

Sexual offences and harassment: a worrying command centric decision

In a CTV National News release of December 2 and 4, 2016, entitled **Military advances fight against sexual misconduct**, the Canadian Chief of the Defense Staff (CDS), General Johnathan Vance, in reaction to victims complaints that the military courts were not handing down harsh enough punishments to deter bad behavior, told CTV's reporter Mercedes Stephenson "that he will now discharge anyone found to have sexually harassed or harmed another member of the military, **even if he or she has struck a plea deal in a military court**. This statement and the policy yet to put down on paper raise worrying legal concerns.

Before I address them, I should mention that, according to the news release, "29 members of the military have already been forced out due to sexual misconduct....and two more soldiers who faced courts martial on sexual assault charges but pleaded guilty to a lesser charge of disgraceful misconduct and had their sexual assault charges stayed....will be served with "intent to release". In other words they will be kicked out of the military.

It is a fact that often time guilty pleas are entered after a plea bargaining as to charges and/or sentences. In respect of sentence deals, the Supreme Court of Canada in the recent case of *R. v. Anthony-Cook* 2016 SCC 43, rendered on October 21st 2016, underlined the importance of plea bargaining in the administration of criminal or penal justice. At par.1 and 2, Moldaver J., on behalf of a unanimous Court wrote:

[1] Resolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently.

[2] Joint submissions on sentence — that is, when Crown and defence counsel agree to recommend a particular sentence to the judge, in exchange for the accused entering a plea of guilty — are a subset of resolution discussions.^[1] They are both an accepted and acceptable means of plea resolution. They occur every day in courtrooms across this country and they are vital to the efficient operation of the criminal justice system. As this Court said in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, not only do joint submissions "help to resolve the vast majority of criminal cases in Canada", but "in doing so, [they] contribute to a fair and efficient criminal justice system" (para. 47).

Under Canadian law there was differing view among judges as to the test against which to measure the acceptability of a joint submission on sentence. The first test was fitness. A judge may depart from a joint submission if the proposed sentence is not fit.

According to a second test, which is in fact a variation of the first, a judge could not depart from the submission unless he or she concluded that the proposed sentence is demonstrably unfit.

Finally the third test, the one adopted by the Supreme Court of Canada, is the public interest test. It means that a judge can depart from the joint submission if the proposed sentence "would bring the administration of justice into disrepute, or is otherwise not in the public interest": see par. 27 to 31 of the decision. Then the Court went on to explain what the public interest threshold means: see par.32 to 34 of the decision. From par. 35 to 43 the Court goes on to explain why a stringent test is required.

Finally, in par. 44 Justice Moldaver goes on to explain why a high threshold is not only necessary, but also appropriate. He writes:

[44] Finally, I note that a high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (Martin Committee Report, at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616). Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online), rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.*, rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (Martin Committee Report, at p. 287).

His comments are relevant in the context of the statement made by the CDS and his intended policy to automatically kick out of the Forces those who pleaded or were found guilty and were properly as well as duly sentenced pursuant to joint submissions.