Summary Trials under the Code of Service Discipline and Mental Disorder

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Mental disorder and mental health issues have, for the last several years, been important issues facing the administration of the affairs of the Canadian Forces. They have also been important factors under the Code of Service Discipline. Consequently, they are key factors for various aspects of military justice. But have they been applied properly and consistently within the legislative regime concerning the Code of Service Discipline?

This article raises the vital issue of the exercise of jurisdiction by presiding officers at summary trial where there is a possibility that a member of the Canadian Forces, accused of an offence under the Code of Service Discipline, suffered from a mental disorder either at the time of the alleged offence, or at the time of the summary trial. Where there is such a possibility, a presiding officer clearly does not have the jurisdiction to proceed. But, where such circumstances arise, have presiding officers nevertheless proceeded with the summary trial? Have review authorities provided adequate review? Should stakeholders in the Code of Service Discipline, and, more broadly, military justice, be aware of this issue, and should it be the subject of greater discussion?

The Annual Report of the Office of the Judge Advocate General of the Canadian Forces (JAG Annual Report) for 2015-16[1] (the most recent report available), indicates that 857 summary trials were conducted in 2014-15 and 721 summary trials were conducted in 2015-16[2]. Comparably, in 2014-15, 70 courts martial were conducted (one of which had two joint accused) and 47 courts martial were conducted in 2015-16[3]. On a tangential note, the number of summary trials conducted in these two fiscal periods is less than 50% of the number of summary trials conducted for each of the fiscal periods five years earlier (e.g. 2009-10 and 2010-11 respectively), while the number of courts martial remained approximately the same.

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[1] http://www.forces.gc.ca/en/about-reports-pubs-military-law-annual-2015-16/index.page;
[2] *Ibid*, Annex A.
[3] *Ibid*, Annex B.

A previous blog article by this author, concerning "The Potential Pitfalls of Op HONOUR-related Administration"[4], postulated the risk of increasingly using administrative measures as disciplinary punishments. That too is a pressing issue; however, broader discussion of that potential maladministration must wait for another time.

A key conclusion from this data is that courts martial comprise less than 10% of Code of Service Discipline proceedings (7.5% in 2014-15 and 6% in 2015-16). This is consistent with the longer trend observed since the JAG began providing Annual Reports following the 1998 amendments to the *National Defence Act*[5]. What this means is that, consistently, the bulk of matters under the Code of Service Discipline are dealt with by commanding officers, delegated officers, and superior commanders, and not by constitutionally independent military judiciary. This conclusion is not earth-shatteringly novel. Nor is it necessarily cause for alarm, since many CF personnel elect to be tried by summary trial[6]. While the absence of a right to elect court martial for certain offences and the nature of certain punishments in relation to *Charter* rights (e.g. Confinement to Barracks/Ship without a right to elect court martial) may be cause of concern, that issue is not the subject of this blog article.

What should be cause for concern is the lack of a consistent approach to the jurisdiction of summary trials where there is a possibility that an accused suffered from mental disorder either at the time of the alleged offence or at the time of the Code of Service Discipline proceeding.

The Queen's Regulations and Orders for the Canadian Forces (QR&O) offer clear direction concerning the jurisdiction of presiding officers at summary trial under such circumstances. QR&O Article 108.16 concerns pre-trial determinations for a presiding officer, including:

> (1) Before commencing a summary trial, an officer having summary trial jurisdiction shall:
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> a. determine if he is precluded from trying the accused because
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> …

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[4] http://cswan.com/wp-content/uploads/The-Potential-Pitfalls-of-Op-HONOUR-related-Administration-Blog-96-Rory-Fowler.pdf, first posted February 8, 2017.

[5] The last nine JAG Annual reports, as well as the Annual Reports of the Director of Military Prosecutions and director of Defence Counsel Services, can be found on-line here: http://www.forces.gc.ca/en/about-reports-pubs-military-law/index.page.

[6] The JAG Annual Report, n 1, does not provide statistics on the percentage of Code of Service Discipline charges where elections are offered to the accused and the percentage of elections to court martial. The last time that this particularly informative data was offered was the 2013-14 JAG Annual Report. In that year, of the 1284 proceedings under the Code of Service Discipline, 1220 were summary trials, and 64 were courts martial. Of these, there were 48 matters referred directly to court martial, 66 elections to be tried by courts martial, 338 elections to be tried by summary trial, 790 summary trials without an election (e.g. the charges laid did not oblige an election for court martial), and 7 matters not proceeded with at summary trial.

iv. there are reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the alleged offence (see Chapter 119 – Mental Disorder), or

…

(2) Where the officer has determined that he is not precluded from trying the accused, he shall proceed with the trial as prescribed in section 7 (Procedure, Reception of Evidence and Powers of Punishment).

(3) Where the officer has determined that he is precluded from trying the accused, he shall not commence the trial but shall:

a. if the officer is a delegated officer, refer the charge to the commanding officer or, where appropriate, to another delegated officer;

b. if the officer is a commanding officer, refer the charge to a superior commander, to a referral authority (see Chapter 109 – Application to Referral Authority for Disposal of a Charge) or, where appropriate, to another commanding officer;

...

The basis for this determination can be traced to subsection 163(1) of the *National Defence Act*, which states:

163 (1) A commanding officer may try an accused person by summary trial if all of the following conditions are satisfied:

…

(e) the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence.

Subsection 164(1) of the *National Defence Act* echoes a similar prohibition for superior commanders.

'Mental disorder' is defined under s. 2 of the *National Defence Act* as a "disease of the mind".

The *National Defence Act* also defines 'unfit to stand trial' as:

… unable on account of mental disorder to conduct a defence at any stage of a trial by court martial before a finding is made or to instruct counsel to do so, and in particular, unable on account of mental disorder to

(a) understand the nature or object of the proceedings,
(b) understand the possible consequences of the proceedings, or
(c) communicate with counsel

Note that the focus is on the process at court martial. There is no mention in the definition of 'unfit to stand trial' of summary trials. Indeed, QR&O Chapter 119, consisting of several Governor-in-Council and Ministerial regulations, plus CDS direction, concerning mental disorder, focuses on the process at courts martial.

This is not because the issue is not relevant to summary trials. Rather, it acknowledges that presiding officers at summary trial do not possess the requisite skills and knowledge (or judicial independence) to make the appropriate determinations. They are therefore not competent to make determinations whether an accused cannot be held culpable due to mental disorder to whether the accused is not fit to stand trial. The presiding officer is competent to make determinations about his or her jurisdiction within the legislated summary trial process. Where mental disorder is concerned, this competence extends only to whether the possibility that an accused suffers from mental disorder would preclude the exercise of jurisdiction. Although mental health concerns fall within the provenance of medical professionals, the determination of mental disorder is ultimately a legal determination, not a medical one.

The purpose of QR&O sub-para 108.16(1)(a)vi. is to signal that, where it is necessary for someone to make a determination under the Code of Service Discipline concerning either fitness to stand trial or culpability of an accused in light of a possible mental disorder, the person making such a determination will have to be a military judge and not a presiding officer.

The provision is essentially constructed in the negative: a presiding officer must determine that he is not precluded from proceeding with a summary trial due to "…reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the alleged offence". In other words, the presiding officer is obliged to conclude that he does not have jurisdiction if there are reasonable grounds to believe that the accused is unfit to stand trial or was suffering from a mental disorder at the time of the alleged offence.

Where a presiding officer makes a determination that he still has jurisdiction (presumably, because the presiding officer determines that the accused was not suffering from a mental disorder at either of the two material times), and an accused disagrees with that determination, the accused could seek review of the determination as part of a request for review under QR&O Article 108.45. A legal officer could initiate a review under QR&O 107.15 based upon the legal officer's monthly review of a unit's Records of Disciplinary Proceedings. Finally, a review authority could, of its own initiative, initiate a review under

QR&O 116.02. In most cases, where an accused contests a determination by a presiding officer under QR&O 108.16(1)(a)vi., such a review will likely arise under QR&O 108.45.

I hasten to add that a failure of an accused to request review under QR&O 108.45 does not preclude an appropriate review authority from acting under QR&O 116.02, regardless of the reasons for such action, even if it is a request from the accused after the expiration of the limitation period established at QR&O 108.45. Ultimately, if there has been an error in the exercise of jurisdiction by a presiding officer, there is more than one route to correct such an error of law.

If an accused is not satisfied with these internal mechanisms, the accused could also seek judicial review of a determination (or lack thereof) by a review authority.

The compelling question is this: How consistently and reasonably is the determination under QR&O 108.16(1)(a)vi applied? In light of the volume of summary trial proceedings (which, as observed above, has nevertheless decreased significantly in the past 5 years) and the frequency with which mental health issues for CF members have been reported, there is a likelihood that the issue of mental disorder regularly arises within the administration of the Code of Service Discipline at the summary trial level.

So what is the actual threshold for the 'test' described at QR&O 108.16(1)(a)vi? It's likely quite low. The term 'reasonable grounds' is commonly used in the context of immigration tribunal determinations and is typically described as a level of evidence that "… while falling short of a balance of probabilities, nonetheless connotes 'a bona fide belief in a serious possibility based on credible evidence.'"[7] This evidentiary standard is applied where the 'reasonable grounds' will justify action that is contrary to the interests of the affected individual (i.e. where an immigration officer has reasonable grounds to believe that an applicant is involved in criminal activity). In this regard, the evidentiary threshold is not unlike the standard of "reasonable suspicion" which is more than a mere suspicion, but less than reasonable and probable grounds[8].

The challenge with applying such a standard to QR&O 108.16(1)(a)vi is that, where such 'reasonable grounds' exist, it will generally be to the benefit of the accused, as opposed to the accused's detriment. Conceivably, a presiding officer need not wait for an accused to raise this factor as a bar to jurisdiction. A presiding officer must make the pre-trial determinations at QR&O 108.16 for all summary trials. It's likely that, if the issue of mental disorder is not raised by someone such as the accused, most presiding officers do not turn their minds in more than a cursory fashion to the specific provision at QR&O 108.16(1)(a)vi.

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[7] *Attorney General of Canada v Jolly*, 1975 CanLII 1058 (FCA), [1975] FC 216 (CA); *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FCR 297, 2000 CanLII 16793 (FCA).
[8] *R v Cahill*, 1992 CanLII 2129, 13 CR (4th) 327 (BC CA).

However, it is conceivable that a presiding officer, approaching circumstances with an open mind, could determine that he or she lacked jurisdiction based upon factors brought to his or her attention that cause the presiding officer to conclude that the accused may have suffered from mental disorder at the time of the alleged offence or was suffering at the time of the summary trial. However, I suspect that, in most cases, it will be the accused who raises the issue.

Understandably, many presiding officers will not wish to yield jurisdiction. For many commanding officers and commanders, discipline is very much a function of command. They will see it not only as their privilege, but also their duty to administer discipline within their unit, formation or command. Most do not take their duties lightly.

However, there is another reason why a presiding officer might be reluctant to cede jurisdiction. I suggest that many presiding officers will be wary of an accused who raises this issue, based upon a belief or suspicion that the accused is trying to 'game the system' or to 'get out of the charge'. Such cases, whether suspected or otherwise, are likely a very small minority. Although the JAG Annual Report does not track the number of summary trial convictions that arise out of an 'admission of the particulars'[9] – and that would be a worthwhile data point to track – in the experience of the author, both as a legal advisor and a presiding officer who presided over dozens of summary trials, most accused admit to most or all of the particulars of a Code of Service Discipline offence proceeded with at summary trial. Most CF personnel acknowledge their wrong-doing.

Some CF members choose to contest their charges, which is their right. Some may raise the issue of suffering from mental disorder either at the time of the alleged offence, or at the time of the summary trial. That, too, is their right. In such circumstances, a presiding officer has an obligation to make a lawful determination under QR&O 108.16(1)(a)vi. Whether a presiding officer suspects that an accused is 'gaming the system' does not alter the requirement for, or the basis of, a determination under QR&O 108.16(1)(a)vi.

It may be that consistent advice has been offered by the Office of the JAG to the various chains of command down to unit and sub-unit level. It may be that presiding officers apply this advice in a reasonable and consistent manner. However, in the event that there has been a lack of consistent advice, or that, perhaps, this advice has not been consistently applied, I offer the following thoughts on the appropriate threshold for a determination under QR&O 108.16(1)(a)iv.:

[9] An accused who is tried by summary trial before a presiding officer cannot 'plead guilty'. He or she can admit to some or all of the particulars of an offence, which can logically lead to a conviction with little or no evidence being presented to the presiding officer.

1. The 'test' has the relatively low threshold of 'reasonable grounds'. This is more than a mere assertion or suspicion, but need not rise to the level of 'probable' or even a 'balance of probabilities'.

2. As this is ultimately a jurisdictional analysis, a comparable test is the 'air of reality': based upon the evidence placed before the decision-maker, if believed, is it possible that an accused suffered from a disease of the mind either during the alleged offence, or at the time of the summary trial? If the answer is 'yes', the presiding officer cannot proceed (and must either refer the matter to court martial or not proceed with the matter).

3. The evidence can be presented by the accused or by someone with specific knowledge of the alleged disease of the mind (e.g. a medical practitioner treating the accused).

4. This is manifestly not a determination of whether the accused actually suffered, or suffers, from a disease of the mind or mental disorder. The purpose of QR&O 108.16(1)(a)vi is to signal that a presiding officer does not have the competence, and, consequently, the jurisdiction, to make such a determination. Thus, if there is an air of reality that an accused suffered from mental disorder either at the time of the alleged offence or at the time of the summary trial, the disciplinary matter is one that requires the greater expertise and skill of a court martial, complete with a constitutionally independent military judge, and qualified prosecutor and defence counsel.

5. Finally, failure of the presiding officer to apply this 'test' correctly, constitutes grounds for review (and quashing of any finding of guilt or sentence) by a review authority[10] or, if necessary, the Federal Court, exercising its exclusive mandate to review the determinations of a federal board, commission or other tribunal[11].

The possibility that an accused suffers from a disease of the mind that constitutes mental disorder does not necessarily preclude the chain of command from proceeding with a matter under the Code of Service Discipline. However, reasonable grounds to believe that an accused suffers from a disease of the mind will preclude the chain of command from proceeding by way of a summary trial. Moreover, such diseases of the mind need not arise from Operational Stress or Post-Traumatic Stress. Those are not the sole diseases of the mind with which Canadian Forces personnel may be afflicted or which constitute mental disorder.

[10] QR&O 108.45 and 116.02.
[11] *Federal Courts Act*, RSC 1985, c F-7, ss 18(1) and 18.1.

Mental health issues and mental disorder are not new issues for the Canadian Forces. The current summary trial process has existed in its present form for nearly 20 years (albeit with some minor modification). Moreover, presiding officers bear an obligation to be trained in, and maintain their training in, the application of the Code of Service Discipline at the summary trial level. They have access to legal advice for each and every summary trial. Review authorities equally have access to legal advice from the Office of the JAG. Consequently, there is very little excuse for misapplying QR&O 108.16(1)(a)vi.