

OPINION

MILITARY SUMMARY TRIALS: A VICTORIAN SYSTEM OF JUSTICE

The summary trial is perhaps, at best, an anachronism presenting an absence of structural independence and impartiality. There is an urgent need to review this.



BY MICHEL W. DRAPEAU

OTTAWA—Soldiers, sailors and airmen are subject to both the ordinary law and to a special code of discipline embedded in the National Defence Act. The Code of Service Discipline (CSD) gives the military their own judges, prosecutors, defence counsels, court reporters, police officers, prison and detention barracks, rules of evidence as well as a wide range of military crimes and offences. There are unique service tribunals accompanied by an antiquated system of punishments. These have not kept pace with the evolution of the criminal law. This subject was critically examined earlier this year by the Senate Committee on Constitutional and Legal Affairs, who, in the best traditions of the 1880s Cardwell and Childer reforms in the United Kingdom, expressed the thought that the gap between military and civilian society in the administration of the criminal law ought to be narrowed. Kudos to them.

While acknowledging the need to preserve a system of justice that encompasses the military's unique culture, role and need to preserve discipline, the Senate report titled, "Equal Justice: Reforming Canada's System of Courts Martial," rightly concluded that regardless of whether military or civilian, one must enjoy the full spectrum of Canadian values and Charter rights. These should also form an indissoluble part of the military fabric. The report also says military personnel should not be disadvantaged, in terms of justice rendered, by their decision to enrol and serve in the Canadian Forces (CF). Although the report was focused on reforms of the court martial system, it recognized the need to examine the 'Summary

Trial' system. A wise thing, since this accounted for 96 per cent of the trials that took place in fiscal year 2007-2008; 2,035 summary trials versus 78 courts martial. Also because a summary trial is Victorian in nature and, worse, is exempt from any form of civilian oversight.

Offences under the CSD include infractions that relate uniquely to military service such as misconduct in the presence of the enemy, disobedience, desertion, and conduct to the prejudice of the good order and discipline (which is a grab-all). However, the CSD also incorporates offences against the Criminal Code and all other federal acts having penal dispositions.

With a few notable exceptions, the military justice system has complete jurisdiction over persons who commit breaches while subject to the disciplinary jurisdiction of the Canadian Forces. All CF members are subject to the CSD and so are spies, prisoners-of-war, persons accompanying a military unit (i.e. embedded journalists in Afghanistan), persons travelling in or on any military vessel, vehicle aircraft or in or on any defence establishment, etc. The trial of a person charged with a military offence may take place in or outside of Canada.

The range of sanctions for service offences is rather rough and gruff. In descending order of severity, it includes the following: imprisonment; dismissal; detention; reduction in rank; forfeiture of seniority; reprimands; fines; and, minor punishments. However, contrary to the Criminal Code, it does not include such things as conditional discharges, probation, restitution, or conditional sentences of imprisonment.

They are two types of service tribunals: courts martial and summary trials. These tribunals may be held anywhere in the world. A court martial can try any offence except a murder or manslaughter charge if the offence is committed in Canada. As recently illustrated in the case of Wilcox, there is no

such restriction if the offence is committed outside Canada.

In principle, courts-martial are convened for the most serious offences.

A summary trial is meant to try cases where CF members are charged with less serious offences and where, it is believed, that both the summary trial and the consequential punishments must follow quickly upon the offence to deter and to punish as well as to rehabilitate those who do so. Although dealing with 'less serious offences,' a summary trial can impose harsh sentences including detention, demotion and hefty fines. The most common offences tried by summary trial are "Conduct contrary to good order and discipline" and "Absence without leave"—which account for close to 75 per cent of the charges.

There are two types of courts martial. First, a general court martial presided over by a judge and a panel of five members, who are all serving members of the Canadian Forces, usually officers. The panel more or less resembles and acts akin to a jury in a civilian criminal trial. Second, a Standing Court Martial presided by a judge, sitting alone.

Courts martial provide the accused with the same range of constitutional and legal protections available in a civilian court. There is also a system of appeal against convictions or against the legality of sentence to an outside, civilian appeal tribunal, the Court Martial Appeal Court. A further appeal to the Supreme Court of Canada is also possible. Legal counsel is provided at public expense.

We can trace the origins of the summary trial, at least in the Army, to the Cardwell-Childer reforms. In 1868, a Royal Commission on the Constitution and practice of courts martial first recommended that COs be allowed to impose fines for drunkenness. In the 1880s, the COs' powers to deal summarily with a number of other common military offences were increased, with the result that summary trials permitted them to administer swift and exemplary justice without depriving them of scarce resources or encouraging unruly soldiers to commit offences in the hope that

their arrest and detention for trial would provide them with an escape route from the front line. This led to a series of new punishments.

Few outside, or even inside, the military have any idea that a conviction by a summary trial results in a criminal record. Few would also know of the very high conviction rate at a summary trial; 92 per cent. Yet, most Canadians expect that a soldier charged with an offence would have his Charter right to a 'fair and public hearing by an independent and impartial tribunal' respected. However, a review of the characteristics of a summary trial raises a serious doubt about such an expectation.

A summary trial is typically presided over by one of the powerful *paterfamilias* in the military society: the commanding officer (CO). Given that the communal life inside a military unit is intense, hierarchical, claustrophobic, and minutely regulated, the CO knows, or is expected to know, everyone under his command. When a CF member accused of an offence is brought before him with witnesses in tow, the CO would most likely know him and the witnesses, all of whom likely being his subordinates. Moreover, through regular internal reporting of incidents, the CO is also likely to be kept well abreast of the circumstances surrounding the alleged offence(s) and, this even before the trial. In civil court, the judge is independent and unaffiliated with the accused, dealing with strangers and hence relying on counsel and witnesses to present evidence.

A summary trial commences when the accused is 'marched in' under escort by a sergeant major who bellows a succession of orders. The accused comes to a 'halt' within a couple of feet of the CO's desk. He remains standing throughout the trial.

The accused has no right to counsel. Instead, the CO normally appoints an 'assisting officer,' one of his juniors, to 'assist' the accused to mount a defence. The assisting officer has no duty of confidentiality toward the accused. There is also no client-solicitor privilege at play.

The CO and the assisting officer have no legal training. They received instead some procedural training provided by the judge advocate general.

The CO ensures the attendance of witnesses including witnesses for the defence. Witnesses are limited to only those witnesses who can be procured without legal process (subpoena or summons).

The CO is not governed by any

rules of evidence. Hearsay and opinion evidence are accepted. There is no ability for the accused to make Charter arguments that might result in a stay of proceedings or dismissal of the case against him.

The level of disclosure provided to the accused for the purposes of a summary trial is less complete than the level of disclosure provided for the purposes of a court martial.

There are no transcripts of summary trials. Only the sentence and the punishments are recorded on a summary sheet.

There is no appeal of the verdict or the sentence imposed by the CO which could deprive a CF member of his liberty. The U.K. and Australia recently recognized this deficiency by giving soldiers convicted at a summary trial an unfettered right of a hearing before an appeal tribunal made up of three lay jurists where they may be represented by a lawyer.

Verdicts and sentences imposed at summary trials may be reviewed, however, by a non-judicial military authority empowered to intervene in this criminal procedure. This procedure is foreign to any member of the civilian bench and bar.

Although I accept that maintenance of discipline is fundamental to the success and overall functioning of the Armed Forces, in the grander scheme of things, that is in a democracy, so is the respect for an individual's legal rights. Yet, at present, summary trials are conducted as if the law and lawyers were irrelevant and in a manner that seems to go against basic Canadian legal principles available to civilians. What solely is relevant is the CO's responsibility for discipline and order in his command.

While some of the punishments imposed by summary trials can be regarded as trivial, others have the potential to seriously affect the lives, reputations, and careers (both military and civilian) of military personnel. However, even if trivial, the determination of these criminal charges should be made through a fair hearing by an independent and impartial tribunal, which is far from being the case. I can only conclude that the summary trial is perhaps, at best, an anachronism presenting an absence of structural independence and impartiality. There is an urgent need to review this.

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