The ChronicleHerald

THE MILITARY AFFAIRS COLUMN BY TIM DUNNE

10 March 2018

Courts martial deny soldiers the very rights they defend

Canada's military courts martial are unfair, unjust and un-Canadian. They deny Canadian soldiers the basic rights that other Canadians are guaranteed and that military personnel are called upon to defend.

Consider, for example, the court martial of Capt. Robert Semrau.

In a forward to Capt. Semrau's 2013 book, The Taliban Don't Wave, now-retired Maj.-Gen. Lewis MacKenzie gave a disturbing description of Semrau's trial.

Semrau deployed to Afghanistan in 2009 to train Afghan National Army soldiers. On Oct. 19, an Apache helicopter fired 30mm high-explosive rounds against Taliban fighters, just prior to Semrau's team emerging from a cornfield. "My eye caught on something dangling from a tree branch," Semrau later wrote, "What the hell are sausage links doing in a tree?"

They were the intestines of a Taliban fighter. Afghan soldiers later testified that Semrau euthanized the man.

Canadian media called it a mercy killing, but Semrau was charged with second-degree murder — the first Canadian soldier accused of homicide on the battlefield.

"The high-profile court martial of Captain Semrau," MacKenzie wrote, "highlighted, in the eyes of many, including yours truly, a deficiency in the court martial procedures within the Canadian Forces."

MacKenzie was referring to changes in the Canadian military justice system aimed at withstanding challenges launched under the Canadian Charter of Rights and Freedoms by DND personnel.

These include five-member panels to provide a military version of a jury at general courts martial, intended, in MacKenzie's words, "to withstand Charter challenges to the independence of military courts."

"No one on Semrau's panel," MacKenzie wrote, "had any background in combat operations."

Acquitted of second-degree murder, attempted murder and negligent performance of duty, Semrau was convicted of "disgraceful conduct," and released from the army. MacKenzie called this a "catch-all . . . to appease those who didn't understand the context and wanted some form of punishment."

Many of the general's colleagues, senior Canadian Forces representatives, opined that Semrau's prosecution was simply a deterrent to soldiers who may face similar dilemmas in the future.

MacKenzie's inference is that military justice lacks the impartiality and objectivity Canadians expect of our legal system. If true, this places an added layer of jeopardy on all who come under the National Defence Act's Code of Service Discipline.

When a court martial convenes

When a military member undergoes a court martial, the accused can choose a full military defence at public expense or a civilian lawyer at his/her own expense.

If the accused chooses to be defended by military lawyers, one or two are assigned and, in the event of an appeal, take the matter to the Court Martial Appeal Court.

If the accused chooses and the public expense is approved, the defence will take the appeal as far as the Supreme Court of Canada at no cost to the defendant.

The defence has the option of plea bargaining, but the process is unlike its civilian counterpart. The prosecuting and defence attorneys are all members of the same "military law firm," the Office of the Judge Advocate General, or JAG. In the civilian system, prosecutors are taken from the Crown prosecution services and accused persons retain defence lawyers privately.

Two forms of court martial

There are two types of court martial, general and standing.

A general court martial is presided over by a military judge and five-member panel of military members who decide guilt or acquittal. The panel composition depends on the rank of the accused. A standing court martial has a military judge alone.

General courts martial normally try offences punishable by a maximum of imprisonment for life, unless both parties consent to a standing court martial.

The standing court martial is intended for offences punishable by imprisonment for less than two years or by a lesser punishment and for offences punishable by summary conviction under any Act of Parliament.

In all other cases, the accused can choose between general or standing court martial.

JAG's director of military prosecutions assigns a military prosecutor and lays charges. Prosecutors frequently lay an alternate charge under National Defence Act, section 129, which makes it an offence to commit "an act to the prejudice of good order and discipline."

This charge has no parallel in the civilian system. It can be anything from being late for work to attempted murder. It's a catch-22 that gives the court martial an option on which to find the accused guilty if the primary charge is unsuccessful.

Who faces a court martial?

The surprising answer is that more than regular Force members can be charged, tried and convicted under Canadian military law. On-duty reservists, spouses, dependent children, contract workers, journalists and other persons become subject to the medieval provisions of the Code of Service Discipline when they accompany the Canadian Armed Forces.

For civilians charged with what would be an ordinary law offence under the Criminal Code, the military code deprives them of the right to a trial by jury and subjects them to a trial by a panel of five service members and a military judge. It's fair to ask why they aren't tried by a civilian court instead.

The fearsome reality is the Code of Service Discipline jurisdiction is virtually unlimited. Besides military offences, JAG can prosecute any offence under National Defence Act, section 130, which applies to "offences punishable by ordinary law." These include offences under the Criminal Code or any act of Parliament.

Perhaps most surprising is the treatment young offenders could receive. Youth between the ages of 16 and 18 can enrol in the Canadian Armed Forces, as a university student, or at age 17, with parental consent. Equally vulnerable are dependent sons and daughters accompanying a Canadian Armed Forces member serving abroad.

Youth membership in the Canadian military is small and there are a number of decision points at which a young suspect's age can be considered and the youth diverted to civil authorities to be handled under the provisions of the Youth Criminal Justice Act. But it is possible that a young member of the Forces could be charged and tried within Canada's military justice system.

Ottawa lawyer and retired army colonel Michel Drapeau notes the court martial process is intimidating for military members, "but for a civilian victim or witness who has no ties to the military, it is like entering another world."

With its unique military protocols, military lawyers, a five-member military panel in place of a jury and judge, all wearing uniforms, it is a daunting experience, even for long-serving military members.

The military judge

The Office of the Chief Military Judge, established in 1997 as an independent unit of the Canadian Forces, provides military judges to preside at courts martial and other judicial responsibilities under the National Defence Act. It convenes courts martial, appoints panel members and provides court reporting and transcription of proceedings of courts martial for appeals and other judicial hearings.

Judges are drawn from the relatively small number of military lawyers with 10 years of experience. A court martial administrator is responsible for court administration, including preparation of a record for appeals to the Court Martial Appeal Court.

Panel or jury?

In a civil trial, the jury is made up of 12 people chosen by the prosecution and defence from a list of individuals who qualify for jury duty.

A general court martial has a panel of only five, all members of the Armed Forces. They are trained, indoctrinated and socialized by common military membership.

They are not chosen by the prosecution or defence, but randomly selected by the court martial administrator. Panel composition varies according to the accused's rank.

A civilian criminal-trial jury and a military court-martial panel have one element in common. They unanimously determine the guilt or acquittal of the accused.

But that's where any similarity ends.

Court-martial panel members, normally drawn from the local military, may be acquaintances, friends, even colleagues from within the same chain of command, especially at the officer level. The military judge is often of lower rank than panel members.

Col. Drapeau gives the perspective of a lawyer with military experience. Panel members, he says, "all share the unique bond, professional ethic, warrior ethos and value system of the military, as well as its unique traditions, missions, structures and operating procedures.

"All are part of a highly structured and authoritarian way of life with a sense of community and camaraderie, unlike any other profession."

Justice Gilles Létourneau, retired judge of the Court Martial Appeal Court, former president of the Law Reform Commission of Canada and Somalia Inquiry Commissioner, has argued it may be easier to obtain a unanimous verdict when evidence is weighed by only five people, instead of 12.

That is particularly so when the five are trained in the same mindset and have the same institutional socialization and indoctrination. They are very different from 12 people coming from different walks of life.

Civilian jury members do not share the same school of thought and do not have common institutional experiences.

And there is an institutional pressure at work in a military panel, exerted by the chain of command to which members belong and upon which they depend for career advancement.

As in a civilian criminal court, the military panel decides guilt or innocence by unanimous vote and the presiding military judge makes all judicial rulings and determines the sentence when there is a finding of guilt.

Justice Létourneau finds it disturbing that an accused service member is denied the right to a trial by jury — guaranteed to other Canadians under paragraph 11(f) of the Charter of Rights and Freedoms — even for an offence as serious as murder.

An accused person's right to a hearing by an independent and impartial tribunal is guaranteed to all other Canadians under paragraph 11(d) of the Charter.

A general court martial is composed of a panel of Canadian military members, a military judge and prosecution and defence lawyers taken from the legal staff of the Judge Advocate General. The accused risks being frog-marched from the courtroom in handcuffs to serve a life sentence without the possibility of parole for 20 or 25 years.

Change is overdue

Canadians tried before military tribunals are denied many rights guaranteed to a person prosecuted before a civil court. But the most striking is this denial of the right to a jury trial.

When paragraph 11(f) of the Charter was drafted and enacted, there was a requirement for a "military nexus" — a direct link to the circumstances of an alleged offence and the discipline, efficiency or morale of the military. Without this connection, military tribunals had no jurisdiction.

Did Parliament intend to deprive Canadian soldiers of their constitutional right to a jury trial for a serious criminal offence in no way related to military service or to the performance of their military duties?

At a Jan. 12, 1981 meeting of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, the wording of what is now paragraph 11(f) of the Charter was tabled for the first time. Through 1980-81, there were discussions on a proposal by New Democrat MP Svend Robinson that military personnel be entitled to jury trials.

The only justification for the exception set out in paragraph 11(f) was provided by the then attorney general Jean Chrétien. He said, "Jury trials in cases under military law before a service tribunal have never existed either under Canadian or American law."

A better reason is provided in Rubsun Ho's 1996 article, "A World that has Walls: A Charter Analysis of Service Tribunals." It says "the standard justification for allowing the military to deny an individual right to trial by jury is derived from the special conditions under which service tribunals may be forced to proceed."

"During times of war or insurrection, convening a jury may be impracticable or unfeasible. The military hierarchy must be able to work efficiently and expeditiously to dispose of any disciplinary problems it may encounter, and wide discretion must be given to front line officers to enforce their authority."

But this refers to military offences in a military context and in time of conflict, not to offences of a civil nature committed in peacetime in purely civil circumstances.

This begs the question: Are courts martial necessary in Canada in peacetime?

Fairness for all

Justice Létourneau notes in "Introduction to Military Justice," that in Canadian society, commission of a criminal offence, by any resident of Canada, results from a lack of personal and collective discipline.

Every person — civilian, police and military — must obey the law. Each person in Canada is obligated to abide by and comply with the law. So all residents of Canada who violate the law should be subject to the same treatment under the law.

"A civilian police officer is a Canadian in uniform," Justice Létourneau wrote. "So is a military police officer. Yet, while the former is entitled to a jury trial, the latter committing the same crime is not."

A service member convicted of a serious criminal offence will usually be incarcerated and dismissed from the Armed Forces, whether she or he was tried before a civil court or a service tribunal. Release or dismissal from the Armed Forces makes a military disciplinary tribunal irrelevant.

Collective discipline and deterrence are guaranteed by charging the person. The example is set by conviction and imprisonment and, ultimately, by dismissal, whether the judgment and sentence are handed down by a civil court or by a court martial.

The conviction also renders collective deterrence irrelevant, since the offender has been dismissed and returned to civilian life, where any recidivism would occur.

The British Columbia Civil Liberties Association gets to the heart of the matter in its 2011 report, “Fairness for Canada’s Soldiers.”

“Canadian soldiers,” it says, “are entitled to the rights and freedoms they fight to uphold.”

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(Reference: Dunne, Timothy J. Courts martial deny soldiers the very rights they defend. Halifax Chronicle Herald. 28 January 2017)