

INTRODUCTION

Good morning,

I am David Antonyshyn,

The aim of my presentation is to provide you with some insight concerning the Canadian experience of working with Private Military and Security Companies in missions abroad, particularly but not exclusively in situations of armed conflict.

My views do not necessarily represent those of the Office of the Judge Advocate, the Canadian Forces, the Department of National Defence, or the Government of Canada.

I will not deal with regulation of the security industry in Canada, nor will I deal with the regulation of the export of those services from Canada and/or by Canadian contractors/companies.

I will focus on Canada's experience using PMSCs, more particularly the Canadian Forces experience, noting that the Department of Foreign Affairs also relies on private security providers in many locations around the world to protect its personnel and premises.

I am not an operator or a contract officer. I am a legal advisor.

Therefore, my particular angle of approach today will be that of a legal advisor who was involved in setting up some of our first arrangements for armed private security in Afghanistan, and, more importantly, as one of those who designed an overall framework at the national level for the Canadian Forces to deal with those contractors, in Afghanistan but also in any other deployed operations.

DEFINITION

I will take this opportunity to define the scope of what I have in mind when I am using the term PMSCs today. I take a broad approach, in line with that followed in the Montreux Document.

PMSCs are contractors providing services generally related to **the protection, guarding and surveillance of persons and of assets**, as well as others, such as those detailed below. The expression PMSC will not include actors providing only logistical, administrative and other similar support services (e.g., maintenance, transport, catering, or construction).

The following is an illustrative, non-exhaustive list, of the types of services which are intended to be covered by the term:

- a. Guarding and surveillance of assets (e.g., moveable objects, buildings, facilities);
- b. Manning of check-points;
- c. Protection of persons;
- d. Escorting and protecting convoys;
- e. Advising on matters of security and protection;
- f. Operation of observation and/or weapons platforms (e.g., Unmanned Aerial Vehicles);
- g. Handling of dogs in support of military operations; and
- h. Training of military, paramilitary and police units (in military and security skills such as use of firearms, protection of persons or property, conduct of military operations, etc.).

I fully understand that it is possible to expand or thin slice this in any number of ways, for example including logistics and only focussing on security services, only considering armed security, only considering non-security services provided to the military on operations occurring in armed conflicts, etc.

The definition used here is broader than one simply dealing with security to cover what we would consider “higher risk” contracts... More on that later idea...

IDEA BEHIND THE PRESENTATION

I have prepared this presentation keeping in mind the theme of this congress, “Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments”. Therefore my goal will be to provide you with information about the Canadian experience in so far as it could assist your understanding how we, Canada, operate, which could be useful in a combined environment. It could also provide you with one example in the event your country finds itself in similar circumstances.

What are those circumstances?

CANADA’S GENERAL CHARACTERISTICS

Canada’s military size and the types of operations it engages in, as well as its relation to its national PMSC industry. Canada’s military is relatively small compared to other countries. The Canadian Forces have been a voluntary force since after World War II. The Canadian Forces have an expeditionary tradition, most often in the context of UN, NATO or other coalition operations. Canada is stable, at peace internally, and at peace with its only neighbour, although rumours in the news have it that we may soon share a land border with Denmark on Hans Island, but that’s another story. Canada has a PMSC industry providing services abroad, including in high threat environments, although it is relatively modest compared to the UK, US, or South Africa. So, you can draw parallels and differences between Canada and other countries on the basis of those characteristics.

Contracting trend...

Like many other armed forces, the Canadian Forces are increasingly relying on private contractors to perform functions traditionally undertaken by military personnel. There are many reasons for that: perceived savings, freeing military resources for other tasks, to name only two.

Among the early shifts in this direction was the Contractor Support Project initiated in 2000 to provide logistical support for the Canadian Contingent Stabilization Force in Bosnia.

This program was replaced by the Canadian Forces Contractor Augmentation Program (CANCAP) formally implemented in 2002 and provides a wide range of support services.

Those can include:

- Administration and Management,
- Food Services,
- Materiel Management and Distribution,
- Communication and Information Systems,
- Land Equipment Maintenance,
- Health Services,
- Transportation,
- Accommodation and Support,
- Construction Engineering Services,
- Power Supply and Distribution,
- Water Supply and Distribution,
- Waste Management,
- Facilities Operations and Management,
- Roads and Grounds,
- Fire Services,
- Geomatics Support,
- Environmental Management and
- Ammunition Support

The CANCAP contract was initially awarded to ATCO Frontec in Bosnia and eventually transferred to the Canadian company SNC-Lavalin PAE Inc. in Bosnia and later, Afghanistan.

Since 2001, although the CF have been deployed to a number of countries on a number of missions with different sizes of contingents (the Balkans, Haiti, Democratic Republic of the Congo, Lebanon, Sudan, to name just a few), Afghanistan has been the biggest, longest, and probably most defining commitment, at least in so far as the use of PMSCs is concerned.

In 2001-2002, the Canadian Forces were engaged in combat operations in the south of Afghanistan along with the US and other Operation Enduring Freedom partners.

From 2003 to 2005, the CF moved to Kabul as part of ISAF.

From 2005 to 2011, the bulk of the CF elements moved back to the south, once again getting engaged in combat operations, but also reconstruction tasks. Initially under OEF, then transition to NATO-led ISAF it assumed responsibility for that region from OEF a few months after the CF have moved there.

Since 2011, the CF have once again moved up to Kabul, focusing now on a training role as part of the NATO training mission.

Contingent is now approx 1000. Whereas it was in the vicinity of 2000-2500 between 2003 and 2011.

This factual background is important to understand what will follow.

After having moved to Kabul in 2003, which was at that time was way more stable and safer than Kandahar, the CF begun using private local guards, unarmed, to provide outer perimeter security around its base.

Once it moved to Kandahar, the Canadian Forces also used private contractors for the provision of security services, but this time, armed.

Reportedly: "Private-security contractors employed by the military are primarily used for 'perimeter security', not to conduct 'offensive operations'. An Afghan company detailed to the Provincial Reconstruction Team site in Kandahar City secures the perimeter, protects convoys of Canadian personnel and provides a 'security cordon' when an incident occurs, such as the explosion of a roadside bomb."

Between 2005 and 2011, the CF were present in a number of locations in Kandahar and other parts of southern Afghanistan. They also maintained some presence in Kabul.

During that period, private contractors were relied upon to provide security in many of those locations, freeing CF soldiers and enabling them to focus on other tasks.

Furthermore, over the years, other tasks have also been contracted out, for example:

- for explosive detection dogs (and their handlers);
- Support for UAVs;
- Chartered commercial helicopters (Russian-made Mi-8) with crews “for resupply missions and potentially for specific troop transport.”
- That is in addition to logistical support functions similar to what had been set up in Bosnia.

NEW MORE FORMAL APPROACH

Until 2007, contracting for those services simply followed the normal rules for contracting any other services and was handled almost entirely locally...

Then, in September 2007, in Nisoor Square, Bagdad, Blackwater contractors used by the US State Department shot and killed 17 Iraqi civilians. This attracted world-wide attention and condemnation.

This particular event led to a series of questions in Canada: from the media, from Parliament and from Government officials. Was Canada using such contractors and if so, how?

I note that neither at that time nor since then, has there been any incident that we know of involving contractors used by the CF in Afghanistan.

This initiated a formalization process by the CF. All contracts that were in place at that time were reviewed, and standardized, particularly with respect to what was expected concerning the use of force. Then, a broader, overarching directive governing the selection and use of PMSC by the CF was designed.

The intent of this directive is to provide guidance to the Department of National Defence and the Canadian Forces and to formalize the processes of deciding to contract a service and selecting a contractor.

Although designed to apply to Afghanistan, it was also conceived in a manner that would be applicable anywhere and for a number of different situations.

It provides a methodical way to address various factors in order to reach sound decisions, recognizing the particular sensitivity related to the procurement of certain services, especially in the context of armed conflict, where they involve tasks related to the use of force. It sends a message that this is a matter that must be handled with special care.

This directive supplements existing general rules concerning contracting.

Although still officially in draft form, it has been completed for a while now and has been followed and implemented in practice.

It was developed in parallel to the Montreux Process, to which Canada participated, leading to the Montreux Document, which Canada supports.

Main considerations articulated in our directive.

a. Operational effectiveness and security of CF:

- i. Reliability of PMSC from an operational and security point of view (level of vulnerability associated with contracting the particular function, including in case of non-adequate performance or sudden termination of the contract);
- ii. Importance of the function considered and its impact on the mission;
- iii. Availability of CF resources and capability gaps; and
- iv. Estimated overall cost of a contract.

- b. **Respect for international law, including Law of Armed Conflict (LOAC) and International Human Rights Law (IHRL)**
 - c. **Effect on broader Government of Canada objectives and consistency with Canadian foreign and defence policy.** It is important to give close consideration to how the contracting of a PMSC may affect broader Government of Canada efforts in the area of operations. Issues that should be given close examination before determining whether to procure services from PMSCs include the potential impact on:
 - i. the development of local national security forces;
 - ii. disarmament, demobilization and reintegration efforts;
 - iii. the proliferation of small arms;
 - iv. the general stability of the area of operations, including consideration of the possibility that illegal armed groups may re-emerge as PMSCs;
 - v. the acceptability of PMSCs in the local environment; and
 - vi. the CF's relationship with the local population resulting from the association with a PMSC.
 - d. **Respect for Canadian legislation, regulations, directions and policies concerning contracting for services.**
2. The above risks are best addressed through a combination of mitigation measures, including:
- a. Clearly defining and limiting the tasks assigned to PMSCs;
 - b. Ensuring adequate screening and selection measures;
 - c. Providing clear and specific instructions to PMSCs concerning contract performance, including monitoring and assessment;

- d. Implementing detailed supervision and oversight measures;
- e. Applying appropriate legal enforcement mechanisms – under the applicable Canadian, host nation or international regime; and
- f. Developing comprehensive risk identification and risk mitigation plans.

Challenges in implementing one type of risk mitigation measure could be offset by increased efforts in one or more of the others.

For example, difficulty in properly screening PMSC personnel could be offset by increasing the level of CF oversight and providing detailed, prescriptive contractual instructions.

Conversely, less oversight may be required if, after thorough screening, PMSC personnel are deemed to be highly trained and reliable, both in terms of performance of their tasks and compliance with the applicable law.

Generally, however, contracts must contain very prescriptive instructions to PMSCs and their personnel to avoid unwanted “mission creep” and prevent inappropriate or illegal acts being committed.

The very first question of the decision-making process is to decide whether or not we will contract out a specific task.

It is Canadian Forces policy not to contract PMSCs for any aspect of detainee handling and processing; for the conduct of intelligence collection or analysis; or for tasks entailing the offensive use of force.

1- The first step is Defining the tasks and general environment

- a. Scope and nature of tasks considered for the PMSC (e.g., guarding forward operating base, escorting VIPs from airport);
- b. Tasks that require access to Protected/Classified information or to restricted areas;

- c. The degree of CF oversight during the performance of the contract;
- d. General nature of the environment where the operation will/does take place, particularly:
 - i. Is there a state of armed conflict and, if so, of what type (international or not) and who are the parties?
 - ii. If there is no armed conflict, what type of situation is prevailing?
- e. Threat level;
- f. Initial estimate of the costs;
- g. Legal regime applicable to PMSCs. This is necessary to determine whether the necessary legal framework is in place to ensure PMSC accountability, under either domestic law of the host nation, of their State of origin, and/or Canadian law (and, in some instances, international criminal tribunals). Information necessary to assess the legal systems of the host nation or of the State of origin of the PMSC can be obtained through various means, such as local contacts, military attaché, DFAIT personnel in theatre, or the relevant country's embassy in Canada. Information to be considered includes:
 - i. Specific Rules concerning PMSCs. Some countries regulate the private security industry, impose specific norms and may even prohibit certain activities.
 - ii. Applicable local civil or criminal legislation affecting PMSCs, such as rules concerning use of force and the carrying of weapons and whether local and legal systems are considered functional and adequate to fairly handle allegations of wrongdoing committed by PMSCs.
 - iii. Existence and scope of Status of Forces Agreement (SOFA) or other agreements or arrangements concerning the possibility for CF to use local, Canadian or foreign

private service providers, their status under local law and jurisdiction over PMSCs contracted by Canada.

- iv. Possibility of having the PMSC subject to the Code of Service Discipline, as per the *National Defence Act*.

Situations of impunity shall be avoided. The CF shall ensure that PMSCs they contract will be subject to some form of effective legal jurisdiction. This could be done in various ways. For example, by negotiating concurrent jurisdiction, via a SOFA, over PMSCs contracted by Canada and ensuring that the Code of Service Discipline applies to them.

2- Initial decision whether to pursue the contracting option, determination of appropriate authority level and launching of the tendering process

With that information in hand, the commander determines whether he/she can decide to pursue the contracting option or if the matter shall be referred to the supported operational commander. A series of considerations are identified to assist the commander in making that call.

In making his/her decision whether to pursue the contracting option, the commander (at the tactical or operational level, as appropriate) should compare that option with that of having the services provided by CF members in terms of:

Operational, policy and legal risks;

Availability of resources; and

Costs.

3 Selection Process

Once the decision has been made to contract a service, the next step is for the contracting authority to select an appropriate contractor.

The selection criteria to be included in the Request for Proposals (RFP) are established at this stage to assess PMSCs' bid proposals and to minimize

the CF's operational, security, policy, and legal risks. All other contracting and procurement regulations must be respected throughout this process.

The following must be addressed in the evaluation criteria used to select a contractor in addition to other technical and task-specific requirements.

- a. **Professional background of PMSCs.** This is relevant in terms of their operational reliability and effectiveness. ;
- b. **Track record of PMSC personnel in terms of violation of national or international law;**
- c. **Required training.** It is essential to ensure that the individuals already have the required training enabling them to perform their tasks in an effective and reliable fashion, and in a manner that complies with applicable international and national law;
- d. **Financial situation, including adequate insurance cover for the PMSC;** and
- e. **Equipment.**

4-5 Then contract is awarded and its performance is subject to ongoing oversight and assessment.

Some of the challenges:

- Shared security, taking over a FOB from one country to another... New contract... Weight to be given to screening process/decision of previous "tenant"...
- Ensuring satisfactory service delivery, linkage between contracting cell and operators who can actually assess quality of work done...
- Getting adequate knowledge of local laws. In particular as these relate to the types of service we are contracting, either generally (for example general provisions of criminal law concerning the use of force) or specifically to this sector of activities. In the latter case, the Afghan Government took incremental steps. Keeping abreast of those maybe challenging. Being plugged in with the local authorities and coalition partners is an absolute necessity. You may find

yourself in a position where the local government could, over night, make legitimate decisions concerning the regulation of private security that will have a direct effect on your operations. This goes to the very first consideration: maintaining CF operational effectiveness and security. When comes time to decide whether contract a particular service or not, a key factor should be how predictable and reliable is the delivery of that service once contracted out.