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Military trials passé

By Tim Dunne



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My Sept. 18 column, “Courts martial far less fair than jury trial” seems to have struck a nerve with selected members of the legal profession.

In his Sept. 20 letter to the editor, David Bright, a lawyer whom I admire for his 40 years of work in both the civil and military justice systems, wrote that “military judges are fair, respectful and not subject to institutional pressure or the influence of the chain of command.” This point of view was shared by Michel Drapeau, a retired colonel and an Ottawa-based barrister and solicitor.

I made no mention of military judges in my column, but I will note that I stand in awe of these jurists who regularly balance the National Defence Act, the Criminal Code and various other penal acts (such as the Security of Information Act and Controlled Drugs and Substances Act), as well as the testimonies of numerous witnesses and the significance of myriad pieces of evidence.

Lt.-Col. David Sinclair’s Oct. 2 response took issue with my conclusion that courts martial are less fair than civilian criminal trials and cites the independent reviews of former chief justice of Canada, Antonio Lamer, and Patrick LeSage, former chief justice of the Ontario Superior Court. Sinclair said that both jurists “recognized that Canada has developed ‘a very sound and fair military justice framework’”

However, retired Justice Gilles Létourneau of the Court Martial Appeal Board, whose comments I reflected in my column, disagrees.

Our military justice framework may be seen to be “very sound and fair,” when it comes to military justice. But I question the need for a separate justice system only for military members.

One Canadian Forces legal officer, upset by my article, demanded to know if I wanted Canada to copy

France's example, eliminate the domestic practice of military justice and conduct it only during operational deployments.

An expert on such issues told me that France, Germany and Belgium "have eliminated military tribunals altogether." In addition to being a lawyer, Michel Drapeau is also a professor with the University of Ottawa's faculty of law who participated in the Global Seminar on Military Justice Reform held at the Yale Law School earlier this month, and who appeared last month before the U.S. Congress Response Systems Panel for an academic discussion on the "The Role of the Commander in the Military Justice System."

He also stated that the military's Code of Service Discipline should, as the name implies, be restricted to military "disciplinary" offences, such as desertion, insubordination, absence without leave, conduct to the prejudice of good order and discipline and similar infractions. "It should **not**," he states, "deal with crimes. Also, it should not have the power to sentence someone to prison . . . That is the role and function of our (civilian) superior courts."

If Canada eliminated military tribunals on home soil, a member of the Canadian Armed Forces accused of criminal activity would be charged and tried in a civilian court, before a civilian judge, and a verdict passed by a civilian jury, just as was the case with navy spy Jeffrey Delisle. He committed espionage as a military member, working in a military establishment, compromised military information, was investigated and charged by the RCMP, and was tried and convicted by a civilian court.

Similarly, former Col. Russell Williams was investigated and charged by the Ontario Provincial Police and convicted under the Criminal Code.

The absence of involvement by the military police and military justice in these two cases raises the question of why we need these institutions when our civilian police agencies and the criminal justice system have conclusively proven they can successfully undertake cases like these.

Sinclair says that I seem "to imply that a fairer trial is one where the accused has a greater chance of being acquitted."

What I said, in fact, was "the Canadian military justice system appears to have a built-in bias that makes it easier to find someone guilty." My concern is not that an accused could be acquitted more easily, but that he or she may be convicted and incarcerated more easily than a civilian accused facing a trial by jury, without the same burden of proof and evaluative oversight that would be required by a jury of 12 people from diverse areas of the community.

I would have expected Sinclair, as a lawyer, to understand the difference.

Michel Drapeau underscores that sentiment: Military tribunals, "particularly summary trials, are vestiges of a Victorian system of justice. It is time to bring them in line with the massive changes and reforms taking place in Europe, Australia, New Zealand, (and) Ireland."

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