FORTIETH KENNETH J. HODSON LECTURE IN CRIMINAL LAW[1]

MILITARY JUSTICE

MAJOR-GENERAL BLAISE CATHCART[*]

[*] Major-General Blaise Cathcart was a Brigadier-General when he gave this lecture but was promoted to Major-General on October 29, 2012. Major-General Blaise Cathcart was born in Exeter, Ontario, in 1961. He is a graduate of Saint Mary's University in Halifax, NS, (Bachelor of Arts (Hons)), University of Ottawa (Master of Arts), and Dalhousie Law School (Bachelor of Law). Major-General Cathcart articled with the law firm of Huestis Holm, Dartmouth, NS, in 1988.

Major-General Cathcart was called to the Bar of Nova Scotia in August 1989. He worked in private practice with the law firm of Boyne Clarke in Dartmouth until he enrolled in the Canadian Forces as a member of the Office of the Judge Advocate General (JAG) in 1990.

Since 1990, Major-General Cathcart has served in a number of positions with the Office of the JAG, including: Assistant Judge Advocate Atlantic Region (1990–91); Directorate of Law/Claims (1991–92); Directorate of Law/Human Rights and Information (1992–93); Deputy Judge Advocate Pacific Region (1993–96); Deputy Judge Advocate Prairie Region (1996–97); Director of Operational Law (1997–2003); post-graduate studies (LL.M.) in International Law at the London School of Economics and Political Science, London, England (2003–2004); the Special Assistant to the JAG (2004–2005); and Director of International Law (2005–2006). He was promoted to the rank of Colonel in June 2006 and served as the Deputy Legal Advisor and General Counsel–Military in the Office of the Legal Advisor to the Department of National Defence and the Canadian Forces (2006–2007); Second Language training (2007–2008); the Deputy Judge Advocate General/Operations (2008–2010). He was promoted to the rank of Brigadier-General in April 2010, before to his appointment to the position of Judge Advocate General on April 14, 2010.

He has deployed as legal advisor to the Commander, Canadian Contingent UN Protection Force (UNPROFOR) and the UN Peace Forces (UNPF) in the former Yugoslavia in 1994 and 1995. Major-General Cathcart deployed as the Senior Legal Advisor to the Commander, Canadian Task Force Bosnia-Herzegovina (SFOR) from February to September 2000. He was the legal advisor to Joint Task Force 2, the Canadian Forces Counter-Terrorism/Special Operations unit from 1997 -- 2000. Major-General Cathcart is eternally grateful for the many years of support from his family and spouse, Ms. Valerie Jones. He and Valerie currently live in Ottawa.

[1] Established at The Judge Advocate General's School on June 24, 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

I. Introduction

Many thanks to Brigadier General Ayres, distinguished guests and the JAG School for the kind invitation to be here today. I believe this is the first time the Canadian Forces JAG has been asked to deliver the Hodson Lecture. It is truly a great privilege and honor to be the 40th Hodson speaker.

I must admit that I was not too familiar with Major General Hodson and the impressive legacy he left in his service careers. After some research and validation with Wikipedia (not Wiki Leaks!), I can say that he was a true scholar, legal officer, and legal trailblazer. I hope I can do him justice here today.

I am thrilled to be back in Charlottesville and at the JAG School. When I was a captain and major, I had the great fortune to benefit from several courses here. I attended the Law of War Course, the Operational Law Course, and, the always stimulating, Contract Attorney's Course. I learned a lot and made many lasting friends.

Each time I return to Charlottesville, I enjoy the great hospitality and collegial exchange of views. However, as a Canadian, I feel a little self-conscious when I hear some locals talking not so warmly of those ”Northerners” and the “War of Northern Aggression.” I politely interject with such folks and indicate that I do appreciate the sensitivities and emotions of the past war but I wonder when you folks are going to get over the War of 1812! Apparently there was some other war in these parts with a different set of “Northerners” and a different type of “Northern Aggression.” I suppose it always a matter of perspective!

Speaking of perspective, I would like to offer a few thoughts today on military justice generally and, more specifically, on the Canadian Forces military justice system.

With the time I have, I will first provide a brief overview of our military justice system. Then I will turn to the issue of military justice more globally. When I wrap up, I will do my best to allow sufficient time for some questions on any military justice or military law matter.

II. Discussion

Okay, first I will start with a few slides on our system in Canada.[2]

As just mentioned in my slide presentation, as Judge Advocate General of the Canadian Forces, I have many responsibilities. One is to act as legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Forces in matters relating to military law.

But another crucial statutory responsibility of the Judge Advocate General under the National Defence Act is the superintendence of the administration of military justice in the Canadian Forces.

Because of this statutory responsibility, I have had occasion to reflect often as JAG about the topic of military justice—about why it exists, about what it means, and about what it requires to effectively achieve its goals.

Together with my senior officers in the Office of the JAG who work in the area of military justice, we have recently articulated in various public contexts what we think about this important subject.[3]

I would therefore like to speak to you today about military justice. I have just given you a quick look at the Canadian military justice system. However, my main aim is not to deal with the nuts and bolts or particular structural arrangements of national systems, for each state will ultimately have to arrive at the particular arrangements that best suit its national law and circumstances, but, rather, I want to focus on what we perceive to be the *fundamental first principles* that should be considered to underpin any legitimate and credible military justice system.

This is a topical subject and we are very passionate about it. Military justice can often be controversial. Members of the general public may know little about it. Legislators may also be largely unfamiliar with it. Many frequently approach it, at best, with a healthy degree of ignorance

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[2] The Powerpoint slides used during the lecture have been omitted from this printed lecture.

[3] *E.g.*, Colonel Michael Gibson, *Military Tribunals*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e336?rskey=e5pof5&result=1&q=&prd=EPIL (last visited Sept. 5, 2013).

and indifference and, at worst, with disdain and cynicism. No doubt most of us have heard the widely-cited and often disparaging maxim attributed to the French Prime Minister Georges Clemenceau that "military justice is to justice what military music is to music."[4]

In my view, such cynicism is misplaced and should be vigorously and professionally challenged.

On one level, it is easy to understand why there may or should be distrust and cynicism. In many states around the world over the past century, military justice systems have been misused, misapplied, and abused. They have been used as instruments of power and control over civilians in circumstances that were clearly a perversion of justice and a gross violation of fundamental human rights.

But even in places such as Canada and the United States with strong democratic traditions and where civilian control over the military is an incontrovertible norm of public life—and which possess legitimate military justice systems—there are many who advocate reducing to a minimum the differences between military law and civilian criminal law, or narrowly constraining the scope of jurisdiction of military justice systems.

In some European countries, military justice systems now exist only as secondary or residual systems dealing with minor disciplinary offences. In others, military justice systems have been abolished altogether in peacetime.

This is not the way that we intend to go in Canada. And I strongly suggest that there are important and proper reasons why it should not be the chosen path.

In our view, simply put, an effective military justice system, guided by the correct principles, is a prerequisite for the effective functioning of the armed forces of a modern democratic state governed by the rule of law. This is especially true for the armed forces of states that are deployed on international operations.

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[4] French politician (1841–1929), http:www.quotationspage.com/quote/21464.html (last visited Sept. 3, 2013).

It is also vital to ensuring the compliance of states and their armed forces with the normative requirements of international human rights law and international humanitarian law.

Some criticize differences between the military and civilian justice systems. These differences exist for a reason. The fundamental point that must be made is that differences do not mean that one system is inherently inferior to the other, nor constitutionally deficient. Differences must be assessed on their merits.

The real question is not whether there are differences, but, rather, whether a military justice system is fair, compliant with constitutional requirements, and effective in fulfilling its purpose.

Separate military justice systems exist because of the unique needs of armed forces to fulfill their mission of defending the state. This was recognized by the Supreme Court of Canada in its seminal 1992 judgment in the case of *R. v. Généreux.*

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need

> for separate tribunals to enforce special disciplinary standards in the military.[5]

The paramount need to maintain discipline in a State's armed forces has long been recognized. However, in the popular imagination, this recognition is frequently accompanied by an often unreflective notion that military justice systems give insufficient regard to fairness or justice to accomplish this.

Such a view is inaccurate. The ends of discipline and justice are not mutually exclusive. The conclusion in the Powell Report of 1960 incorporates much wisdom in recognizing this:

> Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable.[6]

Rather than running down rabbit holes where rigid positions can reflect narrow ideological predispositions about military justice, we consider that the clear basic question that should be posed is: what is it that a state needs its military justice system to do? And, once this is identified, what functional elements does such a system need to possess in order to effectively accomplish these ends?

If this analysis is undertaken, then one will be in a much better position to understand and determine what the scope of the jurisdiction of the military justice system should be in terms of offences, persons, territory, and time, and what differences in procedure may be required.

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[5] R. v. Généreux, [1992] 1 S.C.R. 259 at 293.

[6] U.S. DEP'T OF DEF., REPORT TO THE HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY, BY COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY ('POWELL REPORT') (OCLC 31702839) 11 (18 Jan. 1960).

Let me elaborate what answers we have arrived at in the context of the Canadian military justice system.

We consider that the Canadian military justice system has two fundamental purposes:

> 1. to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
> 2. to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

Accordingly, it serves the ends of both discipline and justice.

These purposes are stated in the statutory articulation of purposes, principles, and objectives of sentencing in the military justice system contained in Bill C-15, the *Strengthening Military Justice in the Defence of Canada Act*, which is currently before the Canadian Parliament.[7]

Our proposed legislation recognizes that it is most acutely in the process of sentencing on the basis of objective principles that there is an obligation to directly face the question: what is it that a state is actually trying to accomplish in trying someone in the military justice system?

The synthesis of the classic criminal law sentencing objectives of denunciation, specific and general deterrence, rehabilitation and restitution, with those targeted at specifically military objectives, such as promoting a habit of obedience to lawful commands and orders and the maintenance in a democratic state of public trust in the military as a disciplined armed force, illustrates that military law has a more focused need and purpose than the general criminal law in seeking to mold and modify behavior to the specific requirements of military service.

In order to achieve these fundamental aims and purposes, we consider that service tribunals must possess certain functional elements:

- the requisite jurisdiction to deal with matters pertaining to the maintenance of discipline and operational effectiveness;

[7] Since this lecture, Bill C-15 has received Royal Assent (S.C. 2013, c. 24).

- those doing the judging must possess an understanding of the necessity for, role of, and requirements of discipline;

- they must operate in a legally fair manner, and be perceived to be fair;

- they must be compliant with national constitutional and applicable international law; and

- they must be prompt, portable, and flexible.

That is why the two types of service tribunals in the Canadian military justice system, courts-martial, and summary trials are designed the way that they are.

Of course, no justice system should or can remain static and expect to remain relevant to its users. Military justice systems are no exception. In order to ensure that military justice systems continue to evolve to keep pace with changes in the law and societal expectations, they need regular and careful attention from lawmakers.

But it is important to recognize that legislative reform of the military justice system involves a process of continuous improvement over time, just as is the case with civilian criminal systems. It should not be considered a "one off" or a "one-shot deal," to be accomplished once in a generation, then neglected.

Such change may be incremental, but it needs to maintain momentum. In our experience, we have found that a statutorily mandated, regular independent review can help ensure that this is accomplished.

In our context, we recognize that the Canadian military justice system is not perfect. No system is. Nonetheless, it is a fair, effective, and essential element in promoting the operational effectiveness of the Canadian Forces and ensuring justice for its members. We are passionately committed to ensuring its continuing improvement and vitality.

Constructive criticism, debate, and suggestions for improvement of the military justice system are necessary and welcome. However, these need to be informed by recognition of the fundamental first principles that underpin the military system. In my presentation today I have sought to set out for you our view as to what these are.

Complacency about this would be unwise, and the Office of the Judge Advocate General is in fact the leading advocate and voice in Canada for continuous improvement of the military justice system. It conducts regular surveys and reviews and engages in comparative law research concerning the systems of other countries on an ongoing basis in order to identify issues and advance improvements.

There is much that we can learn from one another in continuing to adapt and evolve our respective national military justice systems.

We believe there is an emerging international discourse on military justice, much of it increasingly informed by international human rights law. We certainly welcome the discourse and constructive comments that seek to validate and reinforce the need for separate tribunals to enforce special disciplinary standards in the military.

It is clear that there are many common themes and challenges that repeat across our respective national discussions. I would therefore like to encourage the further development of a vigorous international discussion in this area, and undertake that the Canadian Office of the Judge Advocate General is eager to play a constructive part in it.

III. Conclusion

I sincerely urge all who are committed to military justice to remain vigilant in defending the requirement for, and legitimacy of, military justice against those who believe that military justice should not and cannot exist as a separate system. Such people often advocate for the complete civilianization and abolishment of military justice. To my mind, this would indeed be a mistake.

In the end it is simple, we owe it to all of our respective soldiers, airmen, sailors, and special forces troopers, our nations' sons and daughters, our nations' national treasures who willingly put themselves in harm's way to establish, evolve, and maintain a fair and effective

military justice system that recognizes the unique requirements of a professional military force which is founded upon service to country and self-sacrifice. Moreover, the system must always fiercely promote and protect the very democratic values and the rule of law that our men and women in uniform are willing to die for.

Thank you for the privilege and honor of having this opportunity to be the 40th Hodson speaker.