# We need restorative justice for members of Canadian military

It is a principle of fundamental justice that all Canadian citizens are equal before the law and entitled to its benefit and protection.

By Gilles Létourneau and Michel W. Drapeau

The unfair disparity in the enforcement of the criminal law by the military justice system is in breach of this fundamental principle. The time has come to apply this principle and restore justice, write Michel Drapeau and Gilles Létourneau. *Photograph courtesy of DND*

In 1980, the military justice system survived a challenge to its legality with respect to the prosecution of ordinary criminal law offences before military tribunals. The challenge was based on the Canadian Bill of Rights: see Mackay v. R., [1980] 2 S.C.C. 379. The basis of the challenge was the differential treatment afforded to those prosecuted before military tribunals, i.e. members of the Canadian Armed Forces (CAF) and civilians subject to the jurisdiction of the Code of Service Discipline such as dependants of CAF members and civilians contractors accompanying the military abroad.

Unlike the constitutionality-entrenched Canadian Charter of Rights and Freedoms (Charter), the Bill of Rights had no teeth. Yet the Supreme Court of Canada expressed great concerns about the existence of this parallel system of justice for the enforcement of criminal law because military tribunals are tribunals of exception, which, by definition, derogate from the legal system in place and deprive the persons subjected to it of equality before the law.

Justices Brian Dickson and William McIntyre wrote the following at pages 408-409 of the decision: "In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend to prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts. The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code, which differs in some particulars from the civil law, to differing rules of evidence, and to a different and more limited appellate procedure. …While such differences may be acceptable on the basis of military need in some cases, they cannot be permitted universal effect in respect of the criminal law of Canada as far as it relates to members of the armed services serving in Canada."

Chief Justice John Laskin and Justice Willard Estey went further. At pages 380 and 381 of the same judgment, they could not conceive that persons charged with an offence under the ordinary criminal law could be tried before a court where the prosecution is not free from any suspicion of influence or dependency on others. They could not conceive "that there can be in this country two such disparate ways of tying offences against ordinary law, depending on whether the accused is a member of the armed forces or is not."

The truth is that, over the years, through general indifference, the military justice system has expanded its jurisdiction over all ordinary criminal law offences, except murder, manslaughter and abduction of children when committed in Canada. In fact and in practice the military justice system has usurped functions that are constitutionally assigned to the provinces, i.e. the investigation and prosecution of the crimes contained in the Criminal Code of Canada.

Here are the consequences resulting for members of the military as well as civilians, including children, falling under the military jurisdiction.

**•Right to a jury trial**. First and foremost, they lose the right to a trial by a jury. Instead they are entitled to a trial by a panel composed of five members of the military selected randomly by the military. None of the guarantees with respect to the selection and empannelling of a jury given to an accused before a civilian trial apply.

It is sheer common sense that it is easier to obtain an unanimous verdict of guilt or innocence from a panel of five than from a panel of twelve. Indeed, it is all the more so when the five persons are part of the same organization and share the same institutional attributes as opposed to 12 persons chosen and coming from different walks of life.

**•The benefit of hybrid offences.** Second, persons prosecuted before military tribunals lose the benefit of a hybrid offence provided for under the Criminal Code of Canada. A hybrid offence is one that can be prosecuted by way of summary conviction or by way of indictment. Civilian prosecutors can exercise the discretion conferred upon them to proceed by way of summary conviction when the offence committed and the circumstances surrounding its commission do not warrant the full-fledge and stigma of the procedure by way of indictment. A cap on sentencing and a limitation period for prosecuting apply to offences prosecuted by way of summary conviction. These are important benefits that persons prosecuted before military tribunals are deprived of.

**•The right of appeal.** Third, persons convicted or acquitted by a military tribunal are treated differently and detrimentally when it comes to the right of appeal. As a matter of fact, the prosecution in a military trial can appeal the acquittal on a question of mixed law and fact. In a criminal trial before a civilian tribunal the prosecution's appeal is limited to a question of law.

Moreover, while an accused convicted by a civilian tribunal can appeal his conviction on a question of fact, the person convicted by a military tribunal is deprived of that right by the National Defence Act (NDA). In *Military Justice In Action; Annotated National Defence Legislation, 2ed.* published by Carswell earlier this year, we criticized this differential and prejudicial treatment. At page 50 we wrote: "Thus at law, the balance with respect to appeals is tipped in favour of the accused in criminal proceedings before a civilian tribunal. However in proceedings held before a military tribunal, the same balance is tipped in favour of the prosecution to the detriment of the accused. Once again it appears that this situation runs afoul of the presumption of innocence."

**•The sentencing range.** Fourth, persons prosecuted before military tribunals do not benefit from the wide range of sentencing options available to those convicted by a civilian court. They are not entitled to a suspended sentence, a conditional discharge, a probationary order and a sentence of imprisonment to be served in the community or within their unit. Nor are they given equality of treatment with respect to intermittent sentences. While Sec. 732 of the *Criminal Code* fixes at 90 days the maximum length of imprisonment for the availability of an intermittent sentence, the 2013 amendments to the NDA makes this kind of sentence available only if its length does not exceed 14 days.

**•Summary trials.** Fifth, close to 2,000 summary trials are held every year as opposed to some 60 to 65 courts martial. Summary trials are the dominant form of justice in the Canadian military. Yet this form of justice is highly problematic, especially as regards ordinary criminal law offences. Consider the following features of the process.

The accused is tried by his commanding officer who possesses no knowledge of the law. As opposed to a trial before a civilian tribunal where the judge does not know the accused and has no knowledge of the circumstances surrounding the crime, the commanding officer knows the accused, the witnesses and is already aware of the facts and circumstances leading to the crime.

It is also not enough that the accused has no right to counsel, he and his wife are compellable witnesses. He can be forced to incriminate himself in violation of the constitutional right against self-incrimination given to accused by the Charter.

In addition the summary trial process is not governed by the rules of evidence applicable to trials of ordinary criminal law offences. Adverse inferences can be drawn from his silence. Full reliance can be had on hearsay and opinion evidence. *Charter* arguments cannot be raised. The level of disclosure of the prosecution's evidence is much more limited than the level of disclosure at a court martial. But above all, the accused has no right of appeal to a court against his conviction.

**•A criminal record for purely disciplinary offences.** Sixth, military offences are set-up to enforce discipline in the military. Yet, the military justice system generously distributes criminal records to the persons convicted. It even goes as far as creating a criminal record for offences that have no criminal connotation and are purely disciplinary in nature. This is unprecedented in Canada. No conviction by a disciplinary board or tribunal for offences like conduct prejudicial to the profession gives rise to a criminal record. In the military, you can even get a criminal record for a conviction at a trial at which you are not entitled to be defended by a lawyer.

The newly enacted Sec. 249.7 of the NDA creates a criminal record for offences such as insubordinate behaviour, absence without leave, a false statement in respect of prolongation of an absence without leave, drunkenness, conduct to the prejudice of good order and discipline. The military is a profession of arms. This last offence of conduct prejudicial to good order or discipline is in fact a conduct prejudicial to the profession of arms. Yet conducts by lawyers or doctors, for example, that are prejudicial to the legal or the medical profession do not give rise to a criminal record.

**Bill C-32 - Victims Bill of Rights Act does not apply to military personnel**. Seventh, military persons who are victims of crimes investigated or prosecuted under the NDA are excluded from the benefits of the Bill and are, therefore, unable to exercise their victim's rights. Subsection 18(3) of the *Victims Bill of Rights* contains the exclusion.

Fortunately, the Supreme Court of Canada is given in the case of Moriarity et al. vs. Her Majesty the Queen et al., to be heard on May 12, 2015, which is a golden opportunity to restore justice to members of the military by returning to the provincial authorities the investigation and prosecution of ordinary criminal law offences. The civilian police and tribunals possess an expertise fashioned over time that the military police and courts do not have. In addition, they are independent from command and external influence.

It is a principle of fundamental justice that all Canadian citizens are equal before the law and entitled to its benefit and protection. The unfair disparity in the enforcement of the criminal law by the military justice system is in breach of this fundamental principle. The time has come to apply the principle and restore justice.

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