

A self-inflicted blindness and deafness

Following an international conference on penal military justice systems held at the University of Ottawa for the first time in Canada, the United Kingdom Judge Advocate General, His Honor Justice Jeffrey Blackett, deplored the lack of independence and impartiality of the Canadian penal military justice in an interview conducted by journalist Noémi Mercier.

Justice Blackett reiterated the known principle that justice must not only be done, but must also be seen to be done. And it does not appear to be done and equitable when a soldier appearing before a court martial is defended by a major, prosecuted by a colonel and also tried by a colonel.

Moreover, the fact that Canadian military judges hold a rank (in fact a rank inferior to over a 150 other officers), Justice Blackett said, compromises their independence and impartiality. He himself is a civilian judge not accountable to the military while the Canadian Judge Advocate General (JAG), notwithstanding his misleading title, is a military advocate, not a judge. Indeed the Canadian JAG is a military lawyer accountable to the Minister of National Defence.

In addition, the Canadian JAG supervises both the Prosecutions and the Defence Services. While the Canadian Director of Military Prosecutions is a military lawyer acting under the general supervision of the JAG, in the UK the Prosecutions Service is independent: their Director of Military Prosecutions is a civilian. He is the one who decides to prosecute or not without referring to the military chain of command.

In the exercise of his functions the UK civilian Director of Military Prosecutions is assisted by military lawyers. Civilian prosecutors are also involved in the majority of serious cases. As for defence counsels they are generally civilians.

In the UK, since 2003, all judges of the courts martial are civilian judges with some military experience. In addition they sit one third of their time

in a civilian court, something which, Justice Blackett says, reinforces their independence.

In Canada there is no formal mechanism in place to determine who of the civilian or the military authority will prosecute an ordinary criminal law offence. By contrast in the UK, as is the case in Australia, there is a Memorandum of Understanding between the civilian and the military prosecutions authorities.

Now all these deficiencies and lacuna plaguing the Canadian penal military justice and creating unfairness have been raised in numerous legal articles and before House and Senate Committees, but to no avail.

It took over 19 years of costly court litigation to achieve partial independence of Canadian military judges while it was obvious in the early stages of that specific litigation that it was a mere matter of time before the existing law and regulations would have to be changed.

For more than 20 years the leaders of the Canadian military justice system have closed their eyes to the requirements of the Canadian Charter of Rights and Freedoms, the obvious lack of independence and impartiality of the system and the resulting unfairness for militaries and civilians subject to the overarching *Code of Service Discipline*.

These leaders have turned a deaf ear to repeated calls for necessary and long overdue structural improvements and changes to the system. Hence their self-inflicted blindness and deafness so detrimental to the Canadian penal military justice system and the persons subject to it.