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Canadian Army: Looking to the future
The right to legal counsel

by Michel W. Drapeau

The main purpose of this column is not to provide legal advice, it is to inform readers and address their concerns anonymously. In the meanwhile, I welcome readers’ questions about anything related to any particular topic or suggest topics for future columns. In so doing, the published answers will not only benefit the person asking the question, but other readers who can relate to the situation and consider the author’s response in relation to their own life.

KNOW YOUR RIGHTS

In my military law practice, I frequently encounter situations where justice has been avoided, rights have been denied and the chain of command is used as a shield to legal constraints. This article is the first of a series of five that will outline the legal rights of CF members and DND civilians as well as their dependants, when faced with disciplinary, administrative or financial concerns in the DND/CF workplace. It will also include such things as their Right to Privacy (next article), in particular, their safekeeping of personal health information entrusted to CF health care practitioners. The third article will deal with Release issues, the fourth with Veterans issues and the last one with matters such as grievances, harassment and claims.

I hope that this series will help members in knowing their rights and understand when it may be appropriate for them to seek legal representation. As a rule, the best time to see a lawyer is before a problem occurs — not when you are in legal trouble. Preventive law can save time, trouble and money.

CHARTER-PROTECTED RIGHTS

The purpose of the Charter is to affirm that some rights and freedoms are so important, that they should never be infringed upon. The Charter’s raison d’être is to protect individual and minority rights against the “tyranny of the powerful or the majority.” Article 6.04 of the QR&Os 6.04 which sets out the wording for the Oath of Allegiance to be taken on enrolment is meant as a declaration of fealty to the monarch and a promise to abide by Canada’s laws and customs; including the Charter of Rights and Freedoms.

On enrolment, a new CF member also accepts certain professional obligations and responsibilities under the Code of Service Discipline and the Statement of Defence Ethics as well as imbuing himself into the traditions and customs of the service. This is not unusual. Many professions have codes of conduct that are to be followed; doctors professional standards are overseen by the College of Physicians and Surgeons; lawyers are overseen by their respective Law Societies; and accountants, police officers, pilots and dentists have specific codes of conduct whose purpose is to define the standards, values and behaviours that must be subscribed to when one joins these professions.

These Codes do not suspend, displace or supplant the Charter of Rights and Freedoms. At best, they can be seen to “limit” a given right (i.e., a right to free speech). However, such limitations must be demonstrably reasonable and justified to protect a free and democratic society. And, the onus for such a demonstration is on the Crown.

Any law that is inconsistent with the Charter of Rights and Freedoms is null and void to the extent of any inconsistency. This constitutional right includes the application of the National Defence Act, the Queen’s Regulations and Orders, the Defence Administrative Orders and Directives or the Canadian Forces Administrative Orders.
RIGHT TO COUNSEL
One such Charter-protected right is the Right to Counsel. It goes without saying that DND/CF personnel have the right to seek legal counsel in both criminal and civil matters. However, in my practice, I often see CF members more than hesitant or ill informed about that right.

In respect of legal advice, CF members are not normally entitled to receive advice from either a JAG lawyer or the Office of the DND/CF Legal Advisor unless the advice is related to an appearance before a Summary Investigation, a Board of Inquiry, a Court Martial, the Court Martial Appeal Court or the Supreme Court of Canada. That said, these lawyers are simply not permitted to give advice on any potential action or recourse against DND and/or the CF because they are in effect “company lawyers,” and would quickly find themselves in a “conflict of interest” situation.

Therefore, in most circumstances, a CF member is required to rely on civilian counsel should they wish to seek recourse against DND and/or the CF or to obtain legal advice about a range of criminal or civil matters. Consider the following circumstances where civilian counsel could be useful to members, as is their right:

CRIMINAL MATTERS:
♦ Military Police Investigation: A CF member who is facing a Military Police investigation is entitled to counsel, especially while being interrogated. Rights infringements may occur with investigators using intimidation tactics, insisting on recording conversations, posing leading questions and abusing their position.

Having legal counsel present during an interview will ensure that the member’s rights are respected and preserved.

♦ Court Martial: An accused has the right to legal counsel. Because the rules that govern a Court Martial procedure are complex, and because the outcomes can be severe, it is in the members’ interest to retain counsel to ensure their rights are respected. The primary advantage of retaining one of the four lawyers from the DDCS is that they are free to members. However, one should keep in mind that there are only four (4) lawyers to service the needs of the entire force. A very small number indeed.

♦ Summary Trial: Though counsel may not participate in the summary trial procedure, they are able to advise a CF member of their legal rights. Counsel may also advise on things such as evidence at trial, appearance of witnesses, guilty pleas, the right to elect a Court Martial, and on application for a review of a verdict or sentence or a pardon.

♦ Redress of Grievance: Counsel may be retained for any part of the grievance procedure including drafting submissions to the Initial Authority, appealing to the Final Authority or the Grievance Board, seeking recompense from the DND/CF Legal Advisor, and/or judicial review to the Federal Court.

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**Review of PER:** The results of a poor performance evaluation report may haunt a CF member for their entire career, and can have effects on promotions and resulting pension entitlements. It is important, if a member disagrees with the contents of a PER, that they grieve the PER within the statutory time limits.

Drafting a grievance to an unfair or partial PER may be best done by counsel, who can present the facts in an unbiased and robust perspective. Also, if a PER is deemed to be excessive, counsel can help a member determine and exercise their Right of Correction and/or their Right of Notation, to either have the PER changed, or amended.

**Administrative Review (AR):** An AR is conducted by DND/CF for perceived poor performance or inappropriate conduct of a member. This does not mean that there has been actual poor performance. If a CF member is subject of an AR that is unwarranted, it should be challenged because the outcome of an AR can be very serious including, involuntary release, the potential for no severance pay, and the potential for loss of pension and other entitlements. Because of the severity of potential outcome, seeking legal advice is a good idea when challenging an AR.

**Harassment and Human Rights Issues:** Complaints about discrimination or abuse of power should first be made through the grievance process. However, if a member or a DND civilian receives an unsatisfactory response from DND through a harassment or discrimination complaint, other avenues of recourse are available to the Human Rights Commission. This can be initiated and carried by counsel. But there is a time limit for doing so.

CF members or DND civilians are often pressed to sign a document on the spot by a superior or given but few hours to make ‘representations’ on a matter which may have significant career repercussions. Under such circumstances, a member is perfectly entitled to request a delay of 48 hours or more to seek the advice of counsel.

One last thing, when you retain counsel you can and you should inform the appropriate DND/CF authority that you have done so and, by the same token, advise them that you wish all communications related to your matter to be addressed to counsel, and only to counsel.

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**Drapeau practices law in Ottawa, focusing on Military Law. If you have a question for Col Drapeau, you may submit it via email to Esprit de Corps military magazine at info@espritdecors.ca**

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