

## OPINION

# Military grievances: the Crown can do no wrong

Why is it so hard for our military elite to understand this in both the criminal and the administrative law systems?



BY MICHEL DRAPEAU

OTTAWA—Canadian military law is indelibly stamped with the image of the citizen in uniform. This politico-military concept forms the basis of our military. It follows that the rights of the soldier as a citizen must always be reconciled to the furthest extent possible with the duties of the soldier as a soldier. They are entitled to all of the fundamental rights and freedoms covered by our Charter. Those rights and freedoms may only be derogated on the basis of legislation and only where this is in the interest of the functional capability of the Armed Forces. There is no special legal relationship with the state. Straightforward. Then, why is it so hard for our military elite to understand this in both the criminal and the administrative law systems?

In an April 2008 ruling in *R. v. Trépanier*, the Court Martial Appeal Court noted that, as much as possible, the military justice system should mirror the civilian justice system. In its May 2009 report on "Equal Justice: Reforming Canada's Courts Martial," the Senate Committee on Legal and Constitutional Affairs concluded that the goal is to have a system of military justice that takes the military's unique culture, role and need to preserve discipline into consideration while, at the same time, ensuring that individuals subject to the National Defence Act enjoy the full spectrum of

rights guaranteed to them under the Charter. In other words, soldier, sailors and Air Force personnel should not be disadvantaged or deprived, in terms of justice done, by their decisions to enroll and serve in the military.

Yet, there are too many derogations between the military penal system and the civilian criminal system. Because of space considerations, I will cover two brief examples pertaining to the summary trials and the courts martial systems. First, at a summary trial, which is described as "Victorian" in nature, a CF member can be convicted and sent to harsh detention by his boss, the commanding officer, without the benefit of legal representation. And, the soldier cannot appeal such a decision before a court of law. Second, a soldier who is court-martialled will face not a panel of his peers but a panel of officers. Strangely, a CF member can enlist, go to war and die for the country, but service on a panel or jury is denied. Third, the military penal system does not include such punishments as absolute and conditional discharges, probation, restitution, conditional sentences, which are available in the mainstream criminal system to ensure that the punishment fit the crime.

The Canadian military administrative law covers all other non-criminal activities such as enrolments, investigations, pay, allowances, benefits, medical and dental services, postings, transfers, releases, promotions, leave, grievances, etc. When faced with an administrative problem, again the CF member must act all alone against the 'system'. Why? First, because retaining legal counsel is not only expensive but is normally really frowned upon by the military authorities. Second, because in Canada, the thought of having any form of representation runs contrary to the idea of the military as a hierarchical and disciplined body with the sacred duty to effectively and equitably taking care of its members. Thus, the 'freedom of association' that

is recognized in the Charter and, which is enjoyed by a majority of adults in the workplace, including those at the employ of the federal public service, is simply not accessible to the CF membership.

Let me hasten, that I am not advocating the creation of a union for members of the military, although this is most certainly possible and has been raised in the past. In Belgium, representation of soldiers is achieved by trade unions which participate in the negotiation of service conditions. In Denmark, France, Germany, Luxembourg, Poland and Spain, spokespersons are elected. In the Netherlands, soldiers and sailors alike are part of a trade union. However, I am making the point, that in the Canadian military, when things go wrong, the serviceperson is all alone to face the music. And, as if this is not bad enough, the only legal avenue open to him or her when a victim of an injustice is to then exercise the 'right to grieve' which, he knows, the authorities will handle in a lackadaisical and adverse fashion.

Lacking the support of a union and faced with the legal prohibition on collective grievances, understandably and historically, there has been an almost universal aversion to submit a grievance for fear of being identified as someone challenging the 'status quo' or contesting the martial authority of immediate superiors. Before presenting a grievance and crossing the Rubicon, therefore, a CF member will normally think long and hard about 'angering the gods' who have complete control over his career with the result that few grievances are ever submitted. But when they are, I truly believe, that the military should have a legal—and moral duty—to assist the griever in stating the case. However, this does not happen. Far, far from it.

In olden times, the 'right to grieve' was designed to permit the protection of service rights, to correct the mis-use of military authority and, most important, to attune commanders to the effect of various military policies. It was, in effect, a system to permit

individuals dissatisfaction from spreading to a crescendo of voices which would result in mutiny.

Today, a CF member can grieve any administrative act or omissions of his superiors, but not one's committed by his fellow soldiers or subordinates. His grievance must also relate to a service matter. In submitting a grievance, the member must explain the remedy being sought, as no corrective measures will be taken by the military, unless the complaint against unfair treatment requests a specific remedy. The member must also be careful in drafting the grievance as to not offending the sensitivities of superiors; in fact, by regulations, insubordinate language is prohibited. All of which represents a tall order, for a young man or woman in uniform who being aggrieved, now feels compelled to commit to paper a call for help to the hierarchical seniors who may see this as a disguised form of insubordination or refusal to accept the conditions of service. Notwithstanding, when a matter being is grieved, the griever is entitled to have the grievance heard in 60 days. That's the law.

Instead of an administrative tribunal examining a grievance in an objective manner, grievances in the Canadian Forces are the *chasse gardée* of the chain of command. For instance, a grievance must first be submitted to one's commanding officer for adjudication. Imagine, as is often the case, the very source of the aggrieved matter can often be traced back to the omnipotent commanding officer. As one would expect, in recognition of an obvious conflict of interest, a fair person acting judicially would step aside and give his jurisdiction to someone else along the chain. But, regrettably, this is not always the case and this is not a rarity (especially in the Army). Be that as it may, depending on the matter being grieved, the grievance can and is oft time elevated within the chain of command for adjudication at National Defence Headquarters (NDHQ). Then, the waiting game begins.

The average time taken to settle a grievance at the first level is now 180 days. If the grievance has to go beyond, say to the CF Grievance Board and the Chief of the Defence Staff, you can tack on an additional two years before getting a resolution. An eternity! This gives a new meaning to the expression: "Justice delayed, Justice denied."

Funny thing, the very same military brass responsible for

these long delays are constantly complaining about the time taken for the procurement of military hardware but you do not hear a peep out of them about the time taken to resolve grievances. Is the timely acquisition of weaponry and hardware more important than people for a military leader nowadays?

Because of a very, very, very limited jurisdiction, the CF Grievance Board, is occasionally allowed to review but a minuscule number of grievances. In 2008, it handled approximately 100 grievances. Even so, the findings made by the Grievance Board are not binding on the chain of command. Actually, their findings are increasingly ignored or overturned by the Grievance Authority who, as a delegate of the Chief of the Defence Staff, has the discretion to run, and does run, roughshod over the quasi-judicial recommendations of the Grievance Board. Guided by the once accepted legal maxim, 'the Crown commits no wrong'; the Grievance Authority, with unhindered zeal and fidelity, will protect and defend the interests of the institution and not those of the CF member. Those of us who have had a 'run-in,' so to speak, with a fabled insurance company determined to find escape from any liability will have an accurate view as to how this purely military staff organization—which contrary to the CF Grievance Board has no statutory standing—actually works.

When, on the rare occasion, a grievance does reach the desk of the Chief of the Defence Staff for adjudication, the incumbent relies almost entirely upon the analysis performed by the Grievance Authority to determine the grievance. His role is effectively reduced to implanting his imprimatur on the decision letter drafted for his signature. It begs the question, if Canada's top soldier, or his top commanders, cannot or will not take the time required from their busy schedules to become cognizant with the details of the grievances submitted by their 'people' or care enough to make sure that the grievances are addressed within the statutory time limits perhaps the time has come to give CF members a 'right of representation' such as that followed by the public service in general and industry. But, until then, it means that a grievance submitted by an ordinary but loyal and brave CF member will continue to be treated with nonchalance.

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