CANADA'S MILITARY JUSTICE SYSTEM

by Michael Gibson

Lieutenant-General (ret'd) Richard Evraire has recently published a favourable book review of Military Justice in Action: Annotated National Defence Legislation by Justice Gilles Létourneau and Mr. Michel Drapeau. Although I would demur from his favourable review of the book, (in my view, it is of marginal utility as it consists largely of straightforward annotations to statutory and regulatory provisions that are readily available online, and it also contains a number of factual errors), for the present purpose, I would like to focus upon some comments made in the review echoing a number of the critiques advanced by Létourneau and Drapeau in the book and elsewhere. These advocate "… reducing to a minimum possible the disparities between military criminal law and civilian criminal law," as well as lamenting the proclaimed lack of Canadian military legal doctrine. In advancing these views, both the authors and Lieutenant-General Evraire misapprehend the current state of affairs concerning the Canadian military justice system.

The reality is that Canada has one of the best military justice systems in the world. This was recognized by the former Chief Justice of Canada, the late Right Honourable Antonio Lamer, in his 2003 independent review of the provisions of the *National Defence Act,* wherein he stated: "Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence." As he noted, other states, including the United Kingdom, Australia, and New Zealand, have studied the Canadian military justice system and looked to it as an example to emulate in many respects in making improvements to their own systems.

Some of the recommendations of the Lamer Report have already achieved statutory implementation.[1] Bill C-15 (the *Strengthening Military Justice in the Defence of Canada Act*[2]), currently before Parliament, aims to complete the task of providing a legislative response to the recommendations made in the Lamer Report in order to ensure that the military justice

system continues to evolve to keep pace with changes in the law, and in societal expectations.

Létourneau and Drapeau criticize some differences between the military and civilian justice systems. These differences exist for a reason. The fundamental point that must be made is that differences do not mean that one system is inherently inferior to the other, nor constitutionally deficient. The real question is not whether there are differences, but rather whether the military justice system is compliant with constitutional requirements, and effective in fulfilling its purpose.

A separate military justice system exists because of the unique needs of the Canadian Forces to fulfil its mission of defending Canada. This was recognized by the Supreme Court of Canada in its seminal 1992 judgment in the case of *R. v. Généreux*:

DND photo courtesy of the author.

Summary Trial - Afghanistan

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[3]

The paramount need to maintain discipline in a state's armed forces has been recognized since ancient times. But in the popular imagination, this recognition is often accompanied by an unreflective prejudice that military justice systems give scant regard to fairness or justice in order to maintain discipline.[4] This need not be so. The ends of discipline and justice are not mutually exclusive. The conclusion in the Powell Report of 1960 incorporates much wisdom in recognizing this:

> Discipline - a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed – is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice – the two are inseparable.[5]

Rather than becoming entrenched in rigid positions that reflect ideological predispositions about military justice, the question that should be posed is: what is it that Canada, as a state, needs its military justice system to do? And, once this is identified, what functional attributes does such a system need to possess in order to effectively accomplish these ends? Once this analysis is undertaken, one is then in a position to rationally determine what the ambit of the jurisdiction of the military justice system should be in terms of offences, persons, territory, and time, and what differences in procedure may be required.

The Canadian military justice system has two fundamental purposes: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and, to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. It thus serves the ends of both discipline and justice.

These purposes are stated in the statutory articulation of purposes, principles, and objectives of sentencing in the military justice system contained in Bill C-15. [6] This recognizes that it is most acutely in the process of sentencing on the basis of objective principles that one is obliged to directly face the question: what is it that one is actually trying to accomplish in trying someone in the military justice system? The synthesis

of the classic criminal law sentencing objectives of denunciation, specific and general deterrence, rehabilitation, and restitution, with those targeted at specifically military objectives, such as promoting a habit of obedience to lawful commands and orders, and the maintenance in a democratic state of public trust in the military as a disciplined armed force, illustrates that military law has a more positive purpose than the general criminal law in seeking to mould and modify behaviour to the specific requirements of military service.

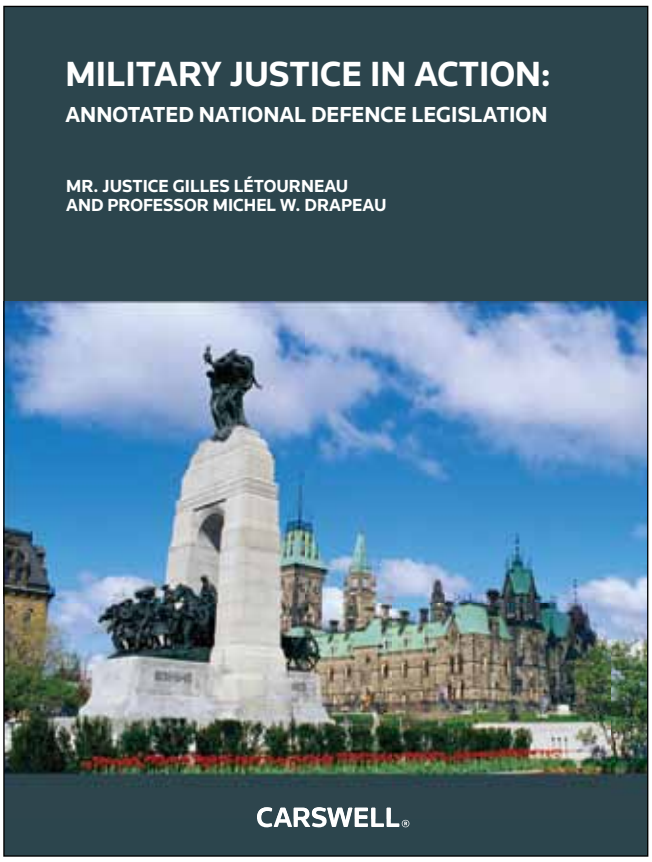
Simply put, an effective military justice system, guided by the correct principles, is a prerequisite for the effective functioning of the armed forces of a modern democratic state governed by the rule of law. It is also key to ensuring the compliance of states and their armed forces with the normative requirements of international human rights law, and of international humanitarian law.

In order to accomplish these fundamental purposes, service tribunals must possess certain functional attributes: the requisite jurisdiction to deal with matters pertaining to the maintenance of discipline and operational effectiveness; that those doing the judging must possess an understanding of the necessity for, role of and requirements of discipline; they must operate in a legally fair manner, and be perceived to be fair (the requirement that the military justice system be perceived to be fair arises both from the need to maintain societal support in a democratic society, and that the fact that, in all-volunteer armed forces, soldiers, sailors, and airmen and airwomen will not long abide a system that they feel to be fundamentally unfair and will vote with their feet); they must be compliant with constitutional and applicable international law;[7] and they must be prompt, portable, and flexible. That is why the two types of service tribunals in the Canadian military justice system, courts martial and summary trials, are designed the way that they are.

The purpose of summary trials is to provide prompt but fair justice in respect of minor service offences, and to contribute to the maintenance of military efficiency and discipline, in Canada and abroad, in time of peace or during armed conflict.[8] Summary trials are vitally important to the operational effectiveness of the CF. They are the workhorse of the military justice system, consistently trying around 96 percent of cases. They exemplify the attributes of promptness, portability, and flexibility mentioned above. And, it must be pointed out, that perhaps the two most eminent constitutional jurists of the *Charter* era in Canada, former Supreme Court of Canada Chief Justices Brian Dickson and Antonio Lamer, have both conducted independent reviews of the military justice system during the past 15 years, and both supported the importance and constitutionality of the summary trial system.

The portrayal of summary trials advanced by the authors in the book and elsewhere, and reflected in the review, is, at best, a very partial depiction of the full picture that must be taken into account in making a responsible and accurate assessment of the fairness and constitutionality of the summary trial system. It does not mention the crucial role played by the offering of elections to accused persons between summary trial and court martial, nor that no person may suffer a true penal consequence as punishment at a summary trial unless they have first been given that election. It also does not mention the long list of statutory and regulatory provisions that promote fairness at summary trials. Constraints of length do not permit a full examination of this issue in this article, but the best antidote for incomplete information is to examine all of the facts. Lieutenant-General Evraire in his review, as well as the Létourneau and Drapeau in the book itself, inaccurately assert that the Canadian Forces does not have much doctrine on military justice; in fact, there is ample. As an example in the context of summary trials, readers who wish to more fully inform themselves can look at the Military Justice at the Summary Trial Level Manual, available on the internet at: http://www.forces.gc.ca/jag/publications/Training-formation/MilJustice-JustMilv2.2-eng.pdf.

The authors observe that members of the Canadian Forces are not entitled to a trial by a jury of 12 persons. This is true. It is what s.11(f) of the *Charter* provides. However, to assert that a provision of the Charter is not consistent with Charter principles is not a viable argument. Rather, because of the unique needs of military discipline and efficiency, the findings at trials by General Courts Martial are determined by a panel of five military members. The differences between panel and jury trials have been judicially considered, and the courts have upheld the validity of court martial panels. Panel members are selected by a random methodology, and they swear an oath to carry out their duties according to law, without partiality, favour, or affection. Court martial panels are different than civilian juries to reflect military needs, but they are not unfair or unconstitutional.



The authors have also criticized the jurisdiction of military courts over civilians in the narrow circumstances Parliament has specified in the *National Defence Act*. This is a complex subject, but for an account of why many civilians would actually *prefer* to be tried by court martial in certain circumstances, and the arguments in favour of retaining such jurisdiction, see: Michael Gibson, "International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity," (2008) 4 *Journal of International Law and International Relations* 1 at 22.

No justice system can remain static and expect to remain relevant to its users, and the military justice system is no exception. Legislative reform of the military justice system involves a process of continuous improvement over time, just as is the case with the civilian *Criminal Code*. Bill C-15 provides important updates, as well as a statutorily mandated regular independent review to help ensure that this is accomplished.

The Canadian military justice system is not perfect. No human justice system is. But it is a fair, effective, and essential element in promoting the operational effectiveness of the Canadian Forces, and ensuring justice for its members.

Complacency in this regard would be unwise, and the Office of the Judge Advocate General is, in fact, the leading advocate for continuous improvement of the military justice system. It conducts regular surveys and reviews, and engages in comparative law research concerning the systems of other countries on an ongoing basis, in order to identify issues and advance improvements. Constructive criticism, debate, and suggestions for improvement of the military justice system are necessary and welcome. But these need to be informed by the recognition of the fundamental first principles that underpin it.

Colonel Michael R. Gibson, CD, BA, LLB, MSc, LLM, *originally an air force navigator, is currently the Deputy Judge Advocate General Military Justice, responsible for military justice policy, legislative reform, and strategic initiatives concerning the Canadian military justice system. As a legal officer, he has served as prosecution, defence, and appellate counsel, and has had significant involvement in recent legislation affecting the military justice system as policy architect, instructing counsel for the drafting of legislation, and as a witness before Parliamentary committees concerning proposed Bills.*

NOTES

1. In Bill C-60 (enacted as S.C. 2008, c.29) and Bill C-16 (enacted as S.C. 2011, c.22).
2. First session, Forty-first Parliament, 60 Elizabeth II, 2011).
3. *R. v. Généreux*, [1992] 1 S.C.R. 259 at 293.
4. As reflected in the widely-cited and now tired maxim attributed to the French Prime Minister Georges Clemenceau that "…military justice is to justice what military music is to music."
5. United States Department of Defense, *Report to the Honorable Wilber M. Brucker, Secretary of the Army, by Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army ('Powell Report')*, (OCLC 31702839) (18 January 1960) at 11.
6. At Clause 62 of the Bill.
7. In Canada's case, as predominantly reflected in the judicial guarantees in Article 14 of the *International Covenant on Civil and Political Rights*.
8. QR&O 108.02.

Photo by Philippe Landreville

The Supreme Court of Canada building, Ottawa.