July 26, 2018

Bill C-77 and the Quiet Revolution in Military Justice

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Statute Commented On: Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts,* SC 2019, c 15

The Governor General might be forgiven for having a touch of writer's cramp at dinner time on June 21, 2019. In the Upper Chamber that day, Her Excellency gave Royal Assent to 20 bills. Bills C-48 and C-69 got plenty of media attention, but Bill C-77 seemed to pass without much fanfare despite its significance for the future of military justice in Canada.

For background, the military justice system is typically thought of being formally expressed through two mechanisms: the summary trial and the court martial. The summary trial is reserved for minor offences "that are important for the maintenance of military discipline at the unit level" and the Court Martial is presided over by a Military Judge and designed to deal with more serious crimes and service offences (see Government of Canada, An Overview of Canada's Military Justice System). Bill C-77 is arguably the most dramatic overhaul of summary trials in our history.

I share the concern of the Canadian Bar Association that this is the first modern reform of the military justice system to have not been preceded by an independent review (see the Canadian Bar Association's letter to the House of Commons Standing Committee on National Defence). Every other major modern overhaul of the military justice system has been supported by the findings of an independent commission conducting extensive research and consultations (the 1997 Dickson Report by former Chief Justice Brian Dickson; the 2003 Lamer Report by former Chief Justice Antonio Lamer; and the 2011 LeSage Report by former Ontario Chief Justice Patrick LeSage).

If Bill C-77 had been preceded by an independent report, we might have a better understanding of the changes and their potential impact on military justice and the Canadian Armed Forces. In the absence of an independent report, however, Canadians who care about the military justice system should understand and monitor the changes that were made by this Bill that has yet to come into force. The object of this post is to assist in providing that understanding.

The Summary Trial in Historical Context

The maintenance of "discipline, morale, and efficiency" are the reason that Canadians maintain a separate system of military justice (*R v Généreux*, [1992] 1 SCR 259). Discipline is essential for an effective fighting force and the *raison d'etre* of military justice and service tribunals. We know that even Ancient Rome viewed good discipline as being paramount to maintaining a strong fighting force, and further viewed military justice as being inextricably linked to the maintenance of that discipline.

Laws change as society progresses and evolves, and what is acceptable today may not be acceptable tomorrow. Military justice is no different. An obvious example of this is the fact that corporal punishment is no longer a part of military discipline or military justice, though the armies of Ancient Rome relied heavily on it.

The consequences for indiscipline have changed, but the importance of keeping discipline in the fighting force has not. Each of the independent reports on military justice has affirmed the importance of the summary trial in maintaining discipline for a whole host of reasons, not the least of which is the direct involvement of the chain of command in their administration.

Does the Commanding Officer Need to be at the Centre of Military Justice?

The Commanding Officer has traditionally been at the centre of the military justice system. The traditional reason for this comes from the fact that the Commanding Officer is the most senior commissioned officer in a unit, and commissioned officers bear the ultimate responsibility for maintaining good order and discipline. This responsibility is expressed in each officer's commission script, issued directly and personally by Her Excellency as Commander-in-Chief of Canada, directing them to "exercise and well discipline both the Inferior Officers and Non-Commissioned Members serving under [them] and use [their] best endeavour to keep them in good Order and Discipline."

Commissioned officers, led by their Commanding Officer, are given their authority directly from the Commander-in-Chief because they may be required to make the lawful order of a subordinate to kill or die. There can be no hesitation on receiving such an order – a soldier, sailor, or airperson must be capable of doing what is ordered and required of them; Canada's security depends on the capacity to make that ultimate sacrifice. As the senior officer of a unit, the Commanding Officer bears the burden of overseeing the discipline and order of their unit, and summary trials are intended to be a fast, fair, and efficient way to do this.

In line with this traditional rationale, the *National Defence Act*, RSC 1985, c N-5, gives Commanding Officers a key role in the administration of military justice. Among other responsibilities, a Commanding Officer will: issue warrants for arrest (s 157) and for search (s 273.3); review conditions for release (s 158.6); and receive a charge after it has been laid (s 161.1). In many ways, the Commanding Officer acts like a Judge or Justice. When it comes to a summary trial, a serviceperson can be tried by one of three officers: a Commanding Officer; an officer delegated by the Commanding Officer; or a Superior Commander. Until Bill C-77, the Commanding Officer had the most significant powers of punishment. Among these powers, they could detain a guilty serviceperson for up to 30 days, reduce them in rank by one rank, or fine them the equivalent of one month's pay (s 163). In contrast, a Superior Commander (usually an officer higher ranking than a Commanding Officer) could not detain a guilty serviceperson, and could not reduce them in rank (s 164).

Bill C-77 changes this traditional balance of power to give Superior Commanders the most serious powers of sanction (Bill C-77, cl 25, ss 162.7, 163.1). This means that a Commanding Officer, when receiving a charge to be tried by summary hearing, will have to decide whether they have

sufficient powers to appropriately sanction a serviceperson if that serviceperson is found guilty of the service offence. If, for example, a serviceperson is alleged to have committed an offence for which reduction in rank is likely to be appropriate, the Commanding Officer would have to seriously consider referring the charge to a Superior Commander because the Commanding Officer has powers that are insufficient to adequately address the service offence (Bill C-77, cl 25, s 163. Note that although the current *National Defence Act*, at s 163 requires the would-be presiding officer to consider whether their powers are adequate, the main difference here is that a Commanding Officer would now have to make this consideration and potentially refer the matter upwards to a Superior Commander instead of to a Court Martial).

Former military judge and retired Lt-Col. Jean-Guy Perron testified to the House of Commons Defence Committee that this change "brings into question whether the CO is still the most important actor in disciplinary matters within his or her unit" (House of Commons, Standing Committee on National Defence, *Evidence*, 42-1, No 114, 1 November 2018 at p 5). I agree with Lt.Col. (ret'd) Perron but, like most Canadians, do not know what this might mean for the Canadian Armed Forces in the long term.

Turning Away from a Penal and Criminal System of Discipline – But at What Cost to the Rights of Servicepersons?

The Minister of National Defence said that Bill C-77 was intended to create a "non-penal, non-criminal […] process to replace the summary trial system" (House of Commons, Standing Committee on National Defence, *Evidence*, 42-1, No 113, 23 October 2018 at p 2). To do this, Bill C-77 eliminates the jurisdiction of summary trials to hear any criminal matters, rejects detention as a possible sanction, and changes the name of "summary trials" to "summary hearings".

Eliminating detention as a possible sanction effectively deals with the strongest possible claim under s 7 of the *Charter* – the right to life, liberty and security of the person – against summary trials. Historically, this has been the flashpoint for most opposition to the summary trial: that a Commanding Officer has been able to detain a person for up to 30 days as punishment for a service offence (*National Defence Act*, s 163(3)).

This has been exchanged for other procedural rights. Parliamentarians have, for instance, abolished the right of service members charged with a service offence to elect to be tried by a court martial rather than a summary hearing (see *National Defence Act*, s 162.1 and contrast with Bill C-77, cl 25), and lowered the standard of proof in a summary hearing from one of "beyond a reasonable doubt" to a "balance of probabilities" (see Bill C-77, c 25, s 163.1 and contrast with *Queen's Regulations and Orders*, PC 2018-0433 (1 September 2018), art 108.20 (Procedure)). Senior legal officers testifying at the House of Commons Committee hearings justified these changes as being acceptable in a system where detention was no longer a possibility (see House of Commons, Standing Committee on National Defence, *Evidence*, 42-1, No 117, 20 November 2018 at pp. 8-9; House of Commons, Standing Committee on National Defence, *Evidence*, 42-1, No 119, 27 November 2018 at pp 6-7).

Does the elimination of detention really justify trimming back the other procedural rights during a summary hearing? This is a question that would have been well-suited for consultation as part of

an independent commission. Many servicepersons might view a reduction in rank, which equates to a loss of opportunity, income, and status, as a very serious punishment in the same realm as detention and well worth the protection of a higher standard of proof and the ability to elect to court martial. Without the kind of extensive consultation that previous independent commissions have engaged in, however, it is difficult to say that this give-and-take of legal rights is a fair bargain for the serviceperson charged with a service offence.

Additionally, members of the reserve force can now be tried by summary trial for offences they commit while off-duty, off-base, and out of uniform. This is significant. Reservists are the "volunteers" of the Canadian Armed Forces. Up until Bill C-77, a reservist was only subject to the Code of Service Discipline when they were in uniform, on a base, or otherwise engaged in service to the Crown as a member of the Forces (see *National Defence Act*, s 60). This particular change might give the military justice system greater reach to deal with reservists whose off-duty behaviour may be unbecoming a Canadian Armed Forces member. Is this greater reach for military justice a good thing? Is it really necessary to intrude into the private lives of citizen soldiers or "weekend warriors" – especially now that these reservists, charged with service offences potentially committed while off-duty, have no election to be tried by court martial and need only be proven guilty on a balance of probabilities?

Allowing for Every Officer and NCM to be Subjected to a Summary Hearing

Up until the changes brought by Bill C-77, there were strict controls over who could be tried by summary trial. These controls disproportionately favoured commissioned officers, who could only be tried by a Superior Commander (that individual with the most minimal powers of punishment) if they were below the rank of Colonel or a non-commissioned member above the rank of Sergeant. In practice, commissioned officers were very rarely referred for summary trial.

The new summary hearings model allows for virtually anybody to be tried by summary hearing, as long as the officer or non-commissioned member presiding at that hearing is a minimum of one rank above the accused's rank. This change has been a long time coming. Treating an individual differently before the law based on the status imbued by commission or rank is an antique tradition that is difficult to justify in a post-*Charter* era. In his assessment of courts martial, which should apply equally to summary hearings, Chief Justice Lamer said:

> To look at the rank of the accused as one of the factors governing the type of court martial to be convened is contrary to the modern-day spirit of equality before the law. There must be a military justification important enough to justify this different treatment. I have not been given any such justification. Any historical rationale for this difference must now be considered in light of the spirit of equality under the *Charter*... (at p 36; 2003 Lamer Report)

What's Next?

Bill C-77 will come into force by an order-in-council that has yet to be issued. Likely to accompany that order-in-council will be regulations outlining what minor sanctions the presiding officer at a

summary hearing might be able to order against a guilty serviceperson. Will these minor sanctions indirectly engage a serviceperson's s 7 *Charter* right? What will they look like?

It will be important to monitor the use of summary hearings and courts martial once Bill C-77 comes into force. According to the Judge Advocate General's annual report to the Minister of National Defence, the number of summary trials being held each year was dropping while the number of courts martial being held each year was holding steady. There are some indications that this might have been a result of the chain of command relying more heavily on less transparent administrative action (such as recorded warnings, probation, etc.) because of how "burdensome" summary trials have become (see the 2003 Lamer Report at p 71 and the 2011 LeSage Report at p 27). Will the new regime mean that the chain of command uses summary trials more frequently in lieu of less transparent administrative action? Will these changes make military justice more fair and transparent?

Above all else, however, the change from summary trials to summary hearings should encourage and maintain a high standard of unit discipline and relative fairness. The pillars of discipline, morale, and efficiency are the *raison d'etre* of the military justice system, and if any of these changes end up demonstrably undermining those pillars, Parliament should not hesitate to take action.

This post may be cited as: Jeffrey N. Westman, "Bill C-77 and the Quiet Revolution in Military Justice" (July 26, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/07/Blog_JNW_MilitaryJustice.pdf