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Courts martial far less fair than jury trials

By Tim Dunne

“Canada has one of the best military justice systems in the world,” Col. Michael Gibson, the Canadian Armed Forces’ Deputy Judge Advocate of Military Justice, wrote in the Spring 2012 edition of the Canadian Military Journal.

But that would depend on how you define “best.” The Canadian military’s justice system differs significantly from Canada’s civil counterpart.

DND’s Judge Advocate General administers Canada’s military justice, operates its own prosecution and defence services, has its own judges and its own system of trial courts, known as courts martial, all of which are intended to address service (military) offences by Armed Forces members.

What constitutes a “service offence” is not only an infraction under the National Defence Act, but also any offence under the Criminal Code or any other Act of Parliament. When a military member commits an offence under the Criminal Code or the Controlled Drugs and Substances Act, it can cease to be an offence under those statutes and become a “service offence” under the Code of Service Discipline.

This begs the question: Why was convicted military spy Jeffrey Delisle investigated by the RCMP and tried before a civilian court? But that’s an issue for another time.

Civilian Crown attorney have various options when it comes to prosecuting civilians. They can take into account a number of factors: the record of offences, the seriousness of the infraction and the impact on the victims.

These considerations are not available to an accused in the military system. When the accused is brought before a court martial, he or she is not entitled to a preliminary inquiry, a suspended sentence, a conditional or unconditional discharge, a probationary order, or incarceration that can be served intermittently, such as on weekends.

In a civil trial, the jury is made up of 12 people chosen by the prosecution and the defence from a list of individuals throughout the community who qualify for jury duty. The prosecution and defence question each candidate to determine bias or predetermination to select who will sit on that jury.

An accused appearing before a court martial for a serious offence punishable by imprisonment of five years or more does not enjoy the right to a jury trial, even for an offence as serious as murder. Instead, he has a five-member panel of a general court martial, not chosen by the prosecution or by the defence, but selected from the Canadian military at random by the court martial administrator.

In his book, *Introduction to Military Justice*, the honourable Gilles Létourneau of the Court Martial Appeal Board notes that “it is not unreasonable to think . . . that it is easier to obtain a unanimous verdict from only five, as opposed to 12.”

These five people have built their careers in the Armed Forces, have received the same training and education about the Code of Service Discipline. The court martial panel is fundamentally different from a 12-member jury of diverse people of different walks of life. “In addition,” said Justice Létourneau, “there is the institutional pressure at work, as well as that exerted by the chain of command to which the members of the panel belong and on which they depend for their career advancement.”

Justice Létourneau points to the possibility that the accused appearing before a general court martial

with its five-member panel could be led from the court room in handcuffs to serve a life sentence without the possibility of parole for 20 or 25 years.

In other words, the Canadian military justice system appears to have a built-in bias that makes it easier to find someone guilty. For a military member, the deck is stacked higher than for a civilian accused of a similar offence before a jury.

Should there be a distinct system of justice for military personnel? Why does a member of the Armed Forces, whom we send into harm's way, have fewer legal rights than his or her civilian counterpart?

Tim Dunne is a Halifax-based communications consultant and military affairs writer.