Military Justice
Past its "best-before" date

As a recruit enrolls in the Canadian Armed Forces, he or she immediately becomes subject to the provisions of the *National Defence Act*, part of which includes the Code of Service Discipline (CSD), the web of law and regulation that governs all aspects of a service person's life. It identifies who is subject to its jurisdiction, and defines military offences; it incorporates all offences under the *Criminal Code*, the federal statutes and foreign laws; it mandates service tribunals for summary trials and courts martial, and establishes the post-trial review or appeal of findings and sentence. The CSD touches every part of a military member's life.

Parliament, in 1998, passed a new law that introduced the most significant changes to Canadian military law since the enactment of the *National Defence Act* in 1950, resulting from the Special Advisory Group on Military Justice and Military Police Investigation Services. Chaired by retired Chief Justice Brian Dickson, *Bill C-25* introduced comprehensive amendments that expanded the reach of the *National Defence Act*. The legislation clarified the roles and responsibilities of the Defence Minister, the Judge Advocate General, and military judges; separated DND's investigative, prosecutorial, defence and judicial functions; revised the summary trial process to be compliant with the *Canadian Charter of Rights and Freedoms*; eliminated the death penalty; and required the Defence Minister to have a review of *Bill C-25* conducted every five years.

This last condition drew the attention of Canadian Bar Association's (CBA) National Military Law Section, which issued a 101-page analysis of both the *National Defence Act* generally and *Bill C-25* specifically.

The CBA is the national association representing 38,000 lawyers, law teachers and law students throughout Canada. Its principal objective is the improvement of law and the administration of justice in Canada.

Four overarching themes emerged from the CBA study that pointed to the need:

- for a regular, independent and **meaningful review** of Canadian military law;
- to **strengthen the independence** of the military justice system and the principal actors within it;
- to reform military law and for it to **conform to the Canadian Charter of Rights and Freedoms** and Canadian values; and,
- for technical and procedural changes to military law to **ensure fairness and efficiency** as well as to meet the needs of the Canadian Armed Forces and its members.

Surprisingly, in their analysis of the legislation, the CBA took issue with the limitation of the five-year review to only the provisions of *Bill C-25*. The Association's National Military Law Section recommended an independent review of the

Is it time to follow the example of other NATO nations which have switched to civilian justice?

Feb 2016 – View from control room of NATO Channel during a live interview with Defence Minister Harjit Sajjan at the Defence Ministerial Meeting in Brussels, Belgium.

PHOTO: SGT JEAN-SÉBASTIEN GIROUARD, CANADIAN FORCES COMBAT CAMERA

entire *National Defence Act* and its regulations every five years. This quinquennial review would act as "an important engine for the re-examination, reform and renewal of military law in Canada. A statutorily-mandated global review will lead to a more cohesive body of law," it noted.

On 21 March 2003, the Minister of National Defence appointed former Chief Justice of Canada, The Right Honourable Antonio Lamer, to conduct the first independent review of the provisions and operation of the far reaching changes to Canadian military law resulting from this legislation. His report, submitted on 3 September 2003, contained many important recommendations, including:

- the establishment of a permanent trial level military court with judges appointed until retirement;
- the elimination of unacceptable delays, reduce bureaucracy and increase transparency in the grievance process; and
- the provision for equal security of tenure for both the Director of Defence Council Services and the Director of Military Prosecutions.

The second independent review began when Defence Minister Peter MacKay issued his direction on 25 March 2011 to establish an external entity, the Bill C-25 Five-Year Independent Review Authority, which appointed the Honourable Patrick J. LeSage to conduct the review. Section 96 of Bill C-25 mandated that the second independent review should have been assigned in March 2008 – making Justice LeSage's appointment and the statutory requirement for the review three years late.

In 2014, section 273.601 was added to the *National Defence Act*, changing the reporting period for the third independent review of *Bill C-25* to seven years from five, with the clock starting "after the day on which this section comes into force, and within every seven-year period after the tabling of a report under this subsection." According to DND communications advisor Laura McIntyre-Grills, "the next report of an independent review must be tabled between now and 1 June 2021."

This creates a gap of 10 years between Justice LeSage's second Independent Review and the third in the series, to be followed by a review every seven years. Had the intent of Chief Justice Dickson's initial report been followed, the third independent review would have been submitted in 2013, and the fourth to be tabled in 2019.

Early in his report, Mr. LeSage's acknowledged that "Unlike my predecessors, former Chief Justices Dickson and Lamer, I had little prior experience with the military or the military justice system". This calls into question the validity of the recommended 10-year gap between his second independent review and the third, when originators of the legislation envisaged a reporting period of half that.

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In his foreword, Justice LeSage noted the cadre of professionals who provided "valuable comments, recommendations and observations that have helped [...] shape the content of the Report. That list includes Colonel Patrick K. Gleeson (Deputy Judge Advocate General/Chief of Staff); Colonel Michael Gibson (Deputy Judge Advocate General – Military Justice); and numerous other members of JAG, who undertook "the considerable challenge of educating me, regarding the military justice system." He also added Major Patrick Vermette (Directorate of Law – Military Justice – Strategic) "who shepherded us through all the base visits, was unwavering in his patience, courtesy, and providing me with invaluable information and guidance throughout this process."

This begs the question, with so much participation by Judge Advocate General legal staff in educating Justice LeSage, just how independent was his "independent review"?

Sadly missing from the list of educators and advisors is an advocate for the sailors, the soldiers and the air force personnel whose lives are so profoundly affected by the *National Defence Act*.

It was a welcome surprise to this writer that the Canadian Bar Association's National Military Law Section strongly recommended that the entire *National Defence Act* and its regulations, directives and orders should be reviewed every five years. To that recommendation, I would also suggest that all future teams reviewing Canadian military justice include people who will strongly advocate for all members of our armed forces, not just for members of the legal branch.

However, the cavalier attitude demonstrated about the independent review of this body of law that has such a ponderous impact on so many members of our Canadian Forces calls into question whether the Code of Service Discipline is even needed when Canada already has an effective justice system.

Perhaps it is time to consider following the example of other nations which have abandoned military justice. These include:

- **Belgium**, **Germany**, **Austria**, **Sweden** and **France**, which abolished military courts in peacetime;
- The **Czech Republic**, which refers military disciplinary issues to the civil judiciary;
- **Finland**, where military prosecution is conducted by public prosecutors;
- **Japan**, whose military personnel are subject to ordinary criminal law.

There are members of the Canadian military who will argue with this proposal. Some would say that military cases should be prosecuted, defended and judged by other military personnel who understand the life and lifestyle of military members, and that only another military member can appreciate the demands and consequences of the higher standards that go hand-in-glove with the higher standards of conduct required of military service.

Is this true of the Canadian military in an age when human rights have become a major force that compels nations to address their approaches to military justice? Even Great Britain, which gave the Anglo-Saxon world the model on which to base their systems of military justice, has undergone extensive revision of its military disciplinary system to ensure that it conforms more closely to the stipulations of the European Convention on Human Rights.

It is time that the Canadian government not merely *review* the efficacy of Bill C-25, nor simply *revisit* the Code of Service Discipline. Perhaps it is time to abandon the dogmas of the past two centuries and bring Canadian military justice into the twenty-first century. **FLD**

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