

COURT MARTIAL COMPREHENSIVE REVIEW

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The Court Martial Comprehensive Review Team (CMCRT) was appointed by the Judge Advocate General to consult experts regarding eight aspects of the court martial system in the Canadian Armed Forces. Below is a summary of the conclusions and recommendations by one of them.

GENERAL PRINCIPLES

The Judge Advocate General's initiative is to be commended. The review of the court martial system – which is only one part of military justice – must enable the armed forces to respect human rights, remain subordinate to political authority and meet operational imperatives in order to deal with demanding circumstances. Any reforms must be in line with that reality. In light of these challenges, reflection, analysis and future direction must go beyond the proposed framework and extend through the excellent democratic institution that is the Parliament of Canada.

1-TRIBUNALS AND COURTS

- 1) Though similar in many aspects to that of civil courts, judicial independence within the court martial system could be enhanced:
 - a. by formally providing for the Court Martial in legislation in the same way as the Federal Court;
 - b. by establishing military judicial districts in the regulations, each corresponding to a region of Canada (e.g., North, Pacific, West, Central, East, Atlantic), and one expeditionary military judicial district to cover all operational deployments (the number of operational sub-districts could fluctuate as necessary). For each district, the infrastructures, logistics and personnel required for proceedings would already be grouped in the administrative centres, so that ideally, only military judges would have to travel;
 - c. by bringing the services of the Court Martial Administrator under a specialized division of the Courts Administration Service.¹

¹ *Courts Administration Service Act* (S.C. 2002, c. 8)

- 2) Though essential to understanding the context of the Canadian Armed Forces, particularly with respect to pure service offences, the members of the court martial panels:
 - a. Should be more than five in number;
 - b. Should be civilians in some number in the rare cases where the accused is a civilian;
 - c. Should be selected by a procedure that, without going all the way to a proceeding before civilian courts, enables the parties to ask questions to reduce the risk of bias by any member. This step should ideally be presided over by a military judge or the Court Martial Administrator, on the condition that the holder of the position has been a member of a provincial bar for at least 10 years. For the sake of efficiency, this preliminary procedure could be carried out by means of telecommunications.²
- 3) Though it appears high relative to the number of proceedings, the number of positions for military judges is appropriate. However, to deal with an increase in cases, judicial duties could be reorganized as follows:
 - a. Expand the pool of people eligible for the reserve military judges panel by lowering the conditions required in order to include people who, without being Reserve Force officers, have been members of a provincial bar for at least 10 years, or judges in a court having criminal jurisdiction, and have been officers in the Canadian Forces for at least 10 years, whatever their occupation. For example, a provincial criminal judge who has been an officer in the CAF for 20 years could be assigned by the Chief Military Judge to a case involving offences under the *Criminal Code*, such as sexual assault or fraud, which he or she is used to dealing with because of his or her civilian judicial duties;
 - b. Reserve Force military judges would mainly be assigned to cases from military judicial districts in the country; the Chief Military Judge could not assign them to cases from the expeditionary military judicial district without their consent;
 - c. The Chief Military Judge would be required to be a member of the Regular Force;
 - d. Cases would be assigned to the military judicial district from which the charge originates. When they leave the initial unit – either by choice of the

² QR&O 112.64.

accused or sent directly by the commander – cases would appear on the Court Martial's radar. Court scheduling would set the terms for each district. The military judge appointed to a term for a given district could manage cases, for example, to request the position of the Director of Military Prosecutions for cases under review without an indictment, to request the position of the accused after discovery, to receive a guilty plea and determine a sentence, and to set a trial date in the event of a dispute.

- 4) Though it originally responded to legitimate concerns, the procedure for receiving a plea is cumbersome. It is important that the choices of the accused be made in a free and informed manner, but it would be appropriate to streamline the process.
- 5) For the purpose of perceived independence, military judges should not have a rank.
- 6) To simplify and clarify the institution's designations, the expressions "standing court martial" and "general court martial" should be abandoned. Rather, we should speak in terms of a Court Martial trial, with or without a panel.

2-PROSECUTION SERVICE

There are as many good reasons to transfer military prosecutions to the civilian side (as in France) as there are to maintain the status quo. Since legal reform requires time, effort and resources to implement, caution demands that we not start down that path until it is reasonably clear and the cost-benefit is favourable. It is therefore recommended that the current system be maintained.

To improve the system, the following recommendations have been made:

- a) To enhance the independence of CMPS:
 1. Physically locate CMPS in a different building from that containing the Office of the JAG;
 2. Within the legal officer MOC, create a "litigator" subgroup. To be a "lawyer-litigator," a person must have at least 5 years in CMPS, the DCS or both;
 3. Establish that once a lawyer has reached the stage of being confirmed within the Office of the JAG (Major/LCdr rank), it is understood that a legal officer joining CMPS will stay there for at least 5 years, unless there are exceptional circumstances. This does not preclude being

reassigned from one office to another or from one service to another within the DMP;

4. Grant promotions to lieutenant-colonel at CMPS only to lawyer-litigators with at least 5 years of experience;
5. Evaluate performance and potential for promotion within CMPS independently of the Office of the JAG;
6. Keep all communication between the Office of the JAG and the DMP regarding specific cases in a separate file.

b) To enhance CMPS's expertise in criminal litigation:

1. Continue temporary assignment of CMPS lawyers to their provincial colleagues;
2. Coordinate the continuing education of CMPS lawyers with that of DCS lawyers;
3. Allow confirmed legal officers (Major/LCdr) who have completed the initial 5-year period to remain litigators for the rest of their careers if they wish to do so.

3- DEFENCE COUNSEL SERVICES

It is recommended that the system be modified to replace the organizational link between DDCS and the JAG with a link between DND and DDCS, a management organization that plays an intermediary role. Transferring what DCS does to a civilian legal aid service is not recommended. The loss of expertise with respect to the military context and the loss of the ability to deploy quickly would negatively affect the delivery of legal services under the *Code of Service Discipline*.

Specifically, the following measures are recommended:

a) To enhance DCS independence:

1. Establish a Defence Counsel Services Board of Directors (DCSBD), made up of 7 to 9 members (CAF members, CBA members, members of provincial legal service commissions, former military lawyers and judges, academics) in the style of the Legal Aid Ontario Board of Directors.³ The DCSBD would become the intermediary between

³ Legal Aid Ontario, Board of Directors, online:
< http://www.legalaid.on.ca/en/about/board_of_directors.asp>.

DDCS and the Department of National Defence, with a memorandum of understanding between the DCSBD and DND on DCS legal service delivery;

2. Within the legal officer MOC, create a “litigator” subgroup. To be a “lawyer-litigator,” a person must have at least 5 years in CMPS, the DCS or both;
3. Establish that once a lawyer has reached the stage of being confirmed within the Office of the JAG (Major/LCdr rank), it is understood that a legal officer joining DCS will stay there for at least 5 years, unless there are exceptional circumstances;
4. Grant promotions to lieutenant-colonel at DCS to lawyer-litigators with at least 5 years of experience;
5. Evaluate performance and potential for promotion within DCS independently of the Office of the JAG;

b) To enhance expertise in criminal litigation:

1. Allow temporary assignment of DCS lawyers to their provincial colleagues;
2. Coordinate the continuing education of DCS lawyers with that of CMPS lawyers;
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4- OFFENCES UNDER MILITARY LAW

- 1) Moriarity OK – Criteria for military prosecution powers – In QR&O rather than policy;
- 2) Review current offences (e.g., abuse of subordinates s. 95 less than 2 years; assault 266(a) indictable offence and liable for imprisonment for a term not exceeding five years);
- 3) Evaluate the possibility of creating new offences:

- a) Sexual Misconduct or Inappropriate Sexual Behaviour : based on former Justice Marie Deschamps recent report⁴, any prohibited sexual conduct not otherwise covered by a sexual offence, including:
 - i. fraternization;⁵ ii. adverse personal relationships;⁶ iii. sexual harassment⁷, and;
 - iv. use of DND electronic networks or computers to communicate or access material of a sexual nature;⁸
- b) Information Technology Security Breach;⁹
- c) Drug Use;¹⁰
- d) Negligent or Unauthorized Discharge of a Weapon: where 'negligent' would be a true criminal offence established by 'a marked departure from the norm' whereas 'unauthorized' would be a strict or absolute liability offence, exposing contraveners to non-custodial sentences;¹¹
- e) Failure to Properly Maintain:
 - i. Personal Equipment;
 - ii. Quarters, or;
 - iii. Work Space;¹²

⁴ Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, (Ottawa: National Defence, 2015) at 46.

⁵ Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 5019-1, *Personal Relationships and Fraternization*, (Ottawa: National Defence, 22 December 2004).

⁶ *Ibid.*

⁷ Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 5012-1, *Harassment Prevention and Resolution*, (Ottawa: National Defence, 20 December 2000).

⁸ Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 6002-2, *Acceptable Use of the Internet, Defence Intranet and Other Electronic Networks, and Computers*, (Ottawa: National Defence, 12 February 1999).

⁹ Canada, National Defence, Defence Administrative Orders and Directives (DAOD) 6003-1, *Information Technology Security Programme*, (Ottawa: National Defence, 18 April 2012).

¹⁰ QR&O, art 20.04.

¹¹ See generally *R v Brideau*, 2014 CM 1005 (CanLII).

¹² QR&O, art 108.17(1)a.

Inappropriate Dress or Deportment¹³: the first being a failure to be properly dressed according to CAF instructions¹⁴, irrespective of the behaviour, while the second is a failure to maintain proper behaviour, while wearing a uniform

5- PUNISHMENTS, SANCTIONS, AND SENTENCING LAWS

The punishments scheme at summary trial should be revamped. Consequences that flow from reprimand and severe reprimand should be specified. The creation of additional punishments should be considered such as: restrictions of privileges, removal from the promotion list, or reduction of pay for one year or deferral for one year of the next pay increment.

6- LAW OF EVIDENCE

Make them thinner, only those required for the better administration of military justice. Otherwise, apply the general regime as defined by *Evidence Act* and CSC decision.

7- RIGHTS, GROUNDS, AND MECHANISMS OF APPEAL

CMPS should be able to appeal on constitutional issues, even if the person is found guilty.

CMAC expertise. 3 options:

- a) Reduce the pool to those with experience in military or criminal law or both
- b) Propose training at the National Judicial Institute
- c) Give CMAC power to name an amicus curiae in military law

8- SPECIFIC GROUPS AND THE MILITARY JUSTICE SYSTEM

Victim is part of the criteria to determine whether in town or not.

Young offender, idem.

Aboriginal offender, idem

Anyone from a group whose special needs cannot, under the circumstances, be adequately accounted for in the military justice system.

9-OTHER CONCERNS

Grievances – this is military justice as well

¹³ *Ibid.*

¹⁴ *Canada, National Defence, A-DH-265-000/AG-001 Canadian Forces Dress Instructions, (np: CDS, 2010), ch 2 "Policy and Appearance", sec 1 "Dress Policy" at paras 1-58.*

JAG mandate – several hats – conflicts?