

Military Courts

- *What type of court martial system is needed for dealing with service offences?*
 - The current non-standing court martial system works well, because it is easy to convene at the necessary location. I am not convinced of the necessity of having military judges, all the more since they appear to have much less experience than civilian lawyers. However, due to significant delays in civilian criminal cases, it is important that judges be appointed to the Department of National Defence for a fixed period, and that these judges be selected based on certain experience and interest (avoid having judges on their first appointment).
- *How much or how little involvement of military personnel is needed in judging a service offence?*
 - I am convinced that former unit and formation commanding officers have the judgment and experience necessary to determine the ins and outs of service offence charges, as well as their impacts on a unit, collective discipline and operational security when required. It is important to maintain this panel and specify criteria (command experience is essential in my opinion) in the military justice system.
- *Is a military judge better than a civilian judge, or vice-versa, in a trial of a service offence?*
 - The principles of law remain the same. The military dynamic in a tactical unit and in operations bears a significance that a judge must be able to understand, but this should not represent an obstacle for an experienced judge, with military legal personnel and lawyers participating in the proceeding. In many respects, a civilian judge will be perceived as being more impartial, whether that is true or not.
- *How much, if any, military expertise does a judge need to deal with service offences?*
 - I am not convinced that all military judges have the same experience and knowledge, or the same military culture as members who have spent a significant amount of time on an operational base or a vessel. There is also a different culture from one element to another. That said, I see the most value in a judge who has worked as a lawyer on military cases in the past, and who has advised commanders. It is certainly most important for a judge to have a thorough knowledge of service offences, as well as the laws applicable to expeditionary operations. It is possible to acquire that knowledge.
- *How much, if any, criminal law expertise does a judge need to deal with service offences?*
 - Many offences brought before court martial have a criminal connection. The danger stems from the possibility that a similar offence could be treated in a similar manner, while an offence may have more significant and serious impacts in a military/operational context.
- *Is there cause to appeal to military panel members rather than civilian jury members, or vice-versa, in a trial of a service offence?*
 - Panel of former commanders.
- *Are deployable military courts needed to deal with offences that take place outside of Canada or in dangerous environments?*
 - The capacity must be maintained. The impact of a court martial is much greater for units in situ. When there is a court martial on one of the bases in Canada for a military member on that base, there is an immediate impact on the units affected, and a clear message for all troops involved. Most of the time, the member will be repatriated, and the length of current missions implies that all witnesses will generally have returned from the mission. An understanding of the context, the local culture, the level of risk and the nature of operations, in addition to the accessibility of local witnesses/authorities are also important elements that, in the context of a long-term mission, could be significant in understanding the cause, and to the perception of justice and discipline by troops in theatre and by partners (allies/locals) who are potentially involved.

Military prosecutions

- *What type of prosecution system is needed for dealing with service offences involving the Canadian Armed Forces?*
 - An important factor in the loss of trust by military members and the chain of command in the military justice system is a case dragging on too long and/or technical points taking precedence

over the interests of military justice and discipline. The main point to consider to maintain discipline is a proceeding with sound judgement and expertise based on knowledge of the military system, including the MP/NIS/CoC investigation system – whether the system is civilian or military, and whether or not the DMP reports to the JAG. A system of civilian prosecutors who have developed expertise in military proceedings and belonging to DND could certainly contribute to the institution’s credibility – compared to military prosecutors who have only done the job for a limited amount of time.

- *How much or how little involvement of military personnel is needed in a prosecution system?*
 - It is not necessary that these be military members. At least one legal officer is required as an advisor, but a mix of civilian and military MPOs would provide a good balance of expertise and experience in civilian proceedings and knowledge of the military.
- *Is a military “director” for a prosecution service better than a civilian “director,” or vice-versa, in a trial of a service offence?*
 - I believe that a civilian director, in the position for a long time and with expertise in criminal prosecution, is preferable given that he or she has the necessary knowledge and interest, as well as the support of legal officers in the office.
- *Are military prosecutors better than civilian prosecutors, or vice-versa, within a trial of a service offence?*
 - See above.
- *Should military prosecutors also spend time during their careers as military legal advisors on other military law issues, or should they specialize in the litigation of offences?*
 - If the director of military prosecutions is a civilian, with some civilian prosecutors, military prosecutors would probably benefit from acquiring experience in other aspects of military law.
- *Are military prosecutors needed to deal with offences that take place outside of Canada or in other dangerous environments?*
 - It is useful to maintain that capacity, and to have prosecutors who have acted as legal advisors to tactical Comds in an operational environment.

Defence

- *What type of defence counsel service is needed for dealing with service offences?*
 - Comments received from members who have used this service are very positive: knowledge of the military system is seen as added value. The fact that offences are and should be judged more severely for members subject to the NDA implies that legal support should be more significant for the sake of fairness, and should be provided by military defence lawyers who understand people in uniform. Because of the availability of military defence, recourse to civilian lawyers should be at the member’s expense, unless the JAG determines that it is in the best interests of the organization and the member that the member be represented by a civilian lawyer.
- *How much or how little involvement of military personnel is needed within a defence counsel service?*
 - As long as a jury is composed of military commanders, and a thorough knowledge of the environment and the NDA is required to properly defend a member, I believe that this purpose is best served by a team composed almost exclusively of military defence lawyers.
- *Is a military “director” for a defence counsel service better than a civilian “director,” or vice-versa, for defending those charged with service offences?*
 - A civilian director could be advantageous if directing a military team, if only to recommend member access to a civilian lawyer, and/or to preserve fairness for members who might feel wronged being defended at a lower price by those accusing them.
- *Are military defence lawyers better than civilian defence lawyers, or vice-versa, for defending those charged with service offences?*
 - See above.
- *Should military defence lawyers also spend time during their careers as military legal advisors on other military law issues, or should they specialize in the litigation of offences?*

- I believe that it is essential for defence lawyers to have operational experience at the tactical level, and that they work with units to understand the environment and the challenges that units have to face, thus making them better equipped to advise their clients.
- *Are military defence counsel needed to deal with offences that take place outside of Canada or in other dangerous environments?*
 - An understanding of expeditionary operations and of the impact of offences committed in the theatre of operations is important.
- *How much, if any, of the cost of defending a person who is charged with a service offence should be paid by the person who is charged?*
 - The undesirable effect of military personnel contributing to the cost of their defence is that they choose a summary trial over a court martial solely for financial reasons. Furthermore, military members' responsibilities, especially those of members in command, cause them to be much more vulnerable to proceedings and decisions where judgement can be questioned and charges can be laid. If a contribution to the cost of defence is considered, a nuanced system is required, taking into account the realities that come with these responsibilities.

Offences under military law

- *Should the court martial system have jurisdiction to deal with ordinary civilian offences when they are committed by military personnel?*
 - The advantage of courts martial is that they can be faster than civilian courts, and sentences are disseminated through the military chain, which helps the chain of command maintain discipline within units.
- *Should the court martial system have jurisdiction only when there is a "direct link" between the circumstances of the alleged offence and the military?*
 - Preferable but not necessary. The "direct link" can be interpreted in many ways, but an offence committed in the civilian world by a military member not on duty does not need to be judged by a court martial, unless the offence was committed on an expeditionary operation.
- *Should the court martial system have jurisdiction to deal with war crimes and crimes against humanity committed by military personnel?*
 - War crimes and crimes against humanity should be judged by a court of competent jurisdiction, and there is significant public and political interest that this be done as transparently as possible. The offence is clearly military, and I think that past experience demonstrates that the public was fully informed of proceedings and results, and they have never generated lively debate. Culpability, once established, must be treated much more severely due to the significant impacts of this type of crime.
- *Are other changes needed in order to improve the court martial system?*

Punishments, sanctions and sentencing laws

- *To what extent, if any, should the court martial system mirror the civilian criminal justice system in terms of sentencing options and rules?*
 - The sentencing structure is problematic because it does not account for the fact that a sentence must be appropriate to the nature of the offence. It is possible, for example, to determine that a member is not able or worthy to bear a rank, and that the best and only way to prevent a repeat offence is demotion, but under the hierarchy principle, the sentence may be contested as too severe compared to other similar cases.
- *Are any of the existing punishments provided for under military law unnecessary?*
 - No.
- *Are there additional punishments that should be provided for under military law?*
 - Adequate.
- *Should sentences be imposed in accordance with a strict hierarchy, or should judges have greater flexibility?*
 - Much greater flexibility.

- *Should both concurrent and consecutive sentences of imprisonment be permitted within the court martial system?*
 - The main objective should be the rehabilitation of the military member, and if possible, the reintegration of the member into his or her unit, as well as discipline at the unit level. I am not convinced that consecutive sentences would serve that objective.
- *Should judges be required to determine individual sentences in respect of each finding of guilty that is made at a single trial, or simply determine the global sentence to be imposed as a means of addressing the totality of the findings of guilt that were made at single trial?*
 - One single sentence.

Evidence law

- *To what extent, if any, should the court martial system mirror the civilian criminal justice system in terms of the applicable rules of evidence?*
 - Mirror the civilian justice system in how it represents the Canadian environment and culture. There is no reason for a different system with respect to evidence law.
- *Are separate MRE necessary?*
 - No.
- *If so, what rules need to be included within the MRE?*
 - None.

Rights, grounds and mechanisms of appeal

- *What types of judges should preside over appeals from courts martial?*
 - Courts martial and the CAF are a federal area of responsibility, and a federal judge certainly has the required qualifications and expertise to hear an appeal.
- *Is military expertise needed at the appellate level?*
 - Depending on the type of case, expertise in military law could be useful at the appellate level, and the appeal judge should have access to this type of advisor.
- *Is criminal law expertise needed at the appellate level?*
 - Yes.
- *Is experience in presiding over appeals necessary at the appellate level?*
 - No.
- *What rights and grounds of appeal should the Crown have within the court martial system?*
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- *What rights and grounds of appeal should persons tried by court martial have?*
 - The same rights as a civilian, due to the increased responsibility and impact of a decision.

Specific groups and the military justice system

- *How should a court martial system account for the special needs of particular groups affected by the system?*
- *What more could be done to account for the special needs of young persons within the military justice system?*
- *What more could be done to account for the special needs of Aboriginal offenders within the military justice system?*
- *Are there other groups whose special needs are not adequately accounted for within the military justice system?*