

## OPINION: CANADA'S MILITARY &amp; BILL C-41

## A balancing act: more military judges or constitutionalizing summary trials

Bill C-41 misses the opportunity to fully address several major structural shortcomings of the National Defence Act, in particular, the constitutionality of summary trials, the disrepair of the CF grievance system and the weakened state of the Military Police Complaints Commission.



BY MICHEL DRAPEAU

Currently, Bill C-41, an Act to amend the National Defence Act, is being considered by the House of Commons Standing Committee on National Defence. This represents the third attempt to amend the National Defence Act since the 2004 recommendations made by the late Antonio Lamer. While the bill does present many positive changes going forward, it does not go far enough to address the pressing concerns that plague our current system of military justice. For instance, it focuses on naming yet more military judges instead of reforming the CF summary trials system. Why?

Bill C-41 had the opportunity to reform a system in need of repair. In its current form, C-41 may represent a step forward, but it is more of a shuffle forward than a great bound. Bill C-41 misses the opportunity to fully address several major structural shortcomings of the National Defence Act, in particular, the constitutionality of summary trials, the disrepair of the CF grievance system and the weakened state of the Military Police Complaints Commission.

It is a concern that, despite the time taken to carefully examine the needs of the Canadian Forces, Bill C-41 is silent on the issue of summary trials, the most common form of trial in Canada's military justice system. This concern has been echoed by the Senate Committee on Constitution and Legal Affairs in its October 2009 report, and has become a theme in this standing committee, with C-41's evasion of summary trials coming under scrutiny on Feb. 7, Feb. 9, Feb. 16 and Feb. 28. During those hearings, there is consensus among many of the wit-

nesses that currently, the summary trial system presents legal obstacles, and in its current state, it may be contrary to the Canadian Charter of Rights and Freedoms.

As noted, summary trials continue to be the dominant disciplinary method used to try offences by the Canadian military. In 2008-2009, a total of 1865 cases (96 per cent) were determined by summary trial, while only 67 were heard by court martial (four per cent) [courts martials are handled by the four existing military judges—giving each a rather low caseload]. Assuming that each summary trial has a different respondent, this means that of a force of approximately 65,000 strong, in 2008-2009 approximately one in 34 CF members were the subject of disciplinary action, and 96 per cent of these cases were heard at the summary trial level. For a disciplinary method of such significance, it is shocking that Bill C-41 does not consider summary trials.

There are many rights-based problems with summary trials.

In summary trials, there is no requirement for the presiding officer, normally a commanding officer, to be legally trained, and, though an accused may seek advice from an assisting officer, the accused may not be represented by counsel. Also, because the presiding officer is usually the commanding officer, the accused is known to them, as are witnesses and all circumstances of the offence even before the trial commences. This presents severe procedural fairness concerns because there is potential for a sentence to be imposed without any consideration of the legality of that sentence. A commanding officer may bring to the summary trial process biases because of prior knowledge of the accused. Also, there is the prospect of undue influence over witnesses because they are subordinates to the commanding officer, and they may be influenced to give a one-sided or in-

complete account of events in order to appease their commanding officer.

The right and circumstances for an appeal to a summary trial decision are troubling. Summary trials do not operate under the rules of evidence, and there are no transcripts of proceedings. This means that summary trials lack the transparency that is required of any common law trial process, which limits the merits of review that may be available to an accused.

Even with procedural fairness concerns, undue influence concerns, lack of transparency concerns, and even though the summary trial system operates outside the common law rules of evidence, the punishments under a summary trial conviction may be severe, and may include up to 30 days of detention, fines, reprimands and demotion. The result of a conviction may also result in a criminal record. And, there is no appeal possible.

The structure of summary trials is in opposition to all civilian statutory equivalents and may be contrary to an accused's rights under the Canadian Charter of Rights and Freedoms. Having the ability to detain someone without giving them the benefit of a fair and transparent trial process is against the principles of fundamental justice, is against the due process requirements of Sec. 11, and represents a deprivation of liberty, contrary to Sec. 7.

Summary trials, in their current state, present a major structural deficiency, and are a process that deviates considerably from the civilian statutory equivalents, and perhaps even their constitutionality. It is uncertain why C-41 is silent on summary trials, and continues to let summary trials exist as the pink elephant in the room.

The current Canadian Forces grievance structure is broken. The system is unable to provide redress within the existing statutory time periods, and currently, there is a growing backlog of grievances awaiting adjudication both at the initial level and the final level. Last year alone, there were approximately 700 new grievances registered by the Director General Canadian Forces Grievance Authority (DGCF-GA). This means that last year, approximately one in 95 current CF members submitted a grievance.

C-41 proposes to rename the Canadian Forces Grievance Board to the Military Grievances External Review Committee. Big deal. This is unnecessary and misleading, for largely the same reason. At present, the Canadian Forces Grievance Board does not provide a means of external review. Currently, the board is staffed entirely of retired CF officers—some of whom having retired relatively recently after a long and successful career in the profession of arms. This is far from an external committee, because all of its members have a military background. If the CF Grievance Board is to be and be perceived as an external and independent 'oversight' civilian body—as it was designed to be in the first instance—then the appointment process needs to be amended to reflect that reality. To that end, the National Defence Act should provide for the nomination of some or all board members from 'civil society.'

Bill C-41 also proposes to allow the Chief of Defence Staff to delegate his authority to settle grievances at the final authority level, contrary to the National Defence Act Sec. 29.11. This delegation is in effect a repudiation of the CDS' overarching responsibility 'to look after his people,' people who, he alone in the affairs of the state, has the legal power to order into harms' way. Soldiers who have an unlimited duty to the state and an inescapable duty of obedience, discipline and loyalty to their officers, need to know that, in the final analysis they may present their grievances about oppressions and injustices to their supreme commander and received from him full assurances of redress.

Currently, the CDS has no authority to offer financial compensation to settle grievances. This is in opposition to the recommendation of Lamer in his 2004 report, which was specifically endorsed by Liberal MP John McCallum, then minister of National Defence. It is not fair that the men and women of the Canadian Forces must have their grievance deferred to the director claims and civil litigation, a Justice Canada lawyer at DND, to seek financial compensation.

The bill does propose many amendments that seek to bring provisions of the National Defence Act in line with common law counterparts. Of note, Bill C-41 seeks to increase the limitation period to commence an action from six months to two years, which is more consistent with limitation periods in civil jurisdictions. Bill C-41 will authorize a tribunal to impose intermittent sentences for

sentences of 14 days or less. This is positive because it considers the unique 'moment in time' needs of the Canadian Forces. Bill C-41 will enable a court martial to consider a victim impact statement when determining a statement. This is positive because it will allow the court martial to consider the gravity of an offence based on the resonating effect that the accused's conduct has had on the victim, and on the broader community. Bill C-41 will permit a tribunal to grant an absolute discharge if it is the 'best interests' of the military and not 'contrary' to the public interest. This provision recognizes the unique nature of military discipline and that punishments must not only be fair, but also must strengthen military values of discipline, respect of command, and protection of the collective good.

Save and except the several provisions dealing with a reserve panel of judges and the quasi-exclusion of the CDS, Bill C-41 should be passed. However, the largest concern with Bill C-41 is not necessarily what it proposes, but what it neglects to propose and this should be a concern for us all. When soldiers join the Canadian Forces, they may leave some privileges of civil society behind, but certainly, they should not be forced to leave their Charter's legal rights as well.

The Constitution is the supreme law of Canada, and any inconsistent law is of no force and effect. Hence, it begs the question: Why then are rights guaranteed under the Charter not protected under the National Defence Act? While the drafters of Bill C-41 did consider and implement some of the recommendations made by Lamer, why is the bill largely so short-sighted and by implication defensive on the actual and pressing needs of the Canadian Forces.

Bill C-41 was an opportunity to bring the National Defence Act more in line with the principles of fundamental justice, but, aside from proposing minor procedural advancements, the bill is remarkably silent on the more important problems, summary trials and the CF grievance system, that continue to plague our system of military justice. If the U.K., Australia, New Zealand, Ireland, to name but four countries could modernize their armed forces legislative framework, why is Canada lagging behind. This is a shame because it is a missed opportunity for Canada to show leadership.

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