

DIALOGUE

A Farewell Salute to the Military Nexus Doctrine*

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INTRODUCTION

In *R. v. Généreux*,¹ the Supreme Court of Canada held² that a parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns, is not, by its very nature, inconsistent with the *Charter*.³ Although the appellant had conceded this point, Lamer C.J.C. sought to put the matter to rest by reviewing the reasons for a parallel system of courts, which he said “provided guides to the system’s proper limits.”⁴ His analysis included the finding that “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.”⁵

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1 [1992] 1 S.C.R. 259 (“*Généreux* SCC”).

2 On this point the Court was unanimous. L’Heureux-Dubé J. dissented on the question of whether the General Court Martial, as constituted at the time of the appellant’s trial, violated his right to a fair and public hearing by an independent and impartial tribunal as guaranteed in s. 11(d) of the *Charter*. Unlike the majority, she held that the General Court Martial was consistent with the *Charter*, and therefore, she would have dismissed the appeal entirely.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

4 *Généreux* SCC, above, note 1 at 287-288.

5 *Ibid.* at 293.

An article appearing last autumn interpreted the *Généreux* decision as focusing “much needed attention on the importance of the ‘military nexus’ test as the basis of jurisdiction of military tribunals over ‘ordinary’ criminal matters.”⁶ Accordingly, the article examined the military nexus doctrine and its role in safeguarding defendants’ rights by restricting court martial jurisdiction to offences with a “military nexus.” The interpretation of *Généreux* as breathing new life into the military nexus doctrine is both flawed and dangerous because:

1. by the time the *Généreux* case was heard, the institutional and international foundation for the military nexus doctrine and its antecedent, the American “service-connection” doctrine, had collapsed;
2. a careful reading of the *Généreux* decision neither advocates nor supports continued application of the doctrine; and
3. in the context of the present court martial system, the imposition of jurisdictional restrictions such as those contemplated by the military nexus doctrine would be a disservice to prosecutors and defendants alike before military tribunals.

After examining each of these reasons, it will be argued that only by understanding *Généreux* as consigning to history both the military nexus doctrine and its approach to military tribunals, can courts martial and civilian appellate review courts address directly questions of fairness posed by court martial procedure.

(a) The Rise and Fall of the American Service-Connection Test

Much has been written about the “Vietnam Era” in the United States, when increased public interest in civil rights came into often violent conflict with the policy of conscription for the controversial war overseas. During this time, there were many who once had been the objects of discrimination and abuse who began to benefit from the recognition and support given to their fundamental rights; but there

6 R.D. Lunau, “Military Tribunals under the *Charter*” (1993) 2 N.J.C.L. 197 at 199. Section 130 of the *National Defence Act*, R.S.C. 1985, c. N-5, creates concurrency of jurisdiction between military and civilian tribunals for *Criminal Code* of Canada offences.

were also many who, with no particular desire to serve in the military, suddenly found themselves subject to the stricter standards of military discipline and the then reduced procedural fairness of military tribunals.

In a series of decisions by the Court of Military Appeals (since renamed the United States Court of Military Appeals or "USCMA"⁷) and the United States Supreme Court that were inspired by the growing commitment to individual rights and the inability to effect adequate reform of military tribunals, procedural fairness and military necessity were reconciled through a restrictive interpretation of the jurisdiction of courts martial.⁸ The resulting service-connection test, introduced in the 1969 U.S. Supreme Court decision in *O'Callahan v. Parker*,⁹ evolved in the jurisprudence of the Court of Military

7 The "U.S." was added to "make it clear that the Court of Military Appeals is a court and does have the power to question . . . any executive regulation or action as freely as though it were a court constituted under article III of the Constitution" [emphasis added]. *House of Representatives Report* No. 1480, 90th Cong., 2nd Sess. 2 (1968). This clarification was necessary because the constitutional separation of powers, with its sharp distinction between the judiciary (and its institutions), and the executive (including the military and its tribunals), created uncertainty over the status of a civilian appellate review court for military tribunals, i.e., was it part of the executive or part of the judiciary?

8 Arguably, both the formulation of the questions addressed by these courts and the responses they gave were predetermined by the constitutional constraints of the courts themselves. On one hand, the Court of Military Appeals from its early days took the bold stance "that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of [the] armed forces." *United States v. Jacoby*, 11 U.S.C.M.A. 428 29:244 (1960). This emphasis on constitutionally guaranteed safeguards was necessary to the enhancement of standards of fairness for military tribunals because the doctrine of the separation of powers, so powerful in defining the spheres of influence of the various branches of the U.S. government, discouraged reference to civilian common law precedents and therefore, in the absence of constitutional standards, constrained procedural standards of fairness to those established in military jurisprudence. On the other hand, the United States Supreme Court, which hears constitutional matters, had no appellate authority over military tribunals until the passing of the *Military Justice Act 1983*, Pub. L. 98-209, and therefore was constrained by its supervisory mandate to a review of the jurisdiction of courts martial. In retrospect, it appears that the move to restrict court martial jurisdiction as a way to enhance procedural fairness in military tribunals and reduce inconsistencies with constitutional standards was a resolution born more of necessity than principle.

9 395 U.S. 258 (1969).

Appeals into a review of the 12 “*Relford* factors,”¹⁰ which continued to be the basis for determining U.S. military tribunal jurisdiction for some 17 years.

A variety of sociological and constitutional distinctions between Canadian and American military tribunals account for the much more limited interest in the service-connection or military nexus approach to court martial jurisdiction shown by reviewing courts in Canada during its sporadic evocation in the jurisprudence of the 1980s. First, in the absence of widespread conscription for a controversial war, far fewer in Canada were likely to resist either the application of military standards of discipline to their conduct or the jurisdiction of courts martial over them. Second, the lack of a rigid separation of powers in the Canadian Constitution permitted the application of civilian standards of fairness and reference to civilian criminal jurisprudence. In this regard, it is worth noting that those who serve in the Canadian military Bar, unlike their American counterparts, have received their basic legal training entirely in civilian law schools;¹¹ and the Canadian civilian appellate court of review for courts martial, the Court Martial Appeal Court, unlike the USCMA, is comprised of members of the civilian judiciary.¹² Accordingly, there is generally greater reliance in Canadian military tribunals on standards of fairness established by civilian criminal precedent than in

10 *Relford v. Commandant, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas*, 401 U.S. 355 (1971).

11 In his 1989 article, Fidell noted the “gap that separates civilian and military societies and defines their views of one another and of their respective legal systems. ‘Hatred’ is certainly too strong a term for the relationship, but would ‘mutual distrust’ do? Anyone who has practised in both communities would have to acknowledge the accuracy of such a description. Worse yet there is little prospect for bridging this gap so long as our society is content to treat the military as a separate society.” E.R. Fidell, “The Culture of Change in Military Law” (1989) 126 *Mil. L. Rev.* 125 at 127. Consequently, “Anyone tracing the path of military law over the last several decades will be struck by two phenomena: the extent of change that has overtaken the system . . . and the resistance to change. Much of the change has been justified – or condemned – under the rubric of ‘civilianization’ – the ‘C’ word, the mere utterance of which still makes the occasional senior military lawyer see red.” *Ibid.* at 125.

12 The Court Martial Appeal Court is comprised of a panel of three judges drawn from the Federal Court and/or the provincial superior courts.

similar tribunals south of the border. Finally, just as economies of scale such as those that exist in the American military justice system tend to militate against reliance on civilian legal training and precedence, so they militate in favour of more formal methods of resolving the question of whether the civilian or the military authorities should handle the prosecution of an alleged offence for which there is concurrency of jurisdiction.¹³

All in all, the need to define court martial jurisdiction by establishing a "military nexus" in the commission of a particular offence, as recommended in the 1980 concurring judgment of McIntyre J. in *MacKay*,¹⁴ lacked the urgency of such a doctrine in the American jurisprudence from which it emerged. Consequently, its support in the Canadian jurisprudence was uneven: the *Relford* factors were expressly rejected;¹⁵ no other test was established;¹⁶ and in the case of certain offences, such as those involving narcotics, the offence itself was considered sufficient to create a nexus and it was unnecessary to show any further connection to military discipline.¹⁷

Despite the greater significance to the American jurisprudence of the service-connection test, in 1987 the U.S. Supreme Court marked the occasion of its first decision as an appellate court to a

13 Informal cooperation between civilian and military authorities as a method of resolving jurisdictional questions was discussed by Watkin in his 1990 examination of Canadian military justice:

"While theoretically such overlapping [of jurisdictions] has the potential to create a problem, in practice, conflict is avoided by liaison between the civilian and military authorities. In addition, policies are in place that require certain offenses, such as impaired driving, to be dealt with by the civilian criminal justice system. These policies are followed even in cases where the nexus approach should result in a clear military jurisdiction. Similarly, jurisdiction is often waived by civilian authorities in order to allow the military to commence disciplinary action."

K.W. Watkin, *Canadian Military Justice: Summary Proceedings and the Charter* (LL.M. Thesis, Queen's University, 1990) at 104.

14 *MacKay v. R.*, [1980] 2 S.C.R. 370.

15 *R. v. MacEachern* (1985), 4 C.M.A.R. 447, 24 C.C.C. (3d) 439.

16 A series of factors was proposed, but not adopted, in the dissenting judgment of Heald J. in *R. v. Ionson* (1987), 4 C.M.A.R. 433, aff'd [1989] 2 S.C.R. 1073.

17 *R. v. MacDonald* (1983), 6 C.C.C. (3d) 551 (Ct. Martial App. Ct.). That the offence itself could suffice to create a military nexus belies the theory underlying the military nexus doctrine (i.e., that it is necessary to make a separate determination of jurisdiction).

military tribunal¹⁸ by restoring membership in the services as the basis for military tribunal jurisdiction.¹⁹ Having exhausted its usefulness in the jurisprudence from which it emerged and in which it was more heavily relied upon, the doctrine insisting upon a service-connection or a military nexus for court martial jurisdiction would seem to require a compelling account of its continued importance to Canadian military jurisprudence for its perpetuation here.

(b) *Généreux* and the Supreme Court's View of Court Martial Jurisdiction

Notwithstanding the complete absence of reference to the military nexus doctrine in the decision in *Généreux*, the statements by Lamer C.J.C. that the reasons for a parallel system of courts "provide guides to the system's proper limits"²⁰ and that "[t]he 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"²¹ have been interpreted on at least one occasion²² to signify the continued importance of the doctrine in determining court martial jurisdiction. However, as the Chief Justice pointed out, the need for separate tribunals is not limited to the need to try offences unknown to civilian courts, but rather extends to the need "to enforce special disciplinary standards."²³ By way of illustration, he cited the following passage from *MacKay v. Rippon*²⁴ with approval:

18 Review by the U.S. Supreme Court of military tribunal decisions was previously limited to judicial review: see above, note 8. It could be argued that the restoration of plenary court martial jurisdiction had to wait until a case came before the U.S. Supreme Court in its *appellate* capacity, both because the USCMA was committed to the service-connection doctrine and so was unlikely to abolish it, and because it was unlikely that a case coming before the Supreme Court on the limited ground of a jurisdictional challenge by a defendant to a finding based on that doctrine would provide a suitable opportunity for the re-establishment of a broader jurisdiction based on status alone.

19 *U.S. v. Solorio*, 483 U.S. 435 (1987).

20 *Généreux* SCC, above, note 1 at 288.

21 *Ibid.* at 293.

22 See Lunau, above, note 6.

23 *Généreux* SCC, above, note 1 at 294.

24 [1978] 1 F.C. 233 (T.D.).

Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence.²⁵

Accordingly, discipline, efficiency and morale depend on the existence of a military justice system to try offences unknown to civilian criminal law, to assess the special impact the commission of an "ordinary" criminal offence might have on the military, and to pass a sentence of appropriate severity. It is to be conceded, though, that the need for different sentencing standards is itself predicated on a military nexus and so, by itself, insufficient to eliminate the need for the military nexus doctrine.

There is a third sense, however, in which military discipline, efficiency and morale necessitate the existence of a parallel system of justice. *Esprit de corps* depends on the confidence that one's conduct, alleged to have violated the *Code of Service Discipline* (even in the commission of an offence also found in the *Criminal Code*) will be assessed by those whose familiarity with the challenges and circumstances of military life is the product of personal experience and whose sensitivity to the requirements of the Code is derived from an ongoing commitment to uphold it. Thus, the need for a system of military courts is more than merely a matter of avoiding disruption of service schedules to permit members' appearance in civilian courts. It entails the right to have one's conduct judged by one's peers – those with first-hand knowledge of the pressures and priorities that characterize military life.²⁶ In other words, it is the virtually plenary

25 Ibid. at 236.

26 It is important to note that appellate and judicial courts inevitably face the issue of the jurisdiction of military tribunals presented from the perspective of those who regard themselves as having been disadvantaged by court martial rather than civilian criminal proceedings. Among the service members who do not seek review (and who may not have been required to appear before a trial court) are those whose actions, though potentially constituting serious violations in a civilian context, are excused partially or completely as a result of the military

criminal jurisdiction of the military justice system itself that promotes morale by removing concerns of service members about the way in which civilians might view their conduct, as it promotes discipline by ensuring that service members cannot through their very misconduct escape the censure of military authority.

It has been argued that discipline with respect to those whose sentence includes dismissal from the service could be served equally by releasing the accused and recommending prosecution by civilian authorities.²⁷ In emphasizing efficiency, this argument overlooks an important challenge to military discipline that exists in the temptation under pressure to refuse to carry out orders, to quit or to desert. To the extent that the penalties prescribed by the *Code of Service Discipline* help to promote discipline, this effect would be curtailed if, as a result of the chance resemblance between one's misconduct and a civilian offence, one were automatically released and returned to a civilian standard of discipline. Moreover, an anomalous situation would arise in which a more serious infraction could receive a less severe penalty as a result of the similarity between it and a *Criminal Code* offence. Finally, the possibility of "forum-shopping" by military defendants would lessen both the incentive to uphold the *Code of Service Discipline* in those tempted to violate it and the pride of those who steadfastly adhere to it.

(c) The Charter and the Military Justice System

If the analysis by Lamer C.J.C. of the history and purpose of the court martial system did not clarify for all that its jurisdiction extends to offences against the *Criminal Code* by reason of their commission by service personnel, then the analysis of the application of the *Charter* to courts martial should have settled this point.

context in which they occurred. In other words, the story not told by the case law on jurisdictional review is that of defendants benefited by military court jurisdiction in the form of an exercise of prosecutorial discretion, acquittal, or lenience in sentencing because of a mitigating factor more easily recognized by a military court.

27 Of course, the release would itself be based on a presumption of guilt and so would be inherently unfair.

Among the distinctions that have emerged in *Charter* jurisprudence between “ordinary” courts and administrative tribunals has been in the application of section 11. The guarantees to “persons arrested or detained” found in section 11, according to the marginal notes, apply to “proceedings in criminal and penal matters.” These guarantees have been held to apply also to administrative proceedings, however, but only by way of informing the content of the principles of fundamental justice.²⁸ In determining whether they applied directly or indirectly to proceedings under the *R.C.M.P. Act*,²⁹ the *Wigglesworth*³⁰ decision in 1987 introduced a functional approach to the identification of criminal and penal proceedings based on whether the proceedings are “by nature” criminal or have “true penal consequences.” In his review of *Wigglesworth* in *Généreux*, the Chief Justice affirmed the findings: that section 11 applies to proceedings that are concerned with offences of a public nature, that is, breaches of rules that are “intended to promote public order and welfare within a public sphere of activity”;³¹ and “that such hearings are to be distinguished from private, domestic or disciplinary hearings which are intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a private sphere of activity.”³² Lamer C.J.C. then found that section 11 applied to courts martial both because the court martial serves a public function by punishing specific conduct which threatens public order and welfare, and because it has penal consequences.³³

28 Section 7 of the *Charter* reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Accordingly, the principles of fundamental justice themselves become standards for administrative proceedings only when those proceedings deprive the individual of liberty or security of the person.

29 *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10.

30 *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. The decision held applicable the s. 11(h) *Charter* protection from double jeopardy to situations arising from the concurrent jurisdiction between the *Criminal Code* and the *R.C.M.P. Act*.

31 *Wigglesworth*, above, note 30 at 560.

32 *Généreux* SCC, above, note 1 at 281.

33 On reciting the statutory provision for court martial jurisdiction over offences committed by service personnel against the *Criminal Code* and any other Act of Parliament, the Chief Justice in *Généreux* made no further comment or

Accordingly, the Canadian legal landscape from the perspective of the *Charter*, outlined in *Wigglesworth* and reaffirmed in *Généreux*, contains “ordinary” criminal courts to which the rights in section 11 apply; administrative tribunals to which these rights may apply indirectly;³⁴ and proceedings such as those under the *R.C.M.P. Act* or the *National Defence Act*³⁵ to which these rights apply by virtue of the criminal nature of the proceedings or their penal consequences. This is a very different view of the status of the court martial from that portrayed by the military nexus doctrine: that approach would restrict courts martial in the trial of offences not exclusively military in nature to occasions when a special military nexus could be established. In so doing, it would assimilate the court martial to the class of professional discipline bodies.

With respect to the court martial,³⁶ further support for a distinction between it and an administrative tribunal is found in the explicit exception in section 11(f) to the guarantee of trial by jury in the case of a military tribunal.³⁷ The court martial is, therefore, not to be located within the spectrum of administrative tribunals for which standards of procedural fairness may be flexibly determined and highly contextualized. Far from being an “inferior tribunal” with inferior standards of justice creating “a presumptive right to be tried in a civilian court” as suggested by the earlier comment,³⁸ the court martial is part of a system of justice that is *parallel* to that of the “ordinary” criminal courts.

To say that a parallel court system with virtually plenary criminal jurisdiction over service personnel is permitted by the

qualification concerning a superadded prerequisite of a “military nexus” once required for court martial jurisdiction: see *ibid.* at 280-282.

34 Section 11 may apply by informing the principles of fundamental justice, which themselves apply only if the person is deprived of liberty or security of the person.

35 Above, note 6.

36 As opposed to a disciplinary proceeding under, say, the *R.C.M.P. Act*.

37 Section 11(f) of the *Charter* reads: “Any person charged with an offence has the right . . . (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.” That s. 11(f) makes an explicit exception for military tribunals itself suggests that the rest of the guarantees found in s. 11 apply to military tribunals.

38 Lunau, above, note 6.

Charter is not to say that the *Charter* permits inconsistencies with its guarantees in such a system. Following *Wigglesworth*, it is this very breadth of jurisdiction that invokes the rigorous application of the *Charter* guarantees. In balancing the rights of defendants against the requirements of discipline and morale in the Forces, the Supreme Court did not take the inferiority of the court martial for granted, addressing only the degree to which individual rights should be sacrificed to military necessity; rather, having established the need for court martial jurisdiction over service personnel, the Supreme Court assessed the impugned independence of the court martial against the *Charter* requirements for independence appropriate to tribunals with that jurisdiction.³⁹

To the extent that the distinction between substance and procedure furthers the discussion of the differences between military and civilian criminal justice, it may be suggested that the *Charter* was held in *Généreux* to permit substantive differences while largely precluding differences of a procedural nature. In the court martial system, the members of the court martial itself,⁴⁰ unlike the members of a jury in a criminal trial, are charged with the determination of both the guilt or innocence of the accused and the appropriate sentence. In this way, the most contextually sensitive factors in the trial – those relating to fact-finding, the weighing of evidence and the assessment of the seriousness of the violation – are placed in the hands of the

39 Section 11(d) of the *Charter* reads: "Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." This section was considered in *R. v. Valente*, [1985] 2 S.C.R. 673, a decision concerning the independence of provincial court judges, in which Le Dain J. set three requirements for judicial independence: security of tenure, financial security and administrative independence. It was as a result of the application of these three requirements to the Standing Court Martial in *R. v. Ingebrigtsen* (1990), 5 C.M.A.R. 87, 61 C.C.C. (3d) 451 that that court martial was found to be insufficiently independent and therefore inconsistent with the *Charter*. Rendered inoperative through the striking down of its enabling legislation, it was quickly revived by amendments to the *Queen's Regulation and Orders for the Canadian Forces* (Ottawa: Queen's Printer) which established an independent military judiciary that was later largely endorsed by the Supreme Court in *Généreux*.

40 Which in the case of the General Court Martial is comprised of between five and nine members.

panel of service personnel who comprise the court martial. Moreover, these “substantive” aspects of the trial are afforded greater deference in appellate review of court martial decisions than are matters of law and procedure.

On the “procedural” side, the staff of the court martial also includes a judge advocate who is not a member of the “court martial” and whose function it is to advise the court on matters of law and procedure. Because the office of the judge advocate and the performance of his or her duties are not as contextually sensitive, Lamer C.J.C. made it clear that they must meet strict *Charter* standards. Accordingly, the requirements for judicial independence established in *Valente*⁴¹ and applied in the Court Martial Appeal Court decisions in *Généreux*⁴² and *Ingebrigtsen*,⁴³ were endorsed with some adjustments by Lamer C.J.C. As foreshadowed by earlier *Charter*-mandated amendments to the *National Defence Act*,⁴⁴ the Supreme Court confirmed its high standards for procedural fairness in courts martial. In this way the jurisdictional resolution, via the military nexus doctrine, of the concern that military defendants might be disadvantaged was displaced in *Généreux* by the direct application of *Charter* requirements. If court martial procedure is thought to be unfair, it must be challenged directly and, if necessary, it must be reformed. As suggested in the oft-cited passage of J.B. Fay, written some two decades ago, the fairness of military justice is a concern shared by prosecution and the defence alike before a court martial. The belief that the military defendant is disadvantaged is itself inimical to discipline.

41 Above, note 39.

42 (1990), 5 C.M.A.R 38, rev'd [1992] 1 S.C.R. 259.

43 Above, note 39.

44 The following amendments to the *National Defence Act* are among those found in the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, R.S.C. 1985 (1st Supp.), c. 31, ss. 42-61: s. 66 comprehensive protection for those tried by military tribunals against double jeopardy resulting from retrial by civilian tribunals; s. 151 provision to incorporate all common law excuses and justifications into any proceedings under the *Code of Service Discipline*; s. 156 the elimination of provisions for the arrest or detention without a warrant of a person “about to commit” an offence; s. 158 comprehensive provisions for pre-trial release; s. 159 requirements for speedy trial; s. 163 prohibition of the same person acting as both the investigating officer and the trier of fact; s. 248 provisions for release pending appeal; and s. 273 specifications for the conduct of searches.

Fairness and justice are indispensable. . . . When the serviceman has confidence in his commanders and believes in the organization, there is discipline. . . . It is from military law that the serviceman receives his most tangible indication of the relationship between himself and those who command. It is under military law that he is tried and punished. If the military law system is a just system, then it will be recognized as such by the serviceman and thus it will promote and support the discipline upon which the military organization is based.⁴⁵

CONCLUSION – CANADIAN MILITARY JUSTICE: DIFFERENT DRUMMER – SAME BEAT

There once was a time when the constitutional constraints and the jurisdictional limitations of reviewing courts impaired the promotion of fairness in courts martial, and when popular support for high standards of fairness necessitated a restrictive interpretation of court martial jurisdiction. Much has changed in the intervening decades, however, and as suggested in the *Charter* analysis in *Wigglesworth* and *Généreux*, there is room in the Canadian legal landscape for the existence of a parallel court system within the military serving a public function. The debate over the proper-jurisdiction of such a court system invoked by the military nexus doctrine assumes the incorrigibility of procedural differences and the inevitability of disadvantage to defendants before courts martial. As the *Généreux* decision demonstrates, it is only by abandoning this collateral approach to fairness for defendants in favour of the direct application to court martial procedure of standards set by the *Charter* and civilian criminal law that the rights of military defendants can be protected. In doing so, the Supreme Court has permitted the courts martial to march to their own drummer, while ensuring that they remain in step with their civilian counterparts.

⁴⁵ J.B. Fay, "Canadian Military Law: An Examination of Military Justice" (1975) 23 *Chitty's L.J.* 120 at 123.