

Will Justice and Fairness Prevail?

By Justice Gilles Létourneau

In his article entitled **'Anglo-American' Military Justice Systems and the Wave of Civilianization: Will Discipline Survive?**, Lieutenant-Colonel S.S. Strickey of the Office of the Canadian Judge Advocate General asks whether discipline will survive as a result of what he calls civilianization of military justice.

The issue in Canada is not about civilianization of military justice. Far from it. It is about justice itself. It is about justice and fairness to soldiers who, as Canadian citizens, are entitled to it as much as civilians when it comes to the military prosecution of ordinary criminal law offences.

How just and fair is a system which allows convictions to be entered by a lay person with no legal knowledge other than a short briefing course? How just and fair are these convictions entered after a summary trial at which the accused is not entitled to legal representation, no rules of evidence applies, the accused and his spouse are compellable witnesses, hearsay is admissible without restriction, the adjudicator knows the protagonists and the circumstances surrounding the offence charged, there is no right of appeal, the accused may be sentenced to 30 days of detention and end up with a criminal record?

How just and fair is a system which generously distributes criminal records for purely disciplinary offences such as absence without leave, lying about the reasons for the absence, conduct to the prejudice of good order and discipline, state of drunkenness, etc.?

How just and fair was a system in which the judges presiding at courts martial were not given the judicial independence constitutionally required by the entrenched *Canadian Charter of Rights and Freedoms*? How just and fair was a system which put on accused the financial and psychological burden of over 19 years of costly court litigation to achieve that independence? See the cases of *R.v. Ingebrigtson* (1990) 5 C.M.A.C. 87, *R.v. Généreux* (1992) 1 S.C.R. 259, *R. v. Lauzon* (1998) 6 C.M.A.C. 19, *R. v. Dunphy* 2007 CMAC 1 and *R. v. Leblanc* 2011 CMAC 2. Needless to say that the search for judicial independence was strongly opposed at every step of the process notwithstanding clear indications from the Court Martial Appeal Court (CMAC) that the situation was problematic from a constitutional perspective. I should add that military judges still hold a rank quite inferior to over a 150 officers who are subject to their judicial jurisdiction and that the judges' grievances are refereed by the Chief of the Defence Staff who also is subject to the *Code of Service Discipline* and falls under the judges' jurisdiction. That certainly does not enhance the public confidence in the independence of military judges.

Until the CMAC intervened in *R. v. Trépanier* 2008 CMAC 3 to strike down the enabling provision as unconstitutional, how just and fair was a system which gave to the military prosecution the tactical advantage of choosing the mode of trial rather than giving it to the accused as it existed under the *Criminal Code of Canada*? How just and fair was it to give to the military prosecution an untrammelled discretion to choose the mode of trial and leave the exercise of that discretion

prone to abuses as it happened? How come that nothing was done legislatively or in practice to correct the situation when a clear warning as to the highly questionable constitutionality of the provision was given to the military by the CMAAC three years earlier in *R.v. Nystrom* 2005 CMAAC 7 ? Not only was nothing done, but the military fiercely opposed the request by the accused *Trépanier* that he be entitled to choose his mode of trial.

How just and fair is a military justice system which, for serious ordinary criminal law offences, denies to those tried by a military tribunal , including civilians, the constitutional right to a trial by a jury given in Canada to all accused?

How just and fair is it to name all ordinary criminal law offences “service offences” and thus avoid the application of the provisions of the *Criminal Code* which is afforded to all Canadians who, according to the Charter, are all equal before and under the law and entitled to the equal protection and benefit of the law?

If the remedy to make the military justice system more just and fairer is called “civilianization”, be it. I am all for it. As for the remedy proposed by Lieutenant-Colonel Strickey, i.e. a Military Justice Committee limited to uniformed military justice practitioners, it simply highlights and compounds the existing problem. It would make the Canadian military justice system even more insular and isolated from the rest of Canadian society at a time when the need is to eliminate useless and unnecessary disparities between the civil penal justice system and the military justice system so as to ensure the best possible compliance with rights and guarantees enshrined in the Charter: see *R.v. Reddick* (1996), 5 C.M.A.R. 485, *R. v. O’ Toole* 2012 CMAAC 5, at par.32.

Let us not forget that the reforms which have taken place in recent years and have improved the fairness of the military justice system were the result of compelling decisions from the Supreme Court of Canada and the CMAAC as well as proposals of the *Public Commission of Inquiry into the deployment of Canadian Forces to Somalia* and former Chiefs Justice Dickson and Lamer who, as far as I know, were not uniformed practitioners.

The remedy is a simple one. Let the civilian courts try ordinary criminal law offences and the military institute disciplinary proceedings against military offenders. In this way the military offenders retain their civil rights that they can invoke before civilian tribunals and the military can secure discipline for disciplinary offences before military tribunals. This would simply require the repeal of s.66 of the *National Defence Act* which provides for the special pleas of *autrefois acquit* and *autrefois convict* and ss. 2 and 130 of the Act which, in fact, misrepresent ordinary criminal law offences as disciplinary offences giving rise to a criminal.