

# MILITARY JUSTICE: FROM OXYMORON TO ASPIRATION<sup>®</sup>

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The mandate for *Charter*-based judicial review of military law is now in its second decade. Comparative analysis of the relationship between military law and the civilian judiciary in common law countries reveals that Canadian courts benefitting from this mandate are so placed within the constitutional structure as to be uniquely able to engage in substantive review of the adherence to the principles of fundamental justice by Canadian courts martial. Accordingly, the question of the jurisdiction of military tribunals which has formed the focal point internationally for judicial review is of passing significance in Canada. The yet critical issues of civilian appellate review and judicial independence can be and are being addressed directly in Canada. In 1990, the Court Martial Appeal Court, labouring under a constitutionally inadequate jurisdiction of its own, struck down the most common form of court martial—the Standing Court Martial—triggering legislative reform that created the first truly independent military judiciary. Similar challenges to the constitutionality of the General Court Martial succeeded in the 1992 Supreme Court decisions in *Généreux* and *Forster*, which confirmed in principle the adequacy of the amendments to the structure of the courts martial and the justifiability of the remaining differences from civilian judicial processes.

Le mandat de faire une revue judiciaire du droit militaire basée sur le *Charte* est entré dans sa deuxième décennie. L'analyse comparatif du rapport entre le droit militaire et le pouvoir judiciaire civil dans les pays de la *common law* démontre que les cours canadiennes, profitant de ce mandat, sont situées dans la structure constitutionnelle de sorte qu'elles possèdent uniquement la capacité de faire une revue substantive de l'adhésion de la cour aux principes. Par conséquent, la question de la juridiction des tribunaux militaires, qui est devenue le sujet de la revue judiciaire au niveau international, est d'une importance passagère au Canada. On est capable et en train d'aborder les questions critiques de la revue d'appel civile et de l'indépendance judiciaire au Canada. En 1990, la Cour d'appel de la cour martiale du Canada, chargée de sa propre juridiction constitutionnellement inadéquate, a annulé la plus commune forme de la cour martiale, la cour martiale permanente, et provoqué de la réforme législative créant première organisation judiciaire militaire d'une indépendance réelle. Des défis comparables à la constitutionnalité de la Cour Générale ont réussi dans *Généreux* et *Forster*, décisions de la Cour Suprême en 1992, qui ont affirmé en principe les modifications structurelles de la cour martiale et la légitimation des autres éléments qui distinguent la cour des procédures judiciaires civiles.

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## I. INTRODUCTION: MILITARY LAW AND THE RULE OF LAW

We are fortunate in Canada to have enjoyed long-standing security from armed attack. We attribute this, in part, to our peaceful nature. Accordingly, we look upon matters of national defence with both a degree of complacency and uneasy ambivalence. However, our prominent role in peace-keeping has underscored the importance of the contribution made by our armed forces to the international rule of law.

Effective armed forces depend, *inter alia*, upon the maintenance of standards of conduct among their members distinct from those of ordinary citizens. The maintenance of these standards, it has been thought, requires a specialized judicial system. Therefore, although the rule of law requires that everyone be subject to ordinary laws administered by ordinary tribunals, it is thought that those engaged in the defence of the rule of law should be subject to a distinct law administered by distinct tribunals. As one American writer noted, "It is one of the ironies of patriotism that a man who is called to the military service of his country may anticipate not only the possibility of giving up his life but also the certainty of giving up his liberties."<sup>1</sup> This irony would be tragic if the liberties denied members of the armed forces were

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<sup>1</sup> R. Sherrill, *Military Justice Is to Justice as Military Music is to Music* (Toronto: Fitzhenry & Whiteside, 1969) at 1.

not merely those incidental to civilian life, but more basic liberties that were forfeited in a judicial process that violated the principles underlying the rule of law they are sworn to defend.

In this way, the growing commitment in Canada and elsewhere in recent decades to the fairness of the criminal justice system has fuelled concern that a parallel system of justice, administered by members of the military who are aware of and sensitive to its military context,<sup>2</sup> may be ill equipped to afford defendants the degree of fairness they would enjoy in ordinary civilian courts. This concern has gained a sense of urgency with the establishment of constitutional guarantees under the *Canadian Charter of Rights and Freedoms*<sup>3</sup> that apply to "everyone."<sup>4</sup> Therefore, despite ambivalence concerning the role of the armed forces, there should be no complacency over the need for fairness in the Canadian military justice system. That system is charged with the responsibility of safeguarding the rights of those who, in defending the rule of law, deserve, no less than other citizens, to benefit from it.

The first decade of *Charter* jurisprudence was marked by sweeping changes in Canadian military law. These changes culminated in the 1992 Supreme Court of Canada decision in *R. v. Généreux*. The Court found that the structure of the court martial in which the appellants were convicted had violated their rights under s. 11(d) to a trial by an independent and impartial tribunal, in a way that could not be justified in a free and democratic society.<sup>5</sup> With the offending provisions in its governing legislation declared of no force and effect, the military court of general jurisdiction was rendered inoperative until the necessary amendments were made. Despite the apparent drama of this event, it was only one of many significant developments that have resulted in the establishment of arguably the fairest military justice system anywhere.

This article seeks to place these developments in their historical and constitutional contexts. Part II examines the trend of the 1950s and 1960s in common law countries to establish civilian appellate review of

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<sup>2</sup> See *R. v. Généreux*, [1992] 1 S.C.R. 259.

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>4</sup> 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" [emphasis added]. "Everyone" has been held to include every person physically present in Canada and thereby under Canadian law: see generally, *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

<sup>5</sup> *Généreux*, *supra* note 2 [hereinafter *Généreux* (S.C.C.)]. Section 11 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."

military proceedings; it contains a comparative analysis of civilian appellate review as it exists in the United States, the United Kingdom, and Canada, assessing the degree to which it has succeeded in bringing civilian standards of fairness to bear on military proceedings. Part III traces the rise and fall of the jurisdictional solution sought in the 1970s and 1980s to the questions of fairness in military tribunals. Part IV considers the crystallization of the principal concern with the fairness of a parallel system of justice into the concern for judicial independence and the jurisprudential developments prompted by this concern. Part V reviews the culmination of these developments in the 1992 Supreme Court of Canada decisions which established the first formally independent military judiciary.

## II. CIVILIAN APPELLATE REVIEW

The first major development in the evolving fairness of courts martial in recent decades occurred in the early 1950s when the United Kingdom, the United States, Australia, New Zealand, and Canada all moved to establish civilian courts of appeal from military tribunals. It was then thought that civilian appellate review was the key to ensuring standards of fairness in military courts commensurate with those of civilian tribunals. In its absence, review of court martial decisions was limited both in its availability and its scope by the constraints of the prerogative writs. As one historian observed, with "surprising unanimity, the common law world concluded virtually at the same moment in time that, just as war is too important to be left to the generals, so military justice is too vital to be entrusted to judge advocates."<sup>6</sup> The striking coincidence in the timing of the introduction of civilian courts of military appeal and the similarity in the extent of their jurisdictions<sup>7</sup> can be contrasted with their varying degrees of success in influencing the evolution of procedural fairness in military tribunals.

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<sup>6</sup> F.B. Weiner, *Civilians Under Military Justice: The British Practice Since 1689, Especially in North America* (Chicago: University of Chicago Press, 1967) at 232.

<sup>7</sup> They cannot review findings of fact, nor can they vary the sentence of the trial court.

### A. *The United States Court of Military Appeals*

The United States Court of Military Appeals (USCMA)<sup>8</sup> is the senior U.S. military appellate court<sup>9</sup> and is composed of five civilian judges<sup>10</sup> appointed for a term of fifteen years by the President with confirmation by the Senate. Since its inception, the USCMA and its predecessor, the Court of Military Appeals (COMA), has identified itself with federal appellate courts, and since 1960, the Court has held “that the protections in the *Bill of Rights*,<sup>11</sup> except those which are expressly or by necessary implication inapplicable, are available to members of ... [the] armed forces.”<sup>12</sup> The efforts to enhance the fairness of court martial proceedings, first of COMA and later of the USCMA, have included striking down Army Manual provisions held to impose “cruel and unusual punishment,” and attempts to establish the right to counsel in summary proceedings. At times, the rulings of the USCMA have been so bold as to invoke the restraining hand of the U.S. Supreme Court.<sup>13</sup>

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<sup>8</sup> The original name of this court was “COMA” (The Court of Military Appeals)—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”: *House of Representatives Report* No.1481, 90th Cong., 2nd Sess. 2 (1968), as found in *NMCMR v. Carlucci*, 26 M.J. 328 (U.S.C.M.A. 1988) (Lexis No. 1653) [hereinafter *Carlucci*].

<sup>9</sup> The USCMA operates in addition to formal appellate courts within each of the services that are empowered to review matters of both law and fact: R.S. Thompson, “Constitutional Applications to the Military Criminal Defendant” (1989) 66 U. Det. L. Rev. 221. (The differences in scale between Canadian and American jurisprudence on any given question make the recent developments all the more remarkable for being in advance of those in the U.S.)

<sup>10</sup> This was increased from three by the 1989 Congressional Amendments to the *Uniform Code of Military Justice*: D.A. Schleuter, *Military Criminal Justice: Practice and Procedure*, 2nd ed. 1990 Cumulative Supplement (Charlottesville, VA: Michie, 1990) at 137.

<sup>11</sup> U.S. Const.

<sup>12</sup> *U.S. v. Jacoby*, (1960) 11 U.S.C.M.A. 428 29:244 [footnote added]. This laudable objective has been impeded, in part, by a lack of awareness and education on the part of practitioners, resulting from a pronounced divergence between the American civil and military bars. See E.R. Fidell, “The Culture of Change in Military Law” (1989) 126 Mil. L. Rev. 125 [hereinafter “The Culture of Change”]. In 1982 the American Bar Association, in its efforts to remedy this situation and to align court martial procedure with civilian criminal procedure, published a comparative analysis: *Federal Rules of Criminal Procedure and Military Practice and Procedure*.

<sup>13</sup> The 1976 U.S. Supreme Court decision in *Middendorf v. Henry*, 96 S.Ct. 1281 (1976) [hereinafter *Middendorf*], explicitly overruled an earlier COMA ruling which stated that assigned counsel must be available to a summary court martial defendant when there was a possibility of confinement. The COMA response of restricting the summary court martial to minor offences of an exclusively military nature was also later vacated: J.B. Jacobs, *The Socio-Legal Foundations of Civil-Military Relations* (New Brunswick, N.J.: Transaction Books, 1986) at 8.

Advocates of enhanced rights for defendants in military tribunals have felt that “[m]ore than any other institution, COMA placed the military’s system of social control under the rule of law.”<sup>14</sup>

The significance of the USCMA’s approach to its mandate and its strong commitment to constitutional standards in military courts is best appreciated in light of the broader context of constitutional jurisprudence shaped by the “political questions” doctrine which held military law to be non-justiciable in civilian courts.<sup>15</sup> This sharp division in the American Constitution between the spheres of influence of the executive and the judiciary underlying the political questions doctrine has fuelled lingering controversy over the application of the *Bill of Rights* to military tribunals, despite the extensive jurisprudence in the civilian courts based on the *Bill of Rights*.<sup>16</sup>

In contrast, no such impediment to judicial review exists in Canada according to a concurring decision in *Operation Dismantle Inc. v. The Queen*<sup>17</sup> where Wilson J. held that matters of national defence were justiciable in civilian courts, and that the court below had erred in following both U.K. precedents, which suggested that defence policy was not “a matter for judge or jury,”<sup>18</sup> and U.S. precedents based on the political questions doctrine, which she cited as a “well established principle of American constitutional law.”<sup>19</sup> It was wrong to conclude, Wilson J. stated, that such matters “involve moral and political considerations ... not within the province of the courts to assess.”<sup>20</sup> Matters of the executive branch, she explained, *are* subject to judicial review in Canada because “there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative.”<sup>21</sup> Clearly, the

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<sup>14</sup> Jacobs, *ibid.* at 6-7. Also, “[s]ince its creation in 1951, the United States Court of Military Appeals has made great strides in creating the beginning of a legitimate jurisprudence in the field of substantive military law”: L.C. West, *They Call it Justice: Command Influence and the Court-Martial System* (New York: Viking, 1977) at 283.

<sup>15</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>16</sup> See *supra* note 12.

<sup>17</sup> [1985] 1 S.C.R. 441 [hereinafter *Operation Dismantle*].

<sup>18</sup> *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142 (H.L.) at 151.

<sup>19</sup> *Operation Dismantle*, *supra* note 17 at 467.

<sup>20</sup> *Ibid.* at 465.

<sup>21</sup> *Ibid.* at 464. Strong support for judicial review of Canadian military law is to be found in the unusual relationship created by the Canadian Constitution between the various “branches” of government. As Hogg explained in a *pre-Charter* discussion, “There is no general ‘separation of powers’ in the [British North America] Act. The Act does not separate the legislative, executive and

presence or absence of a constitutional constraint such as that created by the political questions doctrine can have a significant impact on the application of constitutional standards to military courts.

### B. *The U.K. Courts Martial Appeal Court*

Different kinds of constraints, in particular, the lack of civilian standards of procedural fairness that come with the participation of personnel trained in civilian law in military proceedings, and the absence of explicit constitutional standards, have rendered civilian appellate review in the United Kingdom more conservative. Emphasis has been placed on internal military/administrative avenues of appeal that "are much more extensive than in the civilian courts and have been developed to counter-balance a system that relies to a great extent on the services of lay persons to administer justice."<sup>22</sup> In fact, it has been argued on behalf of the internal military procedures that "the military experience demonstrates the essential fact that free access to appellate review is an indispensable feature of an enlightened system of criminal justice."<sup>23</sup> Despite the fact that free access to appellate review may be of genuine practical benefit, especially in less formal disciplinary proceedings, the absence of constitutionally guaranteed standards as a basis for that review coupled with procedural limitations on its availability,<sup>24</sup> casts

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judicial functions and insist that each branch of government exercise only 'its own' function": P.W. Hogg, *The Constitutional Law of Canada* (Toronto: Carswell, 1977) at 129. The implication of this arrangement is that there are no impediments to the conferral of judicial functions on "bodies which are not courts" and the mandate to exercise non-judicial or "advisory" powers by the courts (an example is the procedure by which proposed legislation is referred to the courts for a determination of its constitutionality before being passed into law): *ibid.* at 129-30. Therefore, the integration between the various branches of government has long supported the military tribunals' performance of judicial functions and the civilian courts' appellate review of military law. This principle has been affirmed in the Supreme Court of Canada decisions regarding the competence of administrative tribunals to consider and apply the *Charter* in their proceedings: *Douglas/Kwanilen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, citing *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455.

<sup>22</sup> P.J. Rowe, *Defence: The Legal Implications (Military Law and the Laws of War)* (London: Brassey's Defence Publishers, 1987) at 22.

<sup>23</sup> *Ibid.* at 23. Rowe concluded, at 23, "The importance of the Court-Martial Appeal Court lies not only in the fact that it provides a means by which an accused can argue that his conviction was wrong, but it also enables a civilian court to oversee the military legal system."

<sup>24</sup> These procedural limitations include the absence of an appeal as of right to the Courts Martial Appeal Court, the absence of a right of appeal for those tried by summary means, the availability of appeal only for those convicted who have petitioned and been rejected by the Defence Council, and the inability of the Courts Martial Appeal Court to review the sentence.

some doubt on its ability to enhance the fairness of court martial proceedings.

In the absence of greater assurances within the U.K. military justice system, it is encouraging to note that the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>25</sup> contains provisions that have been applied to European military tribunals.<sup>26</sup> However, as Rowe explains, the *European Convention*

is not a part of the law of England and any divergence between its requirements and English law can only be considered under the machinery established by the Convention. It is not therefore open to a soldier who has been sentenced to detention by his commanding officer to argue that the sentence is invalid because it conflicts with Article 5 of the Convention since he has been deprived of his liberty other than by a 'competent' court.<sup>27</sup>

Human rights issues arising in English penal proceedings, including issues of procedural justice in military courts, cannot be addressed within the course of those proceedings, but only upon a separate appeal to the European Court with all the attendant logistical and financial barriers. Therefore, any concerns regarding the collateral or indirect influence of appellate review on the fairness of the proceedings at first instance apply *a fortiori* to the influence of the *European Convention* on the British military justice system.

### C. The Canadian Court Martial Appeal Court

The Canadian Court Martial Appeal Court (CMAC), comprised of three judges of either the Federal Court or the provincial superior courts, is the civilian appellate court that hears appeals from Canadian courts martial. The combined effect of the constitutional relationship between the various branches of government and the *Charter* grants the CMAC arguably the broadest authority to engage in judicial review of military law known to common law jurisdictions. As already noted, Canadian civilian courts are not impeded in their review of military law by strong constitutional divisions between the executive and the judiciary

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<sup>25</sup> 4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221 [hereinafter *European Convention*].

<sup>26</sup> In 1976, the European Court applied article 5 of the *European Convention* (which prohibits the deprivation of liberty except if it had been imposed by a "competent court") to military tribunals, thereby implying that military tribunals should be treated as *courts* interpreting *law*: *Engel and Others*, Eur. Ct. H.R. Ser. A, No. 22, Judgment of 8 June 1976 [hereinafter *Engel*].

<sup>27</sup> Rowe, *supra* note 22 at 25. The "competent court" requirement in the *European Convention* is roughly comparable to the Canadian *Charter* s. 11(d) requirement for an "impartial and independent" tribunal: *supra* note 5.

as exist under the American Constitution. Also, as already noted, compared with the civilian appellate review in the U.K., Canadian courts now benefit by conducting their review according to formal constitutional standards.<sup>28</sup> However, the Canadian CMAC has been slow to realize its potential in exercising this authority. In an article written before the advent of the *Charter*, but after the enactment of the *Canadian Bill of Rights*,<sup>29</sup> Starkman referred to the supervisory role played by Canadian civilian courts in military law as “the fountain of ambiguity”<sup>30</sup> and, as recently as 1988, the courts were observed to “have charted a course of deference to the military’s own assessment of what is necessary to the effective functioning of the Forces.”<sup>31</sup>

If the pre-*Charter* jurisprudence of the CMAC was deferential, then its *Charter* jurisprudence of the 1980s may best be described as diffident. This diffidence can be attributed both to the changing standards for civilian penal process and to the uncertainty of the CMAC about its own jurisdiction as a ‘competent’ court for the purposes of section 24(1) of the *Charter*<sup>32</sup> to fashion remedies for *Charter* violations.

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<sup>28</sup> Section 52(1) of the *Charter* reads: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

<sup>29</sup> S.C. 1960, c. 44.

<sup>30</sup> B. Starkman, “Canadian Military Law: The Citizen as Soldier” (1965) 43 Can. Bar Rev. 414 at 442.

<sup>31</sup> A. Heard, “Military Law and the *Charter of Rights*” (1987-88) 11 Dalhousie L.J. 514 at 535.

<sup>32</sup> All in all, until quite recently, its record as a defender of constitutional standards has been disappointing. The results of appeals launched on the basis of two types of *Charter* challenges illustrate this. In the first of two cases to address the constitutionality of statutorily imposed limits on CMAC powers to vary the time limit for the submission of an appeal, *R. v. Fleming* (1984), 4 C.M.A.R. 328 at 330, it was held that the CMAC lacked the discretionary scope of civilian appellate courts: specifically, “the Court being without jurisdiction to entertain an appeal commenced out of time and powerless, itself, to extend that time, jurisdiction cannot be conferred by waiver, nor can the Court ignore its lack of jurisdiction.” Also rejected was a premature s. 15 equality claim (made on the basis that the charge was one in which the civilian courts had concurrent jurisdiction). The appellant had argued that he ought to benefit from judicial discretionary powers equal to those available to civilian appellate courts. The argument failed because s. 15 had not yet come into force. Unfortunately, in a subsequent decision regarding the same relief, the appellant had failed to comply with the deadline prescribed (in an extension granted without comment) and so was denied an appeal without the reasons addressing the constitutionality of allegedly discriminatory limitations of CMAC jurisdiction: *R. v. McCullough*, (1988) 5 C.M.A.R. 3.

The second type of challenge, concerning the constitutionality of the inability of the CMAC to review the severity of the sentence, has been the focus of two appeals arising from convictions for impaired driving in Germany. In the first, the court questioned its own jurisdiction to address an alleged violation of the s. 12 protection against “cruel and unusual treatment” because it has no jurisdiction to review the severity of the sentence. Nevertheless, the CMAC ruled that the reduction in rank, automatically following any sentence of imprisonment (in this case thirty days), was not

As will be examined later, once the civilian jurisprudence applicable to the constitutional questions faced by courts martial took shape, this diffidence gave way to the setting of high standards for fairness in military courts.

### III. JURISDICTION

Although essential to a fair military justice system, civilian appellate review gradually ceased to be regarded as being sufficient to ensure procedural fairness in courts martial. The availability of judicial review simply was not enough when it seemed inevitable that the constitutional rights of defendants in courts martial would be circumscribed in the name of military necessity. In an era of growing interest in formal equality and civil rights, explicit statutory concurrency of jurisdiction such as that created by section 130 of the *National Defence Act*, providing for military trials of criminal offences, led many to question the jurisdiction of courts martial to try service members for crimes which could be tried in ordinary courts. If the military context restricted the ability of the court martial to provide adequate procedural safeguards, then perhaps its jurisdiction should in turn be limited to offences arising solely in that context. The similarity in the conditions of peace time military service and civilian employment, and the proximity of military bases to civilian communities, contribute to the view that military service is an "occupation" rather than an "institution,"<sup>33</sup> and

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cruel or unusual because all service personnel had agreed to be bound by the *National Defence Act*, R.S.C. 1985, c. N-5, and all were liable to suffer the punishment upon receiving a sentence of imprisonment: *R. v. Vaillancourt* (1985), 4 C.M.A.R. 344. In the second case, *R. v. Oliver*, (1988) 4 C.M.A.R. 559 at 561, where it was reviewing a conviction for impaired driving which prescribed a sentence of twenty months, the CMAC held that it was

neither a court with inherent jurisdiction nor a court of first instance. The absence of a right to appeal severity of sentence to this Court was not in issue at trial and it is not, therefore, a matter upon which the Court Martial may be said to have erred. The severity of the sentence is not before us; the law, as it presently stands, precludes that. Accordingly, any pronouncement we might make as to the constitutionality of that law would not be a decision of a legal question properly before us.

One might well wonder, in the light of the current mood of assertiveness of the CMAC, how long it will continue to evade such serious *Charter* issues by citing its modest mandate.

<sup>33</sup> Roughly speaking, the "occupational" model views service members as ordinary citizens employed by the military, and the "institutional" model "insists that there is a distinct military calling and status that make the business of arms different from civilian occupations": D.N. Zillman, "Military Criminal Jurisdiction in the United States" (1990) 20 U.W. Australia L. Rev. 6 at 32. See also C.C. Moskos, "From Institution to Occupation: Trends in Military Organization" (1977) 4 *Armed Forces & Society* 41.

that courts martial should function more like professional discipline tribunals than courts of law.

On a more pragmatic note, the broad concurrency of court martial jurisdiction over civilian offences and the well-established remedy of judicial review for jurisdictional error provided a rich opportunity for further litigation by losing defendants. Having thereby become the most common ground for challenges to the decisions of courts martial, the question of jurisdiction often served only as a vehicle to address other issues raised by a parallel system of justice.<sup>34</sup> In this

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<sup>34</sup> In one notable exception, a genuine complaint against concurrency of jurisdiction (the risk of double jeopardy) came to the fore in Australia as a result of a tug-of-war between civilian and military authorities over impaired driving defendants. In *Re Tracey; Ex parte Ryan* (1989), 63 A.L.J.R. 250, a majority of the High Court found invalid provisions of the *Defence Force Discipline Act 1982* (Cth) preventing a civil court from re-trying a person for substantially the same offence for which he had been acquitted or convicted by a service tribunal or for an offence that had been taken into consideration in relation to a convicted person. The High Court held these provisions unconstitutional because they ousted the jurisdiction of the state courts, but it permitted the common law principles of double jeopardy, as they had developed in each state, to continue to apply: see R.A. Brown, "The Line Between Military and Civil Justice in Australia" (1989) 63 A.L.J. 666. In "Military Justice in Australia: W(h)ither Away? The Effects of *Re Tracey; Ex parte Ryan*" (1989) 13 Crim. L.J. 263 at 287, R.A. Brown charted the significant risk of double jeopardy that persists in a variety of situations in different Australian states through the unevenness of the common law on the subject. He speculated, at 287, that "the service authorities may, in fairness to the accused, be effectively compelled to wait until the relevant civilian prosecutorial authorities decide whether they will prosecute the matter before invoking service proceedings, thereby effectively destroying one of the principal values of military justice, its speed."

Then, in *McWaters v. Day*, [1990] 64 A.L.J.R. 41, when the military reasserted its jurisdiction in a successful challenge to the competence of the civilian state court to try a serviceman also liable to military proceedings, the High Court of Australia granted special leave to appeal and overturned the decision unanimously. The Court held, at 43, that paramountcy could not be invoked on behalf of military jurisdiction through the *Defence Force Discipline Act 1982* because the legislation "contemplates parallel systems of military and ordinary criminal law and does not evince any intention that defence force members enjoy an absolute immunity from liability under the ordinary criminal law." One commentator, J.G. Starke, in "Constitutional Law and Defence—Alleged inconsistency between Commonwealth defence force discipline legislation and State criminal law—Whether two systems parallel so that s. 109 of the Constitution does not apply" (1990) 64 A.L.J. 299 at 300, suggested that "[i]f this has not already been done, perhaps *Guidelines* agreed to by both, should set out criteria to govern the matter of selection of the most appropriate tribunal."

In Canada, such cooperation between civilian and military authorities is cited by K.W. Watkin in *Canadian Military Justice: Summary Proceedings and the Charter* (LL.M. Thesis: Queen's University, 1990) [unpublished] at 104-05, as important in addition to safeguards against double jeopardy:

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 offences, 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 would result in a clear military jurisdiction. Similarly, jurisdiction is often waived by civilian authorities in order to allow the military to commence disciplinary action.

way, review for jurisdictional error was derivative in two senses: it enabled the appellant to challenge the conviction; and it allowed the reviewing court to examine the fairness of court martial procedure in greater detail. Thus, although review pursued through the prerogative orders required complaints to be framed as jurisdictional challenges, the results of these applications for judicial review often reflected the court's appraisal of the fairness of the proceedings under review and the merit of the complaint lodged against them more than they did a strict determination of whether the defendant was properly before the court. As Starkman suggested in 1965, "the courts have used (and at times misused) the concept of jurisdiction as an instrument of policy."<sup>35</sup> When military justice was viewed as unduly harsh or objectionable, its jurisdiction was construed narrowly, and when it met current standards, civilian courts refrained from interference through a generous construction of court martial jurisdiction. That the elasticity of the issue permitted significant *civilian* judicial discretion to engage in a kind of review of military law otherwise beyond its jurisdiction is amply illustrated by the American jurisprudence.

#### A. *The "Service Connection" Test and the "Military Nexus" Doctrine*

The first major decision to limit "court martial jurisdiction over the core group subject to the UCMJ [*Uniform Code of Military Justice*], active duty service personnel,"<sup>36</sup> was that of *O'Callahan v. Parker*.<sup>37</sup> Having exhausted the appeals available within the military justice system, O'Callahan applied through the civilian system and ultimately to the U.S. Supreme Court for *habeas corpus*. He questioned the jurisdiction of the military to try "a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave."<sup>38</sup> The Court's finding that the army did not have jurisdiction to try O'Callahan was significant because the challenge had been launched on the explicitly constitutional basis that courts

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<sup>35</sup> *Supra* note 30 at 442.

<sup>36</sup> See Zillman, *supra* note 33 at 15. Previous determinations of jurisdiction were confined to more dubious subjects for court martial: civilians resisting conscription (*Billings v. Truesdell*, 321 U.S. 542 (1944)); ex-servicemen, honourably discharged (*U.S.A. Ex Rel Toth v. Quarles*, 350 U.S. 11 (1950) [hereinafter *Toth*]); families of those serving abroad (*Reid v. Covert*, 354 U.S. 1 (1957)); and civilian employees serving abroad (*Grisham v. Hagan*, 361 U.S. 278 (1960)).

<sup>37</sup> 395 U.S. 258 (1969) [hereinafter *O'Callahan*].

<sup>38</sup> *Ibid.* at 261.

martial deprived O'Callahan of his rights to grand jury indictment and trial by petit jury as guaranteed by the Fifth and Sixth Amendments to the *Bill of Rights*. The U.S. Supreme Court held that court martial jurisdiction should be construed narrowly as the court was "not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."<sup>39</sup> Further, the Court held that "as an institution [courts martial] are singularly inept in dealing with the nice subtleties [*sic*] of constitutional law."<sup>40</sup> Unable to apply constitutional standards directly to the court martial, the Supreme Court restricted its jurisdiction by requiring that for "the crime to be under military jurisdiction [it] must be service connected."<sup>41</sup> The "service connection" test developed, in the jurisprudence of the COMA, into a review of the twelve "*Relford Factors*"<sup>42</sup> which continued to be the basis for determining court martial jurisdiction for some seventeen years.

Meanwhile, the Supreme Court of Canada heard the only challenge to military law ever to reach it based on the *Canadian Bill of Rights*. Although the majority dismissed the appeal, satisfied with the fairness of courts martial procedure, McIntyre J. showed some sympathy with the claim that military defendants charged with criminal offences should benefit from safeguards present in civilian criminal procedure. In a concurring decision, he held that, when concurrency of jurisdiction exists, a military tribunal should be permitted to try only offences "committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service."<sup>43</sup> Following this decision, the elusive "military nexus"

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<sup>39</sup> *Ibid.* at 265.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* at 272.

<sup>42</sup> The "*Relford Factors*" are found in *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971) [hereinafter *Relford*].

<sup>43</sup> *MacKay v. The Queen*, [1980] 2 S.C.R. 370 [hereinafter *MacKay*] at 410. The majority decision, written by Ritchie J., viewed military law as the equal of civilian law and held that military defendants enjoyed advantages equal to their civilian counterparts. Accordingly, they could not complain that the jurisdiction of military tribunals was based on their status as members of the Canadian Forces. Despite the fact that this was the majority's decision, the CMAC followed the moderate approach of McIntyre J. (possibly because of the strong dissent of Laskin C.J., who argued for caution *vis-à-vis* military tribunals which he viewed as having insufficient judicial independence to be the equals of their civilian counterparts). See Watkin, *supra* note 34 at 95-98.

doctrine developed.<sup>44</sup> While its similarity to the American “service connection” doctrine suggested that it was “borrowed”<sup>45</sup> from the American model, the CMAC rejected the “*Relford* Factors” as a guide to its application insisting instead that “each case should be considered according to its particular circumstances.”<sup>46</sup> The resulting uncertainty,<sup>47</sup> coupled with the significant enhancements in procedural fairness enacted in 1985 as a result of the *Charter*-based amendments to the *National Defence Act*,<sup>48</sup> ultimately cast doubt on the validity of this approach to court martial jurisdiction.

### B. *The Emergence of a “Status Only” Test*

During the period when the “service connection” test marked the limits of court martial jurisdiction, a variety of factors began to weaken the resolve of U.S. courts “to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.”<sup>49</sup> These factors included “the extension of procedural and substantive rights to service personnel ... a shifting of emphasis from criminal to administrative law ... [and] a reemphasis on the contractual nature of military service.”<sup>50</sup> In addition, the 1983 congressional grant of authority to the U.S. Supreme Court to

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<sup>44</sup> *R. v. MacDonald* (1984), 6 C.C.C. (3d) 551 (C.M.A.C.); *R. v. Catudal* (1985), 18 C.C.C. (3d) 189 (C.M.A.C.); *R. v. MacEachern* (1986), 24 C.C.C. (3d) 439 (C.M.A.C.) [hereinafter *MacEachern*]; *R. v. Sullivan* (1986), 65 N.R. 48 (C.M.A.C.); and *R. v. Ionson*, [1989] 2 S.C.R. 1073. Worth noting is that “military nexus” and, indeed, the question of jurisdiction have not been at issue in challenges raised by those subject to military law abroad. One explanation for this may be that the alternative to a court martial convened outside Canada is not a Canadian court, but a local court, which defendants may prefer.

<sup>45</sup> *Watkin*, *supra* note 34 at 97.

<sup>46</sup> *MacEachern*, *supra* note 44 at 443.

<sup>47</sup> *Heard*, *supra* note 31 at 538-41.

<sup>48</sup> The following are examples of amendments to the *National Defence Act* found in *Statute Law (The Canadian Charter of Rights and Freedoms) Amendment Act* R.S.C. 1985 1st Supp., c. 31, ss. 42-61: s. 66 protects those tried by military tribunals against double jeopardy resulting from retrial by civilian tribunals; s. 151 incorporates all common law excuses and justifications into any proceedings under the Code of Service Discipline; s. 156 eliminates provisions for the arrest or detention without a warrant of a person “about to commit” an offence; s. 158 provides for pre-trial release; s. 159 requires a speedy trial; s. 163 prohibits the same person from acting as both the investigating officer and the trier of fact; s. 248 provides for release pending appeal; and s. 273 specifies the conduct of searches.

<sup>49</sup> *Toth*, *supra* note 36 at 22.

<sup>50</sup> *Jacobs*, *supra* note 13 at 5.

review all USCMA decisions directly<sup>51</sup> brought the matter squarely within its purview.<sup>52</sup> In 1987, in its first opportunity to exercise its newly granted mandate, the U.S. Supreme Court replaced the service connection test with a “status only” test for court martial jurisdiction.<sup>53</sup>

### C. *The Underlying Issue: “Are Courts Martial Courts of Law?”*

Although the courts, through jurisdictional challenges, have addressed a variety of issues otherwise beyond review, one of these issues—that of whether military law is law and whether military courts are courts—has since become crucial to the continued existence of the court martial. The changing sociological context aside, the uneasy rapport between the USCMA and the U.S. Supreme Court can in large part be attributed to an ongoing debate over the status of the court martial itself. The restraining hand of the Supreme Court referred to earlier was exercised in *Middendorf* in response to the COMA ruling which stated that assigned counsel must be available to a summary court martial defendant when there is a possibility of confinement.<sup>54</sup> The Supreme Court’s reasons for that response had been that the summary court-martial was more like an administrative proceeding than a criminal trial.<sup>55</sup>

Needless to say, much has happened since *Middendorf* to shape the judicial appraisal of courts martial. The first indication of an evolving understanding of the nature of the court martial came soon after *Middendorf*, but from more distant quarters. In 1976, the European Court of Human Rights held in *Engel*<sup>56</sup> that article 5 of the

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<sup>51</sup> For a summary of the avenues of appellate review in the U.S. military justice system, see J.H. Baum & K.J. Barry, “United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence” (1989) 36 Fed. Bar News & J. 242 at note 1.

<sup>52</sup> It is worth noting the effect of the intervening changes in the make-up of the Supreme Court bench. The three members of the Court who had participated in the decisions of *O’Callahan*, *supra* note 37, or *Relford*, *supra* note 42 (the decisions that formulated the “service connection” test for court martial jurisdiction), Justices Marshall, Brennan, and Blackmun, dissented in the *Solorio* decision, *infra* note 53 (which instituted the “status only” test for court martial jurisdiction).

<sup>53</sup> *U.S. v. Solorio*, 483 U.S. 435 (1987). The mandate for review was granted in the *Military Justice Act of 1983*, 10 U.S.C. § 801.

<sup>54</sup> See Jacobs, *supra* note 13 at 5-10.

<sup>55</sup> See dissents of Marshall and Brennan JJ. at 1293-1305, *supra* note 13. It is not clear whether this suggested a sharp contrast with other forms of court martial or whether it indicated a general distinction between military and criminal proceedings.

<sup>56</sup> *Supra* note 26.

*European Convention* prohibiting the deprivation of liberty except if it had been imposed by a competent court applied to military tribunals. This meant that the reduced procedural standards applicable to administrative or disciplinary proceedings were inadequate to justify the exercise of authority to impose penal consequences. The Supreme Court of Canada eventually took this approach in the 1987 decision in *R. v. Wigglesworth*<sup>57</sup> and extended the section 11(h)<sup>58</sup> *Charter* protection from double jeopardy to cover situations arising from the concurrent jurisdiction between the *Criminal Code*<sup>59</sup> and the *Royal Canadian Mounted Police Act*.<sup>60</sup> The guarantee was held to apply to any proceeding having “true penal consequences” or that was “by nature” criminal even if it was “intended to maintain discipline, professional integrity and professional standards.”<sup>61</sup> The *Charter* guarantees found in sections 7 to 14 were available in these proceedings because persons “subject to penal consequences such as imprisonment—the most severe deprivation of liberty known to our law— ... should be entitled to the highest procedural protection known to our law.”<sup>62</sup>

This functional approach to the problems of procedural fairness and jurisdiction precludes the disciplinary purpose of a parallel system of justice within the military from justifying a narrow construction of either the scope of the court martial or its procedural obligations to defendants before it. Since restrictions in either area would prejudice the parties before a court martial, and because current standards require a proportionate relationship between jurisdiction and process, the *Wigglesworth* approach to courts martial as *de facto* courts has enabled direct consideration of the requirements for the court martial to stand as an integral part of a parallel system of justice.

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<sup>57</sup> [1987] 2 S.C.R. 541 [hereinafter *Wigglesworth*].

<sup>58</sup> Section 11 reads: “Any person charged with an offence has the right ... (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.”

<sup>59</sup> R.S.C. 1986, c. C-46.

<sup>60</sup> R.S.C. 1985, c. R-10.

<sup>61</sup> *Wigglesworth*, *supra* note 57 at 559-62.

<sup>62</sup> *Ibid.* at 562. Accordingly, the “Legal Rights” found in the *Charter* should be guaranteed not only in the prosecution of offences over which the military has concurrent jurisdiction with civilian courts by way of s. 130 of the *National Defence Act*, but also in the prosecution of all offences save those which represent “distinct delicts, causes or matters.” (See *Wigglesworth*, *supra* note 57). For example, a penal sentence for “stealing” under the *National Defence Act* should preclude civilian proceedings for “theft” under the *Criminal Code*. (Double jeopardy protection is available both through the 1985 amendments of the *National Defence Act* and through s. 11(h) of the *Charter*.)

#### IV. JUDICIAL INDEPENDENCE

Arguably the greatest challenge to the fairness of the court martial is that posed by the requirement of judicial independence. The issue of independence is complicated from the start by the fact that the court martial members are drawn from within the command structure, the interests of which are directly represented by the prosecutor. While the integrity of those who serve in a judicial capacity in military tribunals may ensure that justice is done, efforts to establish objective conditions, which ensure that justice also be seen to be done are relatively recent.

##### A. "Command Influence" in the United States

The issue of judicial independence is commonly referred to in the United States as the problem of "command influence"—"the mortal enemy of military justice."<sup>63</sup> Among the disturbing results of a U.S. study mandated by the *Military Justice Act of 1983*,<sup>64</sup> indicating that "command influence" was far from a hypothetical threat, were "that substantial numbers of judge advocates and military judges were aware of instances in which judges had either been threatened with transfer from judicial functions or actually transferred as a result of their rulings."<sup>65</sup> One recent case involved the entire court of the U.S. Navy-Marine Corps Court of Military Review (NMCMR).<sup>66</sup> Having unanimously overturned a conviction, the members of the NMCMR were advised by the Inspector General of the Department of Defence that "she had received an allegation that the decision ... had been affected by 'improper influence,' possibly in the form of *ex parte* communications ... [and] that 'bribery may have been involved'."<sup>67</sup> In the ensuing battle over the prospect of the Inspector General's "intrud[ing] into the court's deliberative process,"<sup>68</sup> the Court filed a petition for extraordinary relief from the USCMA. The USCMA granted the injunctive relief sought and considered the gravity of the situation, saying:

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<sup>63</sup> *U.S. v. Thomas*, 22 M.J. 388 (USCMA 1986) at 393, as cited in *Carlucci, supra* note 8.

<sup>64</sup> *Supra* note 53.

<sup>65</sup> E.R. Fidell, "Military judges and military justice: the path to judicial independence" (1990) 74 *Judicature* 14 at 17 [hereinafter "Military judges"].

<sup>66</sup> *Carlucci, supra* note 8.

<sup>67</sup> See Baum & Barry, *supra* note 51 at 243.

<sup>68</sup> *Ibid.*

Congress could hardly have intended that this court would be helpless to take action to protect the independence and impartiality of military tribunals—which are essential in assuring a servicemember's right to due process ... —when they were threatened by the actions of civilians. Even more important, petitioner has alleged that the respondent Inspector General seeks to accomplish her objective [the interview of the court to examine its deliberative processes] by use of an order from a military superior to a subordinate.<sup>69</sup>

In proposing measures to respond to this problem, one commentator recommended a fixed term of office noting that “surely a system of justice that today leaves judges insecure in their judicial office is a remarkable anachronism,”<sup>70</sup> and “[t]he fact that the current statutory arrangement may withstand constitutional scrutiny does not mean that it is sound public policy.”<sup>71</sup>

### B. *Judicial Independence in Canadian Courts Martial*

Once civilian courts had resolved that ordinary standards of fairness, including those related to judicial independence, applied to courts martial, it remained to be established how the requirement of judicial independence, or lack of it, might be applied. The 1985 Supreme Court of Canada decision in *R. v. Valente*<sup>72</sup> supplied the necessary test and, in so doing, completed the foundation necessary for the most profound challenge to the constitutionality of military tribunals—that based on the section 11(d) *Charter* guarantee of judicial independence.<sup>73</sup> In *Valente*, a decision which concerned the independence of provincial court judges, Le Dain J., writing on behalf of the entire Court, set three requirements for judicial independence: security of tenure, financial security, and administrative independence.<sup>74</sup> With these requirements in hand, the CMAC embarked on its first serious consideration of judicial independence in the September 1990 appeal in

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<sup>69</sup> *Carlucci*, *supra* note 8.

<sup>70</sup> “Military judges,” *supra* note 65 at 14.

<sup>71</sup> *Ibid.* at 17. Another measure recently instituted was the addition, by Congress, of article 6(a) to the *Uniform Code of Military Justice* which authorizes the President of the USCMA to promulgate policies and procedures for investigating allegations against military trial and appellate judges. Although this was apparently a response to the *Carlucci* case, it is not clear whether it forms an adequate resolution of the problem.

<sup>72</sup> [1985] 2 S.C.R. 673 [hereinafter *Valente*].

<sup>73</sup> As anticipated by Heard in his 1988 article, *supra* note 31.

<sup>74</sup> *Supra* note 72 at 694, 704 and at 708.

*R. v. Généreux*.<sup>75</sup> Although the appeal was dismissed by a majority of two to one in the CMAC, the powerful dissent by Décary J.<sup>76</sup> was followed, within weeks, by the *R. v. Ingebrigtsen*<sup>77</sup> decision, which considered judicial independence in the context of the Standing Court Martial (SCM). On behalf of a unanimous court, Mahoney C.J. reviewed the structure and function of the SCM to determine its consistency with section 11(d) and responded to two arguments put forward by the respondent (the military) that had been persuasive in *MacKay*<sup>78</sup> and several subsequent CMAC decisions.

The first of these arguments, based on the majority and concurring opinions of Ritchie and McIntyre JJ. in *MacKay*, claimed that “the existence at the appeal level of a Court Martial Appeal Court was a sufficient guarantee of the independence of military justice”<sup>79</sup> in Canada. Mahoney C.J. swept this notion aside saying, “Similarly dubious is the relevance of the existence of this Court, from which a limited right of appeal lies, to the question whether Standing Courts Martial are independent tribunals.”<sup>80</sup> The second argument was based on the conflation of the requirements of impartiality and independence. Distinguishing these requirements was critical because, as it had been held in *MacKay*, challenging a court’s impartiality requires a factual basis,<sup>81</sup> while challenging its independence requires only a review of the

<sup>75</sup> (1990), [1992] 5 C.M.A.R. 38 [hereinafter *Généreux* (C.M.A.C.)].

<sup>76</sup> It is relatively rare for there to be dissent in the CMAC, and few decisions have been supported by reasons as extensive as those found in Décary J.’s dissent.

<sup>77</sup> (1990), 5 C.M.A.R. 87 [hereinafter *Ingebrigtsen*].

<sup>78</sup> *Supra* note 43.

<sup>79</sup> *Généreux* (C.M.A.C.), *supra* note 75 at 83, Décary J.

<sup>80</sup> *Ingebrigtsen*, *supra* note 77 at 96. In so doing, he echoed the sentiments of Décary J. that “it would be, to say the least, extraordinary for an accused to be entitled to an independent tribunal only if he is convicted and appeals the verdict against him!”: *Généreux* (C.M.A.C.), *supra* note 75 at 83.

<sup>81</sup> In the cases of *MacKay*, *supra* note 43; *Schick v. R.* (1987), 4 C.M.A.R. 540; *Alfred v. R.* (1987), 4 C.M.A.R. 476; *Goodwin v. R.* (1988), 4 C.M.A.R. 527; and *R. v. Forster* (1989), 5 C.M.A.R. 6, the courts held that the absence of evidence of impartiality was fatal to the appellant’s argument. In one of the majority opinions, that of Mr. Justice Barbeau, in *Généreux* (C.M.A.C.), *supra* note 75 at 52, it was held that “standing courts martial in Canada are independent tribunals and must be regarded as such, unless in a particular given instance the record at trial discloses clear facts establishing an absence of independence by such courts which may result from their activities or the conduct of their members.” This is not to say that appeals have never succeeded on the basis of impartiality. In *Lucas v. R.* (1988), 4 C.M.A.R. 247, the intervention of the Judge Advocate was considered a violation of the regulation requiring him to remain impartial at all times, the verdict was overturned, and Corporal Lucas’s rank was restored. Also in *Turgeon v. R.* (1988), 4 C.M.A.R. 578 at 584, a decision that clearly anticipated *Généreux* and *Ingebrigtsen*, the Chief Justice held that

legislation governing it.<sup>82</sup> Mahoney C.J. adopted this approach, stating, “The objective conditions and guarantees of judicial independence must be provided to some extent by law and not only in practice.”<sup>83</sup>

Having overcome the *MacKay* precedent, the Chief Justice applied the three *Valente* requirements for judicial independence to the most common form of court martial, the SCM,<sup>84</sup> concluding that there is

nothing in the present institutional arrangements *vis-à-vis* Standing Courts Martial that offends s. 11(d). The deficiency lies entirely in inadequate security of tenure and financial security. Given the present statutory framework which, it seems to me, could accommodate a truly independent Judge Advocate General, it may be that appropriate amendment of the *Q.R.&O.*'s could achieve the measure of judicial independence constitutionally required to preserve a desirable judicial institution.<sup>85</sup>

In the absence of submissions from the respondent concerning potential justification on the basis of section 1 of the *Charter*, this was sufficient to overturn Corporal Ingebrigtsen's conviction and strike down the SCM.

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the court was “not ... concerned with whether anything in fact prejudicial to the appellant occurred during the off-the-record encounters between the Judge Advocate and members of the Court Martial” because, following *Clabby v. R.* (1986), 4 C.M.A.R. 397 at 399, “for the Judge Advocate to retire with the Court Martial is as much a breach of the principles of fundamental justice as it would be for a trial judge to retire with the jury.”

<sup>82</sup> As Le Dain J. had observed in *Valente*, *supra* note 72 at 685:

Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements ... [Independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

And as Décaré J. had said in *Généreux* (C.M.A.C.), *supra* note 75 at 59, “Legislative and regulatory provisions speak for themselves and if they are *prima facie* an infringement of the rights guaranteed by the *Charter*, no further evidence is necessary.”

<sup>83</sup> *Ingebrigtsen*, *supra* note 77 at 98.

<sup>84</sup> The SCM, described by Mahoney C.J., *ibid.* at 91, as “a relatively recent creation of Canadian law,” has existed since the Second World War to try offences committed in Canada. Unlike the General Court Martial (GCM), its jurisdiction is restricted to those of the rank of Sergeant and below; and, unlike the Disciplinary Court Martial, it has jurisdiction to try all offences. (The fourth type of Court Martial, the Special General Court Martial is convened to try civilians subject to military law, such as dependents living on overseas bases.) The SCM also differs in that it is presided over by a single, legally trained officer who is appointed to the position on an ongoing basis and sits routinely, rather than on an occasional basis: see *ibid.* at 91-92.

<sup>85</sup> *Ingebrigtsen*, *supra* note 77 at 108. “QR&O” stands for *Queen's Regulations and Orders for the Canadian Forces* (Ottawa: Queen's Printer, looseleaf). These regulations amplify the *National Defence Act*.

### C. *The Creation of an Independent Military Judiciary*

Within weeks, amendments to the QR&O regulations governing courts martial were instituted by the Governor-in-Council to reinstate the SCM in accordance with the requirements of security of tenure and financial independence that had been held to be lacking in *Ingebrigtsen*. The significant changes, applying to officers performing judicial duties in all four types of courts martial, established them as “military trial judges,” and sought to satisfy the requirements for judicial independence as follows:

*security of tenure:*

- a) the requirement of a fixed term: article 4.09(2);
- b) the requirement that military trial judges not perform any other duties during that term: article 4.09(4);
- c) the prohibition of termination of the appointment except at the written request of the officer, upon his/her promotion, the commencement of retirement leave based on age or voluntary release, or for cause: article 4.09(6);
- d) the prohibition of release from the services except voluntarily or upon reaching retirement age: article 15.01(6); and
- e) extensive regulations for the conduct of “Inquiries Concerning Officers Performing Judicial Duties” necessary to show cause for terminating an appointment: articles 101.13-16.

*financial independence (and career advancement):*

- a) the elimination of personal reports and assessments that normally form the basis for promotions, training, posting, and pay decisions, for the duration of the term, and the prohibition of any consideration of the performance as a judge on any subsequent reports: articles 26.10-11; and
- b) the establishment of rates of pay equal to the maximum of the annual range for a legal officer of the same rank and a percentage premium 2 per cent higher than the latest merit pay percentage increase paid to a legal officer of the same rank: articles 204.18 & 204.22.

All in all, these amendments provide that, for the fixed term, normally of four years but not less than two years, officers holding military trial judge positions are sheltered from concerns that might affect the performance of their duties in an otherwise thoroughly hierarchical context. In theory, the only form of “command influence” that could affect the conduct of a military judge would be the promise of a promotion which would itself have to be independently justified, and

which according to the regulations also would form the basis for a possible termination of the appointment.

## V. THE MATTER RESOLVED?: THE 1992 SUPREME COURT OF CANADA DECISIONS

With an awareness of the groundwork established by the jurisprudence leading up to the 1992 decisions in *Généreux* (S.C.C.) and *R. v. Forster*,<sup>86</sup> it may be difficult on first reading to discern the jurisprudential achievements made beyond the conference of Supreme Court approval on the earlier CMAC judgments in *Généreux* and *Ingebrigtsen* and the QR&O amendments that followed. Closer examination reveals, however, the interest on the part of the majority of the Supreme Court to clarify certain conceptions regarding the nature of the court martial and to put certain lingering issues to rest. Therefore, although reviewing these issues requires retracing our steps somewhat, it is important to distinguish the issues that may bear fruit in future litigation from those the Court would have us regard as non-starters.

First, speaking for the majority, Lamer C.J. adopted the reasoning of Wilson J. in *Wigglesworth* on the applicability of section 11 of the *Charter*<sup>87</sup> as follows:

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<sup>86</sup> [1992] 1 S.C.R. 339 [hereinafter *Forster*]. *Forster* was a companion decision to *Généreux* (S.C.C.) with respect to the structural consistency of the GCM with the requirements of s. 11(d) of the *Charter*. However, its unusual facts emphasize the distinction between the institutional and occupational models of civil-military relations (*Moskos*, *supra* note 33), creating a virtual conflict of laws. The dispute between then Major Forster and the military began with her consultation with a civilian lawyer following a disagreement with a superior. Her superior reassigned her in a way that she and her lawyer considered to be a "constructive dismissal," and she tried to tender a "resignation." However, since departure from the services can only be effected through the "release" procedure, her resignation was of no effect; when she failed to report for duty at her posting, she was charged with being "absent without leave." At the Supreme Court level, she argued that she did not have the requisite *mens rea* for the offence; however, this argument was rejected because the mistake was one of law and not one of fact, and so could not excuse her actions.

<sup>87</sup> The supremacy of the *Charter* is established in s. 52(1), *supra* note 28. Its applicability to the dictates of the executive branch of government is derived from s. 32(1), which reads: "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ..." [emphasis added]; see *Retail, Wholesale and Dep't Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 592-604; and *Operation Dismantle*, *supra* note 17. The only express exception to the application of the *Charter* to military law is contained in s. 11(f), which 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 ..." The existence of the exception of s. 11(f) has been cited as indicating that the *Charter's* application to military law was contemplated and intended by its drafters.

Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged ... relate to matters which are of a public nature ...

In any event, the appellant faced the possible penalty of imprisonment in this case ... therefore, s. 11 of the *Charter* would nonetheless apply by virtue of the potential imposition of true penal consequences.<sup>88</sup>

In short, courts empowered to function as criminal courts of law should be subject to the same rigorous standards as those courts.

The Chief Justice then considered the serious implications of *Wigglesworth* on the possibility of finding support in the *Charter* for the existence of a court system in addition to the ordinary courts. Specifically, he posed the question of whether “a parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns, [is] by its very nature inconsistent with s. 11(d) of the *Charter*?”<sup>89</sup> It is worth noting that, despite the appellant’s conceding this point, the Court thought it necessary to record its findings on this question, thus indicating its determination to put this matter to rest. It is also worth noting that, posed in this way, the question lifted the analysis, once and for all, out of the administrative law context and placed it in the sphere of criminal law.<sup>90</sup> In this context, the stakes were much higher: if the court martial survived, it would have to be as a full-fledged criminal court and not as an administrative tribunal with a

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Despite the lack of constitutional impediment to judicial review of court martial decisions and the express provision in s. 18 of the *Federal Court Act*, R.S.C. 1985, c. F-7, for prerogative relief for appeals from courts martial, there has been, until recently, a great reluctance on the part of the Federal Court to grant such relief from decisions of courts martial. Dickson J. (as he then was) in *Martineau v. Matsqui Institution Disciplinary Board (No.2)*, [1980] 1 S.C.R. 602 at 624-28, held that there was a “disciplinary exemption” for courts martial from the issuance of writs of *certiorari* in the traditional view, but that this was not a rule of law. Reed J. of the Federal Court Trial Division furthered this trend in *Schick v. A.-G. (Canada)* [1986], 5 F.T.R. 82, by finding that judicial review was available for the decisions of courts martial.

<sup>88</sup> *Généreux* (S.C.C.), *supra* note 2 at 281-82.

<sup>89</sup> *Ibid.* at 288 [emphasis in original].

<sup>90</sup> The drafting of s. 11 of the *Charter* supports this approach. Containing rights relating to “proceedings in criminal and penal matters,” it may serve to inform the content of the “principles of fundamental justice” and so assist in the interpretation of s. 7 in an administrative law context, but is not directly applicable to administrative proceedings. The express consideration of military tribunals in s. 11(f) suggests that the section is intended otherwise to be applicable to proceedings under military law, which in turn, indicates that the framers of the *Charter* intended the court martial to maintain judicial standards. In other words, the *Charter* requirements for criminal proceedings may be contextualized in their application to courts martial, but they are not “flexible” in the administrative law sense.

specialized jurisdiction to which the courts would be prepared to make significant concessions to efficiency and variations in context.<sup>91</sup> These, however, were the battle lines that the respondent would have the courts draw. In light of the greatly expanded requirements for fairness in public law, the extensive and swiftly implemented amendments to the regulations following *Ingebrigtson* indicate that the Legal Branch of the Canadian Forces wished to improve the procedural fairness of courts martial so that they could be compared favourably with the ordinary courts.<sup>92</sup> If the court martial could meet with approval in this regard, it might escape relegation to the role of a disciplinary tribunal suggested in the concurring decision of Stevenson J. and the limited scope that would entail.

Satisfaction of the *Charter's* stringent requirements for procedural fairness, however, as the Chief Justice went on to suggest, would not itself justify the existence of a parallel system of courts. Justification would have to be sought in the purpose of such a system.

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<sup>91</sup> It should be noted that the various types of court martial comprise only the most formal of a range of proceedings operating to maintain discipline in the military. The extent to which the duty of fairness applies to, and is presently afforded in, the many forms of summary proceedings is examined in *Watkin*, *supra* note 34.

<sup>92</sup> The influence of the make-up of the "military bar" should not be overlooked. Rowe's reference earlier to the extensive involvement of laypersons in U.K. courts martial can be contrasted with Fidell's examination of the U.S. military bar which is comprised largely of lawyers who receive their training through the military and whose practice is, of necessity, exclusively within the military justice system. In his 1989 article, *supra* note 12 at 127, Fidell spoke of 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 practiced 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.

Consequently,

[a]nyone 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,' mere utterance of which still makes the occasional senior military lawyer see red. (*Ibid.* at 125.)

When resistance to law reform becomes an entrenched goal of the practising bar, it creates enormous, if not insuperable, barriers to constitutional reform. A third model can be found in the Legal Branch of the Canadian Armed Forces which, comprised of officers with civilian training, has proven to be a moving force in the area of law reform. Articles and theses such as those of Fay, *infra* note 95, and *Watkin*, *supra* note 34, have included extensive recommendations for reform of military law and procedure and have had significant impact on amendments to the regulations governing the Forces. It is noteworthy that these endeavours were supported by the military as integral to these legal officers' career development.

This purpose would, in turn, “provide guides as to the system’s proper limits.”<sup>93</sup> After reviewing the jurisprudence and academic literature, the Chief Justice concluded that the maintenance of discipline and morale in the Forces depends on an efficient judicial system sensitive to context in determining the seriousness of the infraction and the appropriate severity of the punishment.<sup>94</sup> Moreover, as was suggested by Fay nearly two decades earlier, in his study of military law,<sup>95</sup> confidence in the ability of the court martial to satisfy these requirements is itself enhanced by the fact that those taking part in courts martial are themselves members of the Forces. In Fay’s words,

A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.<sup>96</sup>

While the existence of a separate system of justice staffed by military personnel is necessary to the discipline and morale of the forces, neither this purpose, nor the practical requirements<sup>97</sup> of a separate system necessitate or justify standards of fairness or procedural safeguards inferior to those of civilian courts. The misconception that military discipline is achieved through fear of the arbitrariness of court martial proceedings or the inevitability of its verdicts was also corrected by Fay, who wrote:

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

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<sup>93</sup> *Généreux* (S.C.C.), *supra* note 2 at 288.

<sup>94</sup> For example, in civilian life, the striking of a stranger may well incur liability for assault, whereas in the military, blows struck off duty between members of similar rank may be overlooked in the absence of injury, though the very act of a member of the ranks striking an officer or *vice-versa* may warrant a relatively severe punishment.

<sup>95</sup> J.B. Fay, “Canadian Military Criminal Law: An Examination of Military Justice” (1975) 23 *Chitty’s L.J.* 120, 156, 195, 228.

<sup>96</sup> *Ibid.* at 248.

<sup>97</sup> For example, efficiency, the ability to recognize and gauge an infraction, and the ability to discern the appropriate sentence.

serviceman and thus it will promote and support the discipline upon which the military organization is based.<sup>98</sup>

Having laid the groundwork for the review of the General Court Martial, the Chief Justice distinguished *MacKay*, saying that the *MacKay* Court had applied a “subjective test” to determine the tribunal’s actual bias whereas, since *Valente*, the objective question of judicial independence had to be posed separately as it was in this case.<sup>99</sup> Having conceded the impartiality of the Judge Advocate present at his court martial, Private Génèreux, nevertheless, was able to challenge the independence of the GCM because, as the Chief Justice explained,

the question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. ... The appropriate question is whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence.<sup>100</sup>

### A. *Valente Applied*

On applying the first of the *Valente* criteria for judicial independence, security of tenure, Lamer C.J. held that

Unlike the situation of the ordinary courts, a judge advocate is appointed to sit on a General Court Martial on an *ad hoc* basis ... At the conclusion of this type of court martial, the judge advocate and members return to their usual roles within the military ... there was no objective guarantee that his or her career as military judge would not be affected by decisions tending in favour of an accused rather than the prosecution.<sup>101</sup>

Noting that the principle of security of tenure admitted a certain flexibility, the Chief Justice considered the alternatives of finding the court martial a “specific adjudicative task” for which the existing arrangement was adequate, and of requiring “tenure until retirement during good behaviour equivalent to that enjoyed by judges of the regular criminal courts.”<sup>102</sup> On the former it was held that “[a]lthough a General Court Martial is convened on an *ad hoc* basis, it is not a ‘specific adjudicative task’. The General Court Martial is a recurring affair. Military judges who act periodically as judge advocates must therefore

<sup>98</sup> *Fay*, *supra* note 95 at 123.

<sup>99</sup> In *Génèreux* (S.C.C.), *supra* note 2 at 289, Lamer C.J. also noted that this appeal concerned an infringement of the *Charter* rather than its predecessor, the *Bill of Rights*.

<sup>100</sup> *Ibid.* at 283 and at 287.

<sup>101</sup> *Ibid.* at 302-03.

<sup>102</sup> *Ibid.* at 304.

have a tenure that is beyond the interference of the executive for a fixed period of time.”<sup>103</sup> On the latter, it was noted that

[o]fficers who serve as military judges are members of the military establishment, and will probably not wish to be cut off from promotional opportunities within that career system. It would not therefore be reasonable to require a system in which military judges are appointed until the age of retirement.<sup>104</sup>

One interesting point is that the relationship between the issues of security of tenure and financial independence in the context of the court martial tend to merge in the question of security with respect to career advancement. Tenure to a military judge is not so much a concern for job security as it is one for the risk of displeasing superiors and so being passed over for promotions and desirable postings.<sup>105</sup> Similarly, financial security is not a special concern except to the extent that some of the smaller incremental increases may be made available through a good showing on the periodic Performance Evaluation Report.

On the question of financial security, the Court observed:

There were no formal prohibitions, at the time that the appellant was tried by the General Court Martial, against evaluating an officer on the basis of his or her performance at a General Court Martial ... Consequently, by granting or denying a salary increase or bonus on the basis of a performance evaluation, the executive might effectively reward or punish an officer for his or her performance as a member of a General Court Martial.<sup>106</sup>

On both these issues, the Chief Justice noted that the amendments to the regulations that had been implemented in the intervening period were sufficient to correct the problem.

Finally, with regard to institutional independence which the *Ingebrigtsen* Court had not found lacking in the court martial, Chief Justice Lamer found that

military officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. This close involvement ...

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<sup>103</sup> *Ibid.* at 303.

<sup>104</sup> *Ibid.* at 304.

<sup>105</sup> This helps to explain the insistence on the part of the minority of the Court that the court martial was a “specific adjudicative task” for which there was sufficient tenure in the old regulations. This view seems to overlook the situation that arises more with the SCM when a trained legal officer presides routinely over the court martial and is required by the regulations to be the subject of periodic performance evaluation. If the officer’s work during the preceding period for evaluation had included many assignments to courts martial, then the regulations had required the officer’s performance as a judge to be evaluated.

<sup>106</sup> *Généreux* (S.C.C.), *supra* note 2 at 306.

undermines the notion of institutional independence ... The idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system. The principle of institutional independence, however, requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function ... It is not acceptable, in my opinion, that the convening authority, i.e., the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as the triers of fact.<sup>107</sup>

This finding necessitated a further amendment to article 111.23 of the QR&O. However, it was noted that the difficulty caused by the appointment of the judge advocate by the judge advocate general had been remedied in the 1991 amendments to the QR&O.

Although this application of the *Valente* criteria may have had salutary effects on the objectively appraised independence of the court martial, its preoccupation with the independence of the judge advocate to the exclusion of the panel of military personnel comprising the court martial itself should not be accepted uncritically. The respective roles of judge advocate and court martial differ significantly from those of judge and jury in an ordinary criminal court. In the General Court Martial, for example, the court martial consists of between five and nine members<sup>108</sup> and is charged with the responsibilities both of determining guilt or innocence by a majority vote and of determining sentence.<sup>109</sup> One of its members, acting as President of the court,<sup>110</sup> ensures the proper conduct of the trial and the proper performance of the duties of the court,<sup>111</sup> and is empowered to direct the judge advocate to rule on questions of law or of mixed law and fact.<sup>112</sup> Although the judge advocate's rulings on matters of law and procedure can only be disregarded "for very weighty reasons"<sup>113</sup> and, as a practical matter, deference is shown to both the judge advocate's broad legal training and specialized military qualifications, the judge advocate requires the leave of the President to address the members of the court martial. Recognition of the special role of the court martial and its President in military trials has warranted

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<sup>107</sup> *Ibid.* at 308-09.

<sup>108</sup> *National Defence Act, supra* note 32, s. 167; QR&O, art. 111.18.

<sup>109</sup> *National Defence Act, supra* note 32, s. 192.

<sup>110</sup> *Ibid.* s. 168.

<sup>111</sup> QR&O, art. 112.54.

<sup>112</sup> *National Defence Act, supra* note 32, s. 192(4).

<sup>113</sup> QR&O, art. 112.54.

restrictions on eligibility to sit on a court martial<sup>114</sup> in addition to the right of the defendant to object to the selection of any member of the Court. Whether these safeguards are sufficient to secure the independence of the court martial was not considered by the Supreme Court as a result of its exclusive focus on the judicial role of the judge advocate. It will be interesting to see if the court martial or its President become the subject of future debate on the question of judicial independence.

In addressing the possibility that the legislation could be saved under section 1 as a reasonable limit on the right to a hearing by an independent tribunal, Lamer C.J. held that a violation of section 11(d) "will only pass the second arm of the proportionality test in *Oakes*<sup>115</sup> in the most extraordinary of circumstances ... [such as] ... a period of war or insurrection."<sup>116</sup> The GCM failed, in the case of Corporal Généreux's trial, to impair his rights as little as possible and so could not be justified by section 1. This finding is significant in that it established that the formal independence of a military judiciary, in spite of the dearth of foreign examples, is a necessity in a free and democratic society.

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<sup>114</sup> The following persons are prohibited, under s. 170 of the *Act*, from sitting as a member of a General Court Martial: the officer who convened the court martial; the prosecutor; a witness for the prosecution; the commanding officer of the accused person; a provost officer; and any person who was involved in the investigation with respect to the charge in question. The members of a General Court Martial should not normally be of a rank lower than that held by the accused (art. 111.21 (Note A) QR&O). No members of the court martial can be below the rank of captain (s. 170(g) of the *Act*). The President cannot be below the rank of colonel (s. 168(1) of the *Act*). In addition, the members of the Court should not be selected from the unit to which the accused belongs unless the demands of the military require otherwise (art. 111.06 (Note B) QR&O). *Généreux* (S.C.C.), *supra* note 2 at 308.

<sup>115</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103. The test outlines the doctrine developed to determine justification for *Charter* infringements under s. 1. *Watkin*, *supra* note 34, makes an argument similar to that which might be offered on behalf of aspects of military justice held to violate the *Charter* in the context of summary proceedings. As he suggests, disruption of the life of an accused by judicial proceedings in the case of a defendant serving in the armed forces is disruptive of the service itself and so it is better to enhance the procedural fairness of military tribunals than to tailor service members' activities to accommodate attendance at civilian proceedings. Moreover, unless a "service connection" test was used with a presumption in favour of military tribunal jurisdiction, it would tend to fragment and disrupt discipline which, in part, depends upon the recognition of service tribunal authority over service personnel.

<sup>116</sup> *Généreux* (S.C.C.), *supra* note 2 at 313 [footnote added].

### B. *The Context of Military Necessity*

Lest it be thought that this major overhaul of the court martial had proceeded too smoothly, brief reference should be made to the dissent by L'Heureux-Dubé J. who felt that the majority had accorded insufficient weight to the "context." Adequate attention to the context, she argued, would generate "a concern for flexibility and a recognition that differences in tribunals form an acceptable and even desirable part of the Canadian legal landscape"<sup>117</sup>—differences that cast doubt on the applicability of the *Valente* criteria to courts martial. Elaborating on this approach, L'Heureux-Dubé J. disagreed with each of the findings pertaining to the three criteria for judicial independence and concluded that the appellants' constitutional rights had not been violated.

Surprising as it may seem to read a dissent in a dispute that had largely been abated by the respondent's previous amendments to the regulations governing the court martial, it is worth considering briefly the impetus for such a view and its possible consequences. Military law shares a good deal with public law, and viewed in *that* context there may be a tendency to accord the deference to "military necessity" that one would accord to administrative exigencies in the delivery of government programmes. However, if administrative tribunals exist on a continuum from those in which the barest minimum requirements satisfy the duty of fairness through to those with ever greater proximity to courts of law, then it was suggested by the majority in *Généreux*, and it is strenuously urged here, that the court martial does not exist within this continuum. It is not an administrative tribunal that resembles a court. It is a court. Accordingly, the debate over curial deference to the specialized expertise that has engaged the Supreme Court of Canada in recent years<sup>118</sup> is of minimal application in the context of the court martial. Moreover, to the extent that the context of military necessity requires deference, it is not a context in which the maintenance of discipline and morale call for, or even permit, the compromise of the essential procedural requirements for fairness that are available in a civilian court. While the staffing of a tribunal with those able to appreciate the

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<sup>117</sup> *Ibid.* at 328.

<sup>118</sup> See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227; *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *National Corn Growers Assn. v. Canada Import Tribunal*, [1990] 2 S.C.R. 1324; and *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644.

significance of various breaches of the *Code of Service Discipline* and the punishment appropriate to them is a military necessity, it is equally necessary that the fairness of the proceedings continue to enjoy the respect of those subject to them. If there is a special contextual concern in military justice it is with the good reputation of its administration.<sup>119</sup> The risk to the respondent of the appeal in *Généreux* had little to do with the possibility of an enhanced administrative burden; it had to do with the possibility of being characterized, as suggested in the concurring decision of Stevenson J., as a professional disciplinary tribunal and experiencing the reduced jurisdiction appropriate to such bodies.

Ironically, the majority decision that allowed the appeal and identified many constitutional inconsistencies represented a victory for the military. It indicated a confidence on the part of the judiciary, as defenders of the Constitution, that justice could be both done and seen to be done *within*, and not in spite of, the distinct context of the court martial. With the necessary amendments swiftly enacted, the *Généreux* and *Forster* decisions resulted in a remarkable “win-win” situation for military defendants and the military itself in Canada.

## VI. CONCLUSIONS: THE PATH AHEAD

Of the two propositions with which we began—that the rule of law required the existence of effective armed forces for its maintenance, and that military discipline required that service personnel be denied its benefits—it is clearly the former that, in Canada, has been the more commonly questioned. However, the recent Supreme Court of Canada rulings indicate that the latter has finally come to be widely recognized as the less secure.

That military discipline must be perceived to be fair in order to promote discipline and support morale is neither new nor remarkable. The requirements for perceived fairness, however, are a different matter. In the 1950s and 1960s, the existence of civilian appellate review seemed to suffice. In the 1970s and 1980s, the emphasis on formal equality and the equation of soldier with citizen, and military service with civilian occupations, suggested that fairness required a narrow construction of the role and scope of courts martial. In the 1990s, however, the emergence of new visions of equality is permitting the recognition of the possibility that justice may be done even in a court system outside that of ordinary criminal courts.

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<sup>119</sup> See *supra* note 91 and accompanying text.

Have the decisions in *Généreux* and *Forster* and the amendments to the structure of the court martial they required established the fairness of military tribunals once and for all? Assuredly not. Evolving standards for procedural fairness in both the civilian and military context will undoubtedly form the basis for fresh challenges to the military justice system. It is likely that challenges to the severity of punishments,<sup>120</sup> which to date have met with little success, will continue to be launched as will challenges addressing issues arising in the context of summary discipline proceedings, which constitute the overwhelming majority of military proceedings.

This article began by observing the good fortune of Canadians to have long enjoyed peace, and it concludes by observing the good fortune to have the constitutional and jurisprudential resources to resolve conflicts between the military justice system and the constitutional rights of defendants within it in a principled way in accordance with the courts' "mandated responsibility for judicial review."<sup>121</sup> The existence of stated constitutional standards and the absence of sharp divisions between the executive and the judiciary in Canada have established a unique opportunity and structure for judicial review; and the creation of an independent judiciary within the military, endorsed by the Supreme Court in the *Généreux* and *Forster* decisions, has demonstrated firm support for the furtherance of fundamental justice in courts martial. The path from regarding military justice as an oxymoron to regarding procedural fairness as a genuine aspiration of the court martial system in common law countries may be neither short, nor well travelled, but it is one along which the Canadian military justice system, at last, seems well equipped to lead the way.

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<sup>120</sup> For example, *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, suggests that convictions which may stigmatize the offender may require greater procedural safeguards at trial than those which do not in order to be constitutional. Reduction in rank, which, among a great many other things, clearly involves significant adverse effects on one's reputation and position in the military community may form the basis for challenging the legislation.

<sup>121</sup> *Operation Dismantle*, *supra* note 17.