

Why was a ‘Special Staff Assistance Visit’ used at Royal Military College of Canada, rather than a Board of Inquiry?

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On March 29, 2017, the Chief of the Defence Staff (CDS) visited RMCC to release the “Special Staff Assistance Visit - Report on the Climate, Training Environment, Culture and ROTP Programme at the Royal Military College of Canada – Kingston”¹. The Report expressly addressed the use of a Special Staff Assistance Visit (SSAV), rather than a Board of Inquiry (BoI):

A SSAV is a tool used by the senior leadership of the CAF to obtain a full and accurate picture of the state of a unit or function. In that regard, the SSAV Team was asked to conduct an administrative, fact-finding investigation for the purpose of providing an objective assessment of the factors affecting the climate of RMC as a unit of the CAF. It was directed to identify issues and make recommendations to address all of the objectives set out in the VCDS mandate letter. The SSAV Team was not convened as a Board of Inquiry (BOI) and as such could not compel individuals to provide sworn testimony. The SSAV Team was not constrained by the procedural requirements of a BOI (including the recording of all testimony and production of transcripts), allowing it to proceed more quickly and to provide anonymity to the interviewees.²

This statement is both puzzling and problematic.

First, this paragraph is clearly intended to explain the rationale behind the decision to direct a SSAV rather than a BoI. Such an explanation would presumably be offered by the decision-maker who ordered the SSAV, rather than team created by the decision. This rationale was not provided in the SSAV Mandate Letter (enclosed as Annex B to the RMCC SSAV Report).

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¹ <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/special-staff-assistance-visit.html> [RMCC SSAV Report].

² *Ibid*, ‘Background’, para 2.

A Bol is convened "...where it is expedient that the Minister or any such other authority should be informed on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non-commissioned member..."³. The fact-finding investigation at RMCC appears to fall within this scope of inquiry.

Second, in addition to its statutory basis, the scope and powers of a Bol are expanded in Chapter 21 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) and amplified in Defence Administrative Orders and Directives or (DAOD). There are no similar legislative or policy instruments defining Staff Assistance Visits (SAV). Perhaps that was the point – the SSAV could do as it wished, in the manner it wished, with no prescribed methodology to constrain the conduct of the inquiry. Consequently, the merit of the outcome is left somewhat in doubt. The report is highly conclusory.

Third, the stated rationale draws erroneous conclusions or implications about Bol. The report states that it could not compel individuals to provide sworn testimony and, since the SSAV was not burdened with the inconvenience of 'procedural requirements', it could act more swiftly than a Bol.

This rationale appears to be based upon the troubling presumption that the investigation could not be conducted by a Bol *because of* the powers of a Bol to summon witnesses or to administer oaths. The availability of such powers does not equate to an obligation to use them. Nothing in the *NDA*, *QR&O*, or *DAOD* states that a Bol must always exercise these powers. The fact that a Bol *may* exercise such powers is hardly a compelling justification not to use a Bol.

Requirements of procedural fairness are particularly pertinent where the rights, interests, or privileges of an affected person or persons are at issue⁴. The RMCC SSAV Report pointedly avoided drawing any conclusions about any specific person or persons. Even where a recommendation is offered concerning a specific position, there is nothing in the report to suggest that this is based upon any observation relating to a specific occupant, past or present, of that position.

The conclusion that a SSAV is more efficient than a Bol is illusory. Delay in any investigation will inherently be directly proportional to the complexity, scope and thoroughness of the investigation. A SSAV that does not receive evidence under oath and limits the scope and depth of its inquiry is no faster than a Bol that does likewise.

³ *National Defence Act*, RSC 1985, c N-5 [*NDA*], subs 45(1).

⁴ *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*], to name but one of many judgments that establish this principle.

Proponents of a SSAV could assert: “Then why does it matter whether a SSAV or a Bol is used?” There are at least a couple of valid and compelling reasons why a Bol might have been a preferable mechanism.

First, if the SSAV encountered circumstances where it would need to summon a witness or administer an oath, its power to do so would have been limited. A Bol would not have been barred from receiving evidence without oath or cataloguing the evidence anonymously. Unlike a SSAV, if circumstances had changed, it would have had investigative powers available to it.

A SSAV could potentially give rise to differential treatment of witnesses. RMCC is a diverse organization, with both military and civilian personnel. The SSAV could have compelled military personnel to appear before it and could also have exercised less tangible pressure, such potential impact on career, if a member of the CF did not co-operate fully. The same coercive mechanisms are manifestly not available where civilian departmental employees are concerned.

Second, the selection of a SSAV perpetuates misconceptions about Bol. Bol have been subject of much criticism recently, particularly regarding the investigation of deaths of CF members. Many of these cases are apparent suicides. The death (or serious injury) of most CF members, other than as a result of combat, must be investigated by either a summary investigation or a Bol⁵. Both of these mechanisms are defined under QR&O Chapter 21. The CF appears to universally prefer Bol in such circumstances.

Some vocal critics have challenged the use of so-called *in camera* Bol in comparison to public coroner’s inquiries. Such criticisms are misguided; Bol and coroner’s inquiries serve fundamentally different purposes⁶ and the conduct of one does not preclude the conduct of

⁵ QR&O 21.46. This article applies to an officer or non-commissioned member of: (a) the Regular Force; (b) the Reserve Force when the member is on service; and (c) the Special Force. A commanding officer shall order an investigation, either by summary investigation or Bol, where an officer or non-commissioned member (NCM) to whom this article applies dies otherwise than as a result of wounds received in action, or where such an officer or NCM suffers an injury, other than one received in action, that: (a) a medical officer certifies to be serious or likely to cause a permanent disability; or (b) is suspected to be the result of the officer or NCM’s own wilful act.

⁶ For example, under s. 31 of the *Coroner’s Act*, RSO 1990, c C.37, where a coroner’s inquest is held, its purpose is to inquire into the circumstances of the death and determine: (a) who the deceased was; (b) how the deceased came to his or her death; (c) when the deceased came to his or her death; (d) where the deceased came to his or her death; and (e) by what means the deceased came to his or her death. The purpose of an investigation – either by summary investigation or by Bol – obliged by QR&O 21.46 must, by virtue of QR&O 21.47, determine: (a) the cause and contributing factors of the injury or death; (b) whether the deceased or injured officer or non-commissioned member was on duty at the time of the injury or death; and (c) whether the injury or death was attributable to military service.

another. However, an underlying theme of such criticism is that 'Bol cannot be trusted' because they are 'conducted behind closed doors'.

This would have been an ideal opportunity to dispel such myths.

Those same critics assert that the Bol process is 'broken' and that they take too long to complete. Bol are typically conducted by personnel with little or no prior experience with such mechanisms. The learning curve can be an obstacle to success. Combined with a rote reliance on Bol for all investigations of a certain type, as opposed to a needs-based selection, it is easy to understand why there may be delays. However, where a Bol is given significant resources and support – as the RMCC SSAV appears to have received – it can deliver a thorough report and analysis in a similarly brief period of time.

By selecting a SSAV over a Bol, senior CF decision-makers have reinforced past criticism, even where such criticism lacks compelling merit. If the Bol process is broken, what are legislators and CF policy-makers doing to correct the process? If the issue is one of misperception, rather than defect, what is the CF leadership doing to dispel such misperceptions? The CF has a statute-based mechanism for administrative investigations. This mechanism may be used for inquiry into broad and diverse subjects. It would appear to be tailor-made for the type of inquiry that was purportedly conducted at RMCC. However, this mechanism was rejected in favour of an ad hoc approach to inquiry, without an apparent valid reason for doing so.

If Bol are not 'fit for purpose' they should be abandoned or fixed. If they are fit for purpose, then use them.