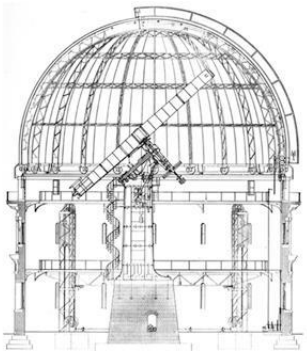

THE OBSERVATORY

The Newsletter of the

Canadian Observatory for Military Justice Reform

Editor: Major Tim Dunne, CD email: tdunne(at)duncom(dot)ca

https://military-justice.ca

Canadian military's sexual misconduct crisis

First exposed in 1998

Almost exactly four years ago, on April 30, 2015, retired Supreme Court justice Marie Deschamps created national news when she submitted her report about sexual misconduct and sexual harassment in the Canadian Forces. Canadians could be forgiven for thinking that this was a newly-discovered situation.

Sadly, that isn't the case. This is a persistent problem stretching back decades.

Maclean's magazine ran three cover stories about sexual assault and harassment in our military in 1998. In the first, an 18-year-old Dawn Thomson was featured in the May 25, 1998, issue of Maclean's magazine. The cover story, "*Rape in the Military*" told of her sexual assault at Royal Canadian Navy's Esquimalt, B.C., installation. Another 13 women with similar experiences were included in the same article.

The next issue of Maclean's, June 1, 1998, featured another cover story "*Speaking Out.*" Tracey Constable was sexually assaulted 11 years earlier at Ottawa's National Defence Medical Centre, but fearing she would not be believed, didn't report it. Retired Major Dee Brassseur, pilot, one of the very first females in the Canadian Forces to fly a CF 188 fighter aircraft, revealed she had been subjected to rape, assault and harassment during her 21-year career.

And yet again, six months later, the December 14 issue featured a third MacLean's cover story "*Rape and Justice.*" Military cook Tannis Babos-Emond was sexually assaulted in 1983 at CFB Borden; administrative clerk Lesleyanne Ryan was sexually assaulted in Bosnia Herzegovina in 1994; and supply technician Master Cpl. Suzie Fortin in 1996 at CFB Kingston.

General Maurice Baril, then Chief of the Defence Staff, acknowledged there was a problem existed.

Military tribunals: A closed disciplinary system

Prior to 1998, sexual assault was handled by the civilian criminal justice system: The allegations were investigated by the civilian police, charged by provincial public and prosecution services for violations of

the *Criminal Code of Canada*. Accused were tried by superior courts across Canada. In other words, murder, manslaughter, abduction and sexual assault committed by military personnel were tried by a superior court, until section 70 was inexplicably changed in 1998 in the wake of the Commission of Inquiry on the Deployment of the Airborne Regiment. Such a major shift in the jurisdiction of the military justice system was never discussed or addressed in any way by either the House of Commons or the Senate prior to adopting such a major legislative change.

Therefore, Parliament passed Bill C-25, *An Act to Amend the National Defence Act* [NDA], in 1998, making several structural changes to the military justice system including jurisdictional changes that removed sexual assault offenses from the list of offenses subject to the exclusive jurisdiction of the civilian criminal justice system. Suddenly, sexual assault became a military infraction handled under section 130 of the *National Defence Act* (NDA)*, "Service trial of civil offenses"* when committed by a military member, even when the victim is a civilian.

A military person charged with sexual assault is also normally additionally charged under section 129 of the NDA, which states, "Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment." This mix of a criminal and disciplinary charges for the same offence raises eyebrows, particularly when the accused in allowed to plead guilty to the lesser disciplinary charges escaping the stigma associated with a criminal record.

A court martial, with its own special structure and rules of evidence, is then convened. If found guilty, the court martial is limited by its own sentencing regime. Of note, the Canadian military's legal processes are exclusive to the military and are intended to handle traditional military disciplinary matters and are significantly different from their civilian counterparts. The Military Police and the Director of Military Prosecutions exist for disciplinary purposes, and the court martial is a military disciplinary tribunal created by the *Code of Service Discipline.*

The changes of 1998 to the *National Defence Act* allows the court martial to do the job of a Superior Court. However, the military tribunal has its own unique rules of evidence, unique court procedures and unique five-person "jury" system. Its unique sentencing regime includes dismissal with disgrace, dismissal, reduction of rank, forfeiture of seniority, reprimand, military detention and fines, all designed to deal with disciplinary infractions and unique appeal mechanisms, not with criminal offences.

Canada's court martial process provides defence counsel for the accused who has the option of plea bargaining. The plea negotiations pivot on the presence of section 129, which, as noted earlier, is a convenient exit ramp from a criminal outcome. Meanwhile victims of a sexual assault - whether military or civilian – are totally excluded from the protection offered the *Canadian Victims Bill of Rights*, which was enacted in 2015 by the previous Conservative government. At section 18(3), the Bill shamefully excludes victims of crimes investigated or prosecuted under the *National Defence Act.*

If the prosecution agrees, the accused pleads guilty to a Section 129 offence and the criminal code charge simply evaporates. This leaves the issue of sentencing open to reduction, a reprimand and a fine, all disciplinary punishments, not criminal sentences.

Suddenly, with the speed of a signature, there is no criminal conviction; there is no criminal record for the accused; and there is no risk of being listed on the registry of sexual offenders.

It is time to reset the clock

The clock should be reset to 1998, before sexual assault was listed in the National Defence Act as one of the offenses that could be tried by a military tribunal.

While Canada's criminal justice system is not without its flaws, faults and problems, it is intended to deal with criminal offenses. If Canadian military sexual offenders were subject to criminal justice, the guilty could plea bargain, but it would be done within the criminal code: the offender would not escape a criminal record and listing in the register of sexual offenders. Also, victims of these crimes would be protected under the Canadian Bill of Rights. Finally, those accused would not longer have the cost for their legal defense at the Court Martial and beyond paid by the public purse.

The Observatory

This newsletter is a free service intended to provide a perspective about the process and procedure which we know as "The Canadian military justice system." While I make every effort to confirm and validate all information in this newsletter, it is based on the belief that it is time for a public inquiry into Canada's military disciplinary processes, leading to a reform of the system, to provide our service personnel with the highest quality of legal support, and to introduce justice into the disciplinary system.

Questions and comments

If you have any questions or comments about the Canadian military's disciplinary tribunals and practices or this newsletter, please contact me. My phone, email and website URL are below.

Email: Admin@duncom.ca
Phone: (902) 461-1842
Web: Canadian Obervatory for Military Justice Reform (https://military-justice.ca)

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