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OPINION: Canada's broken military justice

Role of Judge Advocate General plagued by military conflict of interest, absence of Parliamentary control

Canadian military law has a patchwork history. Nova Scotia passed its first Militia Act in 1758; New Brunswick followed in 1787; Lower Canada in 1803; Upper Canada in 1808 and, eventually, Canada enacted its first federal Militia Act in 1868.

During the Boer War and both World Wars Canadian military personnel were subject to British military justice, the same system that executed 25 Canadians during the First World War. Canada's National Defence Act (NDA) came into force in 1950.

The NDA began the development of a distinctive body of Canadian military law. But two events were to cause profound changes.

First was the shooting death of two unarmed Somali men near the Canadian compound in Belet Huen on March 4, 1993.

The second occurred 12 days later, when an intruder, 16-year-old Shidane Abukar Arone, was detained, savagely beaten and tortured to death while in Canadian custody. Somalia became a metaphor for shameful conduct and a lightning rod for public criticism and national embarrassment.

The Somalia scandal ultimately cost Chief of Defence Staff Jean Boyle his job, contributed to the disbandment of the once-proud Canadian Airborne Regiment and cleared the way for the Canadian Judge Advocate General (JAG), the military's legal branch, to impose a draconian legal regime on the members of the Canadian Armed Forces.

JAG today

The Judge Advocate General, a post currently held by Maj.-Gen. Blaise Cathcart, is the focal point in the need to address the reforms for the proper implementation of military law in Canada.

His title is misleading. He is a lawyer, neither a judge nor a judicial officer and he performs no judicial functions. For all intents and purposes he is the military's legal advisor.

The JAG is the steward and superintendent of Canadian military law and the head of DND's 183-member "law office," with absolute authority over administration of Canadian military law. He possesses a varied collection of responsibilities and authorities.

"I know of no other democracy where this situation exists," says retired Col. Michel Drapeau, an Ottawa-based civilian lawyer who specializes in military law.

At his current rank, Cathcart is subordinate to the chief of defence staff, but he answers to the defence minister, an elected member of Parliament and a member of the government caucus, with partisan interests. He is also better paid than the chief of defence staff and any of the field commanders because, strangely, his pay is that of a federally-appointed judge, although he is not a judge.

He is, first and foremost, a legal advisor and corporate counsel to the minister of defence, an elected, partisan political master. Concurrently, he is also corporate counsel to the governor general, Canada's head of state in his capacity as commander-in-chief of the Canadian Armed Forces, and corporate counsel to the chief of the defence staff, Canada's most senior military leader, and to the deputy minister of defence as well as the military's commanders, commanding officers and leaders.

The chief of defence staff and the deputy minister should have separate legal counsel to advise about deployments, rules of engagement, international law of armed conflict and status-of-forces agreements with other nations, among many other things, without partisan taint. They should have the confidence that their legal advisor is theirs alone and will hold in confidence all legal advice.

Col. Drapeau also explains JAG's schizophrenic legal function: "There is provision in law for a 'joint retainer' in which a lawyer could simultaneously act for two or more people: spouses, business partners or associates. However, the counsel must be completely and equally open with all parties and cannot keep confidential any information relating to any of his clients on joint retainer."

The 'military bench'

Prior to 1998, high-ranking senior military staff were presiding officers at courts martial. But, in the wake of the ruthless and tortuous beating death of Shidane Arone and the subsequent Somalia Inquiry, the office of the chief military judge was born.

The chief military judge, currently Col. Mario Dutil, was appointed in January 2001 and is assisted by three military judges. These four comprise the "military bench", an intermittent disciplinary tribunal that exists only during courts martial, the military's version of criminal court. It begins only when a court martial is convened and enters "jurisdictional hibernation" when the court martial ends.

All members of the Canadian Armed Forces are subject to the judicial authority of the chief military judge, including the chief and vice-chief of the defence staff, even though Gen. Vance and currently suspended vice-chief Vice-Admiral Mark Norman outrank Col. Dutil.

If the chief or any of the general staff (generals) and flag officers (navy senior staff) were accused of a military offense under the Code of Service Discipline, they could face a court martial, facing a military judge. If they met outside the court, the judge would have to salute the accused and defer to him as would any member of the Canadian Armed Forces.

Only individuals who understand military systems and protocols can understand the complex web of relationships involved in these processes. "It makes no sense and does not provide a sense of confidence into the alleged independence of the military judges," Col. Drapeau explained.

A case in point

Maj.-Gen. Michael Rouleau, commander of Canadian Special Operations Forces Command, visited Canadian troops in Iraq in December 2015. During the visit, Gen. Rouleau unintentionally fired his rifle without causing injury or damage.

As the honourable soldier I know him to be, Rouleau acknowledged his lapse of judgment in a letter to Gen. Vance, and accepted full responsibility for his negligence. He was subsequently charged with "neglect to the prejudice of good order and discipline." At his Oct. 11 court martial, he admitted guilt and was fined $2,000.

If Lt.-Col. Louis-Vincent d'Auteuil, Maj.-Gen. Rouleau's judge, were to encounter him before going into court, the judge would have to salute the general as his superior officer, but in a court martial these roles are virtually reversed.

Lt.-Col. D'Auteuil was not blind to Maj.-Gen. Rouleau's rank. While announcing the verdict and sentence, the judge spoke to Rouleau about his "exceptional career within the Canadian Armed Forces . . . (It) is not a coincidence if you achieve what you have achieved in wearing the rank that you have and I think it must be considered, in all of the circumstances, as a mitigating factor."

Politics

The JAG answers to the minister of national defence, a partisan elected member of Parliament with political concerns, and who reports to and is a member of the cabinet, therefore subject to cabinet solidarity.

The Canadian parliamentary system requires cabinet ministers to discuss government business behind closed doors and to express unconditional agreement about all decisions outside the caucus chambers.

It is conceivable that the defence minister could receive direction from cabinet to disallow a particular court martial to take place, or that another must take place because of public perception and media pressure. This would be passed to the JAG under solicitor/client privilege, protecting it from disclosure.

The minister has access only to the JAG on military legal issues and will defer to the JAG on those points.

As the titular head of the legal branch, the JAG decides who will be posted, positioned and promoted. He also significantly influences who is evaluated above his/her peers, and consequently who, among the eight colonels working for him, will succeed him as the next JAG.

Over the years, the JAG branch has benefited from phenomenal growth. According to recent figures, today there are 207 regular force officers and 48 reserve force officers in the JAG branch, of which 251 are lawyers and four are military judges.

These four military judges are, inexplicably, "taking up positions on the JAG establishment," according to DND. The JAG branch also employs 16 paralegals and 97 (civilian and military) administrative staff. This brings the JAG branch to a complement of 366 personnel.

Only members of the legal branch are eligible for appointment as a military judge. JAG sits on their selection committee and provides advice to the minister on the appointment of military judges.

"If civilian judges were picked in this manner, the Canadian Bar Association would have fits of anger!" Col. Drapeau said.

It gets worse. These military judges are not accountable to any complaint mechanism.

As the "superintendent of the military justice system," JAG is empowered to recommend legislative changes, to comment on any proposal by Parliament to change military law, to address Parliamentary committees and to comment on any piece of legislation being presented that affects military law, almost always legislation that he and his staff have drafted.

The JAG has absolute authority over the administration of the military penal and disciplinary system. He has monopolistic power to provide advice to all stakeholders in the system on practices, procedures, development and reforms. He monitors the functioning of the system. He advises government on its efficiency and effectiveness and proposes changes to the National Defence Act.

Contrary to most common law jurisdictions, the JAG holds a military rank and is part of the hierarchy within National Defence Headquarters.

He controls, influences or commands virtually every aspect and element of military law and military "justice" within the Canadian Armed Forces. Not even the managing partner of a large law firm has anything close to this collection of powers.

The JAG suffers from a disturbing conflict of interest. He is a central figure in the military's executive branch while reporting to a political minister.

Separate the judge from the advocate general

Reform of the Canadian military's legal branch is long overdue and perhaps we should look to the British experience, the same system we abandoned in 1950, for indications of how we should address our own system.

The House of Lords argued that everybody should be subject to the same law. A military member's service on the battlefield, his/her rank and position or being awarded a couple of rows of medals does not justify treating military personnel to a different value system and different rights and freedoms than the civilian population whom the military are mandated to protect.

In 1948, Britain's secretary of defence civilianized the Judge Advocate General position and moved it to the court services, rendering the JAG a civilian judicial officer of the High Court with a staff of civilian judge advocates. This ensured that whoever was going to preside at the trial would be a judicial officer independent from the chain of command. The British JAG is a judge performing a judicial and adjudicative function. His position is in stark contrast to his Canadian counterpart.

A 2014 report explained allegations of beatings, electrocution, mock executions and sexual assault of Iraqi military prisoners. The report was passed to the International Criminal Court.

About this time, the British government recognized that a military legal officer may not be as independent and attentive to the values of British society when prosecuting military personnel. Consequently, the director of military prosecution was civilianized and moved to the U.K. Attorney General office.

In the U.K., there are no military lawyers to defend an accused military member. Military personnel tried by court martial must hire their own lawyers. If acquitted, the defence department will reimburse legal costs to a certain level. This puts a military person accused of committing a crime on the same footing as any civilian.

Currently, a Canadian military member undergoing a court martial is provided legal counsel by the defence department without charge. In several cases, these personnel appealed their convictions to the Supreme Court, the legal fees and cost of which are out of reach for the average Canadian.

Canada's adoption of measures similar to Britain's would provide justice with the assurance that people sitting as judges in courts martial were independent, trained and experienced and would apply the same legal standards to military personnel as to Canadian civilians.

If the Canadian military bench were occupied by civilian judges they would receive the same instruction and training available to judges in comparable civilian courts. They would also be accountable to the Canadian Judicial Council, the same body that reviewed the cases of Justices Robin Camp ("Why couldn't you just keep your knees together?") and Ontario Superior Court Justice Frank Newbould for speaking against a land claim near his family cottage.

The Department of Justice Act requires Justice Minister Jody Wilson-Raybould to "have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces." However, she has surrendered absolute power over military law to one military officer, the Judge Advocate General. As the 19th-century British politician Lord Acton observed, "Absolute power corrupts absolutely."

It is time that Ms. Wilson-Raybould re-read her statement of responsibilities and, as a first step, separated the judge from the advocate general.

Our military personnel have paid the price for Parliament's failure to resolve these ambiguities.

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(Reference: Dunne, Timothy J. **Canada's broken military justice.** Halifax Chronicle Herald. 13 May 2017)