**Time for Parliament to legislate control over Canada’s military criminal justice system**

The interim report on the court martial comprehensive review does not instill confidence that the military justice system is working, and this should bring tremendous concern, and a sense of urgency, to Parliament that significant reform is required.

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Military justice

OTTAWA—The cornerstone of Canada’s constitutional democracy is the separation of government powers. As the jealously guarded core of law and with a complete oversight over the executive, the legislature arguably wields the greatest power. If there is public demand for a policy shift, it is the legislature that exercises control over the executive to ensure that the public interest is maintained. This includes control over all government departments, including the Canadian Armed Forces.

Despite its oversight duty, Canada’s legislature has arguably not made a meaningful contribution to the development of military law since 1967, resulting in the unification of Canada’s Army, Navy, and Air Force. In this way—save for legislative reform in 1997 as a result of the findings of the Commission of Inquiry into the Deployment of the Canadian Airborne Regiment to Somalia—this current Parliament is an absent landlord, currently more concerned with legalizing marijuana than in reforming an ancient justice system that so often fails our men and women in uniform.

And the time for the legislature to exercise control over the military has never been more urgent. Last week, an interim report on the court martial comprehensive review was made public, and demonstrates that there is a strong and uniform lack of confidence in the military justice system. In interviewing those in Command roles, senior officers advocate for significant reform to address shortfalls of the military justice system, including civilianization of the prosecution services and the judiciary. These commanders give clear examples where military lawyers have undermined their command function.

Canada’s minister of justice is also ‘absent in office’ on the military justice file. Yet, Sec. 4 of the Department of Justice Act gives the minister responsibility as superintendent over “all matters connected with the administration of justice in Canada, including the military justice system.” The Minister of Justice, Jody Wilson-Raybould, is also the official adviser to the governor general—Canada’s commander in chief—and is the legal member for the Queen’s Privy Council. Not only is the minister passive and uninvolved in military affairs, her legislation goes out of its way to exclude application with the dissolution of Parliament prior to the last federal election, the bill died on the Order Paper, and nearly two years since, there is no indication that it will be reintroduced.

The need for civilian oversight of our military has never been clearer.

The Summary trial

Among advanced democracies, Canada’s military is the last bastion of the ancient summary trial. The ancient summary trials system in Canada is frozen in time and largely unchanged in 328 years.

Nearly 800 military members in Canada face summary trial each year. These disciplinary proceedings, which are heard by that soldier’s commanding officer, could lead to a sentence with “true penal consequences” such as incarceration, demotion, a large fine, or a reprimand. A summary trial conviction may also result in a criminal record.

Amazingly, however, there is no right to legal counsel at a summary trial even if an accused is being tried on Canadian soil, during peace time; nor is there a transcript of proceedings or a right of appeal. Moreover, the commanding officer hearing the summary trial has no legal training.

The summary trial disciplinary procedure is also devoid of any rules of evidence, meaning there is no protection for an accused being compelled to be a witness against himself, there is no protection against self-incrimination, no right to spousal privilege, and adverse inferences may be drawn from the accused’s silence, and hearsay evidence may be taken and fully relied upon.

No other Canadian faces such a one-sided penal justice process. The summary trial process, as practised in Canada, has been all but abolished among all our NATO allies. Canada’s system is still used in Pakistan, Sri Lanka, India, Bangladesh, and Nepal.

In 2015, Canada’s Parliament introduced Bill C-71 which was aimed at modifying the military’s summary trial. However, the authenticity for such reforms is questionable, because with the dissolution of Parliament prior to the last federal election, the bill died on the Order Paper, and nearly two years since, there is no indication that it will be reintroduced.

No impetus for change

As it stands, Canada’s military justice system needs comprehensive reform—a task that requires independent oversight.

Since 1998, there have been two independent reviews of Canada’s military justice system. The first review was conducted by Antonio Lamer in 2003. The second review was conducted by Patrick J. LeBalle in 2012. The recommendations of these two reports were mostly geared at protecting the status quo and not towards significant reforms.

In 2016, Canada’s Minister of National Defence Harjit Sajjan ordered a review of the National Defence Act, and asked stakeholders to make submissions on how to improve their policy and governance process. A separate and parallel internal review, was also launched by the judge advocate general on the court martial system. That review is spearheaded by a senior lawyer with the Office of the Judge Advocate General.

Though a wall-to-wall review of the National Defence Act is desperately required, meaningful reform can only be achieved by external review. Most surprisingly, despite assembling a team and having them conduct extensive consultations with 10 countries globally, at a May 2017 conference, the senior officer leading the JAG review stated it was possible “the report just gets put on a shelf and becomes a reference for future folks examining and looking at options for reform of the court martial system.”

Factually then, there is no real impetus for meaningful change.

Procedurally, a confidential draft report on the court martial system has been produced and provided to the judge advocate general for approval. However, despite permitting broad input from all Canadians, the military lawyers will seemingly only give weight to positions and ideas penned by members of the defence establishment because, as stated by the same senior JAG officer at the same May 2017 conference, “no one can understand military justice unless they have worked in it.”

This is troublesome.

More troublesome is that, according to CAF’s defence ethics teachings, it is impermissible for a serving member to criticize the current operational framework. In the 2016 edition of Maple Leaf Magazine, the Defence Ethics Program published an ethical scenario concerning Albert, who sadly disagreed with his chain of command on a policy decision. The ethical dilemma is: What should Albert do? After some time, the DND’s Ethics Program released its rubric response: If you disagree with departmental policies, a member’s only options are to keep quiet or release from service. The answer and rationale provided by the ethics advisors reads as follows: “If professional servants of the state choose to undermine the governance process when they disagree with decisions, then they render the institution incapable of serving the state.” If Albert felt this issue was important enough, he had the option of resisting his professional obligations by resigning from the institution.

The CAF policy is seemingly, therefore, that if a member disagrees with current governance policies, the only recourse is to resign, or else they will be violating their professional oaths. According to the Defence Ethics Program, for a member to make a submission to assist the JAG review, would be to undermine the governance process itself. The member would be necessarily forced to resign. Given this reality, there is no reason to expect anything but submission to the status quo. Perhaps the senior JAG officer’s prediction—that his report will merely get “put on a shelf and becomes a reference” is more truth than fiction.

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Past likely to repeat itself

In an effort to address the lack of action by military lawyers to review and recommend substantial changes to their own policies, it will undoubtedly lead to a predictable outcome—creation of the report of the self-aggrandized “justice” system, with broad recommendations that will never be fully implemented.

This cynical opinion is grounded in very recent history. Consider Bill C-15: An Act to Amend the National Defence Act. Bill C-15, the bill before the House of Commons in June 2011—more than six years ago. It received royal assent on March 21, 2012, despite the passage of over two years since assent, more than half of this bill has yet to be put into force, including all provisions aimed at strengthening the archaic military justice system.

Bill C-15 was the subject of more than two years of extensive study, including eight separate meetings of the Standing Committee on National Defence, and five full meetings of the Senate Committee on Legal and Constitutional Affairs. Bill C-15 received Her Majesty’s approval, and the approval of the judge advocate general who was directly involved in the consultation process.

For reasons unknown, Bill C-15, a very important legislation and an effort to improve accountability and justice, was not fully implemented. It is now clear that any work prepared by the JAG’s most recent internal review will find equal outcome—just another reference text, as he has foresworn.

Military self-governance—do not let that go to our heads!

Business as usual continues towards the military becoming completely insulated and self-governing, and the military take every opportunity to distance themselves from society. In doing so, they act in stark contrast to the people they serve. Corporal Stuart Langridge—a veteran of the Afghanistan conflict and a victim of sexual assault—risked his career, charged under military law, for bringing the fact for more than 16 months after Langridge’s crimes were revealed. This included with mistakes and have left Langridge’s parents feeling “deceived, misled, and intentionally marginalized.” This included with mistakes and have left Langridge’s parents feeling “deceived, misled, and intentionally marginalized.” This included with mistakes and have left Langridge’s parents feeling “deceived, misled, and intentionally marginalized.” This included with mistakes and have left Langridge’s parents feeling “deceived, misled, and intentionally marginalized.” This included with mistakes and have left Langridge’s parents feeling “deceived, misled, and intentionally marginalized.”

The treatment that the Fynes family suffered at the hands of the Canadian Forces Administration and leadership left them deeply scarred and resulted in a very public inquiry by the Military Police Complaints Commission into 32 allegations of wrongdoing by several military police members. The MPCC considered testimony from 92 witnesses, through 62 days, which straddled nearly six calendar months. Trostine has uncovered unusual, dramatic and disturbing events both in the lead up and the aftermath of Langridge in 1998, that led to a conclusion of sexual assault.

The final report of the MPCC has been ignored by the military police with no meaningful changes being made.

The Deschamps review

In response to media reports of widespread sexual misconduct within Canada’s military, on July 9, 2014, the Department of National Defence announced that there would be an external review on sexual misconduct in the Canadian Forces. The review was undertaken by Madam Justice Marie Deschamps, a highly qualified, and recently retired Supreme Court judge.

Disappointingly, the military only provided beechwoods with a limited mandate, and she was therefore unable to probe too deeply into the military justice system to determine whether or not there was disconnect between the military polices, and more importantly, the application of those policies.

On April 29, 2015, Deschamps’s report was released. The findings detailed an epidemic of sexualized behaviours and attitudes. Specifically, Deschamps concluded that abuse of power in Royal Military College of Canada (RMCC) is “endemic.” She writes that many college students she spoke with “reported that sexual harassment is considered a “passing of the belt,” and sexual assault an ever-present risk. One officer cadet joked that they do not report sexual harassment because it happens all the time.”

There is no reason to believe the findings of this report. Instead, with much fanfare, the current Chief of the Defence Staff, General Jonathan Vance, initiated Operation Honour. His stated mission is “To eliminate harmful and inappropriate sexual behaviour within the CAF.”

The following year, Vance commissioned a Statistics Canada survey to re-evaluate the data set. What embarrassed him must have felt when this new report showed that nearly 1,000 members of the military reported being sexually assaulted within the previous 12 months. His Operation Honour had been directly and flautingly ignored. The Statistics Canada survey further found that soldiers, sailors, and aviators are far more likely than other Canadians to be violently assaulted. It also suggests that military leaders have a long way to go in their efforts to change a culture in which sexual assault is tolerated.

Operation Honours is ongoing, and will not be concluded until all CAF members are able to perform their duties in an environment free of harmful and inappropriate sexual behaviour. “How is this to be measured and victory declared is uncertain, particularly since there will be no external review of the results of this operation.”

Role of courts and tribunals

The courts and tribunals in Canada are largely not willing or able to intervene concerning issues of military law and practice.

Women were only permitted aboard Naval ships and the initial recommendation of Bill C-15, the National Defence Rights Commission forcing it upon them. The CAF and Department of National Defence argued against this modernization.

The unconstitutional right of a criminal accused to select the mode of trial was only abolished in 2008 by order of the Court Martial Appeal Court in v. Leblanc. Security of tenure for military judges was not recognized until 2011, by order of the Court Martial Appeal Court in v. LeBlanc. The judiciary is cautious not to interfere with what it perceives as the will of Parliament. Indeed, the separation of powers may prevent them from doing so. Disappointing, however, was the complete absence of an independent military justice regime. The Supreme Court of Canada seems consistently reluctant to do so.

Canada’s Constitution permits a law to be struck if the breadth of a law greatly exceeds the legitimate purpose. Most recently, in R. v. Moriarity, the Supreme Court of Canada considered whether incorporation of Criminal Code ofences as military discipline confers due process.

The Moriarity case was an opportunity for the Supreme Court of Canada to clarify the balance between the military and the requirement for the military to assume jurisdiction over offences committed in Canada and in peacetime. A central question was as follows: to retain jurisdiction over criminal offences, is it necessary for military prosecutors to show a connection to the maintenance of discipline, efficiency and morale of the military?

The Supreme Court of Canada answered question emphatically: there are no limits to prosecutorial discretion, and any changes to this discretion must be done by the legislature. The historical ‘nexus’ test was quashed. The issue must be addressed by Parliament, not the courts.

Conclusion

The legislature is trusted with ultimate responsibility for a country’s strategic decision-making, including control and oversight of the military. Historically, the military has resisted oversight, conducting internal reviews and only truly responding to crisis as they arise, and in response to changing expectations of civil society whom they serve, and the Department of National Defence’s ability “to control the message.”

The internal review on the court martial system review does not instill confidence that the military justice system is working, and this should bring great concern, and a sense of urgency, to the legislature that significant reform is required. We will have to wait for the publication of the final report by the Office of the Judge Advocate General to find out how these urgent please for reform are addressed.

It is the duty of our legislature and the minister of justice to be vigilant and not allow our military to operate in a vacuum. Former French prime minister Georges Clemenceau once famously quipped: “War is too important a matter to be left to the military.” Perhaps there is a lesson from this statement, and military justice, accordingly, is also an important matter to be left to the legislature.

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