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The Old Bailey in London.

FIRST PRINCIPLES AND LAST RESORTS: COMPLICATIONS OF CIVILIAN INFLUENCES ON THE MILITARY JUSTICE SYSTEM

by Mike Madden

Introduction

There are two distinct types of service tribunals in the Canadian military justice system: court martial and summary trial. Each of these tribunals is governed by provisions set forth in the *National Defence Act* (NDA),[1] including regulations regarding who can preside over proceedings, how a member may appeal or request a review of an outcome, and what the various sentencing options are for a given tribunal. For example, in accordance with *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 108.45, a member who considers the findings of a summary trial to be unjust can request a review of the findings by the officer immediately superior in matters of discipline to the officer who originally presided at the summary trial. In contrast, a member who considers the findings of a court martial to be unjust has the right to appeal the decision or the sentence to the Court Martial Appeal Court (CMAC),[2] in much the same way that a civilian who is convicted of a criminal offence has the right to appeal to a higher court. Since the provisions of the *NDA* are different for each type of tribunal in matters of review and appeal, and in many other matters, one can accurately say that there are two separate "paths" to justice within the military system.

The discussion that follows is concerned exclusively with the 'path' to military justice that begins at court martial. This article will examine the complex nature of civilian influences upon certain elements of the military justice system, as manifested in recent decisions by courts martial and the CMAC. An evaluation of the arguments and justifications used in these recent decisions will reveal some of the problems that result from the application of civilian principles of justice in military cases, and will provide the context for a timely reconsideration of the sentencing standards that ought to be applied at courts martial. In other words, I will argue that, contrary to a recent judicial opinion expressed by the CMAC, well-established rules of civilian courts are often inappropriate in military contexts, and unique elements of the military justice system often demand different and/or more severe sentences than those imposed by civilian courts.

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Review of Recent Jurisprudence

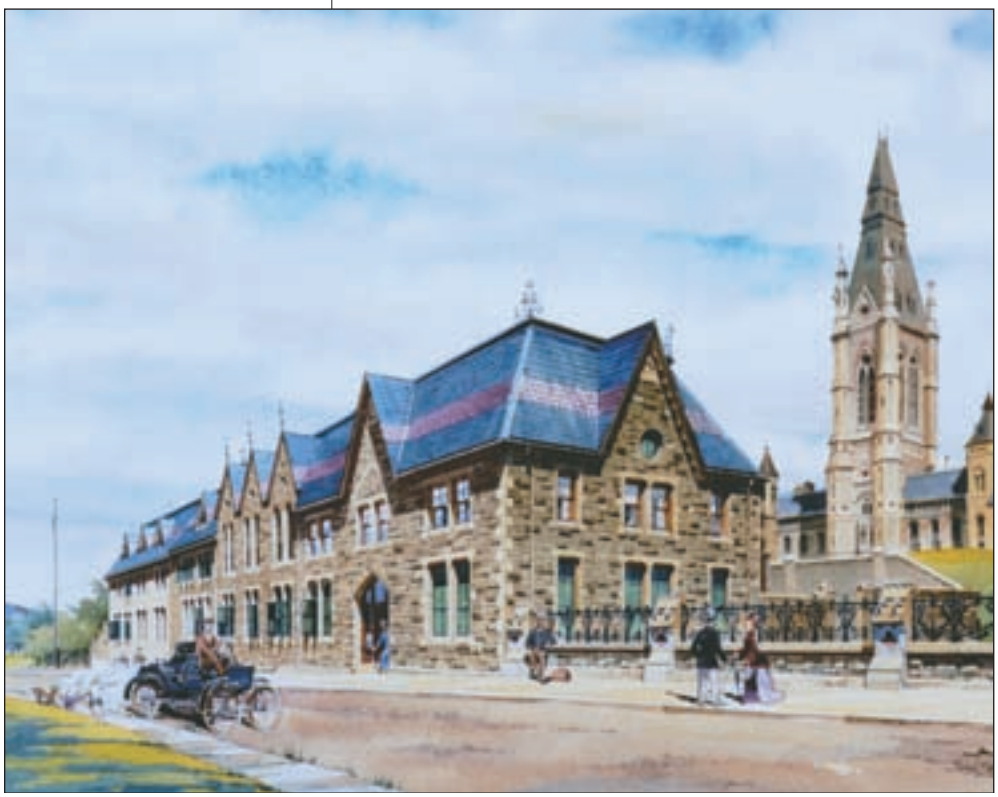
On 3 November 2004, Second Lieutenant (2Lt) Baptista was found guilty by a standing court martial of one charge of forgery and one charge of uttering a forged document, after having already pleaded guilty to two counts of being absent without leave. The presiding military judge found that 2Lt Baptista, after deciding to become involved in the house building industry for personal gain, falsified a price quote from a local building supply retailer, and then used the false quote in an attempt to defraud another retailer of approximately $5500. 2Lt Baptista was sentenced to imprisonment for a period of 30 days, and to dismissal from Her Majesty's Service.[3] Just over one year later, on 26 January 2006, three civilian judges from the CMAC unanimously upheld 2Lt Baptista's appeal that his sentence at court martial was too severe, stating at Paragraph 5 of their decision, "...the military judge committed a serious error of principle," in that, "...imprisonment should only be imposed as a last resort." The CMAC substituted a sentence of a severe reprimand and a fine of $5000.[4] The questions that this article intends to address, primarily through consideration of the above cases, are as follows: What sentencing principles should a military judge apply at court martial, and for what reasons? Were these principles applied erroneously during 2Lt Baptista's court martial? And, perhaps most importantly, what negative consequences might logically follow (or are currently following) from an acceptance of the decision rendered by the CMAC?

"Canada's military legal tradition evolved naturally enough from British origins..."

Brief History of Canadian Courts Martial and the CMAC

Prior to embarking on an analysis of the cases at hand, it would perhaps be useful to review both how the composite military justice system has developed over the years, and how it currently operates. Canada's military legal tradition evolved naturally enough from British origins, as part of a system in which summary trials constituted the majority of service tribunals, with courts martial being convened on an *ad hoc* basis to address more serious matters of discipline.[5] This distribution of tribunals persists into the present, with summary trials accounting for 97 percent (and courts martial only three percent) of all service tribunals in 2005-2006.[6] Prior to 1998, courts martial were presided over by specially qualified military lawyers from within the Office of the Judge Advocate General (JAG), who were not appointed as judges, *per se,* but who filled that role temporarily for the duration of a court martial, during which time they were called "Judge Advocates." Upon completion of a court martial, these officers would resume their normal legal duties as something other than judges.

In a significant 1992 decision, however, the Supreme Court of Canada (SCC) concluded that the right of an accused to a hearing by an independent and impartial tribunal, a right that is protected under the *Canadian Charter of Rights and Freedoms,*[7] was violated by the structure of the court martial system as it existed at that time, since the presiding officers were not guaranteed the requisite security of tenure and financial security that judges need in order to maintain judicial independence. The SCC asserted that since the Judge Advocates were not appointed for any substantial period, and since their salaries and promotions were dependent upon performance evaluations that were conducted by officers responsible to the JAG (the same authority who appointed Judge Advocates to preside at court martial, and whose office was responsible for prosecuting an accused), Judge Advocates could not be considered sufficiently independent of the JAG so as to be able to perform their duties impartially.[8]



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The Supreme Court of Canada, as rendered by artist W.A. Salter.

Presumably in response to this decision by the SCC, amendments were enacted to the *NDA* in 1998 that, among other things, statutorily created an independent Office of the Chief Military Judge (CMJ). The Office of the CMJ now consists of judges who are appointed by a judicial selection committee (made up of civilians and military personnel from predominantly outside the JAG branch), and the judges are now appointed for renewable periods of five years.[9] In this regard, the procedural fairness of Canadian courts martial has increased dramatically since the 1998 *NDA* amendments, with these military tribunals now offering the same constitutional guarantees of independence and impartiality that are expected at civilian courts. As a corollary, the institution of "military judging" has also gained much credibility: officers appointed as judges, by virtue of the selection standards that they have met, their security of tenure, their financial security, and their general insulation from the office of the JAG are now considered as having "...the same powers, rights and privileges as are vested in a [civilian] superior court of criminal jurisdiction."[10]

A civilian court martial appeal authority first emerged in 1950 when a *NDA* amendment authorized the creation of a Court Martial Appeal Board (CMAB). As with the current CMAC, this board could hear appeals regarding either conviction or sentence, or both. Service members also had the opportunity to appeal beyond the CMAB to the SCC, either when leave to do so was granted by the SCC, or by right when there was a dissenting opinion at the CMAB. This type of appeal to the SCC beyond the CMAC still exists, with identical limitations. In 1959, the board was renamed the CMAC, was made a superior court of record, and was thenceforth to be composed exclusively of other superior court judges. In 1991, the CMAC took on its current level of authority when amendments to the *NDA* allowed the court to vary and substitute for the sentences of a court martial instead of merely referring a matter back to the Minister of National Defence when a sentence was found to be too severe.[11] From 1992 until 2006, the CMAC rendered 73 decisions (or approximately five decisions per year) on a variety of matters.

Civilian and Military Sentencing Principles

In order to evaluate whether the CMAC identified and applied relevant sentencing principles in the *Baptista* case, one should first review the general purposes and principles of criminal sentencing, and note any differences in how these concepts apply within military and civilian justice contexts. According to the *Criminal Code of Canada* (CCC), "...the fundamental purpose of sentencing is to contribute ... [to] respect for the law and the maintenance of a just, peaceful and safe society."[12] Any sanctions imposed within this framework should achieve one or more of the following objectives: denouncement of unlawful conduct, deterrence of the offender and others from committing offences, separation of the offender from society (where necessary), rehabilitation of the offender, reparation to the victim or the community, and promotion of a sense of responsibility in the offender.[13] The fundamental *principle* of sentencing is "...[that] a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[14] A secondary sentencing principle is that a sentence should be increased or reduced to account for any aggravating or mitigating factors, such as evidence that the offence was motivated by bias, prejudice, or hate, that it was committed in association with organized crime, or that the offender abused a position of trust or authority in relation to the victim.[15] The Canadian military justice system largely accepts and reiterates these civilian principles of sentencing: in service tribunals "...as a general rule, the proper punishment is the least that will maintain discipline,"[16] and a presiding authority, before rendering a sentence, should consider aggravating or mitigating factors, such as the degrees of provocation and premeditation involved in the commission of an offence.[17] Clearly, there are significant similarities in the principles of military and civilian criminal sentencing.

As a result of the unique nature of the work performed by the Canadian Forces, however, there are also several essential and necessary distinctions to be made between the sentencing principles employed by service tribunals and those employed by civilian courts. For instance, the SCC has affirmed that "...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*"[18] (my emphasis), and the CMAC has added to this idea by defining military discipline as "...instant obedience to lawful orders," where "...the most essential form of discipline in the military environment is self-discipline."[19] It follows from these assertions of higher courts that a military member whose lack of self-discipline leads to the commission of a criminal offence could be sentenced more severely than a civilian could be under otherwise identical circumstances. Similarly, it has been suggested that, when determining a military sentence, "...consideration may also be given to the trust that is placed in members of the CF, particularly by virtue of rank and responsibility."[20] In other words, a military member's rank (if it is high enough) might constitute a kind of *de facto* aggravating circumstance, based upon the level of institutional trust that necessarily accompanies the wearing of that rank. As these examples demonstrate, certain civilian sentencing principles must be adapted in order to preserve good order and discipline within the CF.

Civilian and Military Scales of Punishment

Recognizing the important differences between the needs for "order and peace" in a civilian context, and "order and discipline" in a military context, the respective justice systems within our society have evolved to incorporate not only separate sentencing principles but also distinct scales of punishment that can be awarded as criminal sentences. Under the CCC, imprisonment is considered the most serious sentencing option available, and, as a result of this fact, imprisonment should only be considered as a last resort: "An offender should not be deprived of liberty, if less restrictive sanctions are appropriate."[21] Lesser punishments under the CCC include intermittent imprisonment (for example, a prison sentence served only on weekends), conditional sentences (prison sentences served in the community, with certain restrictions placed on the offender), and other measures such as fines, probation, and community service. In contrast, the *NDA* provides for a more formalized scale of punishments, according to the following hierarchy (from most to least severe): imprisonment for life, imprisonment for two years or more, dismissal with disgrace from Her Majesty's service, imprisonment for less than two years, dismissal from Her Majesty's service, detention, reduction in rank, forfeiture of seniority, severe reprimand, reprimand, fine, and minor punishments.[22] Detention, in the context of the *NDA*, is actually a lesser form of imprisonment, incorporating rigorous rehabilitative training measures into normal prison routines. It is the punishment that most military personnel probably associate with CF Service Prison and Detention Barracks (Edmonton), or "Club Ed" as it is colloquially called. Although "...the punishment of detention was introduced in 1906 at the summary trial level as an alternative to imprisonment, it was intended to be *rehabilitative* in nature, and was to be given to those personnel who were to be retained in the armed forces."[23] This explanation of detention still exists, and is articulated at QR&O 108.20, Note H. As one can see from studying the above sentencing hierarchies, the military and civilian scales of criminal punishments vary significantly in their designs, and implicitly contemplate different values for the sanctity of an individual offender's liberty.

Discussion of CMAC's Decision in *Baptista*

With the aforementioned material as background, it is now possible to consider the CMAC's opinion that the military judge presiding at 2Lt Baptista's court martial committed a serious error of principle when awarding a sentence of imprisonment. This matter merits serious investigation since, as the CMAC has itself asserted, "...highly persuasive reasons must be advanced in order to disturb a sentence imposed in the valid exercise of the convicting court's discretion."[24] As I will endeavour to demonstrate, it can be argued that no such persuasive authority existed in the *Baptista* case, and that unique demands of the military justice system necessitated a sentence as severe as the one originally awarded at court martial.

The principal and only argument provided by the CMAC in its decision to substitute a lesser sentence for 2Lt Baptista was that the military judge "...failed to give effect to the well-established rule that imprisonment should only be imposed as a last resort."[25] The CMAC cited a sentencing principle from the CCC (discussed above), and an earlier decision of the SCC, *R. v. Gladue,*[26] as the sources of this well-established rule. In *R. v. Gladue,* although the SCC unquestionably reaffirms the idea that "...imprisonment should be a penal sanction of last resort,"[27] Canada's highest court also recognizes important, *and uniquely civilian,* explanations for the existence of this general rule:

> Sentencing amendments which came into force in 1996 as the new Part XXIII [of the *CCC*] have changed the range of available penal sanctions in a significant way. The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances.[28]

In other words, it is the availability of sufficiently severe alternatives to a sentence of imprisonment, alternatives that do not exist under the *NDA* (and are therefore unavailable to military judges) – such as conditional sentences and probation, that make it possible to consider imprisonment only as a measure of last resort.

"Under the CCC, imprisonment is considered the most serious sentencing option available, and, as a result of this fact, imprisonment should only be considered as a last resort..."

Furthermore, provisions of the CCC that restrict imprisonment to cases of last resort must be read in conjunction with other sections of the *Code* that provide for a variety of penal sanctions that are not available at courts martial. Although, in a civilian context a conditional sentence would be considered "less restrictive" than imprisonment, it is not clear that

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Aerial view of the Canadian Forces Service Prison and Detention Barracks (CFSPDB) in Edmonton, Alberta.

the CCC defines this to be a less severe sentence. The sentences could be viewed as equally likely to serve the interests of justice, with one simply being less restrictive with respect to individual liberty than the other. In contrast, the *NDA* clearly delineates a hierarchy of available punishments, where no one is considered equivalent to another; in this respect, when a military judge determines that some form of imprisonment is an appropriate sentence, he/she has no discretion to impose an alternate sentence that might be less restrictive. Any other sentence would be either more or less severe than the minimum that is required by the circumstances of the particular case.

It is also important to recall that, based upon the scale of military punishments, imprisonment cannot, in fact, be considered by courts martial as an avenue of last resort since both "dismissal with disgrace from Her Majesty's service" and "dismissal from Her Majesty's service" are defined as more severe punishments than some forms of imprisonment. How can any punishment lower in the hierarchy than the most severe punishment be called a measure of last resort? There is also the problem of ambiguity: Does the CMAC mean to suggest that both *imprisonment and detention* should be measures of last resort, since both are forms of incarceration? Such a claim would be inconsistent with the essentially rehabilitative purpose of detention, and the principle that detention should be awarded only to personnel who are remaining in the CF. I would suggest that the logic of any claim that imprisonment should be awarded only as a last resort, while valid in the context of the sentencing options available under the CCC, is proven flawed by the scale of military punishments statutorily articulated at Section (s.) 139 of the *NDA*.

"How can any punishment lower in the hierarchy than the most severe punishment be called a measure of last resort?"

Apart from the unique sentencing options available at court martial that make imprisonment a valid, and arguably a necessary, sentence in *Baptista,* there are other military considerations that might justify a departure from normal civilian sentencing principles under the circumstances. For instance, Section 718.2 of the CCC encourages consideration by judges of a stronger sentence in cases where an offender abuses a position of trust in relation to a victim, presumably to protect potential victims from criminal acts by those who hold authority over them. In a military context, however, one could argue that, while it is important to protect *individuals* from abuses of trust by their superiors, it is equally (if not more) important to protect the *collective* trust that is placed in the institutional leadership of an armed force by subordinate members of that force. After all, the fundamental military goals of "order and discipline" cannot be effectively preserved if those who attempt to impose the concepts are not trusted by their subordinates. It is likely for these reasons that every commissioned officer in the CF receives a Commission Script that emphasizes the "especial trust and confidence" that is reposed in Her Majesty's officers, and that commands these officers to obey all orders and directions "in pursuance of the trust" reposed in them.

In *Baptista,* one might sympathetically suggest that 2Lt Baptista was not responsible for the management of any personnel or financial assets at the time of his offences, and that he was consequently not *really* in a position of trust. Likewise, it could be argued that 2Lt Baptista attempted to defraud a civilian, not a military organization, and that his position of trust was therefore unrelated to his offences. However, I believe these considerations are irrelevant; although individual officers are periodically posted to positions that are accompanied by greater or lesser levels of personnel or financial responsibility, the fact remains that an officer is trusted to be employed in a variety of roles at any given time, and that this trust does not simply evaporate as a result of the particular circumstances of a given posting. Furthermore, it has been my experience that junior non-commissioned members, and members of all ranks from outside an officer's unit, are not always aware of the full scope of responsibilities that an officer holds in the performance of a particular job. In other words, the general military population might not be aware of the fact that 2Lt Baptista was employed in a position of limited trust when he committed his offences. It is certain, however, that any member of this population will realize that 2Lt Baptista was a commissioned officer. It is fair to assume, then, that members of this population might equate 2Lt Baptista to the numerous others among them who wear equivalent rank, and who do, in fact, hold positions of significant financial and personnel responsibility.

DND photo #DSCO1603

An interior view of the immaculate CFSPDB.

In this respect, any commissioned officer who commits a criminal offence, regardless of the circumstances of his or her present duties, gives cause for subordinate members to doubt the leadership of the CF. The act of committing an offence automatically serves to weaken the "especial trust and confidence" placed in all officers by the Queen. One can reasonably conclude, then, that every officer in the CF occupies an important position of trust, and that each officer therefore has an obligation to conduct him/herself in a manner that strengthens the trust of junior members of the CF in their leaders. If this trust is abused, then a more severe military sentence is necessitated by the aggravating factor:

> In a closely knit and inherently hierarchical organization such as the armed forces ... there is a particular need to mark criminal conduct that is inimical to trust or to discipline with a substantial form of punishment, especially where the offender enjoys NCM or officer rank, because the question of an exemplary or deterrent sentence demands consideration.[29]

In light of this argument, one is inclined to agree with the sentiment expressed (and ultimately the sentence imposed) by the presiding judge at 2Lt Baptista's court martial: "...there is no room for a double standard for officers in the Canadian Forces between their professional dealings in the course of their military duty on the one hand and their private dealings as members of Canadian society on the other."[30] CF officers are trusted in a way that is unlike the trust placed in ordinary members of Canadian society, so it would be a mistake to apply identical sentencing principles to these two clearly distinct groups of people.

Although there were other aggravating factors considered by the presiding judge at 2Lt Baptista's court martial, such as 2Lt Baptista's previous conviction for fraud, it is accepted that these aggravating factors have no uniquely military context, and that any evaluation of the military judge's treatment of these factors by the CMAC was performed by the higher court in an appropriately informed manner. However, it might interest readers, or help them to form their own judgments about the level of justice achieved in *Baptista,* to know that 2Lt Baptista was previously sentenced to a severe reprimand and a fine of $2500 after being found guilty at court martial of a fraudulent act that resulted in a loss of public funds, and that he was investigated and charged with this earlier fraud *before he committed the subsequent fraud.*[31] In other words, "...it is apparent that being investigated and charged for the earlier offence was not taken by the offender as a caution that he should change his ways."[32] Can it truly be said under these circumstances that the military judge erred by imposing a sentence at the subsequent court martial that was too severe?

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Veritas (Truth), by sculptor Walter S. Allward.

Implications of the CMAC's Decision

According to the doctrines of common law adhered to in Canada, lower courts, while often simply *persuaded* by their previous decisions or decisions made by courts outside their jurisdictions, are legally *bound* to follow the precedents set by higher courts within their jurisdiction. Practically speaking, this means that the deciding principle articulated by the CMAC in the *Baptista* case (that imprisonment should be awarded only as a measure of last resort) must be followed by military judges at all subsequent courts martial. This concept of precedent is necessary in the common law in order to ensure that all courts within a given jurisdiction fairly and predictably apply the law. When a higher court may have misapprehended the unique circumstances of a case, however, the precedent set by that court could create ongoing problems for lower courts, as the following factual situation will illustrate.

On 10 January 2007, Captain (Capt) Hynes pleaded guilty to fraud at a standing court martial after having defrauded a local Boys and Girls Club of approximately $2500. The prosecution recommended a sentence of a severe reprimand and a fine of between $2450 and $3450. The defence indicated that a severe reprimand and a fine of $3450 would be appropriate. The military judge then imposed a sentence of a severe reprimand and a fine of $3450.[33] However, the military judge expressed an unusual sentiment of doubt as to the appropriateness of his sentence: "...even though the court considers lenient the common recommendation made by both counsel to sentence you to the punishment of a severe reprimand and a fine to the amount of $3450, it is considered that it would not be contrary to the public interest and would not bring the administration of justice into disrepute,"[34] and, "...the court wants to be clear that in deciding to recommend a severe reprimand and a fine, the prosecution limited in some ways the possibility for this court to consider any more serious sentence."[35]

Let us now consider how this sentence came to pass. In determining its sentencing recommendation to the court, the prosecution likely followed common law traditions by looking to past sentences imposed by courts for similar offences. Although the prosecution might have felt that a more severe sentence was warranted under the circumstances of the case, it would have been unwise to make a recommendation that was grossly inconsistent with precedents, since such a recommendation could promptly have been dismissed by the court as unreasonable. *Baptista* provides a very relevant precedent for *Hynes* in that both cases involve fraud by junior officer offenders. Moreover, *Baptista* was the most temporally proximate case of such a nature, in that it was decided by the CMAC only a year earlier. Thus, the prosecution presumably concluded that the most appropriate sentence to recommend for Capt Hynes was one similar to that awarded by the CMAC in *Baptista,* taking into account the lack of any other simultaneous charges or previous convictions in *Hynes.*

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Justitia (Justice), by Walter S. Allward.

The military judge might also have wanted to award a more severe sentence (as his comments seem to indicate), but he, too, was forced to consider the deciding principle of the CMAC in *Baptista,*[36] and was therefore denied the option of awarding a sentence of detention or imprisonment. Although judges ought not to concern themselves with the manner in which higher courts treat their trial decisions, a judge must also feel some pressure, whether acknowledged or not, to decide a case in a way that will not result in the decision being overturned upon appeal. At the very least, the military judge would presumably have considered that he needed the support of the prosecution if he wished to award a more severe sentence than that imposed by the CMAC in *Baptista.* Thus, both

the military prosecutor and the military judge in *Hynes* were "bound" by a decision that was made by civilian judges, who, as I have argued above, might have incorrectly applied civilian sentencing principles to the military case that was before them. To make matters worse, the conundrum faced by the prosecution and the judge in *Hynes* is one that could easily recur, and could keep recurring until a higher court creates a new precedent for courts martial to follow. The existence of this conundrum alone, however, does not constitute a problem. Legal officers face complex problems and decisions almost every day in the performance of their duties. The real issue is whether the *Baptista* precedent, and the conundrum it creates for judges, undermines the proper and effective functioning of the military justice system.

"The concept of precedent is necessary in the common law in order to ensure that all courts within a given jurisdiction fairly and predictably apply the law."

As I see it, the remarks expressed by the military judge in *Hynes* present two problems, both of which are attributable to the CMAC's decision in *Baptista*. First, a judge must feel free to award the most appropriate sentence in any case, and should not feel bound (unless by statute) to impose a sentence that is either "severe" or "lenient" relative to the offence committed. To restrict judges in the manner described above is to accept that a trial court might be forced to impose an inappropriate, or even a wrong sentence, and this proposition simply runs contrary to all intrinsic and collective notions of justice that we, as a society, hold as true. Second, it is widely accepted that courts must not only ensure that justice is done *but also that it is seen to be done.* Statements of hesitancy, such as the one expressed by the military judge in *Hynes,* cause one to wonder whether justice was actually done in that case, and whether the correct punishment was awarded. If the institution of our judiciary is to continue to function effectively, not only must a judge be satisfied that he has awarded the most appropriate sentence, but so, too, must the general population be satisfied. In other words, if the *Baptista* precedent forces judges, either directly or indirectly, through the recommendations put to them by prosecutors, *to award inappropriate sentences that they cannot convincingly stand behind,* then the precedent is subverting the effective functioning of our military legal system.

"Prosecutors must continue to put forward fair sentencing recommendations at courts martial, including recommendations for detention and imprisonment where appropriate..."

Conclusion

If the above arguments hold true, then *Baptista* was incorrectly decided by the CMAC when that court failed to apply the correct sentencing principles to its review of the military judge's decision. The consequences of this decision have already started to create a harmful cognitive dissonance within some of the different entities involved in the administration of military justice, as seen in *Hynes*. I would suggest, however, that these entities hold the power to effect change and to eliminate the destructive feelings of dissonance that they are currently experiencing. Prosecutors must continue to put forward fair sentencing recommendations at courts martial, including recommendations for detention and imprisonment where appropriate, either by distinguishing their cases from *Baptista* or by citing this and hopefully ensuing scholarly legal studies that have exposed some of the flaws in the *Baptista* precedent. The office of the Director of Military Prosecutions has the further option of appealing decisions of the CMAC to the SCC, at which level precedents set by the CMAC may be overturned. The SCC has acknowledged the unique nature of Canada's military justice system in the past, and it may simply be that the time has come for that court to re-evaluate and/or reassert its position with specific reference to sentences of imprisonment in military cases. Likewise, military judges must not feel bound by recommendations of the prosecution when these are clearly "lenient" relative to the offence(s) in front of the court. The CMAC is not infallible, but neither the CMAC nor SCC will have an opportunity to revisit the established position on imprisonment in military cases unless military judges make decisions they can convincingly stand behind – decisions that recognize and entrench the important distinctions between military and civilian sentencing principles. Although not uncontested, the way ahead in this area of military justice is clear.

Supreme Court of Canada Collection

The Supreme Court of Canada in Ottawa.

NOTES

1. NDA, R.S.C. 1985, c. N-5.
2. NDA, s. 230.
3. *R .v. Second Lieutenant D. Baptista,* 2004 CM 23.
4. *Second Lieutenant D. Baptista and Her Majesty the Queen,* 2006 CMAC 1.
5. David McNairn, "Does Canada Need a Permanent Military Court?" in *National Journal of Constitutional Law,* Vol. 06, No. 2, April 2006, p. 207.
6. *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces, 2005-2006*, at Annex D.
7. *Canadian Charter of Rights and Freedoms,* s. 11(d)
8. *R. v. Genereux,* [1992] 1 S.C.R. 259.
9. NDA, s. 165.21-165.27.
10. *Ibid.,* s. 179.
11. All history and statistics regarding the CMAC are taken from "Court Martial Appeal Court of Canada" *Court Martial Appeal Court of Canada Website,* at <http://www.cmac-cacm.ca/index_e.html>, accessed 5 October 2007.
12. CCC, R.S.C. 1985, c. C-46, s. 718.
13. *Ibid.*
14. *Ibid.,* s. 718.1.
15. *Ibid.,* s. 718.2.
16. *QR&O* 108.20, Note G.
17. *Ibid.,* Note F.
18. *R .v. Genereux,* at Para. 61.
19. *R. v. Stewart* (20 October 1993), CMAC-348, online, CMAC at <http://www.cmac-cacm.ca/decisions/CMAC-348_e.shtml>.
20. *Military Justice at the Summary Trial Level v. 2.0 9/01,* at p. 14-3.
21. CCC, s. 718.2.
22. NDA, s. 139.
23. *Military Justice at the Summary Trial Level v. 2.0 9/01,* at p. 14-3.
24. *R. v. Stewart.*
25. *Second Lieutenant D. Baptista and Her Majesty the Queen,* 2006 CMAC 1.
26. *R.v. Gladue,* [1999] 1 S.C.R. 688.
27. *Ibid.,* at Para. 36.
28. *Ibid.,* at Para. 40.
29. Colonel (ret'd) Michel W. Drapeau, "Canadian Military Law Sentencing Under the *National Defence Act*: Perspectives and Musings of a Former Soldier" in *The Canadian Bar Review,* Vol. 82, No. 2, August 2003, p. 452.
30. *R .v. Second Lieutenant D. Baptista,* 2004 CM 23, at Para. 20.
31. *Ibid.,* at Para. 21.
32. *Ibid.,* at Para. 22.
33. *R. v. Captain K.W. Hynes,* 2007 CM 3001.
34. *Ibid.,* at Para. 12.
35. *Ibid.,* at Para. 13.
36. *Ibid.,* at Para. 11.