



National Defence

Défense nationale

National Defence Headquarters
Ottawa, Ontario
K1A 0K2

Our file: AI-2017-00058

JUN 26 2017

Mr. François Lareau
55-890 Cahill Drive West
Ottawa, Ontario K1V 9A4


Dear Mr. Lareau,

I refer to your request for records previously released under files: A-2016-00215, A-2014-00325.

Enclosed is an electronic copy of the information requested. I would like to thank you for your interest in the Department of National Defence and the Canadian Forces.

Should you require further assistance regarding your request, please contact Steve Melbourne at 613-992-6852, or use our toll free number 1-888-272-8207.

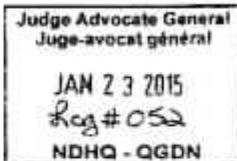
Yours truly,


for Kimberly Empey
Director
Access to Information and Privacy

Enclosure: CD



THE ALBANY CLUB



12 January 2015

Major General Blaise Cathcart
 Judge Advocate General
 National Defence Headquarters
 101 Colonel By Drive
 Ottawa, Ontario
 K1A 0ZK

Dear Major General Cathcart,

Friday 24 April 2015 is the 10th Annual John Weir Foote, VC Memorial Military Luncheon at the Albany Club of Toronto. Major the Reverend Foote was the Padre of the RHLI and later served as a Minister in the Ontario Legislature.

The Foote Luncheon Committee would be honoured if you would address The Club Membership, on a topic of your choosing. We suggest your address be about 25 minutes plus time for a short question and answer session.

The Albany Club

ADDRESS
 91 King Street East
 Toronto, ON
 M5C 1G3
 TELEPHONE
 416-364-5471
 FACSIMILE
 416-364-3075
 WEBSITE
www.albanyclub.ca

If you have any additional questions please contact me.

Your Truly,

John C Walker
 Chair, Foote Luncheon Committee
 Albany Club of Toronto

Judge Advocate General



Juge-avocat général

National Defence
Headquarters
Constitution Building
305 Rideau Street
Ottawa, Ontario
K1A 0K2

Quartier général de la
Défense nationale
Edifice Constitution
305, rue Rideau
Ottawa (Ontario)
K1A 0K2

03 February 2015

Mr. John C. Walker
Chair, Foote luncheon Committee
The Albany Club
91 King Street East
Toronto, ON
M5C 1G3

Dear Mr. Walker:

Thank you for your letter of 12 January 2015 inviting me to the 10th Annual John Weir Foot VC Memorial Military Luncheon at the Albany Club on 24 April 2015.

I am very pleased to accept your invitation to address The Club Membership on that occasion.

If someone from your office could contact my Special Assistant (SA), Lieutenant-Colonel David Antonyshyn to discuss timings and topics that would be most helpful. My SA can be reached by email David.Antonyshyn@forces.gc.ca or by telephone at 613-996-8998.

Once again, please accept my gratitude for the invitation and I look forward to taking part in this event.

Yours truly,

Blaise Cathcart, Q.C.
Major-General

Canada

JUDGE ADVOCATE GENERAL



JUGE-AVOCAT GÉNÉRAL

ANNUAL JOHN WEIR FOOTE, VC
MEMORIAL MILITARY LUNCHEON

24 APRIL 2015

THE ALBANY CLUB
91 KING STREET EAST
TORONTO, ON

Claim Paid 11 May 2015 / SA # 5301411052

n National Défense
Defence nationale



Speaking Notes for

Notes d'allocution de

MGen B.B. Cathcart

Judge Advocate General

Juge-avocat général

ALBANY CLUB

Toronto, Ontario

24 April 2015

Word Count – 4351 (at 130 words per minute) = 33 minutes

Canada

Contemporary Challenges in Canadian Military Law

**JAG Remarks to the
Albany Club
Toronto Ontario
24 April 2015**

Introduction

[Standard Salutations]

It's an honour to be here today, to join a long line of leaders both from inside and outside of the Canadian Armed Forces who have addressed this Club.

My topic for this event is such a matter of import: contemporary challenges in Canadian military law.

To set the stage, I would like to take a few minutes to speak about my role as Judge Advocate General, JAG, and about the Office of the JAG – who we are, how we are structured and the areas of law that we practice.

As JAG, I – by virtue of the *National Defence Act* – act as legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence and the Canadian Armed Forces in matters relating to military law. That is a very broad responsibility on two different axes. First, although the Governor General and the Minister of National Defence (and the others whom I advise at the highest levels of government) make up a small number, the Department of National Defence encompasses 24,000 civilian professionals and employees and the Canadian Armed Forces (which is a distinct organization) has close to 68,000 regular force members and another 27,000 in the part-time reserve force. Second, the scope of military law – which is the law that governs the [armed forces] in peace and during armed conflict, at home and abroad – is very broad.

Military law encompasses not just the law applicable to military operations (and by that I mean not just the use of weapons but also more mundane but no less critical items such as contracting and claims) but also the law related to the administration of military members (from recruitment to

retirement and everything in between, including pay and benefits) and Canada's separate system of military justice – a constitutionally recognized system whose purpose is to ensure the maintenance of good order, discipline (and, therefore, the effectiveness) of the Canadian Armed Forces wherever they are.

Crucially, my role in respect of military justice is not limited to that of legal advisor. I am also – again by statute – the superintendent of the administration of military justice in the Canadian Armed Forces. Those responsibilities were described by the late Chief Justice Lamer as being “similar to those of the Attorney General as historically performed by the JAG under English common law.”

To assist me in carrying out my responsibilities, I command the Office of the JAG, which comprises approximately 140 regular force – that is to say, full time – legal officers, 50 reserve force – or part time – members and about 70 civilian support staff. At any given time, there are also approximately 30 other legal officers who are either undergoing training or posted to other

organizations such as the Canadian Forces Military Law Centre in Kingston, the Legal Bureau of the Department of Foreign Affairs, Trade and Development and the Privy Council Office. The Office of the JAG is organized into four functional divisions each headed by a Deputy JAG. Three of those divisions deal with the provision of advice in what we call the “pillars” of military law: military administrative law, military justice and operational law. The officers within these divisions are based in Ottawa and provide advice to senior leaders, key officials and their staffs at National Defence Headquarters. The Deputy JAG for Military Justice also assists me in my superintendence role while the Deputy JAG for operational law also provides legal advice to the Commander of Canadian Joint Operations Command and to the deployed task forces he commands – this includes by deploying legal officers to provide legal advice to those commanders.

Also based in Ottawa is the Deputy JAG for Regional Services. Her team is made up of legal officers and support staff located in headquarters, on bases and in armouries across Canada, in the

United States and in Europe. These legal officers are our “jacks of all trades,” advising commanders and staffs across the whole spectrum of military law.

Finally, and also as part of my superintendence function, I provide general supervision to the Director of Military Prosecutions and the Director of Defence Counsel Services who are responsible to prosecute and defend, respectively, at courts martial. Each of these officers is appointed by the Minister for a fixed term and has the legislative, regulatory and administrative protections required to exercise their duties and functions in an independent manner. They are assisted by CAF legal officers who are posted into and out of the organizations as part of their normal career progression.

A small group of lawyers, a large client organization with a huge geographic footprint and a broad scope of practice. We call ourselves low density and high demand – and as you might imagine, then, increased operational tempo for the Canadian Armed Forces as a whole means increased legal tempo for our

lawyers. At one point during early 2011, we had 17 legal officers deployed at the same time (about 30 different individuals during that year taking into account rotations)– supporting combat operations in Afghanistan and in the vicinity of Libya but also mentoring legal officers in Afghanistan and the Democratic Republic of Congo in the development of their own military justice systems. In 2014-2015, we have had 5 deployed legal officer positions: 1 in Bahrain in support to Operations FOUNDATION and ARTEMIS; 1 in Qatar and 2 in Kuwait in support to Operation IMPACT; and 1 in the Mediterranean and the Black Sea on board of Her Majesty's Canadian Ships.

Allow me, then to turn to my three issues, starting with some thoughts on what can only be characterized as a series of attacks on the legitimacy of Canada's separate and constitutionally-recognized system of military justice – a system that, in my view, is essential to the maintenance of discipline, and therefore essential to the effectiveness of the Canadian Armed Forces.

Military Justice

The past twenty-five years have seen significant changes in the field of military justice in Canada and other likeminded countries, as we all attempt to balance the requirements to maintain discipline and operational effectiveness while ensuring that victims, witnesses, and those who are accused of offences are all accorded appropriate procedural protections.

Canada, like many of our Commonwealth allies, traces the roots of its military justice system back to British origins. Following confederation, the British model continued to be followed up until 1950 when the Code of Service Discipline was enacted within the *National Defence Act*.

While the British roots are still evident, there have been major reforms to the military justice system since 1950, and particularly since the enactment of the *Canadian Charter of Rights and Freedoms* in 1982. Some key reform milestones include the *Généreux* decision in the Supreme Court of Canada

in 1992, the significant legislative changes made to the *National Defence Act* in 1998 with Bill C-25, independent reviews of the military justice system over the last twenty years, and Bill C-15's more recent changes to the system in 2013. I will say a few words about each of these milestones, and what they mean for military justice in Canada.

In *Généreux*, the Supreme Court acknowledged that the primary purpose of the military justice system is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The court also noted that the Code of Service Discipline served a second, public function, by punishing specific conduct that threatens public order and welfare. These two overarching statements of purpose have helped to guide the development of the military justice system over the last two decades, and now, as a result of Bill C-15, they will be codified in the *National Defence Act* as the fundamental purposes of sentencing within the system.

***Généreux* was followed by the tragic events in Somalia leading to the Somalia Inquiry that examined, among other things, the military justice system. It was during this period in the 1990's that the military justice system was under great scrutiny.**

A key actor in the modernization of the Canadian military justice system during this period was the late retired Chief Justice of Canada, Brian Dickson, who was asked by the government in 1997 to chair the Special Advisory Group on Military Justice. Chief Justice Dickson's recommendations led to many changes to Canada's military justice system in 1998 with Bill C-25. CAF

Following the coming-into-force of Bill C-25, there have been two independent reviews of the military justice system, one in 2003 by the late Chief Justice of Canada, Antonio Lamer and the other in 2011 by the retired Chief Justice of the Ontario Superior Court of Justice, Patrick LeSage. Both of these eminent jurists made a number of recommendations with a view to enhance the military justice system.

All of Chief Justices Dickson, Lamer and LeSage supported the existence of the Canadian military justice system as a separate and unique system of justice necessary to maintain the discipline of the Canadian Armed Forces, and compliant with the *Charter*.

There has been some recent commentary suggesting that the military justice system – in particular the summary trial system – has not developed in a manner that is consistent with other countries – some of whose legal systems have grown from the same British roots, but many of whose did not. Pointing to changes amongst our allies is informative, but responsible military justice reform requires a thorough comparative analysis that includes understanding the legal rationale behind the developments – including the legal traditions and constitutional structures of the states in question.

As a veteran Army officer who served with distinction in Europe during World War II prior to becoming a judge, Chief Justice Dickson fully understood both the Canadian legal and military

contexts when he asserted in 1997 that “the commanding officer is at the heart of the entire system of discipline.” This statement remains true today, and Canadian law continues to recognize the vital role that commanders play in maintaining discipline, by permitting them to preside at summary trials dealing with minor service misconduct.

However, the military justice system is like any justice system: it can often benefit from refinement and improvements. Thus, in response to the Lamer report recommendations, the government attempted – unsuccessfully on 3 occasions – in 2006, 2008 and 2010 - to advance legislation making significant amendments to the NDA. These reforms were subsequently enacted in 2013 through Bill C-15.

The Bill C-15 reforms, among other things, reinforced the independence of military judges, added important new sentencing options into the Code of Service Discipline, and solidified the function of the Canadian Armed Forces Provost

Marshal – the senior military police officer within the Canadian Armed Forces.

In addition to the reforms that have already taken place, it is also worth noting that the Minister of Justice, when speaking in Parliament last spring about the *Canadian Victims Bill of Rights*, suggested that further reforms to the military justice system for the benefit and protection of victims of offences are being contemplated. Should such changes come to pass, they would further represent a positive development and would continue to strengthen the overall fairness and effectiveness of the military justice system.

On this point, I will conclude my remarks on military justice by echoing the words of former Chief Justice Lamer, who said in 2003, "*Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence.*"

These words remain true today, and through a continuous process of proactive military justice oversight, responsible development, and positive change, they will remain true into the indefinite future.

Military Administrative Law

As I suggested in my introduction, the practice of Military Administrative Law touches all members of the CAF, and as a result is often at play in many circumstances underlying stories receiving media coverage. Let me say a few words about Boards of Inquiry (BOIs).

CAF Boards of Inquiry are convened under s. 45 of the *National Defence Act* when the Minister or CAF chain of command needs to be informed on CAF matters [those “*connected with the government, discipline, administration or functions of the Canadian Armed Forces or affecting any officer or non-commissioned member*”].

While CAF Boards of Inquiry share some characteristics with a public inquiry – for example, they both have the authority to obtain evidence by way of sworn testimony – a CAF BOI differs from a public inquiry in a very significant respect.

In evident contrast to a public inquiry, whose purpose is to examine matters of public interest as determined by a coroner or government, a CAF Board of Inquiry is an internal inquiry. In fact, as the Federal Court confirmed, when the CBC sought access to the proceedings of the HMCS Chicoutimi Board, “It is an internal inquiry which reports to [its Convening Authority] on what happened and what can be done to prevent its reoccurrence.” It is, “in essence, a private investigation”.

Simply put, a Board's purpose is to inform the chain of command about a matter in order to take any steps necessary to deal with it. CAF Boards may not make findings of criminal or civil liability – in fact, should the Board receive evidence that it reasonably believes relates to an allegation of a criminal act or a

breach of the Code of Service Discipline, it must adjourn, and the matter must be referred to the Convening Authority who would then typically initiate a separate disciplinary investigation.

The matters which can be investigated by a Board include not only those incidents most likely to result in public attention, such as the death of or serious injury to a CAF member, but matters such as damage to public or non-public property, significant losses of public funds, loss or compromise of classified material, and security incidents.

As I already mentioned, in investigating such matters, the key concern for the CAF is to clarify what happened and identify any lessons that can be learned from those events. In order to ensure that a Board's findings represent something more than its own opinion or speculation, they must be based upon evidence gathered by the Board. Those findings and recommendations are then presented to the commander who convened the Board and anyone else with responsibility for implementing recommended changes.

Evidently, where the Board is examining the death of a CAF member, family members may also be keenly interested in the results of the Board's work.

Families are sometimes surprised by the amount of time required for a Board to carry out its work – particularly if a separate disciplinary investigation is also being conducted – and for its findings and recommendations to be reviewed and approved by the chain of command.

However, this deliberate pace is due to several factors.

First, suitable Board members must be chosen. In order to ensure their objectivity, they must not have been directly involved in the incident [may not be appointed as a member “if a real or perceived conflict of interest exists or may arise”].

However, the requirement to avoid conflict of interest does not preclude the appointment of members who have general knowledge or experience of the area being investigated.

Second, the planning and preparation phase requires Board members to obtain a general understanding of what occurred by gathering documents and conducting informal interviews. This allows them to identify those witnesses from whom sworn testimony will be sought. Once that testimony has been obtained, the Board analyzes all of the evidence, finalizes its findings and recommendations, then submits its report to the Convening Authority.

Third, the Convening Authority must review the report, in particular the Board's findings and recommendations, in order to confirm that:

- the investigation was performed in accordance with applicable regulations and the Board's convening order;**
- the Board provided all of the required findings; and**
- those findings are strictly based on the evidence gathered, and not simply upon the opinions of its members.**

The Convening Authority is aided in its review by legal officers from the Office of the JAG. The Convening Authority then signals its concurrence or non-concurrence with the findings and indicates whether or not the related recommendations will be implemented.

Operational Law

I now turn to Operational Law.

The CAF is currently engaged in a variety of operations and activities nationally, continentally and internationally.

Nationally, we are regularly asked to support other departments in furtherance of their respective mandates in situations where military expertise or assets are necessary and that operational and legal requirements are met. This can take the form of assistance to provincial agencies in response to a natural disaster, support to the RCMP or other law enforcement agencies in the discharge of their duties or the provision of maritime surveillance to assist the Department of Fisheries and

Oceans in fulfilling its mandate. Continentally, we contribute to maintain a constant and rigorous awareness of the air and maritime domains with our US ally within NORAD. Internationally the CAF is active and engaged in many tasks in furtherance of Canada's international objectives and interests in a constantly evolving global security environment. Such is the context in which the OJAG provides legal services in Canada and in any location where the CAF conducts operations. It requires my officers to master complex and evolving areas of the law while sharing the military ethos common to all those engaged in the profession of arms.

I have selected a few topics that will offer a sense of the different aspects of the operational legal practice within the CAF. The first will be an overview of the main international law issues associated with Canada's action within the coalition fighting ISIS in Iraq and Syria. The second will address the legal challenges associated with new technologies. The third will describe the ways in which the Office of the JAG legally supports the

Government of Canada and delivers legal services in deployed environments.

2. CAMPAIGN AGAINST ISIS

As all of you will be aware, Canada is engaged in an armed conflict against ISIS in Iraq and Syria, a group that is recognized in Canada and internationally as a terrorist entity and a non-state actor.

Canada's participation in the military effort against ISIS includes air combat operations, air resupply and reconnaissance, advising and assisting Iraqi forces on the ground. CAF members are not participating in ground combat operations where the use of force or threatened use of force on the ground is essential to accomplish the mission. However, CAF personnel may be required to use force in self-defence.

On 30 March 2015, Parliament voted in support of the Government's motion to extend and expand Canada's military mission against ISIS targets in Syrian territory. The following

day, Canada informed the UN Security Council that it would be taking these steps.

Unlike the legal basis for CAF operations in Iraq, which as mentioned previously were based on the consent of the Iraqi government, the legal basis for Canadian Forces operations against ISIS in Syria is based on the right of individual and collective self-defence, as recognized by article 51 of the Charter of the United Nations. As noted in Canada's letter to the United Nations Security Council:

"ISIL also continues to pose a threat not only to Iraq, but also to Canada and Canadians, as well as to other countries in the region. In accordance with the inherent rights of individual collective self-defence reflected in Article 51 of the United Nations Charter, States must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory." The doctrine of "unwilling or unable" has its detractors. It should be noted, however, that when the United States relied upon this premise to strike ISIS targets in Syria, the

UN Secretary General Ban Ki-Moon made a statement acknowledging that the US airstrikes “took place in areas no longer under the effective control of [the Syrian] Government.” In a 25 November 2014 letter to the Security Council, the UK has also asserted the right to exercise collective self-defence of Iraq against targets in Syria.

As with all of our military activities, CAF operations in Iraq and Syria are conducted in accordance with applicable Canadian and international law, including the Law of Armed Conflict. The measures taken in Canada’s exercise of the multi-faceted principles of self-defence against ISIS in Syria will be limited to what is necessary and proportionate. They are aimed at further degrading ISIS’s ability to carry out attacks, and are not aimed at Syria or the Syrian people. Nor do they entail support for the Syrian regime.

3. LEGAL ISSUES ASSOCIATED WITH NEW TECHNOLOGIES

International Law and International Humanitarian Law, in particular, are not static undertakings. Perpetually the law will be forced to adapt to changing environments, practices and

technologies. Invariably, there will legal challenges associated with new technologies by talking about the cyber environment and the Lethal Autonomous Weapons Systems.

DND/CAF has begun the process of strengthening its cyber capacity in the last decade. One of the core documents for the CAF/DND is Canada's Cyber Strategy in which the GoC reiterated its commitment to secure Canada's cyber systems, and noted that DND and the CAF, like the militaries of our closest allies, are examining how Canada can best respond to future cyber-attacks. The Strategy states that DND /CAF "will strengthen their capacity to defend their own networks, will work with other Government departments to identify threats and possible responses and will continue to exchange information about cyber best practices with allied militaries. DND/CAF will also work with allies to develop the policy and legal framework for military aspects of cyber security, complementing international outreach efforts of the Department of Foreign Affairs, Trade and Development."

4. OJAG PROJECTION OF LEGAL INFLUENCE & LEGAL SERVICES

All CAF military operations require a solid legal basis in Canadian law. International military operations must also rely on a solid international legal framework. International law is composed of a number of treaties, conventions and protocols, which are the result of negotiations amongst states. It is also composed of customary rules, which are observed through state practice and the belief of states that they are bound by those rules.

The sum of those treaties, customs and practices form a complex and constantly evolving legal landscape, which can impact on the conduct of military operations in many direct and indirect ways. The Office of the JAG is actively engaged in several meeting of experts, specialized conferences, working groups and senior level deliberations to shape this legal landscape in a manner that is consistent with Canadian legal tradition, goals and interests.

The negotiation of Law or Armed Conflict treaties on behalf of the Government of Canada requires specialized skills that are found within the Office of the JAG. In one recent instance, we have dispatched legal officers on Canadian delegations comprising officials from the Department of Foreign Affairs, Trade and Development to negotiate the text of what is now the Convention on Cluster Munitions.

I will now turn my focus closer to the action by describing the Office of the JAG's contribution during deployed military operations.

Operational law has gained in importance over the past two decades. Complex, multi-faceted operations with complicated legal issues generated the need to provide operational law advice and to deploy an increasing number of legal officers. Since the First Gulf War, legal advisors were part of the contingents deployed to Somalia, Rwanda, the Balkans, Haiti, East Timor and Eritrea. As a result, deployed legal officers between 1991 and 2001 pioneered the practice of operational law in expeditionary contexts. Since 2002, legal advisors have been

committed in Afghanistan at the tactical, operational and strategic levels, both in national and multi-national headquarters and in conventional and non-conventional environments. The Office of the JAG deployment contributions were not just limited to Afghanistan, however, as legal officers were deployed in support of missions in Haiti, Libya, Congo, Sudan and on ships conducting counter terrorism and anti-piracy operations in Middle Eastern waters. From January 2009 to July 2011, an average of 12 legal officers were deployed at any given time culminating with a peak deployment of 17. Therefore, at any given time, 36 legal officers on average, from a cadre of 160 Regular Force personnel were either deployed, preparing to deploy or had just returned from deployment.

While this contribution has been reduced in recent years, the more recent the campaign against ISIS has required an increased support of deployed legal advisors. Three are currently deployed with our Air Combat mission against ISIS .

They are faced with complex legal challenges requiring a complete understanding of the applicable rules of international law.

For example, they advise on the legality of the means and methods of warfare, the persons that can be targeted, the property that can be destroyed and on detainee issues. Review and contribute to military orders and other directives, including the Rules of Engagement, the targeting directives, and the soldiers' cards.

We also deploy legal officers at sea. We currently have one LEGAD embarked on HMCS Fredericton, which sails in the Eastern Mediterranean as part of the military activities undertaken by CAF to support NATO in the region. She advises on the law of the sea, boarding, verification visits, counter-terrorism and coalition issues.

Conclusion

That, then, is a brief overview of three of the big issues facing me and my officers. None of them lends itself to an easy solution; each of them – like so many others – requires the dedicated efforts of my small team of lawyers. I can assure you that each of us is committed to contributing to a disciplined CAF and to its mission success in a manner that reflects Canadian values and the rule of law by providing legal services that are timely, independent operationally-focussed and solution-oriented.

Thank you very much for your invitation and for your attention.