





Lieutenant-Colonel Sam Fasullo

Private Security Military Contractors and DND Usage

JCSP 47

Exercise Solo Flight

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Lieutenant-Colonel Sam Fasullo

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PRIVATE SECURITY MILITARY CONTRACTORS AND DND USAGE

INTRODUCTION

Whether it is Canada, the US, the UK, Russia, or any other country for that matter, it is highly plausible that they, from a military perspective, have utilized or would have utilized a private security company in an operational capacity. Wagner, G4S, Ageis, GardaWorld are just some of the few global private security contractors (PSC) who have benefited from the many global conflicts that haver or are currently transpiring across the globe. The contracting of private security companies by the military does make sense for mundane security tasks intended for domestic duties such as building security or transportation security. These undertakings are relatively trivial tasks in which the use of highly trained soldiers could be seen as a waste of resources and as such be utilized elsewhere more effectively. Canada, for examples employs commissionaires throughout many DND establishments, a mundane task that is better suited for a private security company than a highly trained limited resource of a CAF member. Another benefit of utilizing a PSC for the aforementioned tasks is that it puts a civilian corporation in charge with dealing with the potential security violations of a civilian and puts the military at arm's length from the civilian. That is, if there was a security incident on a base where the military was used rather than a private security agency, and the incident involved a negative outcome for a civilian, the military opens itself up to public scrutiny and unfavorable public opinion as the military is supposed to defend Canadians and not harm them. However, in an operational environment, and more specifically a hostile operational environment, the use of PSC may be justified. However what skill set, or

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operational advantage does a private PSC have that cannot be fulfilled by the military itself?

According to Brigadier-General Denis Thompson, during his deployment in Afghanistan he stated, "Without private security firms it would be impossible to achieve what we are achieving here."¹ There is no doubt that having additional personnel on the ground will aid in achieving goals, but do they have to be private security contractors? The risk of utilizing private security agencies is a factor that needs to be considered, more than the convenience factor as this paper will discuss. Although many provinces have Acts that regulate private security companies, Canada does not. So, does Canada and DND opens itself to a risk that is too high in the justification of the use of private security firms? This paper will argue although it may be somewhat justifiable to use PSCs, the risks to DND and Canada will outweigh the advantages in contracting PSCs and that Canada and DND already has an untapped resource to fill the needs of private security contracting; that resource is the Reserves. This paper will first examine what is a PSC or a private military security contractor (PMSC) and defines them. Second this paper will examine some of the challenges and incidents that have occurred in the deployment of PMSCs in Canadian operations. Third, this paper will highlight some of the legal challenges of employing PMSCs and finally this paper will recommend how a PMSC like function could be addressed by the Reserve Component of the CAF.

¹ Jacobin. "Canadian Private Security Companies Have Wreaked Havoc in Afghanistan" last accessed 27 May 2022, https://jacobinmag.com/2021/10/canadian-private-security-military-contractor-companies-afghanistan-war-mercenaries-david-lavery

PRIVATE SECURITY MILITARY CONTRACTOR

To begin, the question of what is a private security contractor, or what is a private military security contractor must be answered? For this paper, PSMCs are not the companies that provide typical domestic security services such as base security base patrols or infrastructure entry ID. This paper will specifically focus on PMSCs as defined by the Montreux Document. The Montreux Document, authored by Switzerland and the International Committee of the Red Cross, is a guideline on, "pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict."² The Montreux Document therefore defines PMSCs as, "private business entities that provide military and/or security services"³ and these services include, "armed guarding and protection of persons and objects; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel."⁴ By these definitions Canada and DND have employed numerous PMSCs over various conflicts. These companies have included GardaWorld, Tundra Group, Globe Risk Holdings, Saladin, DynCorp and Watan Risk Management.⁵

PMSC EMPLOYMENT

As previously mentioned in his deployment to Afghanistan BGen Denis Thompson stated that, "Without private security firms it would be impossible to achieve what we are

² Swiss Federal Department of Foreign Affairs, International Committee of the Red Cross. *The Montreux Document*. Geneva, August 2009, p1.

³ Ibid., 9. ⁴ Ibid.

⁵ Jacobin. "Canadian Private Security Companies Have Wreaked Havoc in Afghanistan" last accessed 27 May 2022, https://jacobinmag.com/2021/10/canadian-private-security-military-contractor-companies-afghanistan-war-mercenaries-david-lavery

achieving here."⁶ But what is not mentioned nor addressed is, what are the risks and costs to Canada and its mission in the utilization of these PMSCs. The Montreux document was initiated and generated in response to a number of highly publicized, international PMSC incidents. These incidents that were reported by the various global media outlets, included the Abu Dhabi prisoner abuses, the 2005 Ageis Defence Services shooting of civilians in Iraq and the 2007 Blackwater incident at Nisour Square.⁷ Although the Montreux Document has been endorsed by 58 states and 3 international organizations and Canada is a signatory of the Montreux Document, it is not a legally binding document and has no status as it relates to international law. Even though Canada signed this document in 2008 and to date, Canada still has no policies as they relate to the use and employment of PMSCs. "There is currently no DND/CF policy and doctrine that provides an exhaustive and coherent framework for the employment of contractors on deployed operations, whether in Canada or abroad."⁸ Without policies or guidelines, it opens the risk of subcontracting companies with questionable histories, practices and operations. Without policies or guidelines, it increases the potential for companies or other governments to be accuse of or to accuse one of unfair contracting practices. Take for example the Dahla Dam refurbishment project in Afghanistan, a keystone aid project for the Government of Canada. This project was contracted to SNC-Lavalin who subcontracted the private security company Watan Risk Management which was not a Canadian PMSC but an Afghan security company. The issue with contracting Watan was

⁶ Ibid.

⁷ United States Government Accountability Office, Report to Congressional Committees, "Private Security Contractors DOD Needs to Better Identify and Monitor Personnel and Contracts." GAO-21-255, July 2021. p1.

⁸ Borys, Dr. David A. and Matthewman, Joshua. "Corporate Allies: Canadian Armed Forces and the use of Private Military, Security and Logistic Companies." Canadian Army Journal, 16.2 2016: p 104.

not due to the fact it was an Afghan company, it was the fact that SNC Lavalin continued to use them regardless of the fact that first, they were banned by the US, second, they had ties to President Karzai⁹ and third, they were accused of funneling money to, "the corrupt officials and the Taliban."¹⁰ Having policies or guidelines may not have prevented the contacting of Watan, but without governmental policies or guidelines it makes it difficult to hold anyone accountable for the hiring of or performing of any due diligence prior to awarding a contract.

When examining the Canadian PMSC GardaWorld's contracting performance, "the world's largest privately held security firm,"¹¹ they too have had many questionable incidents and practices. A good example into the workings GardaWorld's operation can be demonstrated on two separate occasions in 2012 and 2014. During these two times Garda employees were jailed for gun smuggling and the use of unlicensed AK-47s.¹² What is even more appalling is the fact that one of the jailed employees was not only the head of the Garda's Afghanistan operations, but he was also a former Canadian Brigadier General who quit the forces prior to his court martial. BGen Daniel Manard was court martialed for inappropriate conduct while he was the Afghan Task Force commander.¹³

⁹ Schaub Jr., Gary and Kelty, Ryan. Private Military and Security Contractors – Controlling the Corporate Warrior. United Kingdom: Rowman & Littlefield, 2016. p 131.

¹⁰ The Council of Canadians. "Controversy swirls around Harper backed Dahla Dam in Afghanistan." Last accessed 27 May 2022. https://canadians.org/analysis/news-controversy-swirls-around-harper-backed-dahla-dam-afghanistan

¹¹ Rabble. "Private security firm GardaWorld, Canada's Blackwater, is a danger to democracy." Last accessed 27 May 2022.

¹² Jacobin. "Canadian Private Security Companies Have Wreaked Havoc in Afghanistan" last accessed 27 May 2022, https://jacobinmag.com/2021/10/canadian-private-security-military-contractor-companies-afghanistan-war-mercenaries-david-lavery

¹³ The Globe and Mail, "Formal Canadian general fined, demoted for affair." Last accessed 27 May 2022. https://www.theglobeandmail.com/news/national/former-canadian-general-fined-demoted-foraffair/article587799/

Manard plead guilty to, "having a sexual relationship with Master Corporal Bianka Langlois while the two were stationed at the Kandahar Air Field base, and then of trying to thwart an investigation into the affair."¹⁴ Interestingly although Manard's conduct was not good enough for the Canadian Forces it seemed to be good enough to be contracted by the Canadian Forces for security details in Afghanistan. Again, having policies are necessary to mitigate these potential situations that can embarrass both Canada and DND. Regardless of how the public view these incidents it did not concern the government of Canada nor DND enough to do anything. In fact, only, "two internal Department of National Defence audits have examined wartime contracting and neither the Canadian Senate nor House of Commons committees on national defense have held hearings on the issue."¹⁵

Unlike the US, to mitigate public scrutiny and deal with the poor media coverage from the Blackwater incident in Nisour Square and contract abuse, the US immediately conveyed congressional committees to understand and examine contracting practices in Iraq.¹⁶ The US' quick response is due to the fact that the US Department of Defence had already implemented a PSC contractor framework in 2009, almost immediately after signing the Montreux Document.¹⁷ Until Canada implements some sort of oversight for PMSC it will remain vulnerable to the practices of these companies.

¹⁴ Ibid.

 ¹⁵ Schaub Jr., Gary and Kelty, Ryan. Private Military and Security Contractors – Controlling the Corporate Warrior. United Kingdom: Rowman & Littlefield, 2016. p 132.
¹⁶ Ibid.

¹⁰ Ibia.

¹⁷ United States Government Accountability Office, Report to Congressional Committees, "Private Security Contractors DOD Needs to Better Identify and Monitor Personnel and Contracts." GAO-21-255, July 2021. p16.

PMSC LEGAL

From a legal standpoint PMSC are not mercenaries. Protocol 1, Article 47 of the Geneva convention defines what a mercenary is and affords no rights as a combatant or a prisoner of war.¹⁸ To be considered a mercenary under article 47 all six of its criteria must be fulfilled. A PMSC may take direct part in the hostilities which meets the conditions of the first criteria, however, since a PMSC has been sent in by a State which is a party to the conflict on official duty, does not meet the condition of the sixth criteria.¹⁹ From a combatant perspective, it is clear from the Geneva Convention that PSMC are not combatants. Article 43 of the Geneva Convention defines combatants as, "Members of the armed forces of a Party to a conflict... are combatants, that is to say they have the right to participate directly in hostilities."²⁰ PMSCs are employed by the armed forces but are not members of the armed forces there for they are not combatants. Article 50 of the Geneva Convention defines a civilian is," any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."²¹ However PMSC fall under Article 4A (2) thus validates that they are not considered civilians. Since PSMCs are not mercenaries, not civilians and not combatants, the employment of these contractors in an operational environment adds to the risk of how PMSC are handled by other combatants

¹⁸ United Nations. "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating the Protection of International Armed Conflicts (Protocol 1). Last accessed 27 May 2022. https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-

conventions-12-august-1949-and

¹⁹ Ibid.

²⁰ Ibid.

²¹ International Committee of the Red Cross. "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts (Protocol I)." https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C 3C12563CD002D6CE4

and other States. This is because the Geneva Convention is clear on the treatment of civilians, combatants and mercenaries. If a PMSC employed by Canada or DND is mislabeled and treated improperly, what are the repercussions to the employer?

Adding to the complexity of employing PSMCs from a corporate perspective, PMSC, "cannot be investigated by international or domestic criminal courts."²² This is because a PMSC is fulfilling a contract and as such are limited only to financial reparations directly resulting from their actions. There any criminality activity can only be a function of the PMSC's employees. From the perspective of PMSC employee, employees must abide by international law, and they can be held accountable for their actions. However, depending on the specific situation of the employment of that individual, immunity agreements may come into play and their "prosecution will depend on the existence of extraterritorial jurisdiction legislation in the contracting State." So, the employees of Canadian contracted PMSC are relatively safe from prosecution. From a State perspective, "the possibility of triggering responsibility of a State with respect to the conduct of contractors it hires is today very complex in theory and almost impossible in practice."²³ This complexity is because one must prove that a State has either explicitly incorporated the PMSC into their armed forces or have explicitly ordered an action that would violate international humanitarian law (IHL) or human rights law. No State would be foolish enough to explicitly order a PMCS to violate IHL. But because of the complexities the lack of persecution of PMSC companies and employees is evident. The US does have a

²² Doctors without Borders. "The Practical Guide to Humanitarian Law." Last accessed 27 May 2022. C:\Users\sfasullo.silvertip\Documents\JCSP\SoloFlight\Doctors without borders The Practical Guide to Humanitarian Law.htm

Contractor Accountability Bill (CAB), which only applies to contractors who deploy with their armed forces. The CAB defines PMSC employee rights and responsibilities which include, determination of status, use of force, responsibilities before the law and individual liability. In addition to the CAB, contractors who violate rules of engagement or who are involved in criminal activities are subject to the US Martial Court. Although the US has regulations and laws still, "no PMC employee has been charged with any crimes while military personnel involved in the same cases have faced prosecution."²⁴ One could argue that even with regulation it is hard to convict PMSC companies and PSMC employees with questionable or illegal actions and therefore why bother. However, without regulations or laws there is no chance of any convictions. As Canada does not have any regulations or policies for the contracting and use of PMSC, is that negligence? Does this open Canada and DND to outside legal actions from entities that may have been affected by the actions of PMSC?

PMSC – EXAMINING THE DOLLARS

So, if PMSC companies and their employees are in a sort of legal purgatory and there are numerous examples of these entities breaking laws, causing havoc and creating scandals when deployed, Canada must use PMSC as a cost-effective solution. When assessing the Afghan Dahla dam project, Canada spent almost \$10 million in security.²⁵ Based on the fact that this project took three years, the yearly security expenditures work out to approximately \$3.35 million. Considering if the CAF could have deployed section of 20

²⁴ Ibid.

²⁵ The Council of Canadians. "Controversy swirls around Harper backed Dahla Dam in Afghanistan." Last accessed 27 May 2022. https://canadians.org/analysis/news-controversy-swirls-around-harper-backed-dahla-dam-afghanistan

personnel commanded by a Warrant Officer to achieve the same security effects along with the added benefit of the CAF forces in reserve if required would there be significant cost savings? Based on an average corporal salary of \$5853 per month,²⁶ and adding a loaded benefits factor of 30%, a 20-person section should cost approximately \$2.18 million per annum in wages, which leaves approximately \$1.7 million for operational expenses, such as food, travel and fuel. Not a significant cost differential. So, if it is not cost, why does Canada use PMSCs? To answer that question, one must look at the second part of BGen Thompsons statement on PSMC. He states that, there are "many security aspects that are performed by private security firms that which, if they were turned over to the military, would make our task impossible. We just don't have the numbers to do everything."²⁷ From the perspective of the military, this statement does make sense, as the forces have struggled to recruit and retain personnel. So, by contracting PMSC, it is an easy remedy to pass off this task to other entity so they can deal with any problems.

RESERVE PMSC

However, the CAF and the Canadian government are missing an opportunity when considering how to employ a security force without the use of a PMSC. I have worked in the oil and gas (O&G) industry for many years, and they too have employment issues. With many boom-and-bust cycles, changing break up times, O&G service companies must constantly adjust their employee count. To accomplish the ebbs and flows of the working environment, other than hire and fire, O&G service companies employ "day

²⁶ Canada. Department of National Defence. "Pay – Non- Commissioned Members." Last accessed 27 May 2022. https://www.canada.ca/content/dam/dnd-mdn/documents/military-pay/pay_ncm-regular-forces-class-c_taux-militaire-rang-force-reguliere-classe-c -2021.pdf

²⁷ The Canada-Haiti Information Project. "Canadian private security companies have wreaked havoc in Afghanistan." Last accessed 27 May 2022.

raters". A day rater falls somewhere between a part time employee and a contractor. Day raters are not normally aligned with a particular company, they may have a company that employees them more, but it gives the day rater the freedom to work for a variety of different companies. In my case, I had a core set of employees to deploy for service jobs, however if I was at capacity, my field managers had a list of day raters to call upon and they would work down that list until the job was filled. The benefit of the day rater was that they were trained to the standards of my company and were versed on my company's policies and procedures. Therefore, my company was responsible for the quality of work and actions of those day raters. The second advantage was that I only used day raters when I needed them and did not have to support them when work was light. Canada and the CAF could utilize the same concept, the challenge would be the implementation. To implement such a program, the following particulars would need to be addressed. First, who would run this and be responsible for this program? Second, who and what qualification would one need to be considered the military equivalent day rater? Third, from a Government of Canada perspective would this day rater equivalent be considered military?

To address the first part of implementation, we know the Reg Force is struggling to maintain its ranks, currently regular force numbers have dropped to 65,644 from a high in 1991 of 85,977.²⁸ Therefore this could this be a reserve force task as they are very familiar with dealing with part time personnel. However, I would argue that there would be a fourth class of reservist. Currently Reservists are employed in either a Class A, B, or

²⁸ The Ottawa Citizen, "Canadian Forces top-heave with generals as rank and file shrinks." Last accessed 27 May 2022. https://ottawacitizen.com/news/national/defence-watch/canadian-forces-top-heavy-withgenerals-as-rank-and-file-significantly-shrinks

C position. Class B and C are full time, Class A is part time and there is a requirement to attend training at least once every 30 days. The standup of a fourth class of Reservist would be meant to hold persons who could be called upon to fill tasks that were meant for PMSC. Additionally, the only obligation to a member of this fourth class would be on an annual basis to verify personal information. The second particular to be addressed is what qualifications, this would be easy, anyone that has completed their basic military training, or if there is a civilian equivalent. Finally, when deployed, they would be considered as military, however Canada may need to do some work and have this fourth class fourth class of Reservist, it gives Canada and DND legal authority over them, set the standards for them to abide by and provides accountability in the deployment of them.

CONCLUSION

In conclusion, Canada and DND's use of PMSC opens them to unnecessary risk. Canada has no legislation or oversight in the employment of these companies. PMSC have on numerous occasions embarrassed Canada and the CAF. They have been accused and been caught performing illegal acts, however they have gone unpunished. Canada does have an opportunity remedy these embarrassments and reduce its risk in contracting PMSC. That is to stop using PMSC in an operational environment, create a fourth class of Reservist who would be accountable to DND and reduce the risks to DND and Canada.

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