MILITARY EFFICIENCY AND MILITARY JUSTICE: PEACEFUL CO-EXISTENCE?

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There is a myth that military justice and military efficiency are mutually contradictory, if not mutually exclusive goals within the Canadian Forces. I encounter this idea, directly or indirectly, frequently in discussion with my civilian legal friends. Apparently, the only way to run an effective military force involves the unthinking and summary imposition of draconian punishments for the slightest infraction. As I will show, nothing could be further from the truth.

What concerns me even more is that I still encounter similar thinking among my military "clients." There are still far too many commanders, some of them at senior levels, who believe that the military justice system is a real impediment to the achievement of their military goals. Is the relationship between military efficiency and military justice one of harmony, creative tension, or unresolvable conflict?

We begin with the proposition that the very existence of any society depends upon its capacity to defend itself by force as a last resort. The sole purpose of military force, and particularly a standing armed force such as the Canadian Forces, is to be the ultimate instrument by which a society may apply force or the threat of force to protect its existence or to advance its perceived interests. Clauswitz noted that war is the continuation of policy by other means. In this imperfect world, a nation which does not possess at least some capability in the area of "other means" is not likely to remain an independent nation for very long. It follows that the establishment and maintenance of an effective military is a valid and important national goal.

What does it take to make armed forces effective? Leaving aside the high-tech hardware aspects, which are of relatively less importance than most people think, the factors that really make a military work are training, motivation, and above all discipline. History shows that in the field the effective military force is the disciplined one. This statement is especially true when the force is, by reason of national constraints, considerably smaller than its leaders would like.[1] The Canadian Forces is a good example of such a force. The Forces is an all-volunteer, highly professional force, in which morale and motivation are agreeably high. By any reasonable standard the Forces are well-disciplined. That discipline is based almost exclusively on such positive factors as the members' belief in the national values represented by the Canadian Forces, and trust and confidence in themselves, their comrades, their equipment and their leaders.

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[1]These constraints can be philosophical or fiscal.

I said *almost* exclusively. There are a few members of the Canadian Forces for whom all of our efforts to instill positive self-discipline are not enough. For these people, we require a system of negative reinforcement in which a lack of discipline attracts sanctions. This is the formal military justice system, embodied in the *National Defence Act*,[2] and called the *Code of Service Discipline*.

To be useful to military command, the military justice system must have several characteristics. It must be prompt, affordable, portable, and credible. The last two features deserve more discussion. The Canadian Forces operate all over the world. At this moment, there are Canadian Forces in sufficient numbers to expect occasional disciplinary problems in Scandinavia, the United Kingdom, Germany, Cambodia, Israeli-occupied Syria, Cyprus, Kuwait and Iraq, Croatia, Bosnia-Hercegovina, and Somalia. In all of these areas, the Forces must be in a position to bring the full range of military justice procedures and sanctions to bear promptly and effectively. In short, justice must go to the troops wherever they may be found.

The question of credibility is perhaps the most important question of all. If the troops stop believing in fair and effective military justice, the breakdown of discipline and ultimately of military efficiency will follow. Remember, the Forces is an all-volunteer force in which recruiting and retention can be quickly and adversely affected by dissatisfaction. It is not in the interests of the Canadian Forces to operate a disciplinary system which is characterized by the imposition of unthinkingly severe punishments after kangaroo courts. On more than one occasion, I have seen fairly radical changes in the efficiency of Canadian Forces units, whether ships, Air Force squadrons, or Army battalions, following the arrival or departure of commanding officers who did not understand this point.

A system of military justice must be fair, and must be seen by the troops as fair. What are the characteristics of a fair system? We need look no further than the *Constitution* of Canada to determine what is a fair system.[3] Section 52 still states that the *Charter*[4] is the supreme law of the land. It would be difficult to argue that the military justice system could depart from *Charter* provisions. The old idea that when you sign up in the military you give up your civil rights is long dead and buried. The members of the Canadian Forces have all undertaken a contingent commitment of absolute personal liability in the defence of Canadian

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[2]*National Defence Act*, R.S.C. 1985, c. N-5 parts IV to IX [hereinafter *National Defence Act*].

[3]*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution*].

[4]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

constitutional values. It would be truly ironic if they were not allowed to enjoy the benefit of those values.

There are four recent, significant appeal judgments concerning the Canadian military justice system. These cases concern essentially the same issue, the guarantee to all Canadians of trial before an independent and impartial tribunal. It is useful to recall that this guarantee did not spring into being on 17 April 1982, but was contained in the "Diefenbaker" *Bill of Rights*[5] from some 20 years earlier. The first, significant appeal judgment concerning Canadian military justice is *MacKay* v. *R.*.[6] In this *Bill of Rights* case, the propriety of our Standing Court-Martial, a statutory creature of s 177 of the *National Defence Act* composed of a military judge sitting alone, was challenged on the basis that such a tribunal could not be said to be truly independent and impartial. The challenge failed. The Standing Court Martial system was upheld in the Supreme Court of Canada,[7] and there was a rather murky discussion of the relationship between military law and the civilian criminal justice system.

In *R.* v. *Ingebrigtson*,[8] as in *MacKay*, a relatively petty alleged drug offender chose to fight his case on grounds other than those related to the facts. Ingebrigtson challenged the independence and impartiality of the Standing Court Martial. Unlike MacKay, Ingebrigtson won. The Court Martial Appeal Court had the benefit of the intervening Supreme Court judgment in *R.* v. *Valente*.[9] It concluded that although *impartiality* was not really an issue, the *independence* of a military judge whose appointment, not to mention his or her pay and promotion prospects, was subject to the discretion of the military executive was not sufficiently guaranteed to meet the requirements of the *Charter*.

The judgment in *Ingebrigtson* was, with all respect to the Supreme Court, a good deal less murky and more persuasive than *MacKay*. Accordingly, a decision was made to accept the Court Martial Appeal Court ruling and get on with rectifying the noted deficiencies. These modifications could be accomplished with regulatory amendment, and in under three months the Forces were "up and running" again with Standing Courts Martial.

In the meantime, more significant storm clouds were gathering. Two cases involving appeals against verdicts of General Courts Martial were in the final stages of preparation in the Supreme Court of Canada. These cases, *R.* v.

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[5]*Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter *Bill of Rights*].

[6][1980] 2 S.C.R. 370 [hereinafter *MacKay*].

[7]Laskin, C.J.C. dissented.

[8](1990), 5 C.M.A.R. 87 [hereinafter *Ingebrigtson*].

[9][1985] 2 S.C.R. 673.

Généreux and *R.* v. *Forster*, were argued together in June of 1991.[10] Both appellants argued that the General Court Martial, as then structured under s. 165 of the *National Defence Act* and regulations, was not constitutionally sound. The main thrust of their attack was aimed at the close link between the military executive, which decides to put a soldier on trial, and the actual triers of fact. These triers of fact were selected and appointed by the very same senior officer who ordered the trial in the first place.

The judgments allowing the *Généreux* and *Forster* appeals were released on 13 February 1992. The Supreme Court was pleasingly specific in describing the deficiencies which it identified, thereby providing a blueprint, or at least an outline, for the *National Defence Act* and regulatory amendments required to fix the system. A crash programme was undertaken to prepare the necessary amendments, and the new regime came into force in June,[11] a scant four months after the judgment of the Supreme Court.

In closing, I wish to review the relationship between military effectiveness and efficiency and the formal requirements of Canadian military justice. The requirements of both are not mutually exclusive, but are quite coincident. That is not to say that the day-to-day execution of the military mission is enhanced by the formalities of what can seem an absurdly technical criminal justice system. Military operational leaders are trained to fix on the objective, to minimize or ignore factors which might cause delay and to confront and overcome resistance. They may accept philosophically that a fair and effective military justice system contributes, in the long run, to the achievement of the mission. However, in the short run they are sometimes less than amused by technical, legal arguments.

Can we live with this short term divergence of interest? A diminishing number of dinosaurs, single-minded fighting men who simply do not accept all this modern human and civil rights stuff, claim that it is impossible to run an effective military machine under these constraints. On the other hand, the rabid *Charter* purists say that no system run by the military will ever be fair and that the military should be out of the game altogether. In the end, as in so much of the administration of justice, it is a balancing process. I conclude with a quote from a very learned Canadian military judge before whom I had the stimulating privilege of appearing many times. Within the context of the independence of the judiciary argument, these words define the balancing process very well. They were quoted with explicit agreement by Chief Justice Lamer in the lead judgment in *Généreux*:

> In a military organization, such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be

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[10][1992] 1 S.C.R. 259 [hereinafter *Généreux*]; 88 D.L.R. (4th) 169 [hereinafter *Forster*].

[11]*An Act to amend the National Defence Act*, S.C. 1992, c. 16.

involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.[12]

[12]J.B. Fay, "Canadian Military Criminal Law: An Examination of Military Justice" (1975) 23 Chitty's L.J. 228 at 248.