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THE MILITARY AFFAIRS COLUMN BY TIM DUNNE

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# Charter rights are ignored in military justice system

Legal process is outdated and unfair

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*Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law . . .*

***Canadian Charter of Rights and Freedoms — Section 15(1)***.

THE CHARTER makes no exceptions for Canada's armed forces and our military personnel do not lose their rights as they take the Oath of Allegiance. But military personnel tried by summary trials are subjected to a modern version of medieval justice. They are denied the most basic and important rights the Charter guarantees to all Canadians.

Summary trials assess Canadian Armed Forces members accused of minor wrongdoing more informally and expeditiously than the alternative, the court martial, which deals with more serious infractions. The summary trial is the principal method through which Canadian military personnel are tried.

The procedure can deal with almost every infraction under the National Defence Act (NDA), other than the most serious offences, and can also address other Canadian statutes, such as the Criminal Code, the Environmental Act and the Controlled Drugs and Substances Act.

The summary trial became entrenched in English military law with the passage of the Mutiny Act in 1689 and, according to Ottawa-based lawyer and advocate for the rights of military members, Michel Drapeau, has not changed since. In those early days, military discipline was more easily dispensed. Those early military leaders only needed the wooden horse, the whip and the noose, which later gave way to the more ceremonial, but no less fatal, firing squad.

The process is arbitrary and medieval and needs to be brought into the 21st century to reflect contemporary Canadian values of human rights and freedoms.

## Presiding Officer

The summary trial's presiding officer is usually the accused's commanding officer or someone delegated to act on the commander's behalf. This officer sits as judge, jury, prosecutor and defence. He or she personally decides the accused's guilt or innocence and imposes a sentence on the spot.

The hierarchical and heavily regulated nature of a Canadian military unit requires COs to know everyone under their command, including the accused and witnesses. Furthermore, it is inconceivable that he or she would not know all the details of the circumstances relating to the alleged offences before the trial begins.

To qualify, presiding officers need only attend a two-day certification course. By contrast, Nova Scotia's lawyers must attend law school for three years, article for an additional year and pass specific exams to be admitted to the bar. They can apply for admission to the bench after 10 years in the legal profession. On appointment, they have a two-week introductory course. There are also annual conferences and online resources to maintain their professional knowledge.

This calls into question the CO's ability to competently and impartially preside over trials and effectively apply mandatory legal concepts, perhaps leading to sentences that fall below the Canadian standard for guilt beyond a reasonable doubt and possibly result in a criminal record.

A CO's possible preconceptions about the accused present significant concerns for procedural fairness. His/her prior contact with the accused and witnesses may introduce biases into the process.

## The Assisting Officer

The Judge Advocate General's 389-page manual for summary trials, Military Justice at the Summary Trial Level, prohibits legal representation for the accused:

"Although legal advice of a general nature will be available to an accused or an assisting officer through the (Director of Defence Counsel Services) there is no right to be represented by legal counsel at a summary trial. Instead, the accused will be assisted throughout the summary trial process by an assisting officer who is specifically appointed by the Commanding Officer for that purpose."

Assisting officers normally have neither legal training nor experience with the summary trial process. Usually, they are officers of the accused's unit appointed under the authority of the presiding officer. Additionally, they are not held to the stipulations of client-solicitor privilege as would a lawyer, which further exposes the accused to increased vulnerability before the military "justice" system.

In his 2003 report on the 1998 revisions to the NDA, Justice Antonio Lamer questions the competence of the assisting officer within the summary trial system. "Based on my discussions with (Canadian Forces) members and submissions that I have received, this seems to be a widespread belief that assisting officers still do not have proper training and expertise to assist the accused."

The JAG report on the effectiveness of military justice for 2007-2008 also reports "concerns over assisting officer training are consistently raised."

## The Summary Trial

Summary trials make up more than 80 per cent of service disciplinary tribunals convened each year under the NDA, while courts martial are used to try the remaining disciplinary cases.

Over the past 15 years, there have been more than 23,400 summary trials. That's an average of 1,560 annually. Only about five per cent of accused are acquitted.

The summary trial process allows for significant penalties to be imposed against those found guilty. They include a reprimand, confinement, extra work, fines up to 60 per cent of monthly basic pay, reduction in rank and incarceration for up to 30 days with the possibility of a criminal record.

Presiding officers are not required to maintain an official transcript of the proceedings. The trial summary sheet records only the sentence and punishments. While an accused can request a review of a sentence, there is no provision for appeal.

There is no requirement to apply the rules of evidence that apply in a civilian courtroom and that help an accused receive a fair trial.

The accused can be compelled to testify against himself or herself; the constitutional right to protection against self-incrimination does not apply. Spousal privilege is disallowed; adverse inferences can be drawn from the silences of the accused and hearsay and opinion can be admitted as "evidence."

The accused is granted some basic rights, such as the opportunity to question witnesses and present evidence. But statements can also be obtained by the presiding officer in written form, by phone or fax, limiting the accused's ability to challenge that "testimony."

The accused cannot make Charter arguments that might result in a stay of proceedings or dismissal of the case. And the level of disclosure provided to the accused at the summary trial does not meet the standard of Canadian jurisprudence.

More troubling is the possibility of a civilian criminal record for a relatively minor offence that often does not exist as an infraction in the Canadian civilian community. A criminal record can have a life-altering, lifetime impact by obstructing the ability to find work and to travel.

But the most serious deficiency is that, even with the possibility of detention and a criminal record, accused personnel are not permitted legal representation.

## Problems with summary trials

Simply stated, summary trials lack the most basic procedural safeguards of the Canadian justice system, including the right to be represented by counsel and rules regarding the admissibility of questionable evidence.

The possibility that up to 30 days detention may result from such a flawed process likely represents a breach of the Charter, which guarantees the right to life, liberty and security of the person except in accordance with the principles of fundamental justice.

A respected Nova Scotia judge told me, "I would have to think long and hard to deprive someone of liberty for 30 days."

The inadequate protections of the summary trial system and concerns about the training and experience of both presiding officers and assisting officers challenge the idea that individuals receive a fair assessment of their guilt and increases the likelihood that accused individuals may be found guilty when such a finding is unjustified.

This puts Canada at variance with the conclusions and recommendations of the United Nations Human Rights Council's Special Rapporteur on the independence of judges and lawyers of June 10, 2011, to which Canada is a signatory.

As Michel Drapeau sadly pointed out at the 30th annual conference of the International Society of the Reform of Criminal Law in San Francisco, on July 13, although many western democracies and our allies have abandoned this medieval form of "justice," Canada's summary trial process puts us in the company of Pakistan, Sri Lanka, India, Bangladesh and Nepal.

Therefore, the structure of summary trials is in stark contrast to all civilian statutory equivalents and may be contrary to an accused's rights under the Canadian Charter of Rights and Freedoms.

Having the ability to detain someone without the benefit of a fair and transparent trial process violates the principles of fundamental justice and due process requirements of section 11 of the Charter, and represents a denial of liberty, contrary to section seven of the Charter.

The Supreme Court of Canada (SCC) has ruled that section 11 of the Charter applies to courts martial.

While the government has the constitutional authority to create a military justice system that operates in parallel to the regular court system, the Supreme Court also emphasized that the Charter of Rights and Freedoms applies to military tribunals convened under the NDA, including the Charter's section 11, which provides criminal due process rights to individuals "charged with an offence."

Without an appeal process for summary trials, the accused cannot refer the matter to an appeal court or the Supreme Court, pre-empting that court from addressing the constitutionality of the summary trial procedure. Current jurisprudence strongly suggests that the Charter, including the procedural rights in sections seven (the right to life, liberty and security of the person) and 11 (the rights of the accused), should also apply to the summary trial procedure.

The Supreme Court recognizes that section 11 of the Charter applies to the legal process in which a judge analyzes evidence and legal argument, if that process is of a "public nature" or if that procedure has "true penal consequences."

Separately, the court recognized that military tribunals have the power to incarcerate persons they find guilty. As the summary trial process and courts martial share the same objectives and both can subject individuals to potential imprisonment, then the court's logic should also apply to summary trials.

Basic fairness requires systems that impose significant penalties on individuals to provide comparable procedural protections. The Supreme Court stated in Suresh v. Canada, "the greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the Charter."

## Conclusion and recommendations

Canadian summary trials deny our military personnel the civil liberties available to all other Canadian residents. Allowing members of the armed forces to be tried, deprived of their liberty and stigmatized for offences without a right to legal counsel is a clear infringement of basic justice, a violation of due process, a desecration of fairness and a disregard for Canadian values.

The National Defence Act should be amended to reflect 21st century Canadian values.

• Detention should be removed from the list of sentences that may be imposed for a summary trial, as should confinement to ships or barracks. This would allow the election of either a court martial if the offence is serious enough to justify imprisonment, or a summary trial if the matter is of unit discipline.

• If detention were removed as a possible punishment, assisting officers would have a viable role, but only if they receive comprehensive training and education to be better prepared to represent individuals accused of offences.

• Under no circumstances should an accused be tried by her/his superior officer or any other officer who may have had notable contact with the accused prior to the trial.

Military tribunals, when they exist, should be an integral part of the general Canadian justice system and operate in accord with human rights standards, including respect for the right to a fair trial and due

process guarantees set out in the UN International Covenant on Civil and Political Rights, to which Canada has been a signatory since 1976.

"The Canadian military's summary trial process fails to meet minimum standards for procedural fairness," the British Columbia Civil Liberties Association notes in its 2011 report, Fairness for Canada's Soldiers. That report opens with the stark observation, "Canadian soldiers are entitled to the rights and freedoms they fight to uphold."

The United Kingdom established a Summary Appeal Court in 2000, after The European Court of Human Rights realized that summary trials were non-compliant with European human rights legislation. Like the Canadian Charter of Rights and Freedoms, the European Convention with the Protection of Human Rights and Fundamental Freedom (1950) emphasizes that nobody shall be deprived of his/her liberty except after conviction by a competent court; and, similar to section 11 of the Canadian Charter, Article 6 of the convention guarantees the right to a fair trial by an independent and impartial tribunal.

In their recent online book, Behind the Times: Modernization of Canadian Military Criminal Justice, retired Justice Gilles Létourneau and retired Col. Michel Drapeau explain the British equivalent to the summary trial process.

The armed services of the United Kingdom use a process named "minor administrative action" (MAA), a disciplinary system for minor infractions apart from military criminal systems. A service member who is a few minutes late for duty or provides poor performance in a routine task, the usual errors associated with young service members, are handled formally by a presiding officer, one to several ranks above the "offender" with a minor punishment, such as reduced shore leave or extra guard duty. MAAs are not recorded on an individual's service record but are recorded within the unit.

Junior commanders deal with the lowest level of misconduct. This has resulted in halving the number of summary dealings in the army, empowering junior leaders and improving discipline without resorting a more formal tribunal.

The Canadian summary trial system has continued unaddressed for far too long, suggesting that several agencies of the federal government, including the Canadian Human Rights Commission, the Standing Committee on National Defence and the Department of Justice, have been asleep at the switch.

Our military personnel are paying the price.

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