Current Issue Review **96-1E**

NATIONAL DEFENCE ACT: REFORM OF THE MILITARY JUSTICE SYSTEM

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Revised 22 January 1997

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ISSUE DEFINITION

Even before the incidents in Somalia involving members of the Canadian Airborne Regiment and the start of the subsequent Commission of Inquiry, questions were being raised about the fairness of the military justice system, especially in view of the constitutional guarantees provided by the *Canadian Charter of Rights and Freedoms*. Supreme Court decisions and legislative amendments between 1985 and 1992 had resulted in significant changes in Canadian military law; however, the recent controversy arising out of the Somalia incidents has led to demands for additional reforms or even the abolition of the military justice system.

Thus, military police procedures leading to charges and the court martial process itself are under increased scrutiny. While the Canadian military is trying to deal with the new strategic and financial realities of the post-Cold War era, not to mention its own tarnished image, it also faces the possibility of fundamental changes in its justice system. These changes could affect the military's capacity to maintain discipline within its ranks as well as its place within Canadian society.

This paper describes the basic features of the military justice system and the major changes made up to 1992 as a result of the *Canadian Charter of Rights and Freedoms* and Supreme Court decisions in cases originating with courts martial. It then examines the growing pressure for reform and the implications for the Canadian Forces.

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* The original version of this Current Issue Review was published in September 1996.

BACKGROUND AND ANALYSIS

A. The Court Martial Process

The rules of military conduct are contained in the Code of Service Discipline in Parts IV through IX of the *National Defence Act*. The Code applies to members of the Regular Force on or off duty and to members of the Reserve Force when they are in uniform, on duty, on a base, or on service. The *Queen's Regulations and Orders for the Canadian Forces* amplify the Act.

The Code of Service Discipline enumerates offences specific to the military. According to section 130 of the Act, any other act or omission punishable by the *Criminal Code* or any Act of Parliament is also an offence under the Act and is triable by a military tribunal. There is an exception under section 70 for certain offences such as murder and sexual assault committed in Canada.

Anyone breaching the Code of Service Discipline can be dealt with through either the summary trial, for minor offences, or the court martial. Part VII (sections 160 to 196) of the *National Defence Act* indicates the structure and powers of military tribunals as well as rules of evidence, amendments of charges, and other details. The summary trial is presided over by a commanding officer, a delegated officer or a superior commander. The accused cannot be represented by legal counsel, the Military Rules of Evidence do not apply, and there is no right of appeal to a judicial body. The accused can, however, elect to be tried by a court martial.

There are four types of court martial: the Standing Court Martial, which tries offences committed in Canada by individuals with the rank of lieutenant-colonel and below; the Special General Court Martial, which is convened only to try civilians subject to military law, such as dependants living on bases outside Canada; the Disciplinary Court Martial; and the General Court Martial. This last is the highest court in the military justice system since it can try the most serious offences and impose the severest penalties. Each General Court Martial is composed of five randomly selected officers, one of whom, with the rank of Colonel or above, is appointed president. This panel of officers functions to some extent like the jury in a civilian court, while a Judge Advocate, appointed by the Chief Military Trial Judge of the Canadian Forces, performs a function similar to that of the judge in a civilian court.

The accused can be defended by a military or civilian defence counsel and can raise objections about the composition of the panel or the choice of Judge Advocate. As in a civilian criminal trial, the accused can challenge the jurisdiction of the court and make use of other motions as well as the full range of applications under the *Canadian Charter of Rights and Freedoms*. There are, however, some major differences between a General Court Martial and a civilian jury trial. For example, the panel of officers can reach a verdict with a simple majority vote rather than needing a unanimous decision. Furthermore, unlike a civilian jury trial, where the jury decides the guilt or innocence of an accused but the judge imposes a sentence, it is the panel of officers that imposes sentence, following instructions from the Judge Advocate. Sentences, as provided for by the *National Defence Act*, can include a reprimand, dismissal from the military, and a reduction in rank, but other punishments can be added.

Any person tried and found guilty by a court martial can appeal to the Court Martial Appeal Court of Canada, which has the same function and status as provincial Supreme Courts. The judges are selected from the Federal Court of Canada and other civilian courts of criminal jurisdiction. Following an unsuccessful appeal to the Court Martial Appeal Court, the accused can appeal to the Supreme Court of Canada. In certain circumstances, the prosecution can also appeal a court martial decision or sentence to the Court Martial Appeal Court and to the Supreme Court.

B. Effects of Recent Legislative Amendments and Supreme Court Decisions

In 1985, the *Statute Law (The Canadian Charter of Rights and Freedoms) Amendment Act* amended the *National Defence Act* and enhanced the procedural fairness of courts martial in keeping with the provisions of the Charter. Subsequently, persons tried by military tribunals were protected against the double jeopardy that could result from retrial by civilian tribunals and were ensured a speedy trial. Another amendment prohibited the same person from acting as both the investigating officer and the trier of fact.

These and other amendments were made because section 11(d) of the Charter states that any person charged with an offence is “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” This applies to the military justice system as well as to Canadian justice in general. In fact, the only express exception to the application of the Charter to military law is indicated in section 11(f),

which states that any person charged with an offence has the right to trial by jury "except in the case of an offence under military law tried before a military tribunal."

Despite the amendments made to the *National Defence Act* in 1985, the fairness and other aspects of courts martial were challenged in a number of cases that went all the way to the Supreme Court. The Supreme Court decisions usually upheld the military justice system, but decisions in 1992 in *R.* v. *Forster* and, notably, *R.* v. *Généreux* resulted in significant changes to the court martial process.

R. v. *Généreux* involved a corporal who had been found guilty by a General Court Martial of possessing narcotics for the purposes of trafficking and whose appeal to the Court Martial Appeal Court was dismissed. An appeal was made to the Supreme Court, which ruled that the individual's rights under section 11(d) of the Charter had been violated because the structure and proceedings of General Court Martial had failed to meet the requirements for an independent tribunal.

The independence of the members of General Courts Martial (and by extension members of Disciplinary Courts Martial, which have similar provisions) was defined by the Supreme Court in terms of security of tenure, financial security and institutional independence. Even before the Supreme Court reached its decision, the Department of National Defence had amended the *Queen's Regulations and Orders for the Canadian Forces* to improve the security of tenure and financial security. For example, the amended regulations prohibit the performance of officers as members of a General Court Martial from being used to determine their qualifications for a promotion or their rate of pay. To address the issue of institutional independence, however, amendments to the *National Defence Act* itself were necessary and legislation to this effect was introduced in Parliament in May 1992.

The provisions governing General Courts Martial and Disciplinary Courts Martial were amended to reduce the exercise of discretionary powers by the military hierarchy. One measure removed the convening authority's power to appoint the President and members of the court. The convening authority also lost the power to vary the number of officers on the panel. The number of officers for a General Court Martial was set at five (it could previously go up to nine) while the panel for a Disciplinary Court Martial was set at three members. Furthermore, the amendments removed the statutory authority of the military hierarchy to limit the role of the Judge Advocate when deciding questions of law and mixed law and fact.

While the amendments to the Act and to the regulations have addressed the Supreme Court's concerns with regard to the impartiality and independence of military tribunals, it has been argued that other aspects of the military justice system may infringe the provisions of the Charter. For example, could other elements of section 11(d), such as the right to presumed innocence and the right to a fair trial, be used as a basis for claims that the military tribunal process violates the rights of an individual? Questions have also been raised about the denial under section 11(f) of the right to trial by jury for individuals before a military tribunal. Thus, there is a possibility that Supreme Court decisions concerning appeals in current or future courts martial will necessitate making additional changes to the regulations and legislation governing military tribunals.

C. The Military in a Rights-Driven Society

While the effects of the *Canadian Charter of Rights and Freedoms* on the military justice system continue to be debated in legal circles, Canadian public opinion has become more aware of the issues and the impetus for change has increased significantly. The courts martial of some of the members of the Canadian Airborne Regiment involved in the Somalia incidents have given rise to the perception that lower ranking personnel have been made scapegoats while senior officers are escaping any significant penalties. There have also been accusations in the news media that officers from National Defence Headquarters with certain interests to protect were over-represented on the panel of officers in these courts martial.

Other issues have been raised during testimony before the Commission of Inquiry, notably with regard to military police investigations and possible conflicts of interest because the office of the Judge Advocate General can be involved in both the prosecution and the defence of a case. The role of senior officers and the commanding officers of units in determining which individuals will be charged has also come under close scrutiny. These and other factors have undermined the confidence of both military personnel and the general public in the military justice system and have led to calls for reform.

The need for a military justice system that parallels the civilian system has been debated by military professionals and legal experts for some time. The military has argued that a separate system is necessary to enforce discipline efficiently, especially in times of combat when discipline issues must be dealt with quickly and effectively to maintain the morale and

effectiveness of a fighting unit. Critics question this justification, however, now that the Cold War has ended and there is less likelihood that Canadian military personnel will be engaged in a full-scale conflict in the near future.

The military also cites the difference between civilian life and the military, where values such as honour, efficiency and discipline are given more emphasis. Although military justice can be harsher, some in the military would prefer to be judged by others in the same profession, rather than by civilians unfamiliar with the military ethos. Indeed, the discussion often centres on whether the military is an institution with its own rules or simply an occupation like any other, whose members should be treated exactly like other citizens.

In Canada, however, the distinction between military and civilian society has been eroded in recent years, mainly because of the new emphasis on individual rights. Like every other segment of Canadian society, the military has become more conscious of the rights and freedoms of every citizen and has made institutional changes to ensure that they are respected. In the last decade, for example, the Canadian military has opened to female personnel all operational tasks except those on submarines, and has clearly stated that racism and sexual harassment will not be tolerated.

Such changes as those concerning women in operational duties were resisted by some because of their claimed negative effects on operational efficiency and morale; however, the respect for individual rights within Canadian society was too strong to ignore and the changes had to be made. In the process, the Canadian military moved faster on some of these issues than did its counterpart in the United States and the United Kingdom, which had both traditionally influenced the ethos and policies of the military in this country.

The Canadian military cannot rest on its laurels, however. In terms of individual rights, Canadian society is moving at its own pace and pressure for the reform of the military justice system may have increased in any case simply as a result of appeals to the Supreme Court concerning current and future courts martial. In the wake of the Somalia affair, however, the military justice system is under particularly close scrutiny and perhaps it will take significant changes to restore the confidence of military personnel and Canadians in general in its effectiveness and integrity.

D. Reform Options

The various options available should be considered carefully because some of them have as many disadvantages as advantages. One option would be simply to abolish the whole military justice system and have military personnel charged with an offence face the same justice system as other Canadians. Even before the Somalia incidents, some argued for such action, if only to reduce the number of senior officers. The present system requires specialists in military law with sufficiently high rank to command respect and to induce them to stay in the military rather than opting for a possibly more lucrative civilian career. The number of such officers is significant, at a time when budget cuts are leading to reductions in the total strength of military personnel, particularly those not involved in operational or combat duties.

The effects on discipline within and outside Canada as a result of abolishing the system would have to be considered carefully, however. The current process for trying offences in a theatre of operation abroad might have to be replaced by an equally complex civilian process. Specialized lawyers familiar with military operations might still be needed to defend the accused or to advise the Department of National Defence on questions of international law and legislative issues. In other words, abolishing the military justice system might place new burdens on the civilian justice system.

Another option might be to replace most if not all the military personnel in this domain with civilian specialists. In some cases, this could be done without extensive measures; for example, already it is not required that the individual serving as Judge Advocate General should have been in the military, though this has been the tradition. By ending such traditions alone, the military could effect many changes in its justice system.

To go to the other extreme, the military aspect of the system could be reinforced. In the current debate on the measures needed to restore the integrity of Canada’s military, there have been calls for greater emphasis on military ethics and traditional values and even for a stricter military that would pay less attention to the rights of the individual. It has been suggested that lax recruitment requirements and policy changes made to protect individual rights have weakened the effectiveness of the Canadian Forces. Some may argue that the military justice system should be concerned primarily with the effective maintenance of discipline and should not be entirely subject to the Charter.

Such a policy, however, could alienate the military from the society it is supposed to defend. A military which, in a rights-driven society, emphasized operational effectiveness at the expense of the rights of the individuals who filled its ranks might lose the public's support

and trust and raise the fear that this attitude might be reflected in the military's dealings with civilians at home and abroad.

In short, the reform of the military justice system would have implications not only for those in the military, but also for the place of the Canadian Forces in Canadian society. Some problems might be solved by abolishing or reinforcing the system, but others might be thereby created, unless the various options were carefully examined. In the face of steadily growing demands for change, the Minister of National Defence, David Collenette, has called for a debate on the best way to update and improve the system. This statement on 1 August 1996 suggested that this debate might begin with a study by a parliamentary committee.

E. Developments in Late 1996

Events in the fall of 1996, such as the resignation of David Collenette as Minister of National Defence on 4 October 1996 and his replacement by Doug Young, delayed, and perhaps changed, whatever plans the government may have had for a parliamentary debate on this issue during the final months of 1996. Nevertheless, military justice continued to attract public attention as a result of the following incidents: the November court martial of an officer charged in the accidental death of Corporal Neil MacKinnon during a military exercise in 1995; the courts martial of soldiers at CFB Valcartier who had been involved in the falsification of invoices; and, especially, the protest carried out by Lieutenant-Commander Dean Marsaw.

Lieutenant-Commander Marsaw had been found guilty by a court martial of physically and verbally abusing the sailors under his command and had been demoted to the rank of Lieutenant (Navy). Questions raised in the news media during the fall of 1996, however, notably on the CBC's *Fifth Estate* program, focused on the military police investigation leading up to this court martial and the conduct of the trial itself. Furthermore, Lieutenant-Commander Marsaw began a second hunger strike to demand that the military police investigation be reviewed. He ended his hunger strike on 28 November 1996, after the Acting Chief of the Defence Staff had informed him that he would be allowed to keep his rank pending the result of his appeal to the Court Martial Appeal Court, where his case would be heard as soon as possible.

With the military justice system now under increased public scrutiny, the new Minister of National Defence began to announce measures for its reform. In a speech

on 10 December 1996, Mr. Young stated that the review of the Code of Service Discipline currently underway would likely result in amendments to the *National Defence Act.* He added, however, that it had already been decided to change the *Queen's Regulations and Orders for the Canadian Forces* to ensure that summary trials will be used mainly for the maintenance of discipline within units and that the procedural safeguards in the charging process will be strengthened. He also stated that measures to enhance the investigative services of the military police were being considered.

In late December 1996, in the wake of the resignation of the Deputy Chief of the Defence Staff, Lieutenant-General Armand Roy, because of improper expense claims, the Minister of National Defence announced his intention to conduct a thorough review of the military and to make proposals to the Prime Minister by 31 March 1997. In addition to requesting suggestions from four notable academics on possible general reforms for the military, Mr. Young also established a panel of experts to advise him specifically on military justice and the military police.

F. Special Advisory Group on Military Justice System

On 16 January 1997, the Minister of National Defence confirmed that former Chief Justice of the Supreme Court, Brian Dickson, Lieutenant-General (retired) Charles Belzile, and J.W. (Bud) Bird, a former Member of Parliament, were members of the new advisory panel and were slated to report to him by 15 March. The panel was asked to make recommendations concerning the jurisdiction, powers of punishment, structure and procedures of courts martial and summary trials; to examine the role of the chain of command in investigations and the laying of charges; to study the role, responsibility and organization of the Office of the Judge Advocate General; to indicate which military police functions should remain within the Canadian Forces; and to examine possible cooperation between the military police and other police forces.

The panel will hold public hearings in four or five cities and is inviting written submissions from people within and outside the military. One adviser to the panel is Lowell Thomas, a retired Assistant Commissioner of the RCMP who has investigated how senior officers dealt with reports that Canadian peacekeepers had abused patients at the Bakovici hospital in the former Yugoslavia.

G. Criticism of Military Police Investigations

Despite the Minister's announcement of a review, the military justice system as a whole, and military police investigations in particular, remained controversial. Some critics claimed that the double standard of the military justice system could be seen in the decision not to bring Lieutenant-General Armand Roy before a court martial, though new charges were being laid against Corporal Michel Purnelle (who is facing a court martial for comments criticizing senior officers). Some say the perception that junior ranks have been punished more severely than senior officers for their misdemeanours has been a contributing factor to the decline in morale among members of the Canadian Forces.

The effectiveness of military police investigations was also questioned, notably by Colonel (retired) Geoff Haswell after a court martial which, on 17 January 1997, found him not guilty of charges of suppressing a document and committing an act to the prejudice of good order and discipline by ordering the destruction of a file related to the Somalia operation. He claimed that the charges had been laid as a result of errors in the military police investigation.

On the same day as Colonel Haswell's court martial ended, the Department of National Defence made public the results of two inquiries. The first of these confirmed that 57 peacekeepers had been involved in abuse of patients at the Bakovici hospital in the former Yugoslavia between October 1993 and March 1994. The other inquiry, conducted by the former Assistant Commissioner of the RCMP, Lowell Thomas, indicated that, while there was no major evidence of interference by senior officers, there had been problems with the way in which the military police had conducted its investigations. Thomas recommended that the independence of the military police should be studied more closely and suggested that the military police should be separated from the chain of command. There has been growing concern that officers, especially those directly involved in a situation being examined, can order lower-rank members of the military police to stop or modify their investigation.

Perhaps the most controversial issue to emerge from these inquiries was the fact that none of the individuals involved in the incidents at the Bakovici hospital will face a court martial. Section 69(1) of the *National Defence Act* states that, with some exceptions,

an individual cannot be brought before a court martial more than three years after the alleged offences have been committed. The report was issued more than three years after most of the incidents had taken place and Lieutenant-General Maurice Baril, Commander of Land Force Command, has decided that there will be no courts martial with respect to the other incidents. Instead, the cases of all 47 individuals still in the military will be reviewed by special career boards which can block the promotions of those concerned or expel them from the military. For a few incidents (such as rape) that involve violations of criminal law, individuals may still face charges, even if they are no longer in the military.

Some critics were angered by the fact that the individuals involved will avoid courts martial, especially since the delay in confirming the incidents was caused in large part by flawed military police investigations. This situation added fuel to the growing demands for significant changes to the system, perhaps even its replacement by the RCMP; the situation also raised questions about the statute of limitations on certain offences, an issue that had not received much public attention hitherto.

PARLIAMENTARY ACTION

The Minister of National Defence, David Collenette, implied in his statement of 1 August 1996 that the debate on the reform of the military justice system might start with a study by a parliamentary committee; however, no such study was undertaken by the Standing Committee on National Defence and Veterans Affairs or any other committee in the latter part of 1996. Mr. Collenette's resignation may have changed plans for Parliament's participation in the reform of the system in the early stages. Nevertheless, there was parliamentary discussion of some aspects of the system and Parliament's role in its reform.

On 1 October 1996, Jim Hart, the Member for Okanagan-Similkameen-Merritt, raised questions in the House of Commons about the case of Lieutenant-Commander Marsaw and called for a review of the military justice system. Mr. Collenette replied that, among other things, he still expected Parliament to take part in any review. On 4 and 24 October 1996, Jean Leroux, Member for Shefford, raised questions about the state of the military justice system and about the courts martial of individuals at CFB Valcartier who had been involved in the falsification of invoices. In reply, on 24 October

the Parliamentary Secretary to the Minister of National Defence, James Richardson, pointed out that the Supreme Court had confirmed the overall validity of the military justice system, but that any legal system ought to be reviewed to adapt to changes in society.

The role of Parliament was again raised in a question on 22 November 1996 by Jack Frazer, Member for Saanich-Gulf Islands, who asked the Minister if a military justice review would be submitted to the Standing Committee on National Defence and Veterans Affairs. Mr. Young replied that it was very probable that the issue would be considered by that committee. It is not clear, however, if the standing committee will be involved in the early stages of the review or only when amendments to the *National Defence Act* are ready for parliamentary consideration.

CHRONOLOGY

1985 -	The provisions in the *National Defence Act* governing military tribunals were amended by the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*.
1992 -	The provisions of the *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces* governing General Courts Martial and Disciplinary Courts Martial were amended in light of the Supreme Court decision in *R.* v. *Généreux*.
18 October 1993 -	The Court martial began of the first of six soldiers charged following the incidents involving the Canadian Airborne Regiment in Somalia.
17 November 1994 -	**The Minister of National Defence David Collenette announced the establishment of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia.**
1 August 1996 -	**The Minister of National Defence expressed the need for a debate on the reform of the military justice system, possibly beginning with a study by a parliamentary committee.**
4 October 1996 -	**Doug Young replaced David Collenette as Minister of National Defence.**
28 November 1996 -	**Lieutenant-Commander (Navy) Dean Marsaw ended the hunger strike he had conducted to protest against the sentence in his court martial; the Acting Chief of the Defence Staff had announced that the officer could stay in the navy pending his appeal, which would be heard as soon as possible.**
10 December 1996 -	**The Minister of National Defence, Doug Young, announced that regulations would be changed in order to strengthen**

procedural safeguards in the charging process and to redefine summary trials so that they would be used mainly for the maintenance of internal unit discipline. He also reported that military police investigation procedures were being reviewed.

16 January 1997 - The Minister of National Defence announced the establishment of a special advisory group composed of former Chief Justice Brian Dickson, Lieutenant-General (Retired) Charles Belzile and Mr. Bud Bird. The group would study the military justice system and military police procedures.

17 January 1997 - The Department of National Defence made public a report which confirmed many of the allegations of misconduct by Canadian peacekeepers at the Bakovici hospital in the former Yugoslavia. Because of the statute of limitations on disciplinary proceedings, the soldiers involved will not face courts martial.

- After a court martial had found him not guilty of ordering the destruction of documents related to the Somalia operation, Colonel (retired) Geoff Haswell criticized the military police investigation.

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