

CANADA'S MILITARY

As the last resort, DND/CF's Ombudsman's intercession is crucial for soldiers

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BY MICHEL W. DRAPEAU

In my military law practice, I occasionally run across a compelling case begging for justice and equity for which there is no apparent legal solution. This is because, inter alia, the law of limitations or some other legal principle or doctrine acts as a barrier to a court appearance or other judicial outcome. Not surprisingly, when this happens, the file, by its very length and complexity, defends itself against the risk of being read or studied further by anyone, whether the media, a politician, or an ombudsman.

I have had one such experience two years ago when, with much chagrin and frustration, I had to decline acting for Lt.-Col. Sean Dennehy recommending instead that he turn over to the DND/CF Ombudsman the realities and truths of his claim's existence. I did so because, I believed that, by virtue of his open-ended mandate, the ombudsman can call upon a whole arsenal of powerful equitable remedies. I was mistaken. This turned out to be an exercise in futility.

Refusing to surrender to his plight or to counsels of hopelessness, Dennehy's cry for justice still begs for a solution. I believe that his experience is not unique. It is, in many ways, illustrative of problems faced by some of our contemporaries, as well as, the habits of mind inherent in our institutions, whose very purpose should be to find remedies to man-made problems. This gives me cause for concern since I expect that as soldiers are repatriated from Afghanistan there is likelihood that there will be more of such claims which will fall between the cracks and will need to be resolved in a novel manner.

A cry for justice

Dennehy, a quiet, gentle and elegant man of 71, was once deployed as a civilian employee at NATO headquarters in Brussels where he was tasked with ensuring that Canada receives critical logistical support during the Cold War in the event of armed conflict. He served there between 1979 and 1988. Prior to his re-engagement with the Canadian Forces in 1988, he visited National Defence headquarters where he was assured by Crown

officials that his NATO service was portable back to Canada and that it would count towards his Canadian Forces annuity. Acting on this information, Dennehy moved back to Canada and completed his service in the Canadian Forces. On retirement in 1991, his pension was based on 24 years of military service with further service as a civilian with NATO. It was certified by Crown officials at around \$50,000 annually.

During the second year of his retirement, Dennehy's world was turned upside down. Suddenly, he was informed that his pension would be reduced forthwith to approximately \$18,000. That's a difference of \$32,000 per year. He was also told that government would 'claw back' 17 months worth of overpayments.

There is no dispute about these facts. They were later admitted by government during their defence against a civil suit for negligent representation. The government admitted that Crown officials misinformed Dennehy and as a result of their erroneous advice his pension was sharply reduced by 63 per cent and the overpayments were clawed back. Furthermore, in an abundance of transparency and simple humanity, in a letter dated Nov. 23, 2000, a senior counsel at Justice Canada declared: "Mr. Dennehy received incorrect and inaccurate information from Crown officials regarding the transferability of his NATO pension rights." Eventually, Dennehy agreed to a settlement of an amount much less than the pension amounts promised and which he reasonably expected to receive from the Crown. He is now fighting to recoup his remaining losses to put him in a position where he would have been in had he received his pension as initially advised and paid by the Crown.

The ombudsman

Occasionally, our judicial and administrative system overlooks the humanity of a particular situation if, for no other reason, than the fact that it is bound by the strict and fair application of regulations and rules which do not permit variations to accommodate unique circumstances. Not surprisingly, this sometimes results in inequitable situations. When this happens, people, not cases, fall between the proverbial cracks. It is partially for this reason that, in Canada and elsewhere, public institutions increasingly rely on the operation of ombudsman



The defence files: Canada's Defence Minister Peter MacKay.

organizations to provide a sort of a safety net for these unfortunate folks because their primary mission is to promote fairness and equity. It is also an informal non-judicial resource built on the principles of independence, impartiality and administrative efficiency.

Conceptually, an ombudsman acts as a trusted intermediary between an organization and, usually, an individual, concerning improper activities perpetrated against an individual, or in some circumstances, against a particular group. To do so, the ombudsman needs in great abundance two qualities above all others: leadership and an acute sense of justice. This coupled with finesse, resourcefulness and an indomitable will to surmount systemic obstacles or other barriers, including the sheer passage of time.

In response to the urgent recommendation by the Somalia Commission of Inquiry to create an independent inspector general, in 1997 National Defence established three "ombudsman-like" civilian oversight organizations: the Canadian Forces Grievance Board; the Military Police Complaints Commission and the DND/CF Ombudsman. What is of note is that none of these organizations have order-making powers. Their investigations lead to recommendation, the implementation of which remains at the mercy of Defence and military officials. To make matters worse, in the very recent past, each of these organizations has been militarized which means that Canada has lost the only effective civilian oversight capability into some critical aspects of our military and its modus operandi and these organizations have lost any surviving iota of institutional independence from DND/CF.

DND/CF Ombudsman

On the positive side, the first two incumbents into the position of the DND/CF Ombudsman, André Marin and Yves Côté, who were drawn from the civil society, proved to be most able to think outside the box created and maintained by law, regulations, customs and traditions. For instance, through their investigation of PTSD, they facilitated the changes in views and perceptions of those suffering from PTSD. After all, it is not that long ago, that those hidebound by regulations labelled PTSD sufferers as lacking moral fibre. Another example of effective investigations is the case of warrant officers who, on course and away from their units, were denied meals and travel funds. That too was corrected. And, a settlement was reached with Squadron Leader (Retired) Clifton Wenzel who was faced with a refusal by the Defence bureaucrats to provide him with an annuity for his most gallant wartime service. These and other solutions to problems created by strict adherence to regulations were brought about by an ombudsman and staff who relied on bold leadership to ensure that justice was done in an informal, and non-adversarial manner, using their powers of investigation, persuasion and recommendation.

In other words, these two ombudsmen thought outside the box of regulations which had produced an inequitable situation from a legal perspective and which did not right the wrong committed. They saw a complaint as an opportunity to improve the services offered by an institution by, focusing not on regulation, but on finding a way to "put things right." Both recognized that strict adherence to laws or regulations or cus-

oms cannot and must not be a bar to an investigation or to the search for an equitable solution.

Obviously, the new military ombudsman, retired Maj.-Gen. Pierre Daigle, R 22e R, has huge shoes to fill. A task which will not be made easy by the fact that, contrary to his two predecessors, Daigle has no legal training and, by virtue of his previous service and rank level, is perceived, at least presently at the beginning of his mandate, as a bona fide member of the military establishment. This perception, therefore, will likely continue until he has had an opportunity to "make his mark," so to speak.

From the beginning, I believed that Dennehy was a case tailor-made for the ombudsman. I also believe that it cries for equity and fairness. One would have thought that, as a retired CF officer entitled to a CFSA annuity, the new Ombudsman would have been in an ideal position to appreciate Dennehy's vulnerable financial position. Yet, last month, after a 19-month investigation, it was the acting director of investigation, not the ombudsman, who informed Dennehy, in a laconic two-page letter, that his complaint could not be investigated and that the file had now been closed on the basis that a settlement had been reached between two parties in a legal action. This to the detriment of a man who devoted his life to the military and to the service of this country.

Conclusion

If Dennehy were to be seen as a test case on how the new ombudsman will be handling complaints, given the current and growing level of stress and fatigue in our military, particularly in the working ranks, mostly as a result of their prolonged deployment in Afghanistan, we may have cause for concern. Over the past decade, our soldiers have relied on the ombudsman to personally assist them with their problems and to act as an articulate and passionate advocate to bring justice, equity and fairness; even if his suggested outcomes were in opposition to "tried and proven" answers provided by the NDHQ staff. In the case at hand, I think that Dennehy's plight deserved, as a minimum, a personal response from the ombudsman himself. It seems obvious that this did not happen and hence this will make Dennehy's fight from this point forward even more difficult, if not plainly impossible, because the ombudsman is truly the platform of last resort.

An ombudsman's function is to resolve conflicts with flexibility, imagination and, more often than not, in a precedent-setting manner. In other words, an ombudsman must find a way! Why? Because an ombudsman possessing vision and the ability to think and to operate 'outside the box' must see a complaint as an opportunity to improve services provided by the particular institution. It must also see it as an opportunity to promote open and accountable government and to enhance the public confidence that government institutions are respecting the principles of fairness and equity. In fact, even when a complaint is not supported, it presents the ombudsman with an opportunity to personally review policies and procedures to ensure the highest standard of equity and fairness; a very noble objective.

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