

Military adopts reforms of critics

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Change is afoot on the military justice file, and it's not all bad news.

On Thursday May 10, 2018 the Minister of National Defence introduced a Bill entitled "An Act to amend the National Defence Act and to make related and consequential amendments to other Acts". If enacted, this Bill will introduce significant changes to the military summary trial system; reforms that critics of the military justice system, including these authors, have advocated for over the past decade and more.

What's the issue?

The Canadian summary trial system has remained largely unchanged for centuries and is by far the most common disciplinary tribunal used by the military. Every year, hundreds of service personnel are subject to summary trials for issues ranging from drunkenness, to being absent without leave, to harassment, assault, and more. Summary trials allow military commanders to execute swift justice on minor disciplinary offences, without the need for independence, lawyers, or the protections of the civil Rules of Evidence. And there is no right of appeal making decisions, for all intents and purposes, final and binding.

The summary trial itself has two big problems: The maximum penalty available to presiding officers includes imprisonment (loss of liberty) and a criminal record may follow a conviction. For years, we have advocated that such 'true penal consequences' make the summary trial a 'quasi-criminal' tribunal, and the absence of protections may offend the Charter of Rights and Freedoms, particularly as it concerns loss of liberty and lack of an independent decision maker. This position was also strongly advocated by (retired) Justice Gilles Letourneau and (now) Justice Anne London-Weinstein of the Ontario Superior Court, and others

For the past decade, these concerns were largely dismissed. Indeed, several Independent Reports produced by retired Supreme Court Justices have disagreed with our concerns of constitutional non-compliance. In his 1997 Report, the Honourable Brian Dickson wrote to the Minister of National Defence that, "particularly with certain relatively minor improvements, the summary trial process is likely to survive a court challenge as to its constitutional validity." Some minor changes were implemented and a second review by Chief Justice Lamer in 2003 concluded that, as a result, "Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence." His conclusion was echoed in 2012 by (retired) Chief Justice LeSage in his independent report. The military also rejected any suggestion of reform, ardently.

Parliament and military leadership

Parliament has finally 'seen the light' and agreed with its critics. May 10, 2018 could mark the start of the most momentous change to the military summary system since the British Militia Act received assent in the year 1745. Once this bill is enacted, presiding officers at summary trial will no longer be able to impose true penal consequences on an accused. Moreover, a criminal record will not follow a

conviction at any summary trial. The bill will effectively decriminalize the summary trial process; and this is as it should be.

The changes introduced by the Judge Advocate General Commodore Geneviève Bernatchez, through the Minister of National Defence, will help to modernize and harmonize the dated military justice file with not only civilian expectations, but with the Constitution and with international standards. Consider that more than a decade ago, the European Court of Human Rights declared the British summary trial system (from which ours was derived) to violate an accused's rights as the trials are not independent and violate an accused's right to be presumed innocent.

Commodore Bernatchez only assumed the reins as JAG last year, but in this short time she has seemingly introduced her vision for a new era of military justice. This latest Bill represents a first major step towards modernizing the military justice system. We are hopeful that the proposed changes will go through all stages of the legislative process in short order, thus enabling soldiers to face a military justice that lives up to their courage and bravery.

Other positive changes

But there is more. Going forward the National Defense Act will also be amended to provide rights to victims of crime and will also put into force significant reforms to the court martial system.

Going forward, victims of crime in the military will no longer be exempt from the Canadian Victims Bill of Rights. This victim may also have a Liaison Officer who will be able to explain to the victim the operation of the courts martial and provide him with the information relating to a service offense to which he is entitled. While this is a step forward, it falls short of the recommendation that such victims also have access to legal advice during the reporting, investigation and prosecution of such a crime against the person.

Many changes from the Military Justice for the Defense of Canada Act which received Royal Assent on June 19, 2013 will be put into force. These include:

- Introducing unconditional discharge, intermittent sentences and restitution orders as punishments available at court martial.
- A court martial will be able to absolve an accused convicted of an offense for which there is no minimum sentence or a maximum sentence of 14 years and over.
- The court martial will now be able to order an offender to serve his sentence intermittently. This may enable a reservist from serving his sentence while maintaining his civilian job.
- The court martial will now be able to impose restitution orders, obliging an offender to compensate a victim in cases of material, bodily and psychological damages suffered.
- Victims will be able to prepare and read impact statements which shall be considered in sentencing.
- The statutory limitation period for bringing an action against the Department of National Defence will be extended from six months to two years.

Conclusion

The reforms to the military justice system introduced by Commodore Bernatchez and her staff, and approved by the Trudeau government, are transformational and constitute a long-awaited tour de force. This long awaited and positive wave of reforms is the result of transformational leadership, which should be recognized. Bravissimo.