

Above the Law

In theory and principle, nobody is above the law in Canada. However, in fact and in practice the reality is quite different at least for certain individuals. Consider this.

The Canadian Judge-Advocate General (JAG), Major-General Blaise Cathcart, failed to comply with his statutory obligation to file with Parliament and the Senate through the minister of national defence an annual report on his administration of military justice: see ss.9.3(2) of the National Defence Act (NDA). Not only did he fail to comply with his obligation in 2012, he reoffended in 2013 and 2014.

His failure was brought to light by an opposition member of Parliament. The JAG's answer before the Standing Committee on National Defence where he was appearing on the issue of sexual offences was that reporting was not his first priority over that three-year span. In other words, complying with the law was not his main priority. Here is what he said in answer to Mr. Jack Harris' question:

Mr. Jack Harris: Does it bother you that we don't have reports for 2012, 2013, 2014, and we're relying on a report that's now three years old?

Gen Thomas Lawson: I have the judge advocate general with me, who can update you.

Mr. Jack Harris: General Cathcart, you will note from my questions that I have a concern about reporting. General Lawson seems to indicate that the reports for 2012, 2013, and 2014, have been filed either with him or with the Minister which would mean that the minister hasn't tabled them. Where exactly are those reports at the moment? Will they be tabled in the House as required by the statute?

MGen Blaise Cathcart: Thank you for that question. I was confused about the question and the response. If you're talking about the Annual Reports that I'm responsible for as Judge Advocate General, they are not with the Minister. Those are my reports. They are still being worked on and they're close to completion. I take the full responsibility for not meeting the timeline as set out to do it on an annual basis. I can go into great detail as to reasons why. The short answer is that there were many other equal military justice priorities, not the least of which you're familiar with, Mr. Harris, dealing with legislation such as Bill C-15.

As expected, there were isolated outcries but not much more. A few TV appearances to denounce the failure, but nothing ensued. Not long thereafter it was business as usual. No charges for the statutory violations of the Act were laid. No administrative sanctions whatsoever were taken against the faulty JAG.

Recently, Global News with indubitable evidence to support its allegations reported that the JAG covertly wrote to the late Chief Justice of the Court Martial Appeal Court of Canada to complain about

the judge's description of the state of military law in Canada. The JAG'S allegations were that the appeal judge might not be impartial if still assigned to sit on military cases. He threatened to lay a complaint against the judge before the Judicial Council. The JAG's covert letter could be seen either as an attempt to interfere with the administration of justice or a threat to bring into the limelight the impugned judge, the Court Martial Appeal Court and the Chief Justice.

However, the allegations were not only wrong and exaggerated but were also based on erroneous, incomplete and manipulated facts. Moreover, the procedure followed by the JAG was highly improper as the Chief Justice pointed out to him in his reply to his letter. If the JAG had reasons to believe that the judge might not be impartial, he had to raise it in open court by way of a motion to challenge.

Again, no administrative or legal sanctions were taken against the JAG. Why and how come? Isn't his conduct a conduct prejudicial to good order and discipline as forbidden by s.128 of the Act? Isn't his conduct a conduct unbecoming an officer contrary to s.92 of the Act?

In matters involving the prosecution of violations of the *Criminal Code of Canada*, as a general rule, the Federal Attorney General and Director of Public Prosecutions as well as the provincial Attorneys General and the director of Director of Public Prosecutions have given up their role of ultimate guardian of the public peace and interest when crimes are committed by members of the military. Occasionally, a curve is thrown for the left field by a provincial Attorney General of the Directors of Public Prosecutions to remind us of their existence. But that is the extent of their involvement.

In the absence of a prosecution by the Attorneys General or the Directors of Public Prosecutions, what about charges laid under the NDA by the Director of Military Prosecutions and his Prosecution Service? Unfortunately, you cannot count on them to do that. Why can they not initiate a prosecution against the JAG? The reason is very simple. They are not independent from the chain of command. They act under the supervision of the JAG who is the head of the legal chain of command. Their pay increase depends on the assessment of their performance by the JAG. They also depend on the JAG for their promotions, assignments and postings.

There is something rotten in the kingdom of Canadian military justice. The Supreme Court of Canada is given the opportunity to restore justice in the coming cases of *Moriarity, Hannah, Vezina and Arsenault* to be heard in this coming month of May (2015). The investigation, enforcement and prosecution of ordinary criminal law offences should go back to civilian authorities and civilian tribunals where the members of the Forces or the civilians tried by military tribunals would not be deprived of the right to a jury trial, the benefit of a prosecution and a trial independent from the chain of command and be subject to a pretense of justice called summary trials with a criminal record as a premium.