

A Symphony of Battle: Trial Advocacy with Canada's Special Forces ~MAJ David Hodson ~

Conducting trials involving members of Canada's Special Operations Force [hereinafter SOF] community requires that the prosecution and defence address multiple considerations to not only facilitate a fair and impartial trial, but, concurrently, to protect Canadian military interests. This reality of military advocacy was never more apparent than during the trial of R. v. Cadieux.

R. v. Cadieux was a SOF negligence trial arising from a live-fire night exercise in preparation for rapid deployment to Iraq. All the SOF operators on the range were wearing Night Vision Goggles [NVGs], the details of which are classified. The weather was described in testimony as "horrible" with the rain, at times, "coming in sideways. Unfortunately, one of the operators, as SOF soldiers are called, was shot in the back. Over a year later, a negligence charge was laid - s. 127 of the National Defence Act.

With significant cooperation between the prosecutors, MAJ Chavi Walsh and MAJ Dominic Martin, and defence counsel, MAJ David Hodson, the advocates were required to address publication bans designed to protect active duty SOF members, in-camera proceedings to address testimony involving classified material, the security of SECRET documents and disclosure, and confirmation of security clearances for randomly selected jury members. As well, although MAJ Walsh and MAJ Hodson are veterans of the war in Afghanistan, all counsel had to be familiar with assault rifles and targeting lasers, and how these items are used within the confines of the SOF training, safety and deployment realities. More importantly, this familiarization had to be presented through evidence to the jury.

During the Court Martial of R. Cadieux, legal history was made when the prosecution brought an application for a View. Considering that the jury had to understand and appreciate what it is like to wear and operate with NVGs at night, whether simulating or in combat, MAJ Martin, with the consent of the defence, successfully argued before the Military Judge, The Honourable MJ Pelletier, that the jury had to experience NVGs. Consequently, for the first time in military court, the jury, all counsel and the presiding Military Judge, wore NVGs in court and at "zero dark thirty", in the field. It was in the field that the trial went beyond the norm.

With the jury and all parties wearing combat fatigues and NVGs, the Court Martial, vis-a-vis The View, proceeded with the sounds of armoured fighting vehicles blasting the sweet thump of triple round bursts, machine guns firing and helicopters flying low overhead. In essence, the trial was conducted within, and accompanied by the sounds of "battle" as soldiers prepared for war. The experience was unlike any other experienced by a Judge and jury in military court.

