

NEWS: MILITARY JUSTICE

Drapeau, Létourneau push to update military justice, say military members deprived of Charter freedoms

Michel Drapeau and justice Gilles Létourneau have a new manual out on military law. They say they want to give a voice to members of the military.

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and juries, the closest thing to a military court-martial jury in Canada remains a panel of five officers, likely senior even to the military judge presiding over the court martial.

Although the Charter of Rights guarantees the choice of a jury trial for all Canadians outside the military charged with serious offences that carry penalties of more than five years in prison, such as manslaughter, murder, and a serious sexual offence, an exemption for the military that Parliament included in the Charter when it was enacted in 1982 remains.

"There are significant changes taking place in Europe, and it's not taking place in Canada yet," Mr. Drapeau said, emphasizing the difference between standards for civilian trials, with independent judges and juries, and the lower legal standards for trials in the military, particularly so-called summary or military service code offences.

"There is no such thing, you would feel outraged if that were to take place in the civilian domain," Mr. Drapeau said as he described the system.

"A military trial, a summary military trial in Canada, means your boss, commanding officer, tries you," he said. "You have no right to have a lawyer present, there are no rules of evidence, there is no transcript, there is no appeal, there is no grievance, and you could go to detention or jail for 30 years."

"I call it a Victorian Order of Justice, and it has no place, it has no place in Europe, the European Convention of Human Rights has been applied and it says 'you've got to change that, and the United Kingdom and a number of other countries have changed it, but Canada has not,'" said Mr. Drapeau.

Mr. Drapeau and Judge Létourneau, who presided over an inquiry into the death of a Somali civilian at the hands of Canadian peacekeeping troops in the early 1990s, said they hope their sweeping 1,761-page benchmark volume, plus indexes, on Canadian military law, its cases and rulings, will become a guide for military and civilian jurists and lawyers.

Governor General David Johnston, commander in chief of the Canadian Forces, will be on hand for the book's launch on Tuesday Oct. 25 in Ottawa, likely along with a host of other pre-eminent military and civilian legal figures and, the two authors hope, Parliamentarians who they hope will one day overhaul the National Defence Act.

"I practice in military law, and I've been a member of the bar for the past 10 years and one of the things that I know is that there is actually no legal text [like the



Military justice: Michel Drapeau and Gilles Létourneau, pictured last week in Ottawa.

Photograph by Kate Malloy, The Hill Times

new book], no doctrine in the Canadian military, which is very strange," said Mr. Drapeau.

"I think it's a huge disadvantage to military law, considering that we have in excess of 100,000 people in uniform in Canada, reservists and regulars, and also we have 25,000 civilians [in the forces], a huge budget, twenty-some odd billion dollars a year, so this fills a void, and we spared no expenses and time, the book is 1,900 pages, enough to provide a comprehensive, exhaustive view of the law," he said.

Recently-retired Supreme Court judge Ian Binnie, in a foreword he wrote for the book, called it a "real achievement" that will help civilians "trying to obtain basic information about military law and to insiders within the military looking for detailed answers to detailed questions."

"In light of increasing public attention to Canadian military operations, including, in particular, the tragic events in Somalia in 1993, and more recently the alleged violations of the rights of detainees in Afghanistan, it is surprising that this (military) 'separate body of law,' and its interaction with our ordinary law, including the Canadian Charter of Rights and Freedoms, has received so little attention in our law schools and scholarly writing," Judge Binnie wrote.

Judge Létourneau and Mr. Drapeau recently returned from an international conference on military law in Greece, where they were both guests speakers

and where they gathered more evidence of how far the Canadian military legal system lags behind other countries, particularly in Europe.

The judge and Mr. Drapeau said Canadians, and civilian families with relatives in the military, would be surprised at the gap between military and civilian legal rights.

"That's a feature of the military, all the Criminal Code offences can be dealt with by the military, and you know that under the Criminal Code you've got summary conviction procedures and indictable offences," Judge Létourneau said. "All of that becomes a service offence, so you lose the benefit, for example, of a preliminary inquiry because you don't have this discretion given to the prosecutor, to choose to proceed by summary conviction."

His example was someone accused of a minor sexual offence. In the military, the accused person could be tried by his or her commanding officer.

"Yes, it's a sexual offence, but the circumstances are that it's a touching of the breast for example. You don't need the full-fledge of the indictable offences, but in the military context it all becomes a service offence," said Judge Létourneau.

For more serious accusations, the best an accused person could get is a court martial, with no civilian judge and no jury.

"When you're dealing with a very, very serious offence, let's say one punishable by more than

five years, they lose the right to a jury trial under Section 11(f) of the Canadian Charter of Rights and Freedoms," said Judge Létourneau. "They are not entitled to a jury trial. The best that that they will get is a general court martial, with a panel of five officers from the chain of command, all friends together that know each other, the same institutional background, as opposed to 12 persons from all walks of life."

"In my view, it's easier to get unanimity with five persons than it is with 12, especially when they are from a different background," said Justice Létourneau.

And, said Mr. Drapeau, the Tim Hortons double-double servers who volunteered to work at the doughnut chain's franchise at the Canadian Army base in Afghanistan would be just as subject to military laws and its justice system as the soldiers they serve.

"Just to add spice to it, a court martial can try a civilian," Mr. Drapeau said.

"It can try a civilian, if the civilian accompanies the military. So all those people who went to Afghanistan serving coffee and cooking meals and repairing tanks, all of those civilians, if they committed an offence, any offence, in Afghanistan, while accompanying, or if you're deployed with your family, your spouse, accompanying you on a posting abroad, they're subject to military law, and if you are, and you get tried by a court martial, as a civilian, you get tried by a jury of your peers, housekeepers,

mechanics, doctors, whatever. In the military, it would be five military officers."

Judge Létourneau pointed to another failing—the fact that a military judge presiding over a court martial is often at a lower rank than members of the officer jury panel, which is often chaired by a colonel.

"At the moment, in Europe, most countries have civilian judges at court martials," said the justice. "That's the way the world is going. We're lagging behind."

The long arm of military law even extends to soldiers who are accused of a crime while on leave. Mr. Drapeau and Judge Létourneau used the example of a military man accused of a sexual assault while holidaying in British Columbia.

"It has nothing to do with his function, nothing to do with the Armed Forces, he is on holidays, yet he could be tried or he would be tried by the Armed Forces," said Justice Létourneau.

Mr. Drapeau added: "He would be tried [by court martial], and he wouldn't have the benefit of a jury trial, he would be judged according to military values by a panel made up of military officers, all of them senior to him, much senior to him."

Mr. Drapeau and Judge Létourneau could not suppress the enthusiasm and hard work they have put into the book as *The Hill Times* interview concluded in Mr. Drapeau's law office on Somerset St., not too distant from Judge Létourneau's Federal Court chambers on Sparks Street.

"We went through five proofs to make this, I tell you what it is not for, it's not for the money, because we're going to get about \$5 a copy for the book, so we're not going to become rich from that," said Mr. Drapeau.

"We did it because of two things, first of all, our love for the military, I'm the son of a military man, I served for 34 years in the military, and I continue, look around my office, you'll see, to work on military issues," he said. "But because of my commitment to the military themselves, I want them to have as good a system as it can, and I can give voice where members of the military cannot. Military lawyers, generals or colonels serving the Forces cannot criticize it, they would be court-martialled if they did."

Justice Létourneau, close to retirement, but restrained still by his judicial robes, put it this way: "I think the jurisprudence of our court over the last, I would say, 15 years has been trying to diminish as far as possible, the differences between the military justice system and the civilian system. In terms of protection of the rights of the accused, but there is only so much that we can do."

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