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THE MILITARY AFFAIRS COLUMN BY TIM DUNNE

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Canadian military justice system shaken to its core

There is a maxim in the Canadian Armed Forces that corporals can be the military's most formidable members. French Emperor Napoleon was nicknamed The Little Corporal. Adolf Hitler served in the First World War as a corporal. Paul Hellyer, architect of the unification of the Canadian Armed Forces in the late 1960s, served in the Second World War as a bombardier, or corporal in the Royal Canadian Artillery. And Robert J. Arrotta, a U.S. marine corporal, was the hero of the battle of Khe Sanh in Vietnam.

Cpl. Raphael Beaudry joined this exclusive club on Sept. 19 when the Court Martial Appeal Court (CMAC) overturned his July 2016 court martial conviction. The immediate effect was to declare that Canadian courts martial of serious civil offences are unconstitutional.

The impact is monumental.

Cpl. Beaudry was charged with two counts under section 130 of the National Defence Act — one of sexual assault causing bodily harm and one of bodily harm, overcoming resistance to commission of offence.

Section 130, entitled Offences Punishable by Ordinary Law, defines civil offences that are punishable under military law as "an act or omission that takes place in Canada and is punishable under . . . the Criminal Code or any other Act of Parliament."

This permits the director of military prosecutions to try military members for any infraction of any federal law, except murder, manslaughter and child abduction.

Beaudry's court martial opened at CFB Wainwright, Alta., on July 11, 2016. Convicted of the first charge and acquitted of the second, he was sentenced to 42 months imprisonment and was dismissed from the military.

Prior to his court martial, Beaudry's request to be tried by a judge and jury was denied.

Beaudry's counsel applied to the Court Martial Appeal Court on June 29, 2016, to challenge the constitutionality of s. 130 (1) (a) of the NDA, which made virtually all civilian offences a service offence, because it denied the right to a jury trial, guaranteed under the Canadian Charter of Rights and Freedoms.

Section 11 (f) of the charter states that "any person charged with an offence has the right . . . except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury

where the maximum punishment for the offence is imprisonment for five years or a more severe punishment."

CMAC's colossal decision

The CMAC currently consists of 67 civilian judges who sit in panels of three to adjudicate appeals submitted by those who disagree with their court martial findings and sentences.

This argument was previously unsuccessful in the cases of R v. Royes (2013) and R v. Stillman (2013), now before the Supreme Court of Canada. However, writing for the majority in its Sept. 19 decision, Justice Vital Ouellette disagreed with the CMAC's previous position. In his view, "an offence under military law" under section 11 (f) is not a civilian offence.

Beaudry's military conviction has been set aside. He is now released after serving 27 months of his sentence.

The CMAC ruling's colossal effect rendered the military's practice of charging and trying Forces members by court martial for serious non-military infractions a violation of the charter. Its "declaration of invalidity" requires that members of the Canadian Armed Forces accused of serious civil crimes are to be tried by judge and jury in Canada's civilian criminal justice system.

In effect, the Canadian military's practice of trying service members for serious civil offences, such as sexual assault, violence and use of weapons in the commission of offences, violates the Canadian Charter of Rights and Freedoms and is, therefore, unconstitutional.

The interests of the victim and the public

The Canadian Charter of Rights and Freedoms is the first part of the Canadian Constitution, the foundation of Canadian law and jurisprudence and our most important piece of legislation.

Changes to lesser laws must be made with care, concern and open public debate. And when changes are made, our legislators and courts must be very guarded against unintended consequences.

In 1998, Bill C-25 extended the military's jurisdiction to incorporate sexual assault, removing service members' access to the charter's protective provisions in relation to this offence.

As if in response, CMAC's Justice Ouellette wrote, "Parliament does not have the authority to amend the NDA to limit or repeal rights guaranteed by the charter. Furthermore, it is not necessary to deprive the member of the right to a trial by jury in such a case to ensure military discipline, efficiency and morale."

CMAC's Beaudry decision resets the process and restores Canadian service members' right to a trial by judge and jury for all serious charges that can result in incarceration for five years or more.

The director of military prosecutions (DMP) has expressed a concern that 40 military disciplinary cases await disposition and has filed an appeal with the Supreme Court of Canada seeking a stay of the CMAC declaration of invalidity to allow its current caseload to proceed until the Supreme Court renders its final decision. In his appeal, Col. Bruce MacGregor wrote that granting the stay will

"protect the rights of all parties in cases currently proceeding in lower courts through the military justice system."

The Judge Advocate General, who administers military justice in Canada, continually asserts that it is necessary to maintaining discipline, efficiency, and morale within the ranks.

I have serious misgivings about the validity of this position. Military justice may have been necessary during the English Civil War (1642-51), the Peninsula War (1807-14), and even both world wars and the Korean conflict.

During periods of crisis, soldiers and sailors were often taken unwillingly from the streets and pubs and pressed into service. The Canadian Forces of today, however, are an all-volunteer outfit whose members willingly, and often enthusiastically, enrol with impressive levels of academic, technical and technological education and skills.

Also, the Canadian military has the capability to return an accused to Canada from almost anywhere in the world within 24 hours. This raises the question of whether military justice by court martial, which was developed when repatriation was impossible, should be changed or simply be eliminated.

In my view, the Beaudry decision will have no impact on discipline and efficiency within the Canadian Armed Forces and may even improve morale.

As it now stands, JAG is denied jurisdiction over murder, manslaughter and child abduction, for which military personnel are already generally tried by civilian courts. The Beaudry decision expands this list of exclusions.

Convicted spy Jeffrey Delisle was sentenced in 2013 to 20 years in prison by a Halifax criminal court and Vice-Admiral Mark Norman's case is being heard in an Ottawa court. Also, family violence cases involving military members are normally tried by civilian courts in a jury trial.

Col. MacGregor's position is this: "Declining to order a stay in this matter will force cases currently proceeding through the military justice system out of that system and into the civilian justice system."

But critics aren't impressed.

"What they are trying to do is to raise a panic where one does not exist," military defence lawyer Lt.-Col. Jean-Bruno Cloutier said in an interview. "It is better for the victim and it is better for the public interest to have these cases heard *downtown*," he continued, referring to civilian criminal courts.

There's no evidence that referring these cases to the criminal courts will affect military discipline. The accused will not escape justice. On the contrary, he will be brought before the same courts, the same judges and the same jury system as all other Canadians accused of serious crimes.

While the Supreme Court may hear the application to stay the declaration of invalidity, the Beaudry appeal will not likely be heard for about a year.

At the same time, having another 40 cases uploaded to the civilian criminal justice system is insignificant, “like another litre of water over Niagara Falls,” said Lt.-Cmdr. Mark Létourneau in an interview. Létourneau is a military defence lawyer representing Cpl. Beaudry.

The military prosecutor retains authority to prosecute all offences committed by military personnel on international assignments and deployed to the various operations of the Forces, and all offences of a purely military nature that are committed within Canada.

Different jurisdictions

There are striking differences between the military justice system and the criminal justice system that make it essential that the Supreme Court should allow the declaration of invalidity to stand.

Unlike the criminal justice system, the court martial does not have the authority to ask for a probation officer’s pre-sentence report on the accused, in order to assist the court in imposing a sentence. It relies only on the offender’s agreement to such a report. Under the military system, the offender can refuse, limiting the information available to help the military judge, particularly in the exercise of concurrent criminal jurisdiction.

“Until you have a pre-sentence report, you may not know if the offender is dangerous,” Cloutier said. “And it’s not just us saying that. This is also the opinion of the military judge.”

Nor does a military judge have the authority to direct that a sexual offender not contact the victim, which contradicts the most basic requirements of criminal justice.

“Under these circumstances, how can it be in the public interest and in the interest of the victims to suspend this declaration of invalidity?” asked Létourneau.

These are judicial tools any Canadian criminal judge has at his disposal.

In the 2012 court martial of Pte. Réjean Larouche, military judge Lt.-Col. Louis-Vincent d’Auteuil suggested the interests of justice and the public would be better served before a court with the full and clear jurisdiction to deal with the offence. Indeed, Parliament has not provided military judges with the same tools and authorities as their criminal court colleagues.

“I can but regret that the court martial does not have the authority to ask a probation officer to make a written report relating to the accused for the purpose of assisting the court in imposing a sentence, as provided by section 721 of the Criminal Code,” Lt.-Col. D’Auteuil wrote in his court martial decision.

“In the current system, the court relies solely on the offender’s willingness to submit to the exercise requiring such a report, and it is not in the position to oblige the offender to do so or to criticize him for not doing so.”

Conclusion

It is apparent the drafters of the charter intended all Canadians accused of serious civilian crimes where incarceration for five years or more is a possibility should have access to a trial by jury.

“A military judge cannot order a pre-sentence report,” Cloutier said, recalling the comments of Lt-Col. d’Auteuil. “So he cannot know how dangerous the offender is, while the civilian judge can direct a report to determine the level of risk the offender presents to the victim, and to give the offender specific conditions that must be observed.”

CMAC Justice Ouellette also wrote in the decision, “It follows that any limit on a right must be related to the maintenance of discipline, morale and efficiency of the Armed Forces. In the absence of such a connection, there is no reason why a member would not enjoy the same rights as any other Canadian citizen. Indeed, it would be ironic for those who have the ultimate responsibility of protecting freedom, justice and social equality, at the risk of their lives, to not to enjoy those same rights.”

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