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Military justice system in need of reform

Sexual assault in the Canadian Armed Forces is a persistent problem stretching back decades

Dawn Thomson was the subject of a cover story, Rape in the Military, in the May 25, 1998, issue of Maclean's magazine, in which she recounted being sexually assaulted while assigned to the Royal Canadian Navy's West Coast installation.

The article also told of 13 other women who were sexually assaulted, suggesting a pattern of sexual abuse of servicewomen.

A second MacLean's cover story Speaking Out, in the June 1, 1998, edition, told of Tracey Constable's ordeal of assault 11 years earlier at Ottawa's National Defence Medical Centre. She did not report it at the time, fearing she would not be believed.

Retired Major Dee Brassseur, a CF-18 pilot, revealed she had been subjected to rape, assault and harassment during her 21-year military career. General Maurice Baril, the then CDS, admitted that a problem existed that had to be addressed.

And yet again, a third MacLean's cover story, Rape and Justice, in the Dec. 14, 1998, edition, told of military administrative clerk Lesleyanne Ryan's sexual assault in Bosnia Herzegovina in 1994; military cook Tannis Babos-Emond told Maclean's she was raped by a soldier in 1983 at CFB Borden; supply technician Master Cpl. Suzie Fortin recounted a similar experience in 1996 at CFB Kingston.

Sexual assault in Canada's military hasn't just recently leaped into public attention since retired Supreme Court justice Marie Deschamps' report of sexual misconduct and sexual harassment in the Canadian Forces, of April 30, 2015, was made public. This is a persistent problem stretching back decades.

How does the Judge Advocate General, DND's corporate legal counsel, deal with this issue and the human tragedies that it leaves in its wake?

Military tribunals: A closed disciplinary system

Prior to 1998, sexual assault was handled by the criminal justice system. The accused were investigated by the civilian police, charged by provincial public prosecution services for violations of the Criminal Code of Canada and tried by superior courts across Canada. In other words, murder, manslaughter, abduction and sexual assault committed by military personnel were tried by a superior court.

Then, suddenly and stealthily, Parliament passed Bill C-25, An Act to Amend the National Defence Act (NDA), in 1998, making jurisdictional changes that removed "sexual assault offenses from the list of offenses subject to the exclusive jurisdiction of the civilian criminal justice system."

Sexual assault was transformed to a mere infraction under the Code of Service Discipline (CSD), now handled under section 130 of the National Defence Act, "Service trial of civil offences".

Since then, the military and civilian tribunals have concurrent jurisdiction over sexual assault, even when the victim is civilian. More often than not, complaints are brought to the Military Police, not the civilian police or the RCMP.

If the investigation determines there is merit to the allegations, the Director of Military Prosecution lays charges under the Code of Service Discipline, not the Criminal Code. A court martial, with its own special structure and rules of evidence, is convened. If the accused is found guilty, the court is limited by its own sentencing regime.

Michel Drapeau became an Ottawa-based lawyer following his 1993 retirement from the Canadian Armed Forces, in which he rose to the rank of colonel. He disputes that sexual assault should fall within Canadian military jurisdiction because it relegates sexual assault victims to second-class citizens and excludes them from the protection offered by the Canadian Victims Bill of Rights (CVBR). He cites a number of other reasons.

His description of the roles of the various elements of the military's legal process draws a distinction between discipline and criminal justice: "Fundamentally, the Military Police exists for disciplinary

purposes; the Director of Military Prosecutions exists also for disciplinary purposes; the Court Martial is a military disciplinary tribunal created by the Code of Service Discipline."

But following the changes to the National Defence Act of 1998, the court martial is now attempting to do the job of a Superior Court.

"This military tribunal has its own unique rules of evidence, unique court procedures and unique five-person jury system," says Michel Drapeau. "Its unique sentencing regime includes dismissal, reduction of rank, forfeiture of seniority, reprimand, military detention and fines, all designed to deal with disciplinary infractions, not criminal offences and unique appeal mechanisms."

When a Court Martial convenes

Four things happen when a military member is charged for sexual assault, or any other offence, and tried by a court martial.

First, the accused is provided with a full defence at public expense. He is defended by one or two military lawyers at the court martial level and, in the event of an appeal, at the Court Martial Appeal Court. The defence will take the appeal as far as the Supreme Court of Canada, if the accused chooses to pursue the matter to that level, all at no cost to the defendant.

Second, and what makes no sense in a democracy, is that, in the case of a court martial, the prosecuting and defence attorneys are all members of the same "military law firm", the Office of the Judge Advocate General.

The panel, the military's version of a jury, consists of five Canadian Armed Forces members chosen by the military chain of command, charged with the responsibility of deciding whether, on the facts, the accused is guilty or not.

The judge also holds a military rank and is a permanent member of Canada's armed forces.

Drapeau describes his perspective as a lawyer with prior military experience: "All share the unique bond, professional ethic, warrior ethos and value system of the military, as well as its unique traditions, missions, structures, and operating procedures. All are part of a highly structured and authoritarian way of life with a sense of community and camaraderie, unlike any other profession."

The court martial process is confusing enough for military members, Drapeau added. "But for a civilian victim or witness who has no ties to the military, it is like entering another world."

Third, and more significant, as the court martial process advances, the defence for the accused has the option of plea bargaining.

More often than not, the military prosecuting authority would have simultaneously charged the accused under section 129, an act to the prejudice of good order and discipline, and under Section 130, which covers all Criminal Code offences committed by military members.

The plea negotiations pivot on the presence of section 129, which is a convenient exit ramp from a criminal outcome.

If the prosecution agrees, the accused pleads guilty to a Section 129 offence and the Criminal Code charge simply evaporates. This leaves the issue of sentencing open to reduction to a reprimand and a fine, both disciplinary punishments.

Suddenly, with the speed of a signature, there is, at present, no criminal conviction; there is no criminal record for the accused and there is no risk of being listed on the registry of sexual offenders.

A case in point

In 2015, Canadian news media reported that a Quebec-based lieutenant-colonel faced two counts of sexual assault under article 130 of the National Defence Act and two of harassment under article 129. He was reassigned to Ottawa and charged.

His court martial convened on Oct. 14, 2015. Following plea bargaining, the charges of sexual assault under article 130 were stayed and the colonel pleaded guilty to two lesser, non-criminal charges of harassment under article 129, conduct to the prejudice of good order and discipline. His sentence was a "severe reprimand" and a fine of $2,000.

Testifying at the Oct. 14, 2015, court martial, Brigadier General Stéphane Lafaux, the accused's superior commander, explained that the officer was relieved from his position one week after the event as Lafaux "no longer trusted his capacity to command the unit."

BGen. Lafaux opined there is no greater punishment for a commander than to be relieved of one's responsibilities.

But two weeks ago, Chief of the Defence Staff Gen. Jonathan Vance took the most decisive and praiseworthy step to date when he upped the stakes for any military member convicted of sexual assault.

His directive, backdated to January, 2016, announced that anyone found guilty of sexual assault will be compulsorily released from the Canadian Armed Forces.

Uneven justice

In the meantime, however, JAG's intransigence will continue to set aside the interests of the victims of these infractions.

In the military, sexual assault victims are second class citizens

The Canadian Victim Bill of Rights, which passed into law on April 23, 2015, outlines the rights of victims of crime in Canada and recognizes that "crime has a harmful impact on victims and on society". It emphasizes the importance "that victims' rights be considered throughout the criminal justice system."

The act underscores that every victim of crime has the right to request information about the status and outcome of the investigation into the offence; the location of proceedings; when it will take place; its progress and outcome; reviews under the Corrections and Conditional Release Act relating to the offender's conditional release and the timing and conditions of that release.

The CVBR also provides a number of protections: to have the victim's security considered by appropriate authorities of the Canadian criminal justice system; to protect the victim from intimidation and retaliation; to have his/her privacy considered by the appropriate authorities in the criminal justice system; to request that the person's identity be protected if a complainant to the offence or a witness in proceedings; to present a victim impact statement to the appropriate authorities in the criminal justice system; and to have the court consider a restitution order against the offender.

But, the CVBR's section 18(3) has a trap door: "This Act does not apply in respect of offences that are service offences, as defined in subsection 2(1) of the National Defence Act, that are investigated or proceeded with under that Act."

The legislative guarantees of the act apply to all people in Canada: citizens, residents, visitors, even people in detention and prisons. Its stipulations are Charter rights for everyone in Canada except when the crime was committed by a member of the Canadian military and the military claims jurisdiction in that circumstance.

"The military exceptions within the act are outrageous and blasphemous", Drapeau says.

"They exclude these victims from any protection. Any crimes which are investigated or prosecuted by the military under the National Defence Act are excluded. This is not restricted to sexual assaults. It goes against one of the universal principles of the rule of law, which states that 'laws are applied evenly'".

Reset the clock

The clock should be reset to 1998, before sexual assault was listed in section 70 of the National Defence Act as one of the offenses that could now be tried by a military tribunal.

The CVBR section 18(3) should also be repealed, so criminal offenses are no longer prosecuted before military tribunals, sparing victims the ordeal of being excluded from the act's provisions.

This gives some urgency to the need to conduct a comprehensive and immediate modernization of the National Defence Act.

Until the NDA is reformed, the interests of victims will continue to be ignored by the military justice system, leaving the central issue unresolved.

As retired Colonel Michel Drapeau noted, at present, Canada's Code of Service Discipline is designed to dispense punishment and not justice.

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