

The ChronicleHerald

THE MILITARY AFFAIRS COLUMN BY TIM DUNNE

17 December 2016

Order in the Court Martial

The Charter of Rights and Freedoms, Canadian law and Canadian values are not a tide that lifts all boats equally.

On their enrolment, personnel of the Canadian Armed Forces (CAF) forfeit many of their Charter rights and freedoms.

Penalties for “infractions” are much more severe in the military context.

Arriving late for work is absent without leave. Simply walking away from a job is desertion. Arguing the wisdom of a superior’s direction is insubordination and collaborating with colleagues to take job action is mutiny.

Where a civilian Canadian could, at worst, lose his or her job, a military member could face a stiff fine, incarceration and a criminal record.

Many rights and freedoms that we take for granted are unavailable to members of our armed services.

This harsh reality lends increased importance to the Defence Department’s Oct. 11 news release announcing “a legal and policy analysis” only — and not a public and independent examination — of the Canadian Armed Forces’ court martial system, the military equivalent of a criminal trial.

The judge advocate general, Maj.-Gen. Blaise Cathcart, Canada’s most senior military legal officer, has appointed Col. Robert Holman, deputy judge advocate general for military justice, to helm the review. He will be assisted by three military legal officers “to conduct a comprehensive review of the Canadian Armed Forces’ court martial system.”

A court martial is not a continuous court, but an ad hoc tribunal that begins only when it is convened and that ends with the acquittal or sentencing of the accused. It can have life-altering consequences for the accused.

Cathcart’s terms of reference outlined the Court Martial Comprehensive Review’s (CMCR) deliverables, which are due on May 13, 2017. The final report is to be delivered by July 14, 2017, in a way that will keep it from public disclosure.

He outlined the road ahead for the team:

Assess courts martial, the military prosecution and defence counsel services, and determine if they should be military or civilian; permanent or ad hoc; and if they can deploy to harsh or hostile environments domestically and internationally;

Examine how the judge advocate general's defence counsel services represent individuals accused of committing service offences that are disciplinary or criminal in nature, and whether defence counsel should be military or civilian lawyers and if the defence should be subsidized or continue to be paid at public expense;

Identify what constitutes a "service offence" and whether any offences should be added to or deleted from the code of service discipline, the network of military laws and regulations that determines a service member's accountability and responsibility;

Review military rules of evidence, punishments, sanctions and sentencing that apply to service offences, including whether current sentencing provisions ought to be updated or repealed and whether any additional sentencing options should be added;

Tabulate the rights, grounds and processes of appeal for the Crown and for anyone subject to the code of service discipline; and,

Identify the special needs of any persons or groups who encounter the military justice system as victims.

The review team is providing the public a very narrow window of opportunity, only until Dec. 15, to submit written contributions.

The team can consult with any Canadian who has "a demonstrable expertise" in any element of the review — senior military representatives and foreign government, academic, military, and legal stakeholders. The team will also solicit views from federal, provincial or territorial government stakeholders, in particular from the federal Department of Justice.

The team is specifically encouraged to consult with the Canadian military's strategic response team on sexual misconduct.

However, like a physician diagnosing himself, the legal branch is undertaking a review of the system they design and control.

As the JAG, Cathcart is, effectively, the head of a large law firm consisting of 167 solicitors. To ask the JAG branch, through a committee composed exclusively of military legal officers, to review his own processes, regulations and law creates a profound conflict of interest.

JAG officers are military officers. Their careers, legal practices and advancement depend on the leaders and managers of the "law office" that employs them. The director general of the review is a potential candidate to succeed the current JAG.

Col. Holman and his three committee members work directly for the JAG, where their careers, performances, bonuses and promotions depend on being in his good graces.

It strains the limits of credibility to anticipate Col. Holman telling Maj.-Gen. Cathcart, “I am proposing that you change how we do business, that you change your status and your salary, that the legal branch undergo fundamental change or transformation.”

This would be like directing the Canadian Bankers Association to rewrite the Bank Act.

By being assigned to review the system in which they work, to question relevant legislation, regulations and practices and to propose change to the legislation that governs their professional practice, the review team members are placed in an impossible conflict.

Shouldn't this be done by an independent civilian body, led by a retired judge selected by a Commons or Senate committee, and not a judge selected by the JAG?

A review is not an inquiry, an investigation or a commission. It is an internal appraisal of the court martial process, which is a very small part of a much larger area that deserves study.

In other words, the announced CMCR is internal, narrow and inadequate.

A court martial is but one component of a very large and complex network of people, legislation, organizations, strictures, procedures and processes.

Cathcart is the judge advocate general, steward of all Canadian military law. The spectrum of military justice incorporates the CSD; military police and its subset, the Forces' national investigation service; the director of military prosecution; defence counsel services; the chief military judge and subordinate military judges; military rules of evidence; courts martial; summary trials; plea negotiations; charges; sentencing; detention; incarceration; the formal grievance process; administrative procedures; the appeal process; the court martial Appeal Court; and boards of inquiry.

This review should be reconstituted into a public inquiry — one that would conduct an independent, informed examination of the entire body of Canadian military justice.

If done properly, the inquiry would survey the literature on military and civil law in Canada and in comparable nations and speak to people of various points of view to gather as much information as possible.

If this were to be a serious inquiry, with the goal of improving Canadian military justice and bringing it into the 21st century, it should, at its most basic, be a formal inquiry under the Commons committee on justice and human rights or, perhaps even more appropriately, the Senate committee on legal and constitutional affairs.

It should have a serving or retired federal judge as the chair, assisted by one or two judges. They would have the intellectual skill, independence, reputation and credibility to look at this from a very broad basis.

Their deliberations would examine military justice through the prism of the Charter of Rights and Freedoms, Canadian values and the network of legislation and regulation that comprise the entire tableau of Canadian jurisprudence — and determine where in all this the Department of National Defence, the Canadian Armed Forces and military justice fit.

The inquiry should also have a human rights advocate, a representative of the Criminal Lawyers Association, a representative for accused persons, a JAG representative with experience in the code of service discipline and an Aboriginal military member whose cultural attributes may not always be in concert with military law.

Together, these would constitute an inquiry that would conduct an independent, informed examination of the code of service discipline.

According to the terms of reference for the announced review, the final report will be unclassified, but will be subject to “solicitor-client privilege”. That limits access only to those whom JAG wishes to read it.

This makes no sense.

For solicitor-client privilege to apply, there must be counsel for an organization to which the solicitor is giving legal advice. In this situation, the publicly funded JAG branch is both solicitor and client, with the review team receiving submissions from the public.

Solicitor-client privilege should be unnecessary. It merely shields JAG senior management from public disclosure about how the advice, contributions and recommendations will be handled, how it is being analyzed, and what will flow from this advice. This reinforces the need for an independent and external public inquiry.

At the end of the process, the results should be made public. The code affects about 100,000 serving regular and reserve military members and perhaps another 100,000 who have retired since 1998, when the NDA was changed to extend jurisdiction for 25 years following retirement.

As it is now constituted, the CMCR is a review by the Department of National Defence. The information gathered, lessons learned and recommendations made can be accepted, ignored or “cherry-picked” by the judge advocate general behind a veil of privilege that prevents any public disclosure.

A public inquiry, however, would mean there will be witnesses, submissions and, in the end, a report — all of which are open to view and available to the public.

The women and men of the Canadian Armed Forces volunteered to join with the understanding that some of their Charter rights and freedoms will be suspended, and knowing that their duties in the defence of Canada and the achievement of the operations into which they may deploy could place them in harm’s way.

At the very minimum, they deserve a military justice system that is compatible with contemporary Canadian values and that has been refined in open debate to meet the needs of this nation and its military members.

They should not be shortchanged with one that has been shaped behind the closed doors of the legal branch by the same legal officers who design and implement it.