

Allied Forces Military Justice Systems Panel On Removing Disposition Authority from Commanders

I. General Role of the Commander

A. Canadian Military Justice System

- 1. Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces:** I want to be clear that while we believe that the changes made to the Canadian military justice system have been very beneficial, neither I nor Major General Noonan are here to specifically advocate for our system as a model for change. *Transcript of Testimony, RSP Public Meeting at 156 (Sept. 24, 2013).*

The 1999 amendments to the National Defense Act removed from the chain of command a number of traditional authorities and created a director of military prosecutions, a court martial administrator, and a specialized unit of the military police, referred to as the Canadian Forces National Investigation Service, CFNIS, all of whom, like the military judges who preside at courts martial, carry out their functions independent from the chain of command.

Transcript of Testimony, RSP Public Meeting at 158 (Sept. 24, 2013).

- 2. MGen Cathcart:** In cases that are investigated at the unit level or by military police other than the NIS, the chain of command retains authority to lay charges. Once charges are laid, the commanding officer has discretion to choose not to proceed with the charges or, depending upon the nature of the charges, to deal with them summarily. Indeed, approximately 95 percent of the charges laid in any given year in our system are at the summary trial level conducted by the chain of command.

Even if the charges are serious enough to warrant a trial by court martial or if the accused has elected to be tried by court martial, the chain of command continues to play a vital role. In such cases, the commanding officer will apply to a referral authority -- this is an officer higher in his or her chain of command -- to have the charges disposed of by the court martial.

Transcript of Testimony, RSP Public Meeting at 159-60 (Sept. 24, 2013).

- 3. MGen Cathcart:** When an accused person is found guilty at court martial, members of the chain of command will often be called upon during the sentencing phase of the trial so that evidence of the impact of an offense on discretion and morale can be received directly from those who are responsible for such matters and who have seen most closely the impact of any offenses. *Transcript of Testimony, RSP Public Meeting at 161 (Sept. 24, 2013).*

- 4. MGen Cathcart:** [Discussing when/how the chain of command is informed of a sexual assault allegation] ...the NIS would advise. They also have the – a report in which they take in complaints, and those reports are distributed to

the chain of command not only for disciplinary purposes, but for a multitude of purposes, administrative and information.

So the chain of command can become aware of it. They would then probably engage both the NIS in terms of saying, well, we want to make sure we're not in your lane and possibly taint any criminal investigation so, you know, tell us, you know, when you want us to be involved or not in terms of assistance. They would also likely consult their own legal advisor to determine what action, if anything, would need to be done in terms of administrative action of removing, for example, the accused from the workplace or the person alleged to have complained against from the workplace, a multitude of sort of administrative activities.

Transcript of Testimony, RSP Public Meeting at 192-193 (Sept. 24, 2013).

5. **MGen Cathcart:** [On sex assault investigations by National Investigation Service] They can come back to the commander. When they're finished their investigation, obviously they have options like any police. They have the power to lay a charge, in which case they could lay a charge and then refer it to the commanding officer at that point for the commanding officer then to proceed or not proceed. But also in our system, if the commanding officer does not proceed with the charge, it is open for the National Investigation Service to still take the charge directly to the prosecutors for consideration.
Transcript of Testimony, RSP Public Meeting at 178 (Sept. 24, 2013).

6. **Question from Professor Hillman:** [I]s there a place to consider the good military character and military service of the accused in the decision about whether to prosecute? *Transcript of Testimony, RSP Public Meeting at 186 (Sept. 24, 2013).*

- a. **Response from MGen Cathcart:** It would -- might be not for the prosecutor directly to consider the good character or otherwise of the accused. That might come out of the chain of command in its referral of the matter in which they comment perhaps, you know, in the context of public interest that here's the individual. But I think from purely the prosecutor's decision making process, that would not likely be a factor.
Transcript of Testimony, RSP Public Meeting at 187 (Sept. 24, 2013).

7. **Major General Steve Noonan, Deputy Commander of the Canadian Joint Operations Command:** [Discussing allegations of sexual assault] And as a commanding officer, if I were to receive such a complaint, I would obtain legal advice from my legal advisor and then refer the matter to the appropriate military police organization for investigation. Further, it's also important to note that as a commanding officer, I would ensure that the victim receives the proper medical and other support that is required in those circumstances.
Transcript of Testimony, RSP Public Meeting at 168 (Sept. 24, 2013).

B. Australian Military Justice System

1. **Air Commodore Paul Cronan, Director General, Australian Defense Force Legal Service:** ...significant difference between the DFDA and the UCMJ is that when it comes to offenses against the ordinary criminal

involving members of the ADF, for example, sexual assaults or other sexual offenses, the DFDA is complementary to and not a substitute for the civilian Australia criminal justice system. Consistent with this approach, the DFDA expressly provides that the ADF cannot deal with certain very serious offenses alleged to have been committed within Australia without the consent of the civilian commonwealth or federal director of public prosecutions. *Transcript of Testimony, RSP Public Meeting at 215 (Sept. 24, 2013).*

2. **Air Commodore Cronan:** If an ADF member is then convicted by the civilian criminal justice system of such an offense, the commander in the ADF may take administrative action against the individual, including, for example, by terminating the member's ongoing service in the ADF. *Transcript of Testimony, RSP Public Meeting at 216 (Sept. 24, 2013).*
3. **Air Commodore Cronan:** Importantly, superior authorities who were effectively senior officers who were convening authorities in their previous role or previous system were given the power to make non-binding representations to the director of Military Prosecutions on the interest of the Defense Force in relation to the prosecution of a matter. By giving superior authorities that power, command was able to retain some measure of input into the administration of military discipline at the court martial and Defense Force magistrate level. *Transcript of Testimony, RSP Public Meeting at 225 (Sept. 24, 2013).*

C. British Military Justice System

1. **Commodore Andrei Spence, Head of Naval Legal Services and Senior Legal Officer, British Royal Navy:** The CO can actually deal with a large number of disciplinary offenses and some criminal conduct offenses which are listed in Schedule 1 of the Act, and also in Section 53 that you may or may not have had a chance to have a look at. What he can't deal with in any sense are those listed under Schedule 2, which include the most serious sexual offenses. And with Schedule 2 offenses, if he becomes aware, if someone complains that -- of an allegation of one of those types of offenses has occurred, what will happen is it's his duty by law to inform the service police that such an allegation has been made, and the service police will then conduct an investigation. If it's one of the serious sexual offenses, that will undoubtedly be the special investigations branch of each of the service police forces. *Transcript of Testimony, RSP Public Meeting at 247-48 (Sept. 24, 2013).*
2. **Commodore Spence:** As soon as the CO is aware and informs the service police, effectively his role in the investigation, preferment of charges, trial, and sentence is ended. He has no role to play. *Transcript of Testimony, RSP Public Meeting at 249 (Sept. 24, 2013).*

II. Impetus for Change Related to Sexual Assault Cases?

- A. **Maj Gen Cathcart:** [T]he sea changes that you referred to that we made were not really driven by sex assault in terms of an issue. *Transcript of Testimony, RSP Public Meeting at 181 (Sept. 24, 2013).*

- B. Air Commodore Cronan:** The impetus for the 2006 reforms can be traced to two factors. First, in incomparable jurisdictions like the United Kingdom and Canada, there had been judicial decisions indicating that in order for service members to be guaranteed their right to a fair trial within a military discipline system, there was a need for commanding officers in the chain of command to play less of a role in the administration of that system. *Transcript of Testimony, RSP Public Meeting at 223 (Sept. 24, 2013).*
- C. Air Commodore Cronan:** [T]hat in abolishing convening authorities, the 2006 reforms transferred the responsibilities of convening authorities to the newly-created positions. *Transcript of Testimony, RSP Public Meeting at 224 (Sept. 24, 2013).*
- D. Commodore Andrei Spence:** [T]he Armed Forces Act '06 was enacted not in anticipation of, and that was really in terms of me explaining that it wasn't in reaction to any particular issue or problem to do with sexual offending or, indeed, any particular type of offending in the round. *Transcript of Testimony, RSP Public Meeting at 244-45 (Sept. 24, 2013).*

III. Impact on Good Order and Discipline

- A. Maj Gen Steve Noonan:** My intent is simply to inform the Panel that as an operational commander, I'm very comfortable with where we have evolved to, recognizing the continued key role of the commanding officer in the system, and the latitude that the system still provides for us to maintain good order and discipline. *Transcript of Testimony, RSP Public Meeting at 167 (Sept. 24, 2013).*

In terms of the role of the commanding officer in the court martial process, in sensitive matters, like an alleged sexual assault, we believe it is in the best interest of the chain of command, the accused, and the complainant to have an independent investigator assess the evidence and lay charges, an independent prosecutor determine whether or not to proceed, and an independent court martial administrator convene a court martial. All of these actors, in my view, strengthen my role in the chain of command as those under my command can be confident in the real and perceived independence of the military justice system. *Transcript of Testimony, RSP Public Meeting at 169-70 (Sept. 24, 2013).*

[Discussing the independence of the MJ system] The summary trial is really important. It's the one where the CO will guard because he's looking after his or her troops. And the harder ones, and that's that threshold piece, I value that independent perception of being unbiased.

Transcript of Testimony, RSP Public Meeting at 198 (Sept. 24, 2013).

- B. Maj Gen Cathcart:** I am confident our system meets the disciplinary needs of the chain of command while addressing the interests of victims and reflecting the constitutionality protected Canadian values of fairness, transparency, and the rule of law. *Transcript of Testimony, RSP Public Meeting at 165-66 (Sept. 24, 2013).*

- C. Air Commodore Cronan:** These reforms have undoubtedly had a significant and positive impact on the efficacy, impartiality, and perceived fairness of Australia's military justice system. *Transcript of Testimony, RSP Public Meeting at 225 (Sept. 24, 2013).*
- D. Air Commodore Cronan:** I think it's fair to say that as a result of the 2006 reforms where we took the convening authority out of play and passed that role to the director of Military Prosecutions, we were then -- our legal court certainly didn't notice any discernible problems with morale or any difficulties that we found as a result of that system. *Transcript of Testimony, RSP Public Meeting at 225 (Sept. 24, 2013).*
- E. Air Commodore Cronan:** Certainly there was a perception, rightly or otherwise, that the pre-2006 system where the convening authority or the pre-2003 system where the convening authority had all of those multiple roles in our court martial system, that looking at it through the lens of impartiality, fairness, that whether it be in reality or one of perception, that those elements needed to be and should be improved. And the reason behind that sits I think both within the military and also the external Australian public looking on, that our people in uniform deserved the best discipline system that we had to offer them, and improving fairness and impartiality was part of that process. *Transcript of Testimony, RSP Public Meeting at 239-40 (Sept. 24, 2013).*
- F. Question from Congresswoman Holtzman:** Are you aware of complaints from commanders that the changes have undermined their ability to lead their troops? *Transcript of Testimony, RSP Public Meeting at 240 (Sept. 24, 2013).*
1. **Response from Air Commodore Cronan:** [T]here was certainly, I think, a certain degree of uncertainty amongst our commanders, that there was a sense of loss of control over that element of the discipline system. But as time moved on, it's accepted, and I am not aware of any concerns that our commanders have in relation to the way our system works. *Transcript of Testimony, RSP Public Meeting at 240-41 (Sept. 24, 2013).*
- G. Commodore Spence:** Probably the most pressing question that you need answering from me, and if I may preempt it slightly at the risk of being too forthcoming, is what's the effect on command of our changes? How do they view it? Do they feel disempowered, disenfranchised? I have to say that the simple answer to that is no. *Transcript of Testimony, RSP Public Meeting at 253 (Sept. 24, 2013).*
- H. Commodore Spence:** I think probably that their anecdotal evidence to me suggests actually that there is a degree of relief that commanders are not having to deal with what are sometimes exceptionally technical legal issues, albeit they'll always have legal advice. *Transcript of Testimony, RSP Public Meeting at 253 (Sept. 24, 2013).*

IV. Effect on Sexual Assault Reporting

- A. Question from Chairwoman Jones:** Do you have any data, or even leaving data aside, do you have any sense that after the 2006 reforms where the

commander was removed from the prosecution function that reporting did increase in the area of sexual assault? *Transcript of Testimony, RSP Public Meeting at 238 (Sept. 24, 2013).*

1. **Response from Air Commodore Cronan:** Not that I'm aware of, and the reason I say that is the 2003 and the 2006 reforms, somewhat like my Canadian colleagues, were not targeted at sexual assault matters particularly, but rather behind it was what was perceived to be an improvement in terms of impartiality in fairness across the discipline system across all ranges of offenses, not just specifically sexual assault. *Transcript of Testimony, RSP Public Meeting at 238 (Sept. 24, 2013).*

B. Question from VADM (Ret.) Houck: [The] question I had was if you have a sense of whether or not the reporting for sexual assaults has changed as a result of changes that you've made in your structure over the years? *Transcript of Testimony, RSP Public Meeting at 282 (Sept. 24, 2013).*

1. **Response from Commodore Spence:** Admiral, I can't say that it has. *Transcript of Testimony, RSP Public Meeting at 282 (Sept. 24, 2013).*