

Feedback from the Officers and Crew of HMCS OTTAWA for the
Court Martial Comprehensive Review

General Comments

- a. While the military justice system is a fair, effective and sound method of maintaining good order and discipline within the CAF, recently some cracks have started to appear.
- b. In summary, the current composition and powers of punishment of Courts Martial are viewed to be still valid and necessary. Changes, if any, would see a reduction in time between the alleged commission of an offence and a trial.
- c. the military justice system (encompassing both Summary Trials and Court Martials in this discussion) is a necessary and important part of maintaining order and discipline within the CAF. There are several reasons the NDA has historically allowed the CAF to implement its own justice system, from regulations that do not apply in civilians to difficulties dealing with infractions in foreign countries/international waters to a unique culture that requires enhanced discipline that needs to be enforced: these issues, and more that I'm sure I missed here, all still apply.
- d. As someone who has been tasked as an Assisting Officer for a Summary Trial multiple times, I know the difficulties involved with preparing a member to go to trial. The first time I was an Assisting Officer I was given the "Guide for Accused an Assisting Officers" and told go assist the accused member. I felt inadequately prepared to ready a member to go to a trial that imposes *real* consequences to them. The Guide was very helpful, but formal training in the form of a qualification would ensure better help goes to accused members. I would recommend creating an e-Learning course on DLN, specifically directed to junior officers as a qualification to get prior to being an Assisting Officer.
- e. the system of Military Justice is warranted and provides a value added service to the CAF. There has been mention of the potential to do away with JAG positions and replace them with Civilians. You don't have to look far to find the benefits that JAG lawyers and judges can provide that a civilian simply could not. I do not think that the military justice system is at a point of dysfunction to require a complete revamp to this level. However, a review from the top down is needed in order to relook at elements of the system, from Powers of Punishment, to Maintaining Order and Discipline. It is fair to say that the military should always be reviewing its policies and procedures so as to ensure that we remain modern and relevant.
- f. The perception right now is that election of court martial over summary trial currently provides members with a much greater chance of getting acquitted of their charges, particularly if they enlist the services of a civilian lawyer, who are perceived to have a better understanding and application of trial law than military lawyers. Many acquittals over the last decade are perceived to be due to "technicalities" and members of the CAF view the accused as having gotten away with infractions.

Application

- a. They (certain members of the crew) believe that it maintains good order and discipline.

- b. The justice system itself does not really maintain good order and discipline, that's what the CoC does. The system only seems to come in when there is an issue.
- c. The UDI system should be clearly identified and explain to all members of the CF, so they have completed understanding of the situation as it happens.
- d. They feel that they do not really get educated that much on this topic, should be some education at PD days or other means for education. When it comes to punishment meted they feel that it is not always fair do to so many ways that the system can punish you from different angles.
- e. the military justice system works best when part of holistic system for dealing with behaviours that are a threat to good order and discipline in the CAF. It seems to me today though, that sometimes the CofC will fail to exhaust other avenues of modifying a member's behaviour, such as coaching, mentoring and identifying deeper personal problems. If these methods are not utilized, especially in cases where supervisors are remise in having due respect and understanding for their subordinates, then I believe ordinary members of the CAF lose faith that the military justice system. In short, when NCMs see the military justice system as a total separate component from other parts of the relationship between Command and a unit, then the military justice system becomes less effective as a resort for modifying negative behaviours as a critical component of Command's responsibility for the welfare of subordinates, as well as the enforcement of discipline.
- f. One of the strengths of the Military Justice system is that the CAF encourages participation, both through attendance at proceedings and making public the results and sentences of those proceedings. The publicity, even of minor infractions, ensures personnel have clear understanding of the consequences of their actions; this is not achieved as effectively in the civilian courts. It serves as a deterrence mechanism that helps maintain order and discipline, and reminds all personnel of the standards they are expected to maintain. The formal conduct and military tradition in Summary Trials and Court Martials also serves as a reminder to all that the CAF is held to a higher standard for very important reasons.
- g. Sexual crimes should never be tried through military judicial system. As indicated in the media, crimes of a sexual nature cannot reasonably be adjudicated through military justice. Victims may feel compelled to stand in front of a court as a witness. In a court where everyone is your co-worker, peer, or worse, a supervisor, standing up to the accused may prove to be a daunting task. In a civilian court, pressures of rank differences and military formalities are removed, thereby creating a more accommodating atmosphere for the victim. In conjunction with Operation Honour, the time is right to allow Sexual Crimes to be handled through civilian authorities.

Fairness

- a. The powers of punishment available to Courts Martial seem fair and warranted.
- b. They (certain members of the crew) believe the system works when utilized properly and not abused. For example, have all avenues been exhausted IRT coaching, mentoring and identifying the actual problem prior to attempting to rectify the situation with appropriate steps before jumping to extremes.
- c. All punishments seem to be fair and transparent.

- d. The system needs to ensure that it comes in line with the Canadian Justice System as far as fairness and punishment.
- e. They (certain members of the crew) feel that the fines are too low based on members pay. The consensus is that if members got hit with \$800 - \$900 fines rather than \$150 – \$200 there would be less reoffenders.
- f. They (certain members of the crew) feel that the system sometimes will be less lenient on higher ranking members than lower rank, however, this is not the case at all times.
- g. Powers of Punishment are the one area where the CAF could potentially use some reform. It frequently feels that the punishments are insufficient. I suspect this has less to do with powers of punishment being too low, and more to do with a reliance on the tradition of Common Law to refer to previous cases to determine appropriate punishments and a lack of understanding of most personnel on certain aspects of the Military Justice system. For an example of the first issue, if a \$200 fine is the “going rate” for a minor offence, say AWOL by an hour, that \$200 fine will not have the same impact on a member 10 years later when pay has gone up substantially. Similarly, punishments of “caution”, “reprimand” and “severe reprimand” are not understood by most members; they are all viewed as a “slap on the wrist” by most, and more education on this subject would be beneficial.
- h. Court Martials are also frequently held in parallel to Administrative Reviews, and again, this is not something that is well understood. There are frequently cases where members accused of serious offences, get seemingly lenient punishments (a fine and a severe reprimand) and the observers are left wondering how “someone that could do that” is still fit to serve, when behind the scenes the member is released through AR. Again, more education will certainly help, but this one is harder to solve due to the Protected B nature of AR.
- i. Finally, I would suggest delegating COs authority to preside over Summary Trials for junior Officers, at least at the A/SLt/2Lt to SLt/Lt level. The requirement to involve a senior Commander to charge a junior Officer with a minor offence too often results in people turning a “blind-eye” or “dealing with it at the lowest level” (e.g. extra duty). This is clearly ethically wrong, but often done to “avoid burdening a Flag Officer with a minor charge”. This inconsistent application of justice is noted by the unit’s personnel, and is, quite rightly, perceived as unjust and preferential treatment of the Officers, who should be held to a higher standard. Junior Officers, in their first few years of service, will inevitably make mistakes and poor judgment calls, and it behooves the military to see that they are appropriately punished, simplifying the process to achieve that goal is certainly in the interest of the CAF.
- j. There is a perception that a member is guilty until proven innocent. While this is not the case in theory, in practice member often feel that way. Any steps that can be taken to make the system feel more “just” would be appreciated by members throughout the CAF.
- k. Powers of punishment are perceived as inconsistently applied, as the same offence on two can have very different punishments applied. There may be valid reasons for the discrepancy (repeat offences, mitigating/aggravating circumstances, etc.); however, these are not communicated in the post-trial notifications, meaning those who do not read them do not have the contextual information to make the logical difference.
- l. Members electing court martials are perceived to have more serious charges reduced to meet perceived higher evidence thresholds. An recent example is a recent court martial

where initial charges were sexual assault but the prosecutor ended up only taking charges of drunkenness to trial.

Composition

- a. The composition of a Court Martial, both at Standing and General Courts Martial seems fair and reasonable. While I am aware that the possibility of using a civilian judge with a military panel is being considered, I am very much against such a change. While the CAF has not had an engagement against a state-actor in the recent past, the possibility exists of a major engagement in the future. During a large conflict the need to conduct trials in theatre, potentially in a higher threat environment, is very real. I do not believe that a civilian judge would be willing or allowed to deploy.
- b. An additional consideration is lack of military background of most of the Canadian populace. For much of the 20th century, a large proportion of the adult population served in the military or had relatives who did. This meant that basic knowledge of the military, including the unique requirements of the service, could be assumed. In the 21st century, our burgeoning population and decreased military means that most judges in the future will have little to no comprehension as to the requirements of the service, and situations that we could easily find ourselves in. This is particularly important with respect to the military mindset that is at great odds to the civilian one – mission first. The aggression, mental fortitude, and cold calculation required in stressful situations is something that is not merely up to an individual but has been inculcated throughout practical and theoretical training. The test of a reasonable person simply cannot apply in an operational theatre OR a training environment. A civilian judge would have years of valuable experience in a civilian setting, dealing with complex cases of jurisprudence. While this could be an asset to Courts Martial, the experience and mindset would not necessarily transfer directly to a military setting.

Timeliness

- a. the Court Martial system is seen as fair, though time consuming. While Summary Trials are often followed quickly after an incident, there is a large concern about the amount of time between the alleged commission of an offence and the commencement of the Court Martial Proceedings.
- b. the Court Martial system is currently overburdened, which has led to a breakdown in effectiveness.
- c. Recently, there has often been an unreasonable amount of time between when a charge occurs and is laid, and the time when a member receives a court martial. The amount of time between the laying of a charge and a trial has been recognized as a key component of procedural fairness by both the civilian and military justice systems, demonstrated in the statutory limits that the civilian system places necessitating when a trial can be brought to court. While in the past the military justice system often found the accused member to be the party which is at fault in delaying the trial, I believe that recently the JAG and military justice system itself has been the delaying party. I suspect that this delay has been due to a system which is under resourced (And indeed this is what the JAG has argued to the CDS in an attempt to gain additional funding), but this is not really

germane to the normal CAF member. What is clear is that the lengthening time between an offence against the CSJ occurring and a Court Martial seriously impacts the procedural fairness to the member, thus undermining the fairness of the system and negatively affecting members' respect for the system.

- d. Changes, if any, would see a reduction in time between the alleged commission of an offence and a trial.