Legislative control is required over the military criminal justice system

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The cornerstone of Canada's constitutional democracy is the separation of government powers. As the artisans of law, and with a complete oversight duty over the Executive, the Legislature arguably wields the greatest power. If there is public demand for a policy shift, it is the Legislature who exercises control over the Executive to ensure that the public interest is maintained. This includes control over all government Department's, including the Canadian Armed Forces (CAF).

Despite their oversight duty, Canada's Legislature has arguably not made a meaningful contribution to the development of military law since 1967, resulting in the unification of Canada's army, navy and air force. In this way – save for legislative reform in 1997 as a result of the findings of the Commission of Inquiry into the Deployment of the Canadian Airborne Regiment to Somalia – this current Parliament is an absentee landlord, currently more concerned with legalizing marijuana than in reforming an ancient justice system that so often fails our men and women in uniform.

Canada's Minister of Justice is also 'absent in office' on the military justice file. Yet, section 4 of the *Department of Justice Act* gives the Minister responsibility as superintendent over "*all matters connected with the administration of justice in Canada"* including the military justice system. The Minister of Justice is also the official adviser to the Governor General – Canada's Commander in Chief - and is the legal member for the Queen's Privy Council.

Not only is the Minister passive and uninvolved in military affairs, her legislation goes out of its way to exclude application over the military. It is almost as if there were a line of demarcation between laws intended for civil society and laws enacted for the military. The corollary to this is that the military is being granted a sort of independence of decision and actions within a widening sphere of competence. To the informed observer, the lines between and military affairs is sharp an clear as if both sides must abstain from transgression.

The need for civilian oversight of our military has never been clearer.

The Summary Trial

Among advanced democracies, Canada's military is the last bastion of the ancient summary trial. The ancient Summary Trials system in Canada is frozen in time; largely unchanged in 328 years.

Nearly 800 military members in Canada face summary trial each year. These disciplinary proceedings, which are heard by that soldier's Commanding Officer, could lead to a sentence with '*true penal consequences'* such as incarceration, demotion, a large fine, or a reprimand. A summary trial conviction may also result in a criminal record.

Amazingly, however, there is no right to legal counsel at a summary trial even if an accused is being tried on Canadian soil, during peace time, nor is there a transcript of

proceedings or a right of appeal. Moreover, the Commanding Officer hearing the summary trial has no legal training.

The Summary Trial disciplinary procedure is also devoid of any rules of evidence, meaning there is no protection for an accused being compelled to be a witness against himself, to protection against self incrimination, no right to spousal privilege, adverse inferences may be drawn from the accused's silence, and hearsay evidence may be taken and fully relied upon.

No other Canadian faces such a one-sided penal justice process. The Summary Trial process as practiced in Canada has been all but abolished among all of our NATO allies. Canada's system is still used in Pakistan, Sri Lanka, India, Bangladesh and Nepal.

CHARACTERISTICS	Canada, Pakistan, Sri Lanka, India, Bangladesh, Nepal 	UK and Australia 	U.S.A. 	France and Germany 
	BEHIND THE TIMES	**MODERNIZED**	**REPEALED**	**AHEAD OF TIMES**
• Right to legal counsel	**NO**	**NO**	Adopted non-judicial proceedings	Summary Trials completely abolished in peace time.
• Presiding Officer has legal training	**NO**	**NO**		
• Rules of evidence are available	**NO**	**NO**		
• Hearsay evidence admissible and reliable	**YES**	**YES**		
• Right of appeal	**NO**	**NO**		
• Punishments includes loss of liberty (incarceration/detention/confinement)	**YES**	**YES**		
• **RIGHT OF APPEAL**	**NO**	**YES**		

In 2015 Canada's Parliament introduced Bill C-71 which was aimed at modifying the Military's Summary Trial. However, the authenticity for such reforms is questionable, because with the dissolution of parliament prior to the last Federal election, the Bill died on the order paper, and nearly two years since, there is no indication that it will be re-introduced.

No impetus for change

As it stands, Canada's military justice system needs comprehensive reform – a task that requires independent oversight.

Since 1998 there have been two independent reviews of Canada's military justice system. The first review was conducted by the Right Honourable Antonio Lamer, P.C., C.C., C.D. in 2003. The second review was conducted by the Honourable Patrick J. LeSage, C.M., O. Ont., Q.C., tabled in 2012. The recommendations of these two reports were mostly geared at protecting the status quo, and not towards significant reforms.

In 2016, Canada's Minister of National Defence ordered a review of the *National Defence Act*, and asked stakeholders to make submissions on how to improve their policy and governance process. A separate and parallel internal review, was also launched by the Judge Advocate General on the Court Martial system. That review is spearheaded by a senior lawyer with the Office of the Judge Advocate General.

Though a wall-to-wall review of the *National Defence Act* is desperately required, meaningful reform can only be achieved by external review. Most surprisingly, despite assembling a team, and having them conduct extensive consultations with ten (10) countries globally, at a May 2017 conference, the Senior Officer leading the JAG review states his belief that it is possible that "the report just gets put on a shelf and becomes a reference for future folks examining and looking at options for reform of the court martial system." Predictably then, there is no real impetus for meaningful change.

Procedurally, a confidential draft report on the Court Martial System has been produced and provided to the Judge Advocate General for approval. However, despite permitting broad input from all Canadians, the military lawyers will seemingly only give weight to positions and ideas penned by members of the defence establishment because, as stated by the same Senior JAG officer at the same May, 2017 conference '*no one can understand military justice unless they have worked in it*.' This is troublesome.

More troublesome is that, according to CAF's defence ethics teachings, it is impermissible for a serving member to criticize the current operational framework. In the June 2016 edition of Maple Leaf Magazine, the Defence Ethics Programme published an ethical scenario concerning Albert, who sadly disagreed with his chain of command on a policy decision. The ethical dilemma is: What should Albert do?

After some time, the Ethics Programme released its rubric response: If you disagree with Departmental policies, a member's only options are to keep quiet or release from service. The answer and rationale provided by the ethics advisors reads as follows: "*If professional servants of the state choose to undermine the governance process when they disagree with decisions, then they render the institution incapable of serving the state ... If Albert felt this issue was important enough, he had the option of respecting his professional obligations by resigning from the institution*."

The CAF policy is seemingly, therefore, that if a member disagrees with current governance policies, their only recourse is to resign, or else they will be violating their professional oath. According to the Defence Ethics Programme, for a member to make a submission to assist the JAG review, would be to undermine the governance process itself. The

member would be necessarily forced to resign. Given this reality, there is no reason to expect anything but submission to the status quo. Perhaps the Senior JAG officer's prediction – that his report will merely get "*put on a shelf and becomes a reference*" is more truth than fiction.

Past likely to repeat itself

It is not reasonable to expect military lawyers to review and recommend substantial changes to their own policies. It will undoubtedly lead to a predictable outcome – another report of the self-aggrandized "best" justice system, with broad recommendations that will never be fully implemented.

This cynical opinion is grounded in very recent history. Consider bill C-15: *An Act to Amend the National Defence Act*. Bill C-15 was tabled by the Conservative Government in June 2011 - more than six (6) years ago. It received Royal Assent on June 19, 2013. Despite the passage of more than four (4) years since assent, more than half of this bill has yet to be put into force, including all provisions aimed at strengthening the archaic military justice system.

Bill C-15 was the subject of more than two years of extensive consultation, including eight (8) separate meetings of the Standing Committee on National Defence, and five full meetings of the Senate Committee on Legal and Constitutional Affairs. Bill C-15 received Her Majesty's approval, and the approval of the Judge Advocate General who was directly involved in the consultation process.

For reasons unknown, Bill C-15, a very important legislation has been forgotten, and left to collect dust in the annals of Parliament. Bill C-15 should be the starting point for any Defence Review. Particularly concerning is that the contents of the Bill that were ignored are specifically aimed at improving the rights of members of the CAF, and strengthening the military justice system such as the scope of sentencing principles, absolute discharge, intermittent sentences, restitution, and allowing victim impact statements.

If Bill C-15 cannot reach its full maturity after all the effort that went to its final product, and more than four years since being signed by the Governor General himself, it is predictable that any work prepared by the JAG's most recent internal review will find equal outcome – just another reference text, as he has foreshadowed.

Military Self-Governance

There is a growing shift towards the military becoming completely insulated and self-governing, and the military take every opportunity to exclude themselves from civilian society. In doing so, they act in stark contrast to the persons that they serve.

Consider that victims of crimes investigated or prosecuted under military jurisdiction have been patently excluded from the recently enacted *Canadian Victims Bill of Rights.* Section 18(3) of that law specifically excludes a victim whose assailant is tried under the *National Defence Act* from being kept apprised of their case as it advances, including victims of sexual assault or violent crimes.

Consider also that in 1998, the *National Defence Act* was amended to remove sexual assault as a criminal offence excluded from military jurisdiction. Now any sex-based crime may be tried and prosecuted before a military court. The reason for the military doing so was their belief that they are better capable of doing so. One has to ask: how is the prosecution of sexual assault or aggravated sex-based crimes, connected to the discipline, efficiency and morale of the military? It is not.

A review of the Defence establishment should not be left to the military to act alone, and in accordance with their own interests. History is replete with examples of how a military, left to their own, ends in catastrophe, some which will be chronicled below. Unfortunately, it is only when facing crisis, and public pressure mounts, that Parliament actually gets involved. Despite their vast resources Parliament, it is surprising that they rarely exercise any foresight to try and prevent catastrophe through meaningful and independent military justice reform.

EXAMPLE A: Somalia

Following the torture-killing of Somali teenager Shidane Arone and political pressure, a Royal Commission of Inquiry was undertaken to investigate the Deployment of the Canadian Airborne Regiment to Somalia.

The Final Report chronicles a litany of failures and, more significantly leadership shortcomings by the military chain of command and significant failures of the military justice system, whether in theatre or at National Defence Headquarters (NDHQ). It also revealed the existence of a climate of cover-up as well as deep moral and legal failings.

The Report made hundreds of findings and provided 160 recommendations, forty-five (45) of which dealing exclusively with the restructuration of the Military Justice System. It was only in response to this tragedy that the Legislature was compelled to introduce sweeping reforms to the National Defence Act, in 1998 introducing Bill C-25. Among the changes were:

a. Abolition of the death penalty;

b. Some strengthening of the independence of military judges relating to their appointment, powers and tenure:

c. Clarification and limitation of the functions of the Minister of National Defence;

d. Creation of new positions within the military justice system, such as the Director of Military Prosecutions.

EXAMPLE B: The Fynes inquiry

In March 2008 Corporal Stuart Langridge – a veteran of the Bosnia and Afghanistan conflicts - committed suicide in a barrack room at Canadian Forces Base Edmonton. He was 28 years of age.

What followed the death of Cpl Langridge was horrific. The military police were lead by inexperienced, unsupervised, and untrained investigators, who made careless mistakes and have left Cpl Langridge's parents, Mr and Mrs Fynes, feeling "*deceived, mislead and intentionally marginalized.*" This included withholding the fact that Cpl Langridge has left a suicide note to his mother for more than 16 months after his death.

The treatment that Mr and Mrs Fynes suffered at the hands of the Canadian Forces Administration and leadership left them deeply scarred and resulted in a very public inquiry by the Military Police Complaints Commission into thirty-two (32) allegations of wrongdoing by several Military Police members. The MPCC considered testimony from ninety-two (92) witnesses, through sixty-two (62) days, which straddled nearly six (6) calendar months. Testimony has uncovered unusual, dramatic and disturbing events both in the lead up and the aftermath of Cpl Langridge's unfortunate passing.

The Final Report of the MPCC has been ignored by the military police with no meaningful changes being made.

EXAMPLE C: The Deschamps Review

In response to media reports of widespread sexual misconduct within Canada's military, on July 9, 2014, the Department of National Defence announced that there would be an External Review on sexual misconduct in the Canadian Forces. The Review was undertaken by Madam Justice Marie Deschamps, a highly qualified, and recently retired Supreme Court judge.

Disappointingly, the military only provided Madam Justice Deschamps with a limited mandate, and she was therefore unable to probe too deeply into the military justice system to determine whether or not there was disconnect between the military policies and, more importantly, the *application* of these policies.

On April 29, 2015, Madam Justice Deschamp's Report was released. The findings detailed an epidemic of sexualized behaviours and attitudes. Specifically, Madam Justice Deschamps concludes that abuse of recruits at Royal Military College of Canada (RMCC) is "endemic". She writes that many college students she spoke with:

"*reported that sexual harassment is considered a 'passage obligé,' and sexual assault an ever-present risk. One officer cadet joked that they do not report sexual harassment because it happens all the time*."

The Military did not fully accept the findings of this Report. Instead, with much fanfare, the current Chief of Defence Staff, General Jonathan Vance, initiated Operation Honour. His stated mission is "To eliminate harmful and inappropriate sexual behaviour within the CAF."

The following year, General Vance commissioned a Statistics Canada survey to revaluate the data set. What embarrassment he must have felt when this new Report showed that nearly 1,000 members of the military reported being sexually assaulted within the previous 12 months. His Operation Honour Order had been directly and flauntingly ignored. The Statistics Canada survey further found that soldiers, sailors and aviators are far more likely than other Canadians to be violated sexually. It also suggests that military leaders have a long way to go in their efforts to change a culture in which sexual assault is tolerated.

Operation Honours is ongoing, and will not be concluded until "*all CAF members are able to perform their duties in an environment free of harmful and inappropriate sexual behaviour*." How this is to be measured and victory declared is uncertain, particularly since there will be no external review of the results of this Operation.

Role of Courts and Tribunals

Civilian Courts and Tribunals in Canada are largely not willing or able to intervene concerning issues of military justice. There are a few examples worth noting:

- Women were only permitted aboard Naval ships and the Infantry in 1989, thanks to a decision of the Human Rights Commission forcing it upon them. The CAF and Department of National Defence argued against this modernization.

- The unconstitutional right of a criminal accused to select mode of trial was only abolished in 2008 by order of the Court Martial Appeal Court in *R. v. Trépanier*; and

- Security of tenure for military judges was not recognized until 2011, by order of the Court Martial Appeal Court in *R. v. Leblanc.*

The judiciary is cautious not to interfere with what it perceives as the will of Parliament. Indeed, the separation of powers may prevent them from doing so. Disappointingly, however, when given the chance to influence the military justice regime, the Supreme Court of Canada seems consistently reluctant to do so.

Canada's Constitution permits a law to be struck if the breadth of a law greatly exceeds the legislative intent. Most recently in *R v. Moriarity*, the Supreme Court of Canada considered whether incorporation of Criminal Code offences as military disciplinary offences was overbroad.

The *Moriarity* case was an opportunity for the Supreme Court of Canada to clarify the historical 'nexus' test, and the required restriction for the military to assume jurisdiction over offences committed in Canada, particularly in peace time. A central question was as follows: To retain jurisdiction over criminal offences, is it necessary for military prosecutors to show a connection to the maintenance of discipline, efficiency and morale of the military?

The Supreme Court of Canada answered the question emphatically: There are no limits to prosecutorial discretion, and any changes to this discretion would have to be legislated. The historical 'nexus' test was quashed. The issue must be addressed by Parliament, not the courts.

Conclusion

The Legislature is trusted with ultimate responsibility for a country's strategic decision-making, including control and oversight of the military. Historically, the military have resisted oversight, conducting internal reviews and only truly responding to crisis as they arise, and in response to public outrage. The result is that Canada's military operates in isolation, as a nation within a nation.

Civilian oversight is required over the military justice system. Most recently Operation Honour, which was designed and run and controlled by the military for the military, has failed to bring about a counter-culture to address the harmful sexualized environment. The 2016 comprehensive survey conducted by Statistics Canada shows that the problem is both enduring and deep-seated. Yet, military leaders continue to bumble in search of solutions. As a result, millions of dollars have been spent in military solutions: travel, pointless surveys, wallet sized reminder cards, and call-in centers that are closed on weekends. It is clear that the military is unable to fix this socio-cultural problem on its own.

"Operation Honour" is unlikely to rank as a success in military annals. It will most likely instead be yet another illustration of the disconnectedness between the military and the expectations of civil society whom they serve, and the Department of National Defence's ability to 'control the message'.

It is the duty of our Legislature and the Minister of Justice to be vigilant and not allow our military to operate in a vacuum. Former French Prime Minister Georges Clemenceau once famously quipped: "*War is too important a matter to be left to the military*." Perhaps there is a conventional wisdom to this statement, and military justice, accordingly, is also to important a matter to be left to the military.