

AN OPINION

# MILITARY JUSTICE AND DISCIPLINE

by LGen Charles H. Belzile (Ret)

*Editor's Note: LGen Belzile (Ret) was part of a Special Advisory Group on Military Justice and Military Police Investigation Services established by the Minister of National Defence.*

*In this article he shares some of the rationale behind the recommendations on military justice which were included in the report to the Minister, released 30 March, 1997.*

RECENT EVENTS, AND A FLOOD OF INVESTIGATIONS AND SPECIAL STUDIES HAVE brought an inordinate amount of discussion and media attention which has been hard on the Canadian Forces (CF). The events even led to an official inquiry into the Canadian Airborne Regiment's deployment into Somalia in 1992-93. An inquiry which lasted two years and produced a rather lengthy report, which many are still busy digesting. By and large, the military did not fare well in most of this spent ink. Throughout those unhappy times the Canadian Forces had to continue to live with over tasking, along with constantly diminishing resource. This, I'm relieved to say, did not completely derail the Canadian Forces, as professionalism and traditional attitudes of "can do" continued unabated, if somewhat subdued.

This unhappy turn of events had some positive sides to it, namely that of inward reflection and of a trigger mechanism for necessary reviews of the Canadian Forces' role in life, as well as what they needed to do to prepare for it. One of the targets for reform was the whole system of military justice and the tools and infrastructure required for that system to operate. A Special Advisory Group on Military Justice and Military Police Investigation Services was established in January 97 by the Minister of National Defence. This Special Advisory Group was chaired by the Right Honourable Brian Dickson, retired Chief Justice of Canada. Its members were Mr. J.W. (Bud) Bird and Lieutenant-General Charles H. Belzile (Ret), the undersigned.

The military justice system was lagging in certain aspects; in particular, it had not evolved as quickly as it should have to align itself with new national legislation such as The Charter of Rights and Freedoms, enacted in 1982. An important case, which made its way to the Supreme Court of Canada, was particularly instrumental in causing some needed adjustments to the administration of justice in the military. That case, (*R. v. Genereux*, (1992)), while indicating that a Court Martial had been judged to be unconstitutional because of its lack of independence, was nevertheless a strong vindication of the military's requirement for a separate justice system and a Code of Service Discipline. In that judgement, The Supreme Court also indicated its

agreement with a previous case, (*Re Mackay and The Queen* (1977)), where the need for discipline in an armed force and the requirements for separate tribunals to assist the military in achieving its difficult task are emphasized. In short, they concluded that the Canadian Forces, as do the Forces of our allied nations, need this very special tool to assist the chain of command in the maintenance of discipline, both in peace and war. Reforms are needed on a continuing basis, however, and those must be consistent with the primacy of the Rule of Law.

## THE FRAMEWORK

The framework through which Military Justice is applied, consists of many steps, all of which form part of the military structure. Military offences, like all offences in society, must be investigated, a decision to prosecute or not made and a court appointed or convened to deal with the case. That court, in the case of the military, a Service Tribunal, hears evidence, pronounces a finding and, if that finding is of guilt, administers a sentence or punishment, as do all courts in the land. That finding, and the associated sentence are then subject to review by superior authorities, in some cases, civilian such as the Court Martial Appeal Court. In the case of courts martial, the appeal

process can go all the way to the Supreme Court of Canada. That framework, through which military justice is administered is thus not very different from that which applies to all Canadian citizens, except in three important aspects. First is the direct involvement of the military chain of command in the process, second is the existence of a purely military and disciplinary context, which has no parallel in the administration of justice by our civilian courts and third is the matter of jurisdiction when operating in a foreign theatre, where a constituted authority may or may not exist.

The direct involvement of the chain of command is and must remain paramount as it is that chain of command which is charged with the responsibility of ensuring they lead a disciplined force and direct it towards the achievement of national objectives. The main differences in context stem from the fact that military tribunals deal with offences of a military nature, which would not be an indicatable offence in society at large. An obvious example of this would include unauthorized absence from work, which would not result in disciplinary proceedings within a corporation, but in the military could, under certain circumstance, be viewed as desertion, a very serious offence. The same military context could also dictate a very different disposition of a minor theft, a criminal offense. In a civilian court, it could be viewed as relatively unimportant, while in the military, it is a direct attack at the team cohesion and mutual trust so necessary for success in operations. While it is recognized that Canadian civilian courts could have jurisdiction over offenses committed by service members abroad, if tried in Canada under section 273 of the National Defence Act, pragmatic considerations with regards to expediency, availability of witnesses and cost could make prosecution very difficult.

To round out this framework, it might be appropriate to remind the reader that over the years two processes for the delivery of justice were established. The first process is the summary trial which is conduct-

ed at the unit level by a commanding officer or his/her delegate, and affords the accused few procedural protections. Designed to deal with less serious service offences, where unit discipline is directly at stake, it affords the officer conducting the trial, a lesser scale of punishment, while satisfying the requirement for expediency in the field.

Courts martial, on the other hand, are established to deal with more serious offences, have much greater powers of punishment and are conducted in a similar fashion to civilian courts, eg. by a single judge or a panel of officers which can be compared to a trial by jury, depending on the type of court martial. All courts martial afford the accused extensive procedural rights, consistent with the serious nature of the offences and possible consequences. Courts martial are also portable, a notable advantage to troops deployed overseas.

Investigations, which may or may not lead to prosecution of a service member, are carried out, either by officers and/or non-commissioned members of the accused's unit or, if required, by the Military Police. Unlike their civilian counterparts, the Military Police have many operational support functions which, at times, may inhibit their investigative efforts.

Overseeing the administration of the whole process of military justice is the office of the Judge Advocate General (JAG), an officer appointed by the Governor in Council and responsible in the performance of his or her duties to the Minister of National Defence and responsive to the Chief of Defence Staff and the Deputy Minister in the provision of legal advice and services to the Department and the Canadian Forces.

Over and above formal court proceedings, the military has, at its disposal a large spectrum of administrative measures such as informal and

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formal counselling and Reports of Shortcomings to assist its leaders in the promotion of discipline. Those administrative measures will not be discussed further in this paper although in many instance they are used as an alternative to the formal system of military justice.

## NEEDED REFORMS

During the course of our work with the Special Advisory Group on Military Justice and Military Police Investigation Services, we were very conscious of the fact that most of the criticism levelled at the military justice system were triggered by events in recent overseas deployments, some of which were part of the daily news for a considerable length of time. There was need to be cautious and not to over-react. Nevertheless, it was obvious some important changes were needed. Without getting into a recommendation by recommendation review, I would like briefly to elaborate on what we felt were shortcomings in the system and what should be done to remove them. Many of the reforms recommended were already in the process of implementation, following extensive reviews of the National Defence Act by the Office of the JAG and some parallel studies being conducted within the Department of Military Police functions and structures. The Special Advisory Group also had access to studies prepared for the Somalia Inquiry.

## THE JUDGE ADVOCATE GENERAL

As a result of the Supreme Court's ruling in the R.v. Genereux case, some changes had already taken place in the appointment of judges at courts martial. Where that role was performed by JAG in the past, today the Office of the JAG recommends to the Minister the appointment of military trial judges. Assignment of judges to various courts is now done by the Chief Military Trial Judge. To enhance further the need for courts martial to be truly independent as required by the Charter of Rights and Freedoms, it was also proposed that military counsel and defence services be completely separated from the office charged with conducting prosecutions.

The JAG's principal responsibilities should also be set out in the National Defence Act. All of the recommendations dealing with the various JAG functions should result in a more efficient system with conflicts or perceptions of conflicts being eliminated.

## THE MILITARY POLICE INVESTIGATIVE SERVICE

In the aftermath of the problems associated with the Canadian Airborne Regiment's mission to Somalia, much was said about the perceived requirement for the task force to have had more Military Police support, thereby ensuring a quicker response if and when investigations of serious crimes were ever needed. It is not my intention to speculate whether their presence in greater number would have prevented those regrettable incidents. However, when a decision was made to send MP investigators, the available experienced people were not numerous since the new tasking given to the Special Investigation Unit, a unit which would have carried out such investigations in the past, kept its members mostly engaged in security operations and investigations. An embryonic National Investigation Services (NIS) was established in September 1993, formally recognizing the ad hoc national investigation team which provided the investigators in Somalia in the spring 1993.

We find it obvious that an independent investigation force is required and have recommended it be based on a reorganized NIS. This force, which needs not be very large, should be under the direct control of the Canadian Forces Provost Marshall who in turn should be responsive to the Vice Chief of Defence Staff. The members of this enhanced NIS should have the authority to lay charges, when warranted by their investigation. Their investigative expertise should be enhanced by more training in investigative techniques and close cooperation with, and even attachment to, other police forces.

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In addition to being responsible for the NIS, the person filling the role of CF Provost Marshall, should be responsible for all military police, except for those directly assigned to the various Commands in operational support functions, who would remain under their command. Such a reorganized Military Police, as independent as an internal police force can be, would be in a much better position to fill its role as an important element of an effective military justice system.

## SERVICE TRIBUNAL

Service Tribunals, as stated above, are of two types, the summary trial and the court martial. They will be discussed in turn.

**SUMMARY TRIALS.** Substantial work had already taken place within DND to

attempt to reform the summary trial process. This was due to the concern for its constitutionality, in light of the Canadian Charter of Rights and Freedoms, following the decision of the Supreme Court of Canada in R.v. Genereux. That decision is a crucial point since the summary trial, even more than courts martial is at the core of the military justice system. Because of that vital need and because we sensed as we travelled across the country that Commanding Officers displayed an understandable reluctance to proceed with summary trials, we sought a legal opinion from our counsel. The opinion concludes that, provided certain improvements are introduced, the process is likely to survive a court challenge as to its constitutional validity.

The difficulties faced by DND, and by the Special Advisory Group, were mostly related to types of offenses which should as a matter of course be tried by summary trial, the powers of punishment of a Commanding Officer (currently up to 90 days detention with approval of a Superior Commander) and the availability or not of independent counsel to the accused offered an election of court martial, in cases where conviction could bring down a sentence of detention, reduction in rank or a substantial fine.

After considerable efforts at trying to categorize offences in such a way as to have the charge determine what kind of proceedings an accused would face, we came to the conclusion that such a clean break was impossible. Because the circumstances surrounding the offence and the likely sentence following a finding of guilty would be factors in categorization, we opted to forego that categorization, as desirable as it may seem.

Because the possible award of a sentence of detention should call for the availability of legally trained counsel, the practicality of leaving such a sentence in the Commanding Officer's quiver became a critical issue, particularly if the unit was deployed in a theatre where the availability of counsel may be problematic. Convinced that the power for a Commanding Officer must, in certain circumstances, continue to include detention as a part of the scale of punishment, a way must be found to have counsel available to assist an accused in deciding whether to seek a court martial or accept to be tried by summary trial.

Such an election could then be done in an informed fashion. This does not appear to be an insurmountable problem, given that legal officers routinely accompany troops in foreign deployment and given the communications means in existence today.

Other adjustments to the scale of punishment have also been suggested, such as that the rank and salary of a person serving detention be reduced to that of private soldier, but that both be reinstated following completion of the sentence. The power of reduction in rank, as a separate sentence, would be limited to only one substantive rank level. Additional training and instruments should also be provided to officers presiding at summary trials as well as to officers and Non Commissioned Members (NCMs) who may be called upon to perform the role of an assisting officer.

**COURTS MARTIAL.** At a court martial, the accused is judged by an impartial and independent panel of CF members, or by a single military judge. The accused can be represented by counsel and military rules of evidence apply. There are four types of court, namely the Disciplinary Court Martial, the General Court Martial, the Standing Court Martial and the Special General Court Martial, all of which have different composition, different rank levels of officers they can try and different powers of punishment. The last shown, namely the Special General Court Martial may only try a civilian subject to the Code of Service Discipline.

As indicated before, most of the concerns about the constitutionality of Courts Martial had been addressed before as a result of *R.v.Genereux*, particularly that of ensuring an accused of a fair and independent trial. With the organization of the counselling, prosecution and judicial functions as separate entities, any conflict or perception of conflict vanishes.

To compensate for the fact that members of Court Martial panels are normally made up of officers who are likely not legally trained, the sentencing of the accused should be done by the judge who presides at a Court Martial. Additionally, it is considered that the composition of the court martial panel, should be opened to NCMs of the rank of warrant officers

or above provided that the NCM is equal or senior in rank to the accused.

## CONCLUSION

Finally, this short review of a very necessary system to the Forces, is far from being exhaustive. The system will require nurturing and constant updating to ensure that military justice keeps up with newly enacted Canadian legislation. The laws of Canada will continue to evolve and so must the military applications of them. The system has recently been under severe stress, but has not, by and large failed us. The Canadian Forces have difficult tasks to perform on behalf of Canada. They deserve to have the best tools available. Those tools include a system of justice which is fair, expeditious and transparent.

Perhaps the best way to end this short summary and to place it in its proper perspective is to quote a paragraph directly from the Conclusion of the Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, submitted to the Minister of National Defence on 14 March, 1997:

"After reading a multitude of documents pertaining to our mandate, and discussing the subjects of military justice and military police with a great many people, both in and out of the Canadian Forces, we have come to the conclusion that, while some significant reforms are needed, there is certainly no requirement for dismantling the existing military justice system. On the contrary, we have found the system to be essentially sound, as is its administration. Thousands of infractions to the Code of Service Discipline are dealt with every year, expeditiously and fairly. With the exception of a very few individual cases which have captured the public's attention, we have concluded following our review that the system as a whole works well." ❖

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The advertisement features a vertical stack of services on the right side, each preceded by a stylized graphic of a hand pointing upwards. The background is dark with a textured, splatter-like effect. At the top, there is a graphic of a hand pointing to a computer monitor. The text 'Creative computer solutions' is written in a large, bold, sans-serif font. Below this, the phrase 'Your Complete Computing Solutions' is written in a smaller, elegant script font. The list of services includes: Logistics Consulting, Upgrades & Repairs, Custom Configured Systems, Networking, Application PC Setup, Training, Software Sales & Support, Scanning Services, Internet/Intranet Applications, Custom Graphics, and Web Design & Maintenance. At the bottom, the name 'Andrew Dowd' is prominently displayed, followed by his address, phone and fax numbers, and email address.

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