assertions without foundation in fact or law. The article is replete with leaps of logic. In particular, its efforts at comparative legal analy-

sis are incomplete and misleading. They ignore the state practice of many of Canada's allies, including the United States. The argument caters to an unreflective prejudice that somehow "military" connotes something that is sinister, or unfair, or second-rate, or not compliant with the Canadian Charter of Rights and Freedoms. Nothing could be further from the truth.

Drapeau's arguments are advanced without reference to the jurisprudence of the Supreme Court of Canada validating the legitimacy and necessity of the existence of a distinct military justice system. His arguments seem to be based on two things: first, the proposition that since some things are done differently in the United Kingdom (U.K.), Canada should rapidly and unquestioningly adopt similar arrangements. One might observe that the British drive on the left in the U.K., but that does not mean that it is appropriate for Canadians to do so in Canada, or for Canada to adopt such a practice without considered reflection on a principled basis. Each state must arrive at the arrangements for its justice system that best reflect its own legal and practical requirements and environment. The structure of the military justice system

and the institutional arrangements for its legal advisers should reflect the functional attributes of what Canada needs as a state, and the requirements of Canadian law.

Comparative analysis of the experience, policies, practice and law of other countries can provide important insights when assessing one's own system, which is why the Office of the JAG makes such analysis a priority. As a result, we understand the full picture of how the U.K. system is now structured, and the policy and legal influences that led to it. In attempting to responsibly draw lessons from such study for reform of one's own system, however, it is incumbent upon the person presenting the argument to be accurate and to provide a complete and balanced depiction. Vague references to the Charter and to universal human rights standards lack rigour. In fact, ensuring compliance with the provisions of the Charter and international legal standards, including the International Covenant on Civil and Political Rights, is one of the reasons legal officers serving in the Office of the JAG are educated and trained to a very high standard.

The suggestion made by Drapeau that Canada is somehow lagging behind the developments

in other countries is simply inaccurate. In fact, the Canadian military justice system is widely praised and has been studied and often emulated by other countries around the world. Canada has been, and remains, at the forefront of responsible legislative reform of its military justice system. This was recognized by the former chief justice of Canada, Antonio Lamer, who stated in the report of his independent review of the military justice system that "Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence."

Canada has had a military JAG for more than a century. The persistence of the military character of the JAG over this extended period reflects a fundamental utility in this. It is not an "anachronism," but a highly-functional attribute rooted in the demands of the unique environment within which the JAG provides advice. The military characteristics, legal responsibilities and authorities of the JAG, currently specified by Parliament in the National Defence Act, follow the recommendations of the Special Advisory Group, chaired by the former chief justice of the Supreme Court of Canada, Brian Dickson, in 1997. Moreover, these arrangements have since been reviewed by two independent review authorities, former chief justice of the Supreme Court of Canada Antonio Lamer in 2003, and former chief justice of the Superior Court of Ontario Patrick LeSage in 2011. Neither of these august jurists expressed any concerns in this regard, nor made any recommendations to change them.

The second part of Drapeau's argument is the assertion that JAG should be "stripped" of his or her judicial functions. This is a curious and internally inconsistent argument, as Drapeau acknowledges elsewhere in the article that the JAG has none. Although the nomenclature is the same, having a common historical origin in British military history, the functions performed by the JAG in the U.K., and the JAG in the Canadian military justice system, are now entirely different. In fact, the functions performed in the U.K. by its JAG, who is a High Court judge, are largely analogous to those now performed in the Canadian military justice system by the chief military judge who is entirely independent and separate from the JAG.

In contrast, the Canadian JAG does not fulfil a judicial function, but rather, as was noted by Lamer, performs statutorily-mandated functions that might be broadly described as analogous to those of an attorney general for the military justice system: to act as the legal adviser to the Governor General, the minister, the Department of National Defence and the Canadian Forces in matters relating to military law, and to superintend the administration of military justice in the Canadian Forces. These responsibilities are functionally analogous to those that Parliament has assigned in respect of the civilian justice system to the attorney general of Canada in the Department of Justice Act. And, the responsibilities are no more in conflict than are those of the attorney general. Drapeau's argument in this respect is misleading.

Another of his criticisms that does not withstand scrutiny is the assertion that the relationship of "general supervision" between the JAG and the director of Military Prosecutions somehow compromises prosecutorial independence. It does not. In fact, this relationship between the JAG and the director of Military Prosecutions which Parliament has specified in the National Defence Act essentially parallels that which it has specified in the Director of Public Prosecutions Act to exist in the civilian criminal justice system between the attorney general and the director of Public Prosecutions.

Drapeau makes the assertion that the JAG "has been fighting tooth and nail" to maintain "an outmoded system of justice." This simply does not accord with the reality. It is belied by the mission and vision statement of the office of the JAG which provides that "in support of the Canadian Forces and the Department of National Defence, the Office of the Judge Advocate General delivers independent, operationally focused, solution oriented legal advice and services across the full spectrum of military law, and superintends the administration of military justice" in a manner "that reflects Canadian values and the rule of law," and by its second strategic goal to "lead proactive military justice oversight, responsible development and positive change."

The two purposes of the Canadian military justice system, as specified in the sentencing principles contained in Bill C-15 currently before Parliament, are: to promote the operational effectiveness of the Canadian Armed Forces by contributing to the maintenance of discipline, efficiency and morale; and, to contribute to respect for the law and the maintenance of a just, peaceful and safe society. Thus, in a nutshell: to promote operational effectiveness, and to do justice.

The military legal officers that serve in the Office of the JAG are uniquely well-positioned to support these goals. They are a superbly talented, highly educated and dedicated group of professional lawyers who are enormously proud of their service to Canada both as members of the legal profession, and as officers in the Canadian Armed Forces. They are vigilant to recognize their professional ethical obligations as members of provincial law societies, including their duty to be independent in the provision of legal advice. But they also recognize that their military character is not a detriment, but rather an asset that better enables them to serve their clients who include their fellow members of the Canadian Armed Forces. The synthesis of these two attributes is what makes them highly effective in the performance of their duties. Parliament has clearly recognized that the best way to achieve operational success and justice and, importantly, to respect Canada's soldiers, sailors, airmen and airwomen, is to have a military JAG and uniformed legal advisers.

Colonel Michael Gibson is deputy Judge Advocate General (Military Justice) of the Canadian Armed Forces.

news@hilltimes.com
The Hill Times