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WINDS OF CHANGE?

The Canadian military justice system is so far removed from the society it is supposed to represent and defend.



Colonel-Maître™

MICHEL W. DRAPEAU

Michel W. Drapeau is a professor of military law at the University of Ottawa. He also served in the Canadian Forces for 34 years retiring in 1993 in the rank of colonel. He is the co-author, with Gilles Létourneau, of *Military Justice in Action: Annotated National Defence Legislation, Second Edition*.

Military law in Canada, with its own governance regime and penal justice system, tends to evolve slowly and quite separately from civil society. This is due in large part to two interconnected factors. First, the Judge Advocate General (JAG), who reports to the minister of National Defence, has alone the unfettered governance over all uniformed actors in the military justice system. Second, the distinctiveness of the military justice system from the mainstream of national (criminal and administrative) law is reinforced by the fact that there is only a very tiny number of judges, lawyers, law professors, legislators and public officials who concern themselves with military law. Not even the Canadian Bar Association, which has the mandate to pursue improvement in the law and the administration of justice, intervenes in this domain—a situation made inevitable when in 2014 its CEO accepted a key appointment in the military legal branch as honorary colonel, placing him and the CBA in a perceived conflict of interest.

Not surprisingly, therefore, suggestions for much-needed modernization and enhanced fairness of the military justice system have so far been met with an indifferent reception from the lawmakers. Whether it relates to such matters as sexual assaults in military colleges and elsewhere, mistreatment of military families and PTSD sufferers, *in camera* military board of inquiries instead of coroner's inquests, a broken military grievance system or the lack of competence of the military police, the occasional hues and cries from the general public, driven principally by media reports, might appear *ab initio* to be forceful agents for real change. However, in reality such clamouring has not led parliamentarians to make legislative changes that would contemporize the military justice system.

Yet, one would legitimately expect changes which are in-line with contemporary Canadian legal doctrine and principles as well as in harmony with a majority of our allies. Ironically, however, when Parliament has acted, the military has had a capacity to delay the implementation of many such reforms. For instance, 60 of the 134 sections of Bill C-15, Strengthening Military Justice in the Defence of Canada Act, which was enacted into law on June 19, 2013, have yet to be put in force. Yet, pending provisions covering areas such as extension to limitation periods for civil claims, admissions, definition of sentencing principles, absolute discharge, intermittent sentences, restitution and victim impact statements aimed at rendering fairer our military justice system are side-tracked.

On Nov. 13, 2015, the faculty of law at the University of Ottawa hosted the first ever academic Military Law Conference in Canada. The conference featured 20 world-renowned experts who illuminated the fact that military justice globally, particularly in countries with whom we share a common legal heritage and similar values, is going through a period of foment by enacting major reforms and shrinking military justice jurisdictions in favour of increased civilian capacity and a fairer system that affords rights to our military personnel. This inaugural conference served as a real eye-opener and “*une prise de conscience*” by civil society illustrating how far removed and alienated the Canadian military justice system is from the society it is supposed to represent and defend.

Some of the major highlights from our international speakers include the following:

1. The president of the European Organisation of Military Association, an umbrella structure composed of 41 military associations and trade unions from 25 countries with a total membership of approximately 500,000, informed the audience that the right to freedom of association and related rights for military personnel are well recognized in international legislation. Experience has shown that the manifestation of such rights has not compromised combat efficiency or military discipline. Quite the contrary. Involving democratic military associations in a well-structured dialogue with political and military authorities has *de facto* improved morale and loyalty of troops. They can also enhance the status of the military profession in society.

2. The president of the International Society for Military Law and the Law of War briefed attendees on the worldwide evolution of military jurisdictions. Specifically, he noted that on the European continent the lack of transparency in military legal procedures and the existence of ‘special rules’ not in conformity with civilian standards have created a general spirit of discontent and suspicion giving rise to several appeals before the European Court of Human Rights. The judgments of this court led countries such as the United Kingdom, Ireland etc., to make fundamental changes to their summary trial procedures—something that is still severely lacking in Canada.

In the meanwhile, by way of political action, Belgium, the Czech Republic, Denmark, Finland, France, Germany, the Netherlands have abolished military courts entirely.

3. Both the JAGs from the United Kingdom and Canada addressed the conference. Their juxtaposition starkly revealed their antipodal tenure.

JAG for the U.K.: The JAG has been a civilian High Court Judge since 1948. (Ireland, Australia and New Zealand have followed suit.) The JAG is independent from the executive branch and is not accountable to the government. He is held to and possesses the same standards of independence and impartiality as a civil court judge. The JAG is responsible for appointing civilian judges to preside over military tribunals (courts-martial and appeals of summary trial convictions). The JAG is no longer part of the U.K. Ministry of Defence. He does not provide legal advice to the military chain of command.

JAG for Canada: The JAG is not a judge or judicial officer. He is a lawyer with a military rank whose role is one of legal adviser. The JAG has been conferred a plenipotentiary mandate over the administration of the military and penal disciplinary justice system. He has monopolistic authority to provide advice to all stakeholders in the military justice system on practices, developments and reforms. Part of the executive, he proposes changes to the National Defence Act.

The JAG for the U.K. observed with candour that: “The U.K. has increasingly had to replace functions previously performed by service personnel with civilians to demonstrate ‘independence and impartiality.’ It is important that those civilians who operate in the system enjoy the confidence of both the military and the general public to ensure military justice is not perceived as a cover up on the one hand or oppression on the other.”

The conference also raised awareness of existing differences between the Canadian military and the Canadian civilian justice system which are no longer warranted or justified and which bring unfairness to military members. It also addressed a wide range of subject areas dealing with, *inter alia*, the disciplinary jurisdiction of military tribunals which has expanded to the point that only the offences of murder, manslaughter and abduction of children, when committed in Canada, cannot be tried by service tribunals. Indeed since 1998, the military has been granted jurisdiction for the investigation and prosecution of sexual assaults, a situation which is the subject of increasing public

criticism which is far from being abated by the timid actions of DND in response to the Deschamps Report on Sexual Misconduct in the Military.

The expansion of the military justice system has resulted in a corresponding loss of a high number of rights for our soldiers, including the constitutional right to a jury trial, the right to a preliminary inquiry, the loss of the benefits to a hybrid offence etc. for those prosecuted before and tried by military tribunals. [Of note, civilians including dependants, contractors and journalists, as well as members of their family accompanying the Canadian Forces abroad fall under

the jurisdiction of military tribunals.] Similarly, the summary trial system, whose very constitutional validity was also openly questioned by experts, has remained intact despite the fact that it substantially deviates from the norms of fundamental fairness that should not be tolerated or allowed to continue to operate. Moreover, and most bizarrely, victims of crimes investigated or prosecuted under military jurisdiction have been patently excluded from the recently enacted Victims Bill of Rights. It is somewhat unseemly to think

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at Yesterday's on Sparks Street just outside of the Parliamentary Precinct. Later, she worked at the now-defunct National Press Club, where she served former CTV reporter and now Senator Mike Duffy, and remembers when the crowd at the bar was five-people deep.

But as *Maclean's* political editor Paul Wells puts it, stepping into Ola Cocina “couldn't be further emotionally, psychologically” from high-end places like Hy's Steakhouse or “buzz places” like Brixtons where the Hill crowd usually hang their hats post-Question Period. “That's most of the charm of the place,” he says.

Mr. Wells tells *P&I* it's a place he is able to leave his 'Hill persona' aside and goes in with his family for a meal that always feels like an occasion.

“She really cares about her clients, you can just tell,” says Jacquie LaRocque, Compass Rose Group principal and an Ola Cocina breakfast regular.

Like much of Ms. Chevrier's Hill clientele, Ms. LaRocque lives nearby and heard about it through a friend in the area. She said Ms. Chevrier really understands the bubble those in political Ottawa operate in, but she also likes being able to support what she described as a candid, hard working woman.

For SiriusXM's Everything is Political host Evan Solomon, Ola Cocina is the best of Ottawa's food scene. It has “superb food, great personality and an intimacy you can't find very many places. It's like being at the best kitchen party in town. Its location is both totally convenient but somehow out of the way, so there is sense of discovery every time you go there,” he says.

“Maybe this is why it attracts political types. Finding it is like getting a scoop, or winning an election. It just feels special.” **P&I**

“**Finding it is like getting a scoop, or winning an election. It just feels special.**”

—Evan Solomon

National Defence Act needs to be modernized

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that CF members who volunteer to put their lives on the line to defend our security and values must give up their basic rights which seem so essential to those not in uniform.

The week following the conference, the Supreme Court rendered its decision in *Morarity v. The Queen* in which it declared constitutional section 130 of the National Defence Act, a provision which transforms criminal offences as ‘service offences’ becoming part of a mix of offences of a strictly disciplinary nature. The decision also struck down the doctrine of “military nexus” which requires a connection, albeit a loose one, between the nature of the offence and the accused's military service. Far from being an impediment to legislative reform, this decision makes it now imperative that a full-scale independent systemic review of the Canadian military justice system be undertaken to ensure that it corresponds to strict functional necessity. That is without encroaching, as it currently does, on the right of soldiers and on the jurisdiction that can and should belong to ordinary civilian courts. In the final analysis it should bring the military justice system more in line with contemporary Canadian legal doctrine and principles and prevent it from falling further behind global trends.

CONCLUSION

Attempts to modernize the National Defence Act to bring it more in line with global trends or our own civilian penal system have been serially resisted by our own military. Several reforms made as a result of pressures were initiated from outside, including the judiciary but not within DND. At present, the Canadian penal military justice system mitigates the right to equality before and under the law as well as the right to equal protection and benefit of the law guaranteed by section 15 of the Canadian Charter of Rights and Freedoms. The conference has confirmed the urgent need for the 42nd Parliament to embark upon a review which will lead to its reevaluation and rejuvenation to ensure its harmony with the ordinary law of Canada. Such reform would have implications not only for those in the military, but also for the rightful place of the Canadian Forces within Canadian society. **P&I**

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