

Military Law under the Charter

David J. Corry

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Abstract

Mr. Corry reviews the courts' approach to the military justice system as it relates to the fundamental rights of service personnel. He recognizes that some sacrifice of procedural protections is necessary if the Armed Forces is to fulfill its purpose, but determines that, especially in light of the protections offered by the Canadian Charter of Rights and Freedoms, the courts have adopted an overly passive role in the supervision and review of the military judicial process.

MILITARY LAW UNDER THE CHARTER

BY DAVID J. CORRY*

Mr. Corry reviews the courts' approach to the military justice system as it relates to the fundamental rights of service personnel. He recognizes that some sacrifice of procedural protections is necessary if the Armed Forces is to fulfill its purpose, but determines that, especially in light of the protections offered by the Canadian Charter of Rights and Freedoms, the courts have adopted an overly passive role in the supervision and review of the military judicial process.

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I. INTRODUCTION

The military establishment is, of course, a necessary organ of government, but the reach of its power must be carefully limited lest the balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in free society.

Earl Warren,
Chief Justice of the United States¹

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* Member of the 1985 graduating class of Osgoode Hall Law School. Presently a member of the Alberta Bar with the law firm Fenerty, Robertson, Fraser & Hatch. Former Canadian Naval Officer 1973-82.

In a constitutional democracy, in which certain basic rights are held to be fundamental to all persons, the military is a necessary evil. The constitution guarantees that democratic rule will not develop into a tyranny of the majority over the minority. The constitution defines the limits of democratic rule: individual rights are sacred and the will of the majority shall not tread upon them.

Military society stands in marked contrast to the constitutional democracy. The fundamental objective of the armed forces is military efficiency to create an effective and integrated fighting force. All private considerations must give way to the fundamental goals of the military organization. Individual rights of service personnel, therefore, are not sacred. They are sacrificed for the sake of military efficiency.

The contrast between the military and a constitutional democracy is most clearly reflected in their respective legal systems. It reaches the point of dilemma when the two legal systems come into contact: when the military is subjected to judicial review by the civilian courts. This requires the courts to tread a fine line, balancing the exigencies of the armed forces with the fundamental rights of individual service personnel.

Canada matured as a constitutional democracy on April 17, 1982. With the adoption of the *Canadian Charter of Rights and Freedoms*,² the courts for the first time have been asked to give serious consideration to the rights of those who are subjected to the military judicial process. The purpose of this paper is to examine the effect that the *Charter* will have on military law in Canada. Will the civil courts be reluctant to interfere with the administration and enforcement of military law? Will they defer to military tribunals, or will the courts intervene when military justice violates individual rights? These are a few of the many questions that remain to be answered over the years as the military is subjected to review under the *Charter*.

In examining the above questions, this paper will draw on the extensive jurisprudence of the United States, which has subjected the military to constitutional scrutiny over a 200-year history. Canada clearly must chart her own course, but in so doing, the many issues faced and resolved in the United States, and the mistakes that have been made, will be a valuable starting point. Before considering those cases, however, I will begin by examining the state of Canadian law governing review of the military prior to the *Charter*.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11.

II. REVIEW OF PRE-*CHARTER* LAW GOVERNING THE MILITARY

A. *The Common Law*

The federal government is granted sole jurisdiction over the "Militia, Military and Naval Service, and Defence" pursuant to section 91(7) of the *Constitution Act, 1867*.³ In exercise of this jurisdiction, Parliament has enacted the *National Defence Act*,⁴ which is the governing statute of the Canadian Forces. The Second Division of that statute contains the *Code of Service Discipline*, which is a complete code of military law applicable to persons under service jurisdiction.⁵ Also, under section 12 of the *National Defence Act*, the Governor-in-Council and the Minister of National Defence are empowered to make regulations for the organization, training, discipline, efficiency, administration, and government of the Forces, so long as such regulations are not inconsistent with the *National Defence Act*. Under this authority, the government has promulgated the *Queen's Regulations and Orders (QR & Os)*. The *QR & Os* amplify the *Code of Service Discipline* and serve as the authoritative manual for military law in Canada.

The jurisdiction of the civil courts is not affected by the *Code of Service Discipline*, and persons subject to the *Code* may be triable in both military and civil jurisdictions.⁶ In general, the law of Canada, which applies to all citizens, also applies to members of the Forces. Therefore, the person who joins the service is still within the jurisdiction of the civil courts and, as a member of the Forces, is also within the jurisdiction of the military courts.

In determining original jurisdiction, one must look at the three types of offences that apply to service personnel: first, those offences that are triable only by the civil courts; second, those that are triable only by a military tribunal; and third, those that are within the jurisdiction of both military and civil courts. In the first type of offence, when charged with murder, manslaughter, or sexual assault, the service person must be tried by the civil court, and cannot be tried under military law.⁷ The second type of offence involves those matters that are purely of a military nature.⁸ These include absence without leave, desertion, disobedience of

³ (U.K.), 30 & 31 Vict., c. 3.

⁴ R.S.C. 1970, c. N-4.

⁵ *Ibid.* s. 55 deals with the jurisdiction of the *Code of Service Discipline* over persons. In addition to military personnel, the *Code* also applies to civilians accompanying a unit of the Armed Forces, and alleged spies for the enemy.

⁶ *Ibid.* s. 61.

⁷ *Ibid.* s. 60.

⁸ *Ibid.* Part V, ss 62-119, 121, 122.

a lawful command, mutiny, insubordination, and so on. The third type of offence involves matters of the civil law that are brought into the *Code of Service Discipline* under section 120 of the *National Defence Act*,⁹ or certain offences under the *Code of Service Discipline* that may be triable in the civil courts with the consent of the Commanding Officer of the complainant.¹⁰ Under section 120 of the *National Defence Act*, a member of the Canadian Forces may be tried under military law for any offence under the *Criminal Code* or any other act of the Parliament of Canada. Also, offences that are triable in civil courts, with the consent of the complainant's Commanding Officer, may be triable by military tribunal under section 120.

In the case of offences brought under the *Code of Service Discipline* through section 120, the civil courts maintain jurisdiction whether or not the accused person is tried by a military tribunal. Section 61(1) of the *National Defence Act* states that "Nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court." Therefore, a member of the forces can be brought before a civil court and tried for a matter that has already been disposed of by the military under section 120 of the *National Defence Act*. The *Act* requires that the civil court shall, in awarding punishment, take into account any punishment that was imposed by the service tribunal.¹¹ Additionally, when the punishment of the military court was a sentence of imprisonment, upon conviction or acquittal by the civil court the military sentence is remitted.¹² However, these provisions do not eliminate the problem of double jeopardy and it would appear, at first glance, that section 61 of the *National Defence Act* violates section 10(h) of the *Charter*, which provides that:

Any person charged with an offence has the right . . . 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.

The civil courts have jurisdiction to review matters decided by military tribunals. Persons found guilty under military law have a right of appeal to the Court Martial Appeal Court (CMAC) regarding either the sentence

⁹ *Ibid.* s. 120(1): Offences Punishable by Ordinary Law. "An act or omission (a) that takes place in Canada and is punishable under Part XII of this Act, the *Criminal Code* or any other Act of the Parliament of Canada; or (b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the *Criminal Code* or any other Act of the Parliament of Canada."

¹⁰ *Ibid.* Part XII, ss 243-263.

¹¹ *Ibid.* s. 61(2).

¹² *Ibid.* s. 61(3).

imposed or any matter of law.¹³ The CMAC is made up of civilian judges who are selected from the Federal Court of Canada.¹⁴ There is a further right of appeal to the Supreme Court of Canada, if the matter is dismissed by the CMAC.¹⁵

The statutory right of appeal is in addition to, and not in derogation of, rights that service personnel have under the law of Canada.¹⁶ Therefore, members of the Forces may apply to the civil court, asking the court to exercise its inherent supervisory power under the prerogative writs. While the civil courts have expanded the scope of review over inferior tribunals in recent years, they have been reluctant to interfere in military matters, unless the military tribunal has acted without jurisdiction or has exceeded its jurisdiction.

Until recently, the civil courts would not inquire at all into matters involving the discipline of members of the Armed Forces. The attitude of the courts was based on *obiter dictum* in the case of *Sutton v. Johnstone*,¹⁷ decided by the Court of Exchequer in 1786. The plaintiff, Captain Sutton, was the Commanding Officer of Her Majesty's Ship *Isis*, and Johnstone was his superior commander in charge of the squadron. The British were at war with the French, and in April of 1781 the *Isis* was damaged in a naval engagement against the enemy. The French fleet withdrew, and Johnstone ordered the *Isis* to pursue the enemy. Sutton did not obey the order because of the condition of his ship. Consequently, he was arrested and tried by court martial for disobedience of orders. When Sutton was acquitted, he brought a civil action against Johnstone for malicious prosecution. The matter was tried twice in the lower courts, and Sutton was awarded damages on both occasions. Johnstone appealed to the Court of Exchequer, which reversed the judgment at trial. Upon appeal to the House of Lords,¹⁸ the judgment of the Court of Exchequer was affirmed on the ground that Johnstone had probable cause for the prosecution. Although this was enough to dispose of the matter, Lord Mansfield and Lord Loughborough stated in *obiter* that an action cannot be maintained by a subordinate officer against a commander for an act

¹³ *Ibid.* s. 197.

¹⁴ *Ibid.* s. 201(2), (5). Specifically, at least four judges must be from the Federal Court; other judges from a superior court of criminal jurisdiction may be appointed. Three judges constitute a quorum.

¹⁵ *Ibid.* s. 208. Appeal to the Supreme Court of Canada is only allowed on a question of law. It is granted as of right when there is a dissent in the Court Martial Appeal Court. Otherwise, leave must be granted by the Supreme Court of Canada.

¹⁶ *Ibid.* s. 198.

¹⁷ 1 T.R. 510, 99 E.R. 1215. For an interesting analysis of the case, see W.S. Holdsworth, "The Case of *Sutton v. Johnstone*" (1903) 19 L.Q. Rev. 222.

¹⁸ (1787), 1 T.R. 784, 99 E.R. 1377.

done in the course of discipline and under powers legally incident to the situation.¹⁹ The *dictum* of Lord Mansfield has been cited since that time for the broad proposition that the civil courts will not inquire into the exercise of military discipline.

In *Dawkins v. Lord Rokeby* (1866),²⁰ the plaintiff serviceman sued for damages for false imprisonment and malicious prosecution. The court held that even assuming there was clear malice and absence of probable cause, the plaintiff, Dawkins, had no cause of action.²¹ A subsequent action was brought by the same parties, and heard by the Court of Exchequer in 1873.²² Kelly C.B. delivered the judgment of the Court and dismissed the plaintiff's action. He stated:

With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other judges in *Sutton v. Johnstone* . . . are . . . authorities to show that a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law.²³

The Canadian courts have followed the general approach of the English courts. In *Ex parte Fogan* (1919),²⁴ the plaintiff serviceman was convicted by court martial for the offence of drunkenness committed while in a private home. It was Fogan's third offence, and he was sentenced to nine months' imprisonment at hard labour. Fogan applied to the civil court by way of *certiorari*. In dismissing the action, the New Brunswick Supreme Court held that *certiorari* was not available to review a matter of procedural error made by a military tribunal. The military tribunal in this case had not exceeded its jurisdiction, and therefore the civil court refused to intervene.

One of the leading Canadian cases exemplifying the 'hands off' attitude of the civil courts regarding matters of military discipline is *Regina and Archer v. White* (1956).²⁵ In that case, a former Constable of the Royal Canadian Mounted Police (RCMP) was convicted of four disciplinary charges under the *Royal Canadian Mounted Police Act*.²⁶ White applied for *certiorari* before the Supreme Court of British Columbia in order to remove the record of convictions held by RCMP Superintendent Archer.

¹⁹ *Ibid.* at 1226, 1243.

²⁰ 4 F. & F. 806, 176 E.R. 800 (Ct.Comm.Pleas) [hereinafter cited to E.R.].

²¹ *Ibid.* at 812.

²² *Dawkins v. Lord Rokeby* (1872), [1873] L.R. 8 Q.B. 255.

²³ *Ibid.* at 271.

²⁴ 46 N.B.R. 370, 48 D.L.R. 194 (S.C.).

²⁵ [1956] S.C.R. 154.

²⁶ R.S.C. 1970, c. R-9.

The trial court recited the common law principle that the civil courts have no power to interfere with matters of military conduct and discipline. In dismissing White's application, the court held that disciplinary matters within the RCMP are akin to those before a military tribunal and, therefore, the same principles apply. *Certiorari* is not applicable to decisions of the RCMP disciplinary tribunal when that body has acted within its statutory powers. White appealed to the Court of Appeal of British Columbia, which held that *certiorari* was applicable in this case, because the military cases are not relevant to RCMP disciplinary matters. Superintendent Archer appealed to the Supreme Court of Canada.

The Supreme Court was unanimous in allowing Archer's appeal and restoring the judgment at trial. However, only Abbott J. agreed with the trial judge that the courts have no power to interfere with internal matters of discipline within the RCMP. The majority held that the right of the court to intervene by way of *certiorari* is undoubted, both in respect of the military and the RCMP. In this case, however, there was nothing in the material before the court to sustain charges of fraud, bias, or want of jurisdiction.

Rand J. expressed the opinion that the court would be reluctant to interfere with proceedings before the RCMP tribunal:

If, within the scope of authority granted, wrongs are done by individuals, and that is not beyond possibility, the appeal must be to others than to civil tribunals, or as in the case of the Army, they must be looked upon as a necessary price paid for the vital purposes of the force.²⁷

Notwithstanding the general reluctance of the civil courts to interfere in military matters, when the exercise of military authority denies service personnel their fundamental common law rights and liberties, the civil court will intervene. This principle was followed in *Rex v. Thompson (No.1)* (1945),²⁸ which stands as one of the few cases in which the civil courts have been willing to interfere in the exercise of military discipline.

In this case, Thompson applied to the civil courts by way of *habeas corpus*. Thompson was a Non-Commissioned Officer in the Canadian Army. He was arrested on charges of theft of public property and improper possession of public property. He was detained in military custody for two and one-half months, and finally was brought before a District Court Martial. Thompson submitted that the Court Martial did not have jurisdiction to hear the case. The Court Martial held that it did have jurisdiction and proceeded with the trial. The proceedings were interrupted by the accused's application for *habeas corpus* brought before the Ontario

²⁷ *Supra*, note 25 at 160.

²⁸ [1946] O.R. 77, 4 D.L.R. 579, 86 C.C.C. 193 (H.C.).

High Court. LeBel J. held that the Court Martial had acted without jurisdiction and ordered that Thompson be released from custody. He examined the relevant provisions of the *Army Act*²⁹ and the military rules of procedure. The jurisdiction of the Court Martial was conditioned upon a prior hearing of the charge by the Commanding Officer (CO). The CO must exercise his or her discretion by either dismissing the charge, disposing of the case summarily, referring the matter to proper military authority, or remanding the case to trial by court martial. Because the requisite hearing by the Commanding Officer had not been held, LeBel J. found that the Court Martial did not have jurisdiction to hear the matter.

Following his release from custody, Thompson was transferred to another regiment. There he was re-arrested on the same charges. Thompson again petitioned the civil courts, this time by way of *prohibition* in order to prevent his new Commanding Officer from taking further proceedings on the same charge.³⁰ The Ontario High Court granted Thompson's application, and in so doing Urquhart J. expressed some concern that the new Commanding Officer knew little of Thompson apart from the charges pending before him. Therefore, the Commanding Officer could not reasonably exercise his discretion regarding the matter. Urquhart J. held that Thompson had good cause for being apprehensive about his hearing before the new Commanding Officer and his trial by court martial.

Rex v. Thompson is an exceptional case in a long line of Anglo-Canadian jurisprudence. Although Urquhart J. in *Rex v. Thompson (No.2)*³¹ found that there was a reasonable apprehension of bias, there was no express finding that the new Commanding Officer had acted without jurisdiction. The statutory basis of the Commanding Officer's discretion does not require familiarity with the personnel brought before him or her. Clearly Urquhart J. was more concerned about the abuse of process, in light of Thompson's initial release by way of *habeas corpus*, than he was about the legality of the proceedings under the new Commanding Officer.

In Canada, service personnel do not entirely give up their common law rights upon enlistment. However, these rights may be expressly taken away by statute,³² or by order-in-council under the *War Measures Act*,³³

²⁹ 44 & 45 Vict., c. 9, as am. This was, in fact, the *Army Act* of the United Kingdom, which governed the Canadian Army as provided by the Canadian *Militia Act*, R.S.C. 1927, c. 132.

³⁰ *Rex v. Thompson (No.2)* (1946), 4 D.L.R. 591 (Ont. C.A.) at 598-99.

³¹ *Ibid.*

³² *Supra*, note 28.

³³ S.C. 1914 (2d Sess.), c. 2. See *Re Gray* (1918), 57 S.C.R. 150, 42 D.L.R. 1.

which grants the federal Cabinet the authority to suspend common law rights during a national emergency.

The power of the federal Cabinet to authorize conscription in time of war was upheld by the majority of the Supreme Court of Canada in *Re Gray* (1918).³⁴ Anglin J. quoted with approval the judgment of Lord Atkinson in *R. v. Halliday*.³⁵ Anglin J. stated:

However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that personal liberty of the subject can be invaded arbitrarily at the mere whim of the executive. What is contended is that the executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact.³⁶

Once a person enlists in the military, or is conscripted into service, he or she becomes subject to the *Code of Service Discipline*. That person is subject to the *Code* at all times and in all places and, consequently, his or her liberty is considerably constrained.³⁷ While members of the Armed Forces may apply for review of a military matter, the scope of review is much narrower than the civil courts have exercised for other inferior tribunals.³⁸ The courts have been particularly loathe to interfere in military matters during a national emergency, and pursuant to sweeping powers granted under the *War Measures Act*, cabinet powers to suspend common law rights entirely have been held to be *intra vires*. Generally speaking, under the common law, it is clear that military personnel have very limited rights of review.

B. *The Canadian Bill of Rights*

When the *Canadian Bill of Rights*³⁹ was enacted in 1960, it offered tremendous scope for review of military action by the civil courts, that is, if they had been willing to take up the gauntlet. At the court-martial level, military lawyers cited the *Bill of Rights* on numerous occasions, but with little success. Only four *Bill of Rights* cases were heard by the Court Martial Appeal Court; all were denied except one, which was decided on other grounds. Only one of these cases, *MacKay v. The Queen*,⁴⁰

³⁴ *Re Gray, ibid.*

³⁵ (1917), [1917] A.C. 260 (H.L.).

³⁶ *Re Gray, supra*, note 33 at 182.

³⁷ *McArthur v. The King* (1943), [1943] Ex. C.R. 77, 3 D.L.R. 225.

³⁸ Under the writ of *certiorari*, the court will review for error of law on the face of the record, in addition to reviewing for jurisdictional error.

³⁹ S.C. 1960, c. 44.

⁴⁰ (1980), [1980] 2 S.C.R. 370, 114 D.L.R. (3d) 393 [hereinafter cited to D.L.R.].

was appealed to the Supreme Court of Canada. It was decided in 1980, twenty years after the *Bill of Rights* was enacted.

The three cases prior to *MacKay* raised very specific issues in which the accused argued that a certain provision of the *QR & Os* violated the *Bill of Rights*. In *Platt v. The Queen*,⁴¹ the accused challenged article 111.60 of *QR & Os*, which states that a person charged is not entitled to have a defending officer appointed until after a court martial has been ordered by the convening authority. The Court Martial Appeal Court rejected Platt's claim that the article violated his right to counsel as provided by section 2(c) of the *Bill of Rights*.⁴²

The two cases that followed, *Robinson v. The Queen* (1971)⁴³ and *Nye v. The Queen* (1972),⁴⁴ both challenged article 112.54(3) of *QR & Os*. A General or Disciplinary Court Martial⁴⁵ is composed of military officers who have minimal legal training. A Judge Advocate is appointed to assist the court martial and to give an opinion upon all matters of law and procedure. *QR & Os*, article 112.54(3) allows the court to disregard the opinion of the Judge Advocate when it has "very weighty reasons" for so doing. In both *Robinson* and *Nye*, the court martial disregarded the legal opinion of the Judge Advocate on a matter of law. In both cases, it was argued that article 112.54(3) denies the accused a fair trial according to law,⁴⁶ and denies the right to equality before the law,⁴⁷ and due process of law.⁴⁸ Therefore, it was submitted, the accused was denied the right to a hearing in accordance with the principles of fundamental justice pursuant to the *Bill of Rights*.⁴⁹ In *Robinson*, the appeal was allowed on other grounds; however, the Court Martial Appeal Court implied that it would favour a *Bill of Rights* challenge to article 112.54(3) if the matter arose in the future. When the issue was raised again in *Nye v. The Queen*, the Court Martial Appeal Court held that article

⁴¹ (1963), 2 C.M.A.R. 213.

⁴² Section 2(c)(ii) of the *Canadian Bill of Rights*, *supra*, note 39 provides that a person who has been arrested or detained shall have the right to retain and instruct counsel without delay.

⁴³ 3 C.M.A.R. 43.

⁴⁴ 3 C.M.A.R. 85.

⁴⁵ The General Court Martial and Disciplinary Court Martial are discussed later in the text.

⁴⁶ Section 2(f) of the *Canadian Bill of Rights*, *supra*, note 39 provides that a person charged with a criminal offence shall not be deprived "of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause."

⁴⁷ *Ibid.* s. 1(b) provides for "the right of the individual to equality before the law and the protection of the law."

⁴⁸ *Ibid.* s. 2(e) provides that a person shall not be deprived "of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

⁴⁹ *Ibid.* s. 2(e).

112.54(3) did not infringe the *Bill of Rights*. Under that provision, the members of the court martial could only disregard the opinion of the Judge Advocate on a question of law when they had been convinced that his or her opinion was ill-founded. Therefore, according to the Appeal Court, the accused was not denied due process of law and fundamental justice.

MacKay v. The Queen (1980)⁵⁰ was the only major challenge to the military system under the *Canadian Bill of Rights*. In that case, Private MacKay was charged with trafficking in drugs under the *Narcotic Control Act*.⁵¹ He was suspected of selling marijuana to fellow soldiers on his base located at Esquimalt, British Columbia. The offence was brought under the *Code of Service Discipline*, pursuant to section 120 of the *National Defence Act*.⁵² MacKay was convicted by a Standing Court Martial on a number of counts and was sentenced to sixty days' detention. On appeal to the Court Martial Appeal Court, all but one of the convictions was affirmed. Private MacKay appealed to the Supreme Court of Canada.

On appeal, the accused argued that section 120 of the *National Defence Act* was inoperative under the *Bill of Rights*, in that he was tried under military law for offences under the general law. A civilian would be tried in civil court for the same offences.⁵³ Therefore, MacKay argued that he was denied equality before the law, pursuant to section 1(b) of the *Bill of Rights*.⁵⁴ In addition, MacKay submitted that section 120 denied members of the Armed Forces the right to a fair hearing by an independent and impartial tribunal as contemplated by section 2(f) of the *Bill of Rights*.⁵⁵ The Supreme Court dismissed MacKay's appeal by a majority of seven to two.

Ritchie J. delivered the majority opinion. He pointed out that the *National Defence Act* was enacted by Parliament under section 91(7) of the *British North America Act, 1867* (now the *Constitution Act, 1867*).⁵⁶ That section gives Parliament the authority to enact legislation to control behaviour and discipline in the Forces and to establish courts to enforce this legislation. In reiterating the 'valid federal objective' test,⁵⁷ Ritchie J. held that legislation that deals with a particular class of people does

⁵⁰ *Supra*, note 40.

⁵¹ R.S.C. 1970, c. N-1.

⁵² *Supra*, note 4.

⁵³ *Supra*, note 9.

⁵⁴ *Supra*, note 47.

⁵⁵ *Supra*, note 46.

⁵⁶ *Supra*, note 3.

⁵⁷ In *Bliss v. A.G. Can.* (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417, Ritchie J., for the majority, invoked the valid federal objective test.

not offend the *Canadian Bill of Rights* if, as here, the legislation had been “enacted for the purpose of achieving a valid federal objective.”⁵⁸

In my opinion, the *MacKay* case was wrongly decided. Ritchie J. does not explain the meaning of a valid federal objective. He appears to have applied a division of powers test and suggested that once the legislation in question is found to be *intra vires* Parliament, it does not violate the *Bill of Rights*. That being the extent of the inquiry, Ritchie J. does not consider whether a military trial for civil offences serves a valid objective under the provisions of the *Bill of Rights*.

McIntyre J., in a separate concurring judgment, does attempt to provide some meaning to the valid federal objective test within the context of the *Bill of Rights*. He states that any departure from the general application of the law “should be countenanced only where necessary for that attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives.”⁵⁹ McIntyre J. goes on to hold that in this case, the drug offences were sufficiently related to the service to justify treatment under military law. The offences, except one, occurred on military property and attacked the standards of discipline and efficiency of the service and, therefore, were properly tried by court martial.

While McIntyre J. is to be applauded for developing a meaningful test under the *Bill of Rights*, one must criticize him for not applying that test. Without proof of the fact, McIntyre J. held that military prosecution of drug offences is necessary to maintain the requisite objective of military discipline. Nevertheless, the test proposed by McIntyre J. is a useful one that attempts to establish an appropriate balance between constitutional rights and the legitimate and necessary interests of the state. This balancing approach in *MacKay* suggests an appropriate test, to be discussed later, for the application of section 1 of the *Charter* to constitutional claims.

In regard to the other ground of appeal, Ritchie J. held that a trial by court martial did not deprive an accused of a fair and public hearing by an independent and impartial tribunal. According to the majority, there was no evidence in the record to suggest that the President of the Court Martial acted in anything but an independent and impartial manner. Ritchie J. stated further that the President’s experience in the military and his position in the Judge Advocate General’s branch suggest that he was well qualified to adjudicate matters of military law.⁶⁰

⁵⁸ *Supra*, note 40 at 410.

⁵⁹ *Ibid.* at 424.

⁶⁰ *Ibid.* at 411. McIntyre J. makes the same point at 421.

Ritchie J.'s approach implies that an accused must show *actual bias* or lack of independence before a tribunal would be found to offend section 2(f) of the *Bill of Rights*. If this is the approach contemplated by Ritchie J., it clearly ignores a long history of cases decided under the common law.⁶¹ In those cases, the court would intervene in a decision of an inferior tribunal when there was a *reasonable apprehension of bias*. The party seeking review need not go so far as to establish actual bias by a member of the tribunal. In his dissenting judgment in *MacKay*, Laskin C.J.C. points to a number of factors that would give rise to a reasonable apprehension of bias.⁶²

The *MacKay* case is part of a long line of disappointing and poorly reasoned cases under the *Bill of Rights*.⁶³ In particular, the valid federal objective test and the *MacKay* case itself have been subjected to considerable criticism.⁶⁴ In short, the *Bill of Rights* does not subject the military system of justice to review by the civil courts. It remains to be seen whether the *Charter* will provide any greater protection for the rights of service personnel.

III. THE CHARTER

In deciding a claim under the *Canadian Charter of Rights and Freedoms*,⁶⁵ the court must answer three fundamental questions. First, does the *Charter* apply? Second, have any of the rights as guaranteed by the *Charter* been infringed? Third, and this question is probably the most difficult, is the infringement a reasonable limitation of the person's rights, pursuant to section 1 of the *Charter*?

A. Does the Charter Apply to Military Law?

Section 32(1) of the *Charter* states that the *Charter* applies:

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories. . . .⁶⁶

⁶¹ *Metropolitan Properties v. Lannon* (1968), [1969] 1 Q.B. 577 (C.A.); *Committee for Justice and Liberty v. National Energy Board* (1976), [1978] 1 S.C.R. 369; *R. v. Pickersgill, Ex P. Smith* (1970), 14 D.L.R. (3d) 717 (Man. Q.B.).

⁶² *Supra*, note 40 at 401-2.

⁶³ The other cases are: *A.G. Can. v. Lavell* (1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481; *R. v. Burnshine* (1974), [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584; *Prata v. Minister of Manpower and Immigration* (1975), [1976] 1 S.C.R. 376, 52 D.L.R. (3d) 383; and *Bliss v. A.G. Can.* (1978), *supra*, note 57.

⁶⁴ See J. MacPherson, "Developments in Constitutional Law: The 1978-79 Term" (1980) 1 Supreme Court L. Rev. 77 at 111ff; M. Gold, "Case Commentary on *Mackay v. The Queen*" (1982) 60 Can. B. Rev. 137.

⁶⁵ *Supra*, note 2.

⁶⁶ *Ibid.*

This clearly includes the Canadian Armed Forces, which completely falls within the authority of Parliament and the government of Canada.

Section 32(1) is subject to qualification: pursuant to section 33, Parliament may expressly declare in an Act of Parliament that the Act or certain sections of the Act shall operate notwithstanding section 2, and sections 7 through 15 of the *Charter*. To date, this override power has not been exercised with respect to the *National Defence Act*. Until such a declaration takes place, the men and women of the military are protected under the provisions of the *Charter*.

One provision of the *Charter*, the right to a trial by jury under section 11(f), specifically excludes trials under military law tried before a military tribunal.⁶⁷ In drafting the *Charter*, therefore, Parliament turned its mind to the military legal system. In so doing, Parliament chose to deny service personnel only that right guaranteed under section 11(f) of the *Charter*. By implication, Parliament must have intended that the remaining provisions of the *Charter* would apply to military law.

B. *Supremacy Clause: Section 52(1)*

Section 52(1) of the *Constitution Act, 1982*⁶⁸ explicitly states that:

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.

The *Charter* is part of the “Constitution of Canada”⁶⁹ and, therefore, any law which is inconsistent with the *Charter* is “of no force or effect.” This clearly includes the *National Defence Act* and any other law that applies to the Canadian Forces.

Certainly, section 52(1) refers to the “Constitution of Canada” as a whole, which includes the authority of Parliament to enact legislation governing the military⁷⁰ and the limiting provisions of the *Charter*. Before

⁶⁷ Section 11(f) of the *Charter* provides:

Any person charged with an offence has the right . . .

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

⁶⁸ Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

⁶⁹ *Ibid.* s. 52(2).

⁷⁰ Pursuant to s. 91(7) of the *Constitution Act, 1867*, *supra*, note 3. Parliament has jurisdiction over “Militia, Military and Naval Service, and Defence.”

section 52(1) will apply, the court must not only find that a right or freedom as guaranteed by the *Charter* has been infringed, but also that the law in question is *not* a “reasonable limit . . . as can be demonstrably justified in a free and democratic society,” pursuant to section 1 of the *Charter*. Therefore, any provision of military law that violates the *Charter* and is not saved by section 1 will be struck down by the civil courts. It will be of “no force or effect” both with respect to the matter before the court and any pending or future actions by the military authorities.

Section 52(1) embodies the previous practice of the civil courts in determining a constitutional matter. Once the constitutional validity of the *National Defence Act* is properly placed in issue, the presiding tribunal must determine the constitutional question before proceeding with the case.⁷¹

In addition to the traditional remedy embodied in section 52(1) of the *Constitution Act, 1982*, section 24(1) of the *Charter* provides for a new remedy that is applicable only for a breach of the provisions of the *Charter*.

C. Remedy Clause: Section 24(1)

Section 24(1) of the *Charter* provides that:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.⁷²

The effect of section 24(1) is two-fold: first, it provides standing to any members of the Armed Forces whose rights or freedoms as guaranteed by the *Charter* have been infringed; and second, it grants the “court of competent jurisdiction” broad powers to grant a remedy once a matter has been found to infringe the *Charter*.

The issue of standing under the *Charter* is one that is yet to be determined by the civil courts. It is not clear to what extent the rights or freedoms of a person must be infringed before he or she will be ensured standing before the court. Perhaps *any* infringement of a specific provision of the *Charter* will allow for standing. On the other hand, perhaps the infringement not only must violate a specific provision of the *Charter*, but also must fail to satisfy the test under section 1. In other words, the court may refuse standing to a person unless he or she can show that there has been a significant infringement of his or her rights. This

⁷¹ P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 693.

⁷² *Supra*, note 2.

latter approach, which is the more restrictive one, has been followed in the United States. It is known as the doctrine of 'justiciability'.⁷³

Although the doctrine of justiciability has been subsumed under the general head of standing, it raises some distinct issues. When the United States courts consider justiciability, they engage in a balancing test that considers the nature of the constitutional rights that have been infringed and the extent of the infringement, together with the potential effect that a decision would have on the body subjected to review. In this respect, the doctrine is akin to the type of analysis required under section 1 of the Canadian *Charter* and, therefore, will be addressed in the discussion of the limitation of *Charter* rights.

D. *Court of Competent Jurisdiction*

A person who seeks standing under section 24(1) of the *Charter* must apply to a "court of competent jurisdiction" in order to obtain a just and appropriate remedy. This gives rise to the initial issue of which court has jurisdiction to decide a question under the *Charter*: a civil court, a military tribunal, or both.

In most cases, the constitutional question will be raised initially in the court of original jurisdiction. This means that persons who are before a military tribunal must first bring an application under section 24(1) of the *Charter* before that tribunal. If the military tribunal is held to be the *only* court that has jurisdiction over military personnel who are brought before the tribunal and who raise a *Charter* issue, the consequences will be far reaching. As a specialized court, the military tribunal will not have experience in dealing with constitutional issues, and will clearly be reluctant to place limits on its own statutory powers. Of course, the party raising the *Charter* issue before a court martial will have a right to appeal to the civilian Court Martial Appeal Court, but the grounds of appeal will be limited to the sentence and questions of law.⁷⁴ The factual determination by the military tribunal in the first instance may very well decide the issue.

⁷³ The doctrine of justiciability determines whether a party litigant has standing to bring an application under the *Charter*, not on the traditional basis as to whether the plaintiff has an interest in the law suit, but rather on the nature of the law suit. Justiciability is a threshold test used by the Courts to determine whether it is appropriate for the Court to hear a case. The following factors are considered: whether there is a cause of action, whether the action is within the jurisdiction of the Court, whether it was brought within the limitation period, and whether the action raises any legal question and is appropriate for judicial resolution. Focusing on this latter factor, the U.S. Courts have only granted standing where the party litigant can show that there has been a significant infringement of his or her rights. This approach has been adopted by lower federal Courts in the U.S. in military cases. See *Mindes v. Seaman*, *infra*, note 175 and accompanying discussion.

⁷⁴ *National Defence Act*, *supra*, note 4, s. 197.

In my opinion, section 24(1) of the *Charter* should not be given such a narrow application in matters of military law. Clearly, the civil court having general jurisdiction is competent to decide a *Charter* issue, even when it is brought by a full-time member of the Armed Forces regarding a matter of military law. In fact, the civil court is the preferred jurisdiction given the nature of the claim, which is to consider limits to the powers of the military tribunal, and given the experience of the civil courts in deciding issues under the *Charter*.

Section 198 of the *National Defence Act* explicitly preserves the rights of service personnel under the law of Canada. This includes rights under the common law, specific statutory rights, and rights as guaranteed under the *Charter*. Therefore, it is arguable that any member of the Armed Forces whose rights as guaranteed by the *Charter* have been infringed or denied may apply to either a competent civil court or a military tribunal under section 24(1) of the *Charter*.

The second issue raised under section 24(1) of the *Charter* is the range of remedies that are available to the court. The court may apply a number of defensive remedies, which have traditionally been used, such as dismissing a charge, quashing a conviction, ordering a stay on proceedings, or declaring that a law is of "no force or effect." In addition, the court may exercise a broad range of 'affirmative remedies',⁷⁵ that is, the court can order that positive action be taken by the Department of National Defence or an official from that Department, in order to remedy the breach of the *Charter's* provision.

However, before considering the possible remedies that are available under the *Charter*, one must first determine whether military law infringes or denies the rights or freedoms as guaranteed by the *Charter*.

IV. MILITARY LAW AND FUNDAMENTAL RIGHTS

While I would argue that there are many provisions of the *Charter* that are infringed by the military legal system,⁷⁶ the discussion that follows will consider only one: does a trial before a military tribunal deny service personnel the right to a "fair and public hearing by an independent and impartial tribunal," as guaranteed by section 11(d) of the *Charter*? I will examine this question, first by outlining the nature of the military legal

⁷⁵ Hogg, *supra*, note 71 at 697ff.

⁷⁶ For example, it can be argued that a separate system of military justice violates the equality provision, s. 15 of the *Charter*. The procedures of military discipline could be challenged under s. 7, the right to "life, liberty and security of the person." Where a military person is confined to base, barracks, or detention, it might contravene s. 9, the right not to be "arbitrarily detained or imprisoned." Also, with the exception of s. 11(f) the remainder of s. 11 is applicable to the military.

system, and then by examining aspects of that system in the context of section 11(d) of the *Charter*.

A separate military system of justice has been in existence since William the Conqueror established the Court of Chivalry shortly after 1066 A.D.⁷⁷ The object of this separate system of justice is the complete discipline of military personnel. Within the military judicial system, justice was a secondary matter to the discipline and efficiency of the armed forces, with the success of the military enterprise being the ultimate goal. Military justice in Canada is administered at two procedural levels: by summary trial or by court martial. The summary trial is held under the authority of, or presided over by, the accused's Commanding Officer.⁷⁸ It is a somewhat informal and expeditious means of dealing with relatively minor offences under the *Code of Service Discipline*. Only persons below the rank of Warrant Officer or an Officer Cadet may be tried by the Commanding Officer.⁷⁹ Over 90 percent of the cases under military jurisdiction are dispensed with in this fashion.

Under the summary trial procedure, the presiding officer, the trier of fact, and the prosecutor are one and the same person. The accused is entitled to the aid of an assisting officer, often of his or her own choice,⁸⁰ but is not entitled to legal counsel.⁸¹ The accused has no right of appeal from the judgment of the presiding officer.

The powers of punishment of the Commanding Officer under the summary trial are extensive.⁸² With the consent of an "approving authority,"⁸³ the CO can sentence a guilty party to ninety days in detention barracks. When the accused is below the rank of Corporal, the CO, on his or her own accord, can impose a sentence of up to thirty days. Alternatively, the CO can impose a fine of up to 60 percent of a month's pay, order a reduction in rank in the case of a Non-Commissioned Member, or impose other more minor punishments.⁸⁴

⁷⁷ For documentation of the history of military law see Great Britain War Office, *Manual of Military Law*, 4th ed. (London: H.M. Stationery Office, 1899); J. Boughey, *The Elements of Military Administration and Military Law*, 10th ed. (Yorktown, Surrey: William Webb, 1886).

⁷⁸ *The Queen's Regulations and Orders for the Canadian Forces* (Ottawa: Queen's Printer, looseleaf), c. 108.

⁷⁹ *Ibid.* art. 108.25.

⁸⁰ *Ibid.* art. 108.03.

⁸¹ *Ibid.* art. 108.03, s. (5)(b).

⁸² *Ibid.* art. 108.27.

⁸³ *National Defence Act*, *supra*, note 4, s. 141(3); *QR & O*, *ibid.* art. 108.38. Must be an officer holding the rank of Brigadier-General or higher, or a Colonel designated by the Minister of National Defence.

⁸⁴ Minor punishments would include reprimands, confinement to ship or barracks, extra work and drill, stoppage of leave, or a caution. [In the Canadian Armed Forces, the term 'Non-Commissioned Officer' has recently been changed to 'Non-Commissioned Member'.]

In offences of a more serious nature, or where the punishment likely to be imposed is detention, reduction in rank, or a fine exceeding \$200, the accused has a right to elect a trial by court martial.⁸⁵

In the case of a more serious offence, a convening officer may direct a trial by court martial and the accused is then not entitled to elect a summary trial. Pursuant to section 143(1) of the *National Defence Act, QR & Os* article 111.05 prescribes that the following persons may convene a court martial:

1. the Minister of National Defence;
2. the Chief of Defence Staff;
3. an officer commanding a command, upon receipt of an application from a commanding officer; and
4. such other service authorities as the Minister may prescribe or appoint for that purpose.

When a Commanding Officer does not have jurisdiction to try the accused, or his or her powers of punishment are inadequate, the CO will refer the charge to a higher authority: the next superior officer in matters of discipline. The higher authority may dismiss the charge, proceed with a summary trial under his or her powers, or proceed with a court martial. The superior commander may not have the authority to convene a court martial, in which case he or she will refer the matter to an officer who does have such authority.

With respect to the procedure followed and the powers of punishment available, there are significant differences between a summary trial and a trial by court martial. A court martial has greater powers of punishment than a summary trial court. At a court martial, the accused has a right to be represented by legal counsel, civilian or military.⁸⁶ At a summary trial, the accused is only entitled to representation by an assisting officer. The military rules of evidence⁸⁷ are applied at a court martial. There are no formal rules of evidence governing the summary trial. Finally, following an adverse finding by the court martial, the accused has the right of appeal regarding sentence or errors of law to the Court Martial

⁸⁵ *QR & O, supra*, note 78, art. 108.31.

⁸⁶ *Ibid.* art. 111.60 provides that every accused is entitled to have a defending officer or counsel and an adviser at court martial. The defending officer can be any commissioned officer, but is normally a qualified lawyer. Counsel can be any barrister or advocate in good standing. An advisor can be anyone. Legal counsel must be engaged at the accused's own expense.

⁸⁷ *Ibid.* Appendix XVII contains the Military Rules of Evidence. They are made under the authority of the Governor-in-Council pursuant to s. 152 of the *National Defence Act, supra*, note 4. The Rules of Evidence are very fair and provide adequate protection of the accused's rights with respect to evidential matters. See A.K. Swainson, "The Rules of Evidence at Courts Martial" (1977) 25 *Chitty's L.J.* 272, 312, 339; (1978) 26 *Chitty's L.J.* 25, 52, 160, 212, 227; and J.B. Fay, "Canadian Military Criminal Law: An Examination of Military Justice" (1975) 23 *Chitty's L.J.* 120, 156, 195, 228. Both writers highly commend the military rules of evidence.

Appeal Court.⁸⁸ There is no right of appeal following the summary trial and no record of the proceeding to form the basis of an objective review.

There are four types of courts martial under Canadian military law: General Courts Martial, Disciplinary Courts Martial, Special General Courts Martial, and Standing Courts Martial.

The various forms of courts martial differ with respect to the composition of the court, powers of punishment, and jurisdiction. The General Court Martial (GCM) is the court of general jurisdiction for persons subject to the *Code of Service Discipline*.⁸⁹ The court may try any matter under the *Code* and pass any sentence except a minor punishment. (A minor punishment being more suitably handled by a Commanding Officer at summary trial.)⁹⁰ The GCM can pass a sentence of death, imprisonment for two or more years, or lesser punishment. The court is appointed by the convening authority,⁹¹ and consists of not less than five officers and not more than nine.⁹² All must be above the rank of Captain. The President of the Court Martial presides over the proceedings and must hold the rank of Colonel or above.⁹³ A Judge Advocate must be appointed to the court in order to officiate,⁹⁴ determine questions of law or mixed law and fact as directed by the President, and to advise the court on matters of law.⁹⁵ The court need not follow the advice of the Judge Advocate. A prosecutor, who must be a commissioned officer, is appointed by the convening authority.⁹⁶ The prosecutor is normally a military lawyer, but legal training is not a requirement.

In contrast to the GCM, the Disciplinary Court Martial (DCM) is more limited in its jurisdiction and powers of punishment. It has jurisdiction over any offence under the *Code of Service Discipline*, but cannot try

⁸⁸ *National Defence Act, ibid.* s. 197.

⁸⁹ *Ibid.* s. 144.

⁹⁰ Minor punishments are prescribed in regulations made by the Governor-in-Council under the authority of s. 125 of the *National Defence Act, ibid. QR & O, supra*, note 78, art. 104.13 provides for the following minor punishments: confinement to ship or barracks, extra work and drill, stoppage of leave, and a caution.

⁹¹ Pursuant to s. 143(1) of the *National Defence Act, ibid.; QR & O, ibid.* art. 111.05, the following persons are "convening authorities" who may convene courts martial: the Minister of National Defence, the Chief of Defence Staff, an officer in charge of a command upon receipt of an application from a commanding officer, and other authorities as appointed by the Minister of National Defence.

⁹² *National Defence Act, ibid.* s. 145; *QR & O, ibid.* art. 111.18.

⁹³ *National Defence Act, ibid.* s. 145; see *QR & O, ibid.* c. 112 for the trial procedure at General Court Martial.

⁹⁴ *QR & O, ibid.* art. 111.22. The Judge Advocate officiates only certain aspects of the court martial. Ultimate authority regarding the conduct of the trial is vested in the President who may overrule the Judge Advocate in certain matters including legal advice.

⁹⁵ *National Defence Act, supra*, note 4, s. 168; *QR & O, ibid.* art. 112.06.

⁹⁶ *QR & O, ibid.* art. 111.23.

anyone above the rank of Captain.⁹⁷ The DCM's powers of punishment are limited to a maximum of less than two years imprisonment and the court cannot impose a minor punishment.⁹⁸ There is no restriction as to the rank of the officers. The President of the court is to be a Major or above.⁹⁹ A Judge Advocate may be appointed, but this is not a mandatory requirement.¹⁰⁰ The prosecutor must be an officer.¹⁰¹

The Standing Court Martial (SCM) consists only of the President, who is an officer who has been a barrister or advocate for more than three years.¹⁰² The court has jurisdiction only over certain offences of a more minor nature.¹⁰³ However, the SCM does have jurisdiction over offences under section 120 of the *National Defence Act*. A Judge Advocate is not appointed to a SCM.¹⁰⁴ The prosecutor may be anyone holding the rank of Corporal or above and the person need not have legal training.¹⁰⁵ The SCM is the most commonly used form of court martial in the Canadian Forces.

The Special General Court Martial (SGCM) is a unique form of military tribunal that is used to try civilians who are subject to the *Code of Service Discipline*. These are civilians who participate with a unit of the Canadian Forces, civilians who are accommodated with a unit, dependents who accompany military personnel while abroad, and civilians embarked on a military vessel or aircraft.¹⁰⁶ The court usually consists of a judge of a superior court in Canada.¹⁰⁷ The SGCM follows the rules and procedure of the GCM, but has limited powers of punishment that are more applicable to civilians.¹⁰⁸

The finding of the court martial and the sentence are determined by majority vote. In the case of a death sentence, the court must be unanimous regarding the sentence, unless the death sentence is mandatory, in which case the court must be unanimous regarding guilt.¹⁰⁹ A sentence

⁹⁷ *Ibid.* art. 111.35.

⁹⁸ *Ibid.* art. 111.36.

⁹⁹ *National Defence Act, supra*, note 4, s. 151(2); *QR & O, ibid.* art. 111.40.

¹⁰⁰ *National Defence Act, ibid.* s. 152; *QR & O, ibid.* art. 111.41.

¹⁰¹ *QR & O, ibid.* art. 111.42.

¹⁰² *National Defence Act, supra*, note 4, s. 154; *QR & O, ibid.* art. 113.51.

¹⁰³ *QR & O, ibid.* art. 113.565, which lists offences for which a SCM is *not* to be directed.

¹⁰⁴ *Ibid.* art. 113.59.

¹⁰⁵ *Ibid.* art. 113.60.

¹⁰⁶ *QR & O, ibid.* arts 113.01, 102.01, 102.09; *National Defence Act, supra*, note 4, s. 55(4).

¹⁰⁷ *National Defence Act, ibid.* s. 155.

¹⁰⁸ *QR & O, supra*, note 78, arts 113.04, 104.02. The powers of punishment are limited to the following: death, imprisonment, and a fine.

¹⁰⁹ *National Defence Act, supra*, note 4, s. 168(5),(6).

of death must be approved by the Governor-in-Council.¹¹⁰ The members of the court vote orally, beginning with the most junior officer and ending with the most senior.¹¹¹ In the case of an even court, the President casts the deciding vote.¹¹²

As is evident, the military administers a separate and integrated system of justice with jurisdiction over service personnel, which distinguishes it from the civil system. It remains to be determined whether or not these distinguishing features infringe the *Charter* by denying military personnel the right to a “fair and public hearing before an independent and impartial tribunal.”

In examining the independence and impartiality of a military tribunal, it is important to distinguish between the court martial and the summary trial. The summary trial warrants examination because it is the most common form of military justice.

The Commanding Officer or a delegated officer who presides over a summary trial must exercise a number of key roles in the course of the trial. He or she is the judge, the trier of fact, and the prosecutor. There is no separation of institutional roles to prevent a conflict of interest, which arises in fulfilling the duties of prosecuting officer and judge. As prosecutor, the CO has a clear interest in the outcome of the proceedings. He or she has been briefed prior to the trial by the Regimental Sergeant Major¹¹³ or the Coxswain,¹¹⁴ who has drafted the charge and conducted an investigation. The CO has clearly decided that a charge is warranted; otherwise the matter would not have proceeded to the summary trial. As judge and trier of fact, the CO must keep an open mind and must objectively weigh the evidence presented. There are clear conflicts of interest. Furthermore, the CO's major interest is in maintaining unit efficiency. That is his or her primary duty. The summary trial is a means of furthering efficiency and not necessarily a means of administering justice. It is difficult for a CO to adjudicate a case solely on the facts presented at the proceeding, particularly if he or she commands a small unit. A CO knows the unit. He or she often knows of the member's job performance within the unit, and which persons in the unit are the ‘bad cats’. The CO becomes well acquainted with those personnel who repeatedly appear at the summary trial. This knowledge often influences

¹¹⁰ *Ibid.* s. 178(1).

¹¹¹ *National Defence Act, ibid.* s. 168; *QR & O, supra*, note 78, art. 112.40.

¹¹² *National Defence Act, ibid.* s. 168; *QR & O, ibid.* art. 112.49.

¹¹³ The Regimental Sergeant Major usually holds the rank of Chief Warrant Officer (First Class) and is the senior Non-Commissioned Member on the base or within a regiment.

¹¹⁴ The Coxswain usually holds the rank of Chief Petty Officer (First Class) and is the senior Non-Commissioned Member in a Ship.

the CO's judgment when it comes to weighing evidence, judging credibility, and imposing a sentence.

The assisting officer is only of limited help to an accused and, in most cases, is unable to provide an effective defence. He or she is not legally trained. The duty of assisting officer is imposed on top of an already demanding assignment of duties and is often seen as a burden. Furthermore, it often conflicts with the officer's allegiance to the unit and to the Commanding Officer. Also, the role of the assisting officer can be greatly restricted at trial by the presiding officer who controls the overall proceedings. This same presiding officer is responsible for the career evaluations of the assisting officer. The assisting officer is anxious to fulfill the expectations of his or her superior, whatever they may be.

In conclusion, in spite of the integrity of the officers in the Canadian Forces, the summary trial process is far from being fair, independent, and impartial. Given the conflict of duties, Solomon himself could not possibly maintain the degree of impartiality that is necessary to render a just judgment at the summary trial.

The *Uniform Code of Military Justice (UCMJ)*¹¹⁵ in the United States provides for a summary court martial that is similar in some respects to the summary trial under Canadian military law.¹¹⁶ The summary court martial is an informal proceeding that is conducted by a single commissioned officer and has jurisdiction over enlisted personnel in the U.S. Armed Forces.¹¹⁷ The presiding officer, who is not the Commanding Officer of the accused, acts as judge, factfinder, prosecutor, and defense counsel. In the United States, the accused must consent to trial by summary court martial; otherwise a trial may be ordered by special or general court martial.¹¹⁸ The maximum sentences that may be imposed by summary court martial are one month's confinement at hard labour,

¹¹⁵ *Uniform Code of Military Justice*, 10 U.S.C. § 801-940 (1970) [hereinafter *UCMJ*]. Enacted in 1950, the UCMJ included major reforms of the military justice system. The *UCMJ* applies to all armed services in the United States. It was amended by the *Military Justice Act of 1968*, Pub. L. No. 90-632 (Oct. 24, 1968) and the *Military Justice Act of 1983*, Pub. L. No. 98-209 (Dec. 6, 1983). This is the American equivalent of the Canadian *Code of Service Discipline*.

¹¹⁶ The *UCMJ* *ibid.* provides four methods for disposing of military offences: the general, special, and summary courts martial and disciplinary punishment pursuant to Art. 15 of the *UCMJ*. General court martial is the court of general jurisdiction and can award any punishment including death. The special court martial is limited to sentences of six months' confinement at hard labour. Punishment, under Art. 15, is conducted by the accused's CO who can impose up to thirty days' correctional custody or minor punishments. The summary court martial sentences fall between those punishments imposed under Art. 15 and those under special court martial.

¹¹⁷ *Ibid.* Art. 20.

¹¹⁸ *Ibid.* Art. 20.

reduction in rank, and a fine of up to two-thirds of the accused's pay for one month.¹¹⁹

In *Middendorf v. Henry* (1975),¹²⁰ a class action was brought by a number of enlisted men of the U.S. Marine Corps, who were charged with unauthorized absences and other offences. All the men were either subjected to or ordered to stand trial by summary court martial. In each instance, the accused requested the assistance of counsel, which was denied. Consequently, the enlisted men argued that they had been denied their right to counsel, pursuant to the Fifth¹²¹ and Sixth¹²² Amendments of the U.S. *Bill of Rights*. They brought an action in District Court seeking *habeas corpus*, an injunction against future confinement resulting from summary court-martial convictions when the assistance of counsel is denied, and an order vacating the convictions of those who had already been convicted.

A majority of the United States Supreme Court held that the accused in a summary court martial has no right to counsel. The Sixth Amendment does not apply to a summary court martial because it is not a "criminal prosecution."¹²³ In the majority opinion, Rehnquist J., as he then was, emphasized the difference between a summary court martial and a civilian criminal trial. The charges against the accused have no common law counterpart and service personnel convicted by summary court martial do not suffer popular opprobrium as they would following a criminal conviction. Rehnquist J. stated that the summary court martial is not adversarial and that the penalties are not comparable to those of a criminal court.¹²⁴

Regarding the Fifth Amendment, Rehnquist J. held that although a loss of liberty may result, the right to due process does not embody a right to counsel when a service person is tried by summary court martial. The majority held that the Court must defer to the determination by Congress that counsel should not be provided for this type of proceeding and that to provide counsel would convert a brief informal hearing into a time-consuming process that would waste the resources of the military.¹²⁵

¹¹⁹ *Ibid.* Art. 20.

¹²⁰ 425 U.S. 25.

¹²¹ The Fifth Amendment of the American *Bill of Rights* provides, in part, that "no person . . . shall be deprived of life, liberty, or property, without due process of law."

¹²² The Sixth Amendment provides, in part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

¹²³ *Supra*, note 120 at 33-34.

¹²⁴ *Ibid.* at 34-40.

¹²⁵ *Ibid.* at 43.

Canadian decisions have adopted a similar approach to that of the U.S. Supreme Court majority in *Middendorf v. Henry* and have characterized the summary trial as a disciplinary rather than a criminal proceeding. In *R. v. Robertson*,¹²⁶ a member of the Canadian Forces elected to be tried by summary trial and requested the right to civilian counsel. The Commanding Officer denied the request, and exercised his discretion to have the accused tried by court martial. Robertson argued that he was entitled to be represented by civilian counsel at his summary trial, pursuant to section 10(b) of the *Charter*. The Court Martial Appeal Court held that section 10(b) was not applicable to proceedings by summary trial. In the Court's opinion, the right to counsel pursuant to the *Charter* applies only in respect of the loss of liberty through arrest or detention itself.

The Court Martial Appeal Court in *Robertson*, like the United States Supreme Court in *Middendorf v. Henry*, has, in effect, downplayed the criminal and adversarial element in the summary trial. The result of the Court Martial Appeal Court's approach is to exclude summary trial proceedings from the scope of the *Charter*.

Contrary to the approach of the courts, summary trial proceedings share a great deal in common with the criminal process. A military conviction, like one under the criminal law, has considerable consequences for the career of those persons who are convicted. The main consequence of both the summary trial and the criminal process is that a conviction can deprive a person of his or her liberty. This is the fundamental element that characterizes the process as criminal in nature.

Additional consequences follow a criminal conviction by a civil court. A record is kept of the conviction and any further proceedings by a criminal court will take account of the record in imposing an appropriate sentence. The conviction may also affect the convicted person in his or her career and social relations because of social disapproval and mistrust of convicted persons. This, of course, depends largely on the type and seriousness of the offence for which the person was convicted.

The consequences of a military conviction are similar. Military convictions are recorded on the member's conduct sheet. In passing a sentence, the military tribunal will always take note of the conduct sheet. Furthermore, any conviction has significant consequences for the career of the member. At the very least, he or she will not advance in his

¹²⁶ (1983), 9 C.C.C. (3d) 404 (C.M.A.C.).

or her career. In more serious cases, or after repeated offences, a person may be released from the service as a result of his or her military record.¹²⁷

I would not disagree with the courts' characterization of the summary trial as a minor, disciplinary proceeding if the Commanding Officer's powers of punishment were limited to such sanctions as extra work and drill, confinement to barracks, or stoppage of leave. However, this is not the case. The Commanding Officer has powers of punishment that include up to ninety days' detention. A sentence of thirty days' imprisonment in detention barracks, which the Commanding Officer can order without approval,¹²⁸ is not uncommon. In fact, the sentences assessed following a summary trial are very much in keeping with those of the Provincial Court (Criminal Division) or in criminal cases where the Crown proceeds by summary conviction rather than by indictment.¹²⁹ Yet, no one is about to characterize summary conviction proceedings as disciplinary rather than criminal in nature.

In my opinion, any proceeding in which a person's liberty can be denied for a period of up to ninety days is a criminal proceeding. This is what distinguishes military proceedings from disciplinary proceedings of an administrative nature. In matters before the Law Society of Upper Canada, the College of Physicians and Surgeons, and even certain police tribunals,¹³⁰ the various disciplinary bodies do not have the power to sentence their members to detention.

A strict reading of section 11 of the *Charter* sheds some doubt on the distinction that the courts make between military and civil offences. The rights in section 11 are guaranteed to "any person charged with an offence." 'Offence' is not limited to criminal offence *per se*. In fact, section 11(f) specifically excludes persons charged with "offences under military law" from the right to trial by jury. By implication then, the word 'offence' in section 11 must mean both military and civil offences; otherwise, section 11(f) of the *Charter* would not make sense.

¹²⁷ Under the *UCMJ* convicted personnel in more serious offences are given a dishonourable discharge. See for example, *Parker v. Levy* (1974), 417 U.S. 733. In the Canadian Forces, "dismissal with disgrace," pursuant to s. 125 of the *National Defence Act*, *supra*, note 4 or "dismissal," pursuant to *QR & O*, *supra*, note 78, art. 104.07 are very severe sentences and are not often imposed. However, an administrative dismissal under Category 5(B) for misconduct is common. It is initiated by the accused's CO in more serious cases or for a repeat offender. See *QR & O*, art. 15.36.

¹²⁸ *QR & O*, *ibid.* art. 108.27.

¹²⁹ Under s. 722 of the *Criminal Code of Canada*, R.S.C. 1970, c. C-34, the maximum punishment for a summary conviction offence is a \$500 fine or six months' imprisonment or both.

¹³⁰ Under s. 36 of the *Royal Canadian Mounted Police Act*, *supra*, note 26 a member of the RCMP can be subjected to one year's imprisonment, for a major offence. For a minor offence, the maximum sentence is confinement to barracks for thirty days. Under the Regulations to the *Police Act* of Ontario, R.R.O. 1980, O. Reg. 791, s. 52, the maximum punishment for a major offence is dismissal. Members of police forces governed under provincial statute *cannot* be sentenced to imprisonment.

In conclusion, the summary trial process is analogous to the criminal process in many respects. The fundamental right to liberty, sacrosanct under the common law and guaranteed by the *Charter*, is at stake. For this reason, the accused at a criminal trial and the accused at a military trial are equally deserving of a "fair and public hearing before an independent and impartial tribunal."

The court-martial process is much more formal than the summary trial. Therefore, the accused benefits from the procedural protections that are offered and the process is not haunted by the obvious conflicts of interest that confront the Commanding Officer under the summary trial. Nevertheless, I submit that it is neither independent nor impartial.

The President of the court martial is always a senior ranking military officer. He or she may or may not have legal training. The court martial is composed entirely of commissioned officers. Only in the case of a Disciplinary Court Martial is there a requirement that the President be legally trained and, in this case, the court martial consists only of the one officer. In other cases, it is unlikely that the members of the court martial will be legally trained. When a Judge Advocate is appointed to the court martial, his or her role is to advise the court on matters of law, although the advice may be disregarded. Finally, the prosecuting officer is often legally trained. All the key participants in the trial are commissioned officers in the Canadian Forces.

The distinction between officers and other personnel in the service is fundamental. They are totally segregated from one another, housed in separate quarters, and fed in separate messes. There is rarely any social mixing between officers and other service personnel and, in those rare situations that allow it, there is strict control of the social function. After years of training, officers are indoctrinated with values of duty, discipline, and the goal of military efficiency. These values clearly prevail in the military tribunal as the officers consider the cases before them.

In the United States, Congress has recognized the dominant officer influence in the court-martial process and has, therefore, provided for limited participation on the court bench by enlisted persons. However, this is provided only when requested by the accused, and the enlisted persons, all of whom are senior non-commissioned members, form a minority of the court.¹³¹

In cases dealing with the jurisdiction of military law, the United States' courts acknowledge that the military legal process is institutionally inadequate to safeguard the constitutional rights of service personnel.

¹³¹ *UCMJ*, *supra*, note 115, Art. 25; See *U.S. v. Crawford* (1964), 15 U.S.C.M.A. 31.

However, the courts recognize that this is necessary to some extent to maintain military efficiency. This approach is an honest one. It acknowledges that members of the U.S. military sacrifice their rights in the name of service to their country and it recognizes the deficiencies in the military legal system.

Realizing the inadequacies of the military system, the United States Supreme Court, in a series of decisions, has narrowed the scope of military jurisdiction. In the first case, *Toth v. Quarles* (1955),¹³² a former airman who was honourably discharged was arrested at his civilian home in Pittsburgh for charges of murder and conspiracy committed while on service in Korea. Although he had no relationship with the military at the time of his arrest, he was taken to Korea to stand trial before a court martial.¹³³ The U.S. Supreme Court held that the act was unconstitutional and beyond Congress's powers under Article I of the U.S. Constitution to "make Rules for the Government and Regulation of the land and naval Forces."

Black J., writing for the Court, recognized that:

The trial of soldiers to maintain discipline is merely incidental to the army's primary fighting function. . . . And conceding to all military personnel that high degree of honesty and sense of justice that nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same qualifications that the Constitution has deemed essential to fair trials of civilians in federal court.¹³⁴

In particular, Black J. emphasized the fact that those who exercise judicial functions in military trials are appointed by military commanders, do not have life tenure, and may be removed at will. Black J. concluded:

There are dangers in military trials which were sought to be avoided by the *Bill of Rights* and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.¹³⁵

The United States Supreme Court, therefore, held that Article 3(a) of the *Uniform Code of Military Justice* is unconstitutional and that Congress cannot subject civilians like Toth to trial by court martial. Like all civilians, Toth is entitled to the benefit of safeguards that are afforded those in the civil courts and that are authorized by Article III of the Constitution.

In another case, which dealt with the jurisdiction of military law over civilians accompanying service personnel abroad, the U.S. Supreme

¹³² 350 U.S. 11.

¹³³ The military assumed jurisdiction pursuant to *UCMJ, supra*, note 115, Art. 3(a).

¹³⁴ *Supra*, note 132 at 17.

¹³⁵ *Ibid.* at 22.

Court held that a trial by court martial did not meet the requirements of Article II, section 2¹³⁶ or the Fifth and Sixth Amendments of the Constitution. In *Reid v. Covert* (1957),¹³⁷ Mrs. Clarice Covert was convicted by a court martial of murdering her husband, an airforce sergeant whom she had accompanied to England. Mrs. Covert was sentenced to life imprisonment. She was held in custody pending a re-trial, which was ordered by the Court of Military Appeals, because of an error concerning her defence of insanity. While in custody, Mrs. Covert petitioned the District Court for a writ of *habeas corpus* on the ground that the Constitution prohibited her trial by military authorities. In spite of the fact that no U.S. court had extra-territorial jurisdiction over Mrs. Covert, the Supreme Court granted *habeas corpus* and ordered that she be set free.

Mr. Justice Black delivered the opinion for the majority of the Court. The decision recognized that the emphasis in the military has been to maintain obedience and fighting fitness and, consequently, there has been less emphasis in protecting the rights of service personnel. Black J. pointed out that "Courts-martial are typically *ad hoc* bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of 'command influence'."¹³⁸

Despite recent statutory reforms to the *Uniform Code of Military Justice*, which granted some protection to the accused, Black J. concluded that the system precludes the necessary constitutional safeguards for a fair trial in the civil courts. He said:

In part this is attributable to the inherent differences in values and attitudes that separate military society from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than the value and integrity of the individual.¹³⁹

In concluding that military tribunals violate principles of fairness and impartiality, the United States Court has adopted a 'structural approach'. In other words, the process under military law has been structured in such a way that it cannot possibly exclude subtleties of command influence and higher military values such as the need for discipline.

¹³⁶ Art. II, s. 2 provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

¹³⁷ 354 U.S. 1. The case was consolidated with an appeal by Mrs. Dorothy Smith in the U.S. Supreme Court. She too was convicted by court martial of killing her husband, an Army Officer stationed in Japan, and sentenced to life imprisonment.

¹³⁸ *Ibid.* at 36.

¹³⁹ *Ibid.* at 39.

In Canada, the *Code of Service Discipline* applies to civilians, pursuant to section 55(1) of the *National Defence Act*, which includes civilian dependents who accompany service personnel abroad.¹⁴⁰ Therefore, as was the case in *Reid v. Covert*, a crime committed by a dependent could be tried under Canadian military law. Section 55(1) of the *National Defence Act* has yet to be considered by the civil courts.

The *Code of Service Discipline* also applies to ex-service personnel in Canada for service offences committed while the former personnel were on active service. Pursuant to section 55(2) of the *National Defence Act*, persons who have been released from the Canadian Forces can be arrested by the military authorities and subjected to trial by court martial for past offences. This is precisely what happened in *Toth v. Quarles*.

As the decision in *Toth* indicates, the courts are reluctant to allow the jurisdiction of military law to extend to civilians. In such cases, the civil courts have been quick to point out the structural inadequacies of the military system of justice.

The civil courts have exhibited greater reluctance to uphold constitutional rights when the case has involved the application of military law to active service personnel. Consequently, in both Canada and the United States, the courts have had difficulty in resolving the issue of the jurisdiction of military tribunals with respect to civil offences.

In both Canada and the United States, active service members of the armed forces have been subject to military law for offences prohibited by the general criminal law. Under section 120 of the *National Defence Act*, Canadian service personnel can be tried for offences prohibited by the *Criminal Code*, or any other federal statute, except for the offences of murder, manslaughter, or sexual assault. In the United States, offences under the general criminal law are incorporated into various provisions of the *Uniform Code of Military Justice*. For example, Article 120 of the *Code* makes rape or carnal knowledge a crime under U.S. military law.

Prior to *O'Callahan v. Parker* (1969),¹⁴¹ in the United States, the question of court-martial jurisdiction depended entirely on the status of the accused. The *O'Callahan* case introduced another factor: the nature of the offence. In that case, a sergeant in the U.S. Army who was stationed in Hawaii was convicted of assault and attempted rape. While on an evening pass, he broke into a hotel room, and assaulted and attempted to rape a young woman. The accused was convicted by court martial,

¹⁴⁰ *National Defence Act*, *supra*, note 4, s. 55(4)(c).

¹⁴¹ 395 U.S. 258.

sentenced to ten years' imprisonment at hard labour, and given a dishonourable discharge.

While in confinement at Lewisburg Penitentiary, Sergeant O'Callahan filed a writ of *habeas corpus* in the U.S. District Court. He submitted that the court martial was without jurisdiction to try him for non-military offences committed off military property while on an evening pass. O'Callahan's petition was denied. On appeal to the United States Supreme Court, the majority granted the petition and held that in order for an offence to be under military jurisdiction it must be "service connected." In O'Callahan's case, the court found that there was "no connection — not even the remotest one" — between O'Callahan's military duties and the crimes in question.¹⁴² In reaching its conclusion, the majority recited the "dangers lurking in military trials,"¹⁴³ and the fact that military justice has failed to preserve important constitutional guarantees.¹⁴⁴ The Court stressed the general principle in *Toth v. Quarles* (1955),¹⁴⁵ that the authority of military law must be limited to "the least possible power adequate to the end proposed."¹⁴⁶

The service-connected test, which was applied in *O'Callahan v. Parker*, was affirmed and expanded in another U.S. Supreme Court decision, *Relford v. Commandant* (1971).¹⁴⁷ In *Relford*, a corporal on active service was convicted of kidnapping and rape for two offences that took place on military property. The Court determined that the service-connected test required an *ad hoc* consideration of twelve factors.¹⁴⁸ Considering those factors in Relford's case, the Court held that the offence was service connected and denied the application for *habeas corpus*.

¹⁴² *Ibid.* at 273.

¹⁴³ *Ibid.* at 298, citing *Toth v. Quarles, supra*, note 132 at 22-23.

¹⁴⁴ *Supra*, note 298.

¹⁴⁵ *Supra*, note 132.

¹⁴⁶ *Ibid.* at 22-23.

¹⁴⁷ 401 U.S. 355.

¹⁴⁸ The twelve factors considered in *Relford v. Commandant, ibid.* were:

1. The service person's proper absence from the base.
2. Commission of the offence away from the base.
3. Commission at a place not under military control.
4. Commission in peacetime and being unrelated to authority stemming from the war power.
5. Commission within U.S. territorial limits and not in occupied zone of a foreign country.
6. Absence of any connection between accused's military duties and crime.
7. Victim not engaged in performance of military duty.
8. Presence and availability of civilian court in which offence can be prosecuted.
9. Absence of any flouting of military authority.
10. Absence of any threat to a military post.
11. Absence of any violation of military property.
12. Offence being among those traditionally prosecuted in civilian courts.

In safeguarding the rights of service personnel in the United States, *O'Callahan* was the high water mark. In *Relford*, the Supreme Court itself had been satisfied to apply the service-connected test only on an *ad hoc* basis. Since then, the civil courts have all but closed the door on *O'Callahan*, and have deferred to the military, permitting the military court to determine those areas where court-martial jurisdiction is appropriate.¹⁴⁹ This is the result of conservatism within both the U.S. Court of Military Appeals and the Supreme Court.¹⁵⁰ The current trend, which in my opinion is an unfortunate one, is to allow only limited application of the *Bill of Rights* to military personnel.

The Supreme Court of Canada, in *MacKay v. The Queen* (1980),¹⁵¹ has also had occasion to consider the question of the jurisdiction of military tribunals over ordinary criminal offences. Rejecting MacKay's claim that his right to a fair and public hearing by an independent and impartial tribunal under section 2(f) of the *Canadian Bill of Rights* had been violated, Ritchie J., for the majority, emphasized that the President of the Standing Court Martial was an officer of considerable rank and experience in military law. There was no more suitable candidate for President of a court martial. Focusing entirely on the record of the court-martial proceeding and ignoring the structural bias inherent in the court-martial system, Ritchie J. held that "[t]here is no evidence whatever in the record of the trial to suggest that the president acted in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed."¹⁵² McIntyre J., in his concurring opinion, held that despite the close association of the President with the military community and his identification with military society, the President was able to adjust his attitude in order to meet the requisite duty of impartiality.¹⁵³

Additionally, the Court relied on the appeal procedures under the *National Defence Act*, whereby an accused has a right to appeal to the civilian Court Martial Appeal Court. These provisions, according to the Court, protect the accused's right to a fair trial.

In his dissenting judgment, Laskin C.J.C. adopted a structural approach and held that the Standing Court Martial had violated the right to a

¹⁴⁹ See *Schlesinger v. Councilman* (1975), 420 U.S. 738; N.G. Cooper, "O'Callahan Revisited: Severing the Service Connection" (1977) 76 Mil. L. Rev. 165.

¹⁵⁰ See C. Goodrich, "Denying Soldiers the Rights They Fight to Protect" (Nov. 1982) 2 Cal. Lawyer 49 at 50.

¹⁵¹ *Supra*, note 40.

¹⁵² *Ibid.* at 403.

¹⁵³ *Ibid.* at 404.

fair trial before an independent tribunal, pursuant to section 2(f) of the *Canadian Bill of Rights*:

Needless to say, there is no impugning of the integrity of the presiding officer; it is just that he is not suited, by virtue of his close involvement with the entire military establishment to conduct a trial on charges of a breach of the ordinary law.¹⁵⁴

Laskin C.J.C. pointed out, correctly in my opinion, that the adjudicator's familiarity with the service is irrelevant. MacKay was charged with an offence under the *Narcotic Control Act*.¹⁵⁵ No matter how much experience the President had in military matters, this would not have better equipped him to adjudicate a trafficking offence than a civilian judge. In fact, as Professor Gold aptly pointed out in his critique of the *MacKay* decision, if the President were influenced by the special needs of the military, that would clearly violate the accused's right to a fair trial, at least with respect to the elements of the offence and the defences available.¹⁵⁶

The majority and concurring judgments in the *MacKay* case applied the wrong test of fairness and impartiality under section 2(f) of the *Bill of Rights*. The test employed in the area of administrative law, under a long line of authority, determines whether the circumstances of the case give rise to a "reasonable apprehension of bias" — not whether the tribunal was in fact biased.¹⁵⁷ In reviewing decisions by administrative tribunals, the guiding principle is not that justice is done, but rather that justice is *seen* to be done.¹⁵⁸

This is exactly what concerned the Chief Justice in his dissenting opinion in the *MacKay* case. Laskin C.J.C. pointed out that the accused was "in the hands" of his military superiors throughout the whole legal process. The charges were laid by MacKay's Commanding Officer. The Standing Court Martial was ordered by a senior commander. Pursuant to section 154 of the *National Defence Act*, a Lieutenant-Colonel was appointed as the Standing Court Martial from an approved list of legally trained officers. Finally, both the President of the Standing Court Martial and the prosecutor were from the office of the Judge Advocate General and were commissioned officers in the Canadian Forces. In making the following remarks, Laskin C.J.C. aptly pointed out that his concern with the military system is the appearance of impartiality:

¹⁵⁴ *Ibid.* at 421.

¹⁵⁵ *Supra*, note 51.

¹⁵⁶ Gold, *supra*, note 64 at 140-41.

¹⁵⁷ *Committee for Justice and Liberty v. National Energy Board* (1976), [1978] 1 S.C.R. 369; *R. v. Pickersgill, Ex P. Smith* (1970), 14 D.L.R. (3d) 717 (Man. Q.B.).

¹⁵⁸ *Metropolitan Properties v. Lannon* (1968), [1969] 1 Q.B. 577, 599 (C.A.), Denning M.R.

In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a court of justice, separate from the prosecution and free from any suspicion of influence of or dependency on others.¹⁵⁹

The majority opinion suggested that the right of appeal to a civilian court guarantees that the court martial will act fairly and impartially. Clearly, this position is untenable. The fairness and impartiality of the appeal tribunal are a very separate matter from the fairness exhibited by the trial court itself. One reason to separate the two is that the right of appeal under sections 195 and 197 of the *National Defence Act* is limited to questions of law. The appeal court will not interfere unless there is a serious error of law, or the finding of fact is unreasonable and cannot be supported by the evidence presented.¹⁶⁰ A second reason is that the appeal court, in reviewing the trial record and in considering the submissions on appeal, may not detect the subtle ways in which the military system influences the decision.

MacKay v. The Queen is the leading Canadian case involving the rights of military personnel. It has been followed on a number of occasions by lower courts, when considering decisions involving the *Charter*. In my opinion, however, *MacKay* should not be followed in determining whether the military system of justice infringes section 11(d) of the *Charter*.

A number of recent decisions of the Court Martial Appeal Court have followed *MacKay* in considering the jurisdiction of a military tribunal over criminal offences brought under military law pursuant to section 120 of the *National Defence Act*.¹⁶¹ The Court also considered the *Charter* in these cases, but to date none of the service personnel have challenged the military legal system through section 11(d). Nevertheless, the reasoning in these cases provides some insight into the nature of judicial review by the Court Martial Appeal Court, and may reflect the approach of the Court should there be a major challenge to military jurisdiction under the *Charter*.

Two of the decisions involve drug offences. In *R. v. MacDonald*¹⁶² the accused service person was convicted by Standing Court Martial of trafficking in narcotics contrary to the *Narcotic Control Act*.¹⁶³ He

¹⁵⁹ *Supra*, note 40 at 402.

¹⁶⁰ Gold, *supra*, note 64 at 141.

¹⁶¹ Section 120 of the *National Defence Act*, *supra*, note 4 incorporates into military law any act or omission punishable under the *Criminal Code* or any other statute of the Parliament of Canada. Persons subject to the *Code of Service Discipline* who commit civil offences can be tried by a service tribunal pursuant to s. 120.

¹⁶² (1983), 150 D.L.R. (3d) 620 (C.M.A.C.).

¹⁶³ *Supra*, note 51.

had sold three 'joints' for five dollars to another member at a civilian establishment while both were off duty. The Court Martial sentenced MacDonald to six months' imprisonment.

In determining the sentence, the Standing Court Martial applied a general principle that trafficking requires some form of incarceration. As one ground of appeal, MacDonald argued that the sentence was so severe in the circumstances that it was illegal. In dismissing the argument, President Mahoney held:

While the principle that "trafficking requires some form of incarceration" may be a wrong principle to be applied by a civil court, it is not necessarily a wrong principle to be applied by a military court in sentencing. In addition to the considerations dictating the proper principles of sentencing in the civil courts, there is an overriding disciplinary consideration to be taken into account by courts martial. Indeed, that disciplinary consideration is a major reason for the existence of a separate system of military law and separate courts to administer it. I am not prepared to hold that the determination that a trafficking conviction under military law requires some incarceration is illegal.¹⁶⁴

Another argument raised by MacDonald was that trafficking was not a military offence, and therefore his right to a trial by jury under section 11(f) of the *Charter* had been violated. Section 11(f) states that a right to a jury trial does not extend to offences under military law. The Court Martial Appeal Court dismissed this ground of appeal and held that the offence came within the ambit of military law, as it fell within the letter of section 120(1) of the *National Defence Act* and had a real military nexus. Therefore section 11(f) was not applicable.

President Mahoney stated that "illegal drug use by service personnel entails obvious and serious disciplinary considerations." He concluded:

The connection between drug use and the user's performance of his or her military duties is clear. The right, indeed duty, of the military command to deal with drug use and the concomitant trafficking and possession by military personnel is likewise clear.

Where and when service personnel acquire or use illegal drugs, whether off or on base, off or on duty, is of little moment. The effect of its use is the basis of the disciplinary concern. Wherever the drug is bought or used, it is entirely reasonable to expect that its effects will be manifested on duty. A military nexus is present in the circumstances of this appeal.¹⁶⁵

While the connection between military jurisdiction over drug offences and military discipline may be clear to President Mahoney, it is not at all clear to me. As with McIntyre J. in *MacKay v. The Queen*,¹⁶⁶ he upheld

¹⁶⁴ *Supra*, note 162 at 622.

¹⁶⁵ *Ibid.* at 626.

¹⁶⁶ *Supra*, note 40.

the jurisdiction of the military tribunal in the name of discipline without any proof that drug use affected discipline one way or the other.

In *R. v. MacEachern* (1985),¹⁶⁷ the accused was convicted of possession of marijuana and sentenced under military law to a fine of \$1,000 and thirty days' detention. The drug was found by military police while MacEachern was on leave at his home located several hundred miles from his ship. The Court Martial Appeal Court dismissed MacEachern's challenge to the jurisdiction of the Standing Court Martial. Addy J. applied the 'military nexus test' and held that there was a sufficient nexus between the consequences of the offence and the interests of the military. Again, the Court took official notice of the fact that drug offences detrimentally affect discipline, morale, and efficiency. The Court also failed to consider whether or not the civil courts could be equally effective in dealing with the problem, particularly in light of the fact that most military drug offenders are discharged from the service once they have served their sentence.

The military nexus test was again applied by the Court Martial Appeal Court in *R. v. Catudal*¹⁶⁸ and *R. v. Sullivan*.¹⁶⁹ In *Catudal*, the accused member of the Armed Forces was charged with nine counts of unlawfully setting fires. Eight of the offences occurred on a military base, and on that basis the Court held that there was a sufficient military nexus to grant the General Court Martial. However, in one instance, the accused set fire to a motel while travelling to a new posting. There was no military nexus in the case of this incident and it was not an offence under military law. The Court Martial Appeal Court held, therefore, that the offence was not within the jurisdiction of the General Court Martial and quashed Catudal's conviction with respect to that count.

In *Sullivan*, the accused soldier was convicted on five counts of gross indecency with teenage boys. All the offences took place at the accused's quarters located at Canadian Forces Base Gagetown, and four of the five boys were children of service personnel. After pleading guilty to each of the charges before the military tribunal, Sullivan was ordered to leave the Court, and the Judge Advocate advised the tribunal as to sentencing in the accused's absence. When the Court reconvened, Sullivan was sentenced to four years on each count, to be served concurrently.

Sullivan appealed the conviction on the ground that the Court Martial did not have jurisdiction over the offences in question, since they were offences under the *Criminal Code*. The Court Martial Appeal Court upheld

¹⁶⁷ 63 N.R. 59 (C.M.A.C.).

¹⁶⁸ (1985), 63 N.R. 58 (C.M.A.C.).

¹⁶⁹ (1986), 65 N.R. 48 (C.M.A.C.).

the conviction and held that the service member was triable in military court because there was a real military nexus or service connection to the offence. It offended the morale and discipline of the service by striking deeply at the integrity of the military establishment.

On another ground, Sullivan challenged the legality of his sentence under the *Charter*. He argued that he was denied fundamental justice as guaranteed by section 7¹⁷⁰ by not being permitted to be present when the Judge Advocate addressed the Court on the principles of sentencing. Because the soldier had been denied his fundamental rights, and because the sentence imposed was too long, the Court Martial Appeal Court ordered that Sullivan be discharged under section 24(1) of the *Charter*. He had served one year of his sentence.

The recent decisions of the Court Martial Appeal Court indicate a common trend. First, the cases apply the military nexus test, and it has generally been accepted that a military tribunal has jurisdiction only where the offence is military connected, and has a real effect on the morale, discipline, and efficiency of the Armed Forces. Second, in the case of drug offences, and also in the case of the gross indecency offences committed by Sullivan, the Court Martial Appeal Court assumed that the offence in question was detrimental to morale, discipline, and efficiency without actual proof of that fact. Finally, the cases indicate that some challenges under the *Charter* by military personnel have been successful, and have not been limited by section 1 of the *Charter*. However, to date no service member has based a challenge on section 11(d), which guarantees the right to a fair hearing before an independent and impartial tribunal.

Under the *Charter*, the courts must examine the appearance of justice in the military system and employ the structural test of fairness and impartiality. Applying this test, the structure of the military system of justice clearly violates section 11(d) of the *Charter* and should be subject only to the specific limitation provided under section 1.

Although the United States' courts have been critical of the military judicial process when it has extended its jurisdiction to civilians, these same courts and the Court Martial Appeal Court have displayed considerable restraint when the accused is a full-time member of the regular forces. This is where the principle of military necessity begins to water down the criticism made by the civil courts of the military judicial process. Surely the civil courts must recognize that if the military system is unfair to civilians, it is equally unfair to service personnel. However, these courts have been reluctant to intervene and uphold the rights of military personnel

¹⁷⁰ *Supra*, note 2.

because it is believed that the military system of justice is necessary for the maintenance of discipline. In effect, the civil courts have placed a limitation on the application of constitutional rights to members of the Armed Forces. Are these limitations appropriate under section 1 of the *Canadian Charter of Rights and Freedoms*?

V. THE LIMITATION OF RIGHTS

Section 1 of the *Charter* provides that:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁷¹

In considering the application of the *Charter* to military law, the difficult question is not whether the military system infringes on the rights of its personnel, but rather whether the infringement is justified given the essential role of the military. This calls on the court to balance the fundamental rights of individuals against the undesirability of judicial intervention in the military system.

Depending on the legal policy adopted, the court could develop one of four possible doctrines under the limiting provision of the *Charter*: the doctrine of military immunity, the doctrine of justiciability, the separate community doctrine, or the least restrictive means test.

The least activist approach that could be adopted is the doctrine of military immunity. Under this approach, the military would be immune from the application of the *Charter*. The courts would recognize that the military system offends the *Charter*, but would refuse to intervene into military affairs. In the matter of the rights of service personnel, the courts would defer to Parliament and the military hierarchy.

The approach adopted by the Supreme Court of Canada in *MacKay v. The Queen*¹⁷² is, in my opinion, very close to the doctrine of military immunity. Once the matter in *MacKay* was found to be within the jurisdiction of Parliament and the military, the Court, under the valid federal objective test, would not make further inquiries. In *MacKay*, there was no review of the rights asserted and, therefore, the military was virtually immune from review under the *Bill of Rights*.¹⁷³

¹⁷¹ *Ibid.*

¹⁷² *Supra*, note 40.

¹⁷³ Of course, there would be some review even under the valid federal objective test. For example, if provisions of the *National Defence Act*, *supra*, note 4, or the actions of military authorities discriminated against blacks, this would be considered as invalid, and having no rational connection to the federal objective of maintaining a disciplined and efficient armed forces.

Employing the military immunity doctrine, the Court takes judicial notice of the need for a separate system of military law in the name of military efficiency. At the trial level in the *MacKay* case, Cattanach J. put it this way:

Without a Code of Service Discipline, the armed forces could not discharge the function for which they were created. . . . To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfillment of the role they have chosen and paramount in that there must be rigid adherence to discipline.¹⁷⁴

The doctrine of military immunity leaves the important task of safeguarding the rights of service personnel entirely to Parliament and military authorities. Given that the main concern of these bodies is military discipline and efficiency, this is tantamount to placing the *Charter*, as it applies to members of the military, on a sacrificial altar.

In the United States, military activities have always, at least to some extent, been open to review under the *Bill of Rights*. The courts have exhibited various doctrinal approaches over the years. During the 1950s and 60s, when the ideological leaning of the U.S. Supreme Court was more liberal, the Court was very critical of the military judicial system and readily intervened to safeguard the rights of service personnel. On the other hand, the recent trend has been toward conservatism, and in the U.S. Supreme Court, as well as among the Circuit Courts, there has been a reluctance to interfere in military matters. The Circuit Courts have been the most deferential and have employed the doctrine of justiciability to the review of cases involving the military. The United States Supreme Court has been less hesitant and has at least considered the alleged violation of the *Bill of Rights*. Nevertheless, the Supreme Court has employed the separate community doctrine, which subjects the military to a lesser degree of constitutional scrutiny than would be the case for other matters within the authority of the federal government.

The doctrine of justiciability is used not as a means of limiting the constitutional rights of service personnel but, rather, as a means of preventing judicial review of certain military claims. The lower federal courts claim to have received little guidance from the U.S. Supreme Court regarding when review of a military case is appropriate. Consequently, the 1971 decision of the Court of Appeal of the Fifth Circuit, *Mindes v. Seaman*,¹⁷⁵ has been very influential in determining the threshold

¹⁷⁴ *Re Mackay and the Queen; Re Kevany and the Queen* (1977), 36 C.C.C. (2d) 522 (F.C.T.D.) at 524.

¹⁷⁵ 453 F.2d. 197 (5th Cir.).

standards of reviewability. Although *Mindes v. Seaman* has never been approved by the U.S. Supreme Court, it is followed in eight judicial circuits, leaving only two circuits that have not adopted the *Mindes* test.¹⁷⁶

In *Mindes*, an Air Force Captain was discharged from active service and placed in the Reserves after he received an unfavourable career assessment. Captain *Mindes* claimed that the discharge was based on a factually erroneous report and he was, therefore, denied due process of law under the Fifth Amendment. The *Mindes* discharge was affirmed by the Air Force Review Board. He made a further allegation on his application for review that the Air Force Review Board failed to make findings of fact and conclusions of law as required by due process.

The Court in *Mindes* examined a number of cases that considered military matters and noted that, in some instances, the court proceeded to review the claim. However, the Court also noted several cases in which review was not undertaken. The Court attempted to reconcile these decisions and devised a test for the review of internal military matters. Following the test, the Court determined whether or not a claim against the military would be reviewed. A case that failed to meet the requirements of the test would be found to be non-justiciable and the civil court would decline to hear the case.

The Court in *Mindes* stated that a threshold test was necessary in order to minimize the interference of the civil courts into military affairs. The civil courts should not second guess actions by military authorities who have expertise in military affairs. The Court noted that review by the civil courts should not "stultify the military in the performance of its vital mission."¹⁷⁷ The new test proposed by the Court was justified because it reflected the general reluctance of the civil courts to interfere with internal military affairs.

Under the *Mindes* test, a trial court examines the substance of the constitutional claim in conjunction with the policy reasons behind non-review of military affairs. The court must balance "several subjective and interrelated factors":

1. the nature and strength of the plaintiff's claim against the military;
 2. the potential injury to the plaintiff if review is refused;
 3. the type and degree of anticipated interference with the military function;
- and
4. the extent to which the exercise of military expertise or discretion is involved.¹⁷⁸

¹⁷⁶ *Dillard v. Brown* (1981), 652 F.2d 316 (3d Cir.); *Dilley v. Alexander* (1979), 603 F.2d 914, 920 (D.C. Cir.). See G.W. Gorenstein, "Judicial Review of Constitutional Claims Against the Military" (1984) 84 Colum. L. Rev. 387 at 397ff.

¹⁷⁷ *Supra*, note 175 at 199.

¹⁷⁸ *Ibid.* at 201-2.

With respect to the first factor, the Court in *Mindes* suggested that constitutional claims would normally merit the attention of the court; however, when the claim was a tenuous one, such as a claim challenging a haircut regulation, the matter would not be justiciable.

The Court offered no explanation regarding the weight to be given to the second consideration. However, the earlier cases considered in the decision consistently reviewed court-martial convictions, which in most cases involved deprivation of liberty. However, based on *Middendorf v. Henry*,¹⁷⁹ the same cannot be said with respect to summary courts martial, or disciplinary punishment under Article 15 of the *Uniform Code of Military Justice*. Perhaps the courts will decline to review 'minor' disciplinary matters, notwithstanding the potential loss of liberty.

With respect to the third factor, the Court in *Mindes* stated that when the type and degree of interference with the military were such that they would seriously impede the armed forces in the performance of vital duties, the court would normally refuse to hear the case. However, this must be weighed along with the other factors.

The final factor calls on the court to defer to military expertise when the matter involves an exercise of discretion and calls on the superior knowledge and experience of military authorities.

The Court of Appeals for the Fifth Circuit held that the District Court had improperly dismissed Captain Mindes' application without proper consideration of the above factors. The appeal by Mindes was allowed and the case remanded to the District Court to apply the proposed test.

Mindes v. Seaman has been very influential in the United States. This is unfortunate. In my opinion, the *Mindes* test offers little guidance in determining constitutional claims against the military. The test itself involves vague and meaningless phraseology. The Court in *Mindes* suggests a balancing test, yet does not elaborate how this is to be done. The Court did not even apply the test in the case at bar, but rather remanded the case to the District Court to apply the test. As a result, the application of the *Mindes* test has been totally inconsistent. Often, the courts have simply quoted the factors *verbatim* and arrived at a result without any further discussion.¹⁸⁰ Inevitably, the application of the *Mindes* test causes the courts to defer to military expertise and the alleged needs of the military, at the expense of the constitutional rights of service personnel. The test is premised on the deference of the civil courts to

¹⁷⁹ *Supra*, note 120.

¹⁸⁰ See *ben Shalom v. Secretary of the Army* (1980), 489 F. Supp. 964, 971 (E.D. Wis.); *Ne Smith v. Fulton* (1978), 443 F. Supp. 411, 413 (M.D. Ga.), *aff'd* (1980), 615 F.2d 196 (5th Cir.).

the expert judgment of military authorities. Consequently, a claim by the military experts that a certain course of action is vital to the military function is held by the civil courts to be cogent proof of that fact. There is no onus on the military to lead evidence to establish the relationship between the challenged course of action and military efficiency. Thus, courts following *Mindes* have declined to review a number of claims, including those involving due process, First Amendment rights, equal protection, and the right of privacy.

Although *Mindes* has been followed by a majority of the judicial circuits in the United States, it has not been adopted by the United States Supreme Court. The lower courts, therefore, rely primarily on *Orloff v. Willoughby* (1953)¹⁸¹ and, to a lesser extent, on *Gilligan v. Morgan* (1973)¹⁸² as authority for adoption of the *Mindes* test. However, neither case supports the approach taken in *Mindes* of imposing a threshold test in the review of constitutional claims against the military. In *Orloff*, the U.S. Supreme Court reviewed the constitutional claim by the plaintiff that under the *Doctor's Draft Act*,¹⁸³ he was entitled to a commission upon his enrolment into the Army. Orloff was declined a commission and assigned to a low-grade medical position because he failed to disclose possible membership with subversive organizations upon his enrolment. The Court held that it was constitutionally permissible for the Army to exercise its discretion in assignments to personnel and, in so doing, to consider membership in subversive organizations. Certainly, the Supreme Court deferred to military discretion in *Orloff*, but this did not preclude the Court from considering the plaintiff's claim. The case was clearly justiciable.

Gilligan v. Morgan is the only case in which the Supreme Court has refused to review a case because it involved a non-justiciable matter. This case was brought by students at Kent State following the tragic confrontation between protesting students and the Ohio National Guard. The Court declined to hear the case, not because it believed that the National Guard was immune from judicial review, but rather because of the peculiar claim for relief brought by the students. The students did not seek damages for the injuries sustained as a result of the National Guard's actions, nor did they ask for a restraining order against the National Guard. The students claimed that the Ohio National Guard was being trained in such a way that it would inevitably use force in violation of their due process rights. The relief claimed was that the

¹⁸¹ 345 U.S. 83.

¹⁸² 413 U.S. 1.

¹⁸³ *Universal Military Training and Service Act*, 50 U.S.C. App. § 454(i).

District Court undertake extensive supervision of the National Guard's training. The Supreme Court dismissed the students' appeal on the ground that there was no appropriate relief that a District Court could fashion.

The approach of the United States Supreme Court has not been to adopt a threshold test in determining whether to exercise judicial review of military matters. Rather, the Court has developed the separate community doctrine in applying the *Bill of Rights* to the armed forces. This is the current approach of the United States Supreme Court in deciding claims involving military matters.

In a series of cases, beginning in 1974, the Supreme Court has maintained that the armed forces is a "separate community" in which greater than usual restrictions on individual liberty are necessary.¹⁸⁴ The separate community doctrine has been justified only in very general terms and the Court has stated that the vital function of the military has required the Court to defer to Congress or to the military hierarchy in constitutional matters.

The separate community doctrine was reaffirmed by a majority of the United States Supreme Court in its most recent decision involving the military. In *Chappell v. Wallace* (1983),¹⁸⁵ five black enlisted men launched a tort action against their superior officers for violations of their constitutional rights. The plaintiffs alleged that in making duty assignments, assessing their performance, and imposing penalties, their superior officers discriminated against them because of their race.

The United States District Court dismissed the action on "the grounds that the actions complained of were non-reviewable military decisions," that the officers against whom the claim was brought were entitled to immunity, and that the plaintiffs had failed to exhaust their administrative remedies.¹⁸⁶

The enlisted men appealed to the Court of Appeals for the Ninth Circuit, which reversed the decision of the District Court. The Court of Appeals cited *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (1971),¹⁸⁷ which authorized the award of damages for constitutional violations by federal officials even though Congress has

¹⁸⁴ *Parker v. Levy* (1974), 417 U.S. 733; *Secretary of the Navy v. Avrech* (1974), 418 U.S. 676; *Schlesinger v. Ballard* (1974), 419 U.S. 498; *Schlesinger v. Councilman*, *supra*, note 149; *Greer v. Spock* (1976), 424 U.S. 828; *Middendorf v. Henry*, *supra*, note 120; *Brown v. Glines* (1980), 444 U.S. 348; *Rostker v. Goldberg* (1981), 453 U.S. 57.

¹⁸⁵ 103 S. Ct. 2364.

¹⁸⁶ The members, according to the Court, should have first used the complaint system provided within the military under *UCMJ*, *supra*, note 115, Art. 138.

¹⁸⁷ 403 U.S. 388.

not expressly authorized such suits. Following the decision of the Court of Appeals, the officers appealed to the Supreme Court.

The U.S. Supreme Court reversed the decision of the Court of Appeals and held that enlisted military personnel may not maintain an action to recover damages from a superior officer for alleged constitutional violations. Burger C.J. delivered the judgment of the Court. He stated that the need for special regulations in relation to military discipline requires a special and exclusive system of military justice. Civilian courts must, at the very least, hesitate long before tampering with the established relationship between enlisted personnel and their officers. Burger C.J. concluded:

The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.¹⁸⁸

The Chief Justice emphasized that the Court does not hold that military personnel are barred from all redress in civilian courts for constitutional violations suffered during the course of military service. However, the Court exercises caution when the matter interferes “with the relationships that define military life and the power of the military to deal with its own personnel.”¹⁸⁹

Professor Hirschhorn aptly summarized the separate community doctrine as consisting of four propositions:

First, as a matter of observation and history, the armed forces are a distinct subculture in which the individual is subordinated to the organization in a manner unlike any other government activity. Second, the existence of this peculiar relationship is evidence that it rationally serves both the armed forces’ internal purposes and the larger society’s interests. Third, when individual rights appear to conflict with the smooth working of the armed forces, the Court distrusts its own ability to reconcile them without harming military effectiveness. Fourthly, its exceptional reluctance to intervene on behalf of judicially developed individual rights is justified because the purpose of the armed forces, “to fight wars”, is fundamentally different from any other government activity.¹⁹⁰

In my opinion, the separate community doctrine is an unfortunate development within the jurisprudence of the U.S. Supreme Court. The doctrine grants far too much deference to the discretion of military authorities at the expense of constitutional rights — an approach that seems to conflict with the status that a democracy accords to its

¹⁸⁸ *Supra*, note 184 at 2367.

¹⁸⁹ *Ibid.* at 2367.

¹⁹⁰ J.M. Hirschhorn, “The Separate Community: Military Uniqueness and Serviceman’s Constitutional Rights” (1984) 62 N.C.L. Rev. 177.

constitution. Certain members of the judiciary have recognized this, and the separate community doctrine has been subjected to much criticism in dissenting opinions in the military cases.

In *Greer v. Spock* (1976),¹⁹¹ the U.S. Supreme Court again invoked the separate community doctrine and upheld a Fort Dix regulation that prohibited the distribution of political leaflets and the holding of political meetings on Fort Dix property. (The post permitted free civilian access to certain unrestricted areas.)

The dissenting judgments of Brennan J. and Marshall J. were very critical of the separate community doctrine relied upon by the majority. After pointing out that the Fort Dix areas in question were so open that there was a danger of muggings after payday and a problem with prostitution, Brennan J. stated:

The Court's opinion speaks in absolutes, exalting the need for military preparedness and admitting of no careful and solicitous accommodation of First Amendment interests to the competing concerns that all concede are substantial. It parades general propositions useless to precise resolution of the problem at hand. According to the Court, "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise" . . . [and] "it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum". . . . But the training of soldiers does not as a practical matter require exclusion of those who would publicly express their views from streets and theater parking lots open to the general public.¹⁹²

Marshall J. joined in dissent, stating:

I am deeply concerned that the Court has taken its second step in a single day¹⁹³ toward establishing a doctrine under which army military regulation can evade searching constitutional scrutiny simply because of the military's belief — however unsupportable it may be — that the regulation is appropriate.¹⁹⁴

The deference to military authority, which the Court grants under the rubric of the separate community doctrine, runs contrary to the guiding principles of a constitutional democracy. Clearly if constitutional rights are to mean anything at all, military regulations should not be upheld when they infringe these rights, unless the military authorities establish by evidence that their regulations are necessary to promote military efficiency.

Additionally, the separate community doctrine is based on antiquated ideas of military society that no longer hold true for modern armed forces.

¹⁹¹ *Supra*, note 184.

¹⁹² *Ibid.* at 851.

¹⁹³ Justice Marshall is referring to *Middendorf v. Henry*, *supra*, note 120, which was decided the same day as *Greer v. Spock*.

¹⁹⁴ *Supra*, note 184 at 872-73.

The current body of military law dates back to Richard II (1377-1399). Although the punishments in the ancient *Articles of War*¹⁹⁵ were very severe, the substantive content of the crimes has changed very little over time. The British *Articles of War* of 1878 were very similar to those promulgated by Richard II in the fourteenth century. In 1879, the British Parliament consolidated these Articles with the *Mutiny Act*¹⁹⁶ in a newly enacted statute entitled the *Army Discipline and Regulation Act*. The new statute was re-enacted as the *Army Act*¹⁹⁷ of 1881. This Act was the historical foundation for the *Code of Service Discipline* under the *National Defence Act*. Many of the provisions of the *United States Uniform Code of Military Justice* have similar roots that can be traced to ancient British military law.

The military law that is currently in force, in both Canada and the United States, was developed for a military organization very different in nature from today's armed forces. For example, the Army and Navy in the eighteenth and nineteenth centuries were isolated from British society, often for extended campaigns under arduous conditions. The officers originated from radically different classes of society than did other service personnel and this was reflected in the disparity of the conditions under which each group served. The so-called 'volunteer' troops were drawn from the lowest ranks of society, often forced into service by press gangs or offered the chance to volunteer following a conviction in the criminal courts. Military law was seen as a necessary means of keeping the reluctant, unskilled troops in line. Its effectiveness was guaranteed through the sheer swiftness and harshness with which the officers administered the law.¹⁹⁸

Since the Second World War there has been a gradual convergence of military and civilian social structures.¹⁹⁹ The modern military is very much a part of larger society and is no longer the isolated community of the eighteenth and nineteenth centuries. One reason for this change lies in the sheer number of personnel involved. The modern armed forces requires vast numbers of personnel who carry out specialized tasks.

¹⁹⁵ *Articles of War* applied to the military only during times of declared war. They were promulgated under the authority of the Monarch under Royal Prerogative.

¹⁹⁶ The *Mutiny Act* was the statutory enactment of military law that governed the military in times of peace. In 1689, the British Parliament enacted the first *Mutiny Act*. Prior to that, only the *Articles of War* applied to the military, and only during war. The *Mutiny Act* provided for a Standing Army in peacetime, only with consent of Parliament.

¹⁹⁷ *Supra*, note 29.

¹⁹⁸ D. Corry, "Two Standards of Justice: Military Law and its application to the Officers and Men of the British Army in the 18th and 19th Centuries" (1984) [unpublished].

¹⁹⁹ A.D. Biderman & L.M. Sharp, "The Convergence of Military and Civilian Occupational Structures" (1968) 73 *Am. J. Sociology* 381.

Nations maintain huge standing armies. Members of the peace-time armed forces spend much time in the civilian community. Many civilians will have spent at least some time in military service. The relationship between the military and civilian societies is one of constant interaction.

Technological advances have vastly changed the nature of modern warfare. In order to obtain competent personnel to operate very sophisticated equipment, the armed forces of today requires a highly trained recruit.²⁰⁰ Very few positions in the military are capable of being filled by unskilled personnel. This has had a profound impact on the modern military. First, the backgrounds of the officers and the enlisted personnel are similar in many respects. The vast disparity in education and social class has virtually disappeared. Second, most recruits enter the military following high school or after spending some time in the work force. They bring into the armed forces the values and experiences that have been nurtured in civilian society. Basic military training can only build on these values; it cannot change them. Third, given the education and experience of today's enlisted personnel, they are, for the most part, responsible and mature individuals. Most are willing to accept their duties responsibly and carry them out to the best of their ability. They are a far cry from the vagabonds, scoundrels, and criminals who formed the ranks of the British Army of yesteryear.

Furthermore, today's armed forces has a much larger logistical component than the military of the past. Over 80 percent of the personnel today are in support positions. Therefore, the vast majority of service personnel not only spend most of their time in the civilian community, but they also perform jobs like those held by civilians.²⁰¹ The effectiveness of the logistical-administrative component of the service does not depend on discipline, but rather on business and managerial skills.

Even in the combat positions, the nature of warfare and the skills required to fight in a war have changed considerably over the years. In the eighteenth and nineteenth centuries, armies had to be assembled in a common battleground and the battle was fought in a contained geographical area. In a modern theatre of war, units are dispersed over a large geographical area. Wars are fought on a continental or global scale. There is a constant threat that the enemy will intercept communications between units and, therefore, communications are kept to a minimum. Equipment is operated by highly trained specialists. The

²⁰⁰ M. Janowitz, ed., *The New Military* (New York: Russell Sage Foundation, 1964); M. Janowitz, *The Professional Soldier* (Glencoe, Ill.: Free Press, 1964).

²⁰¹ *The New Military*, *ibid.*

personnel must be capable of exercising their initiative and making instantaneous decisions.

Traditional military training emphasized discipline and blind obedience to command. In the eighteenth and early nineteenth centuries, the morale of the troops was often overlooked. Frequent use of the lash and the harsh administration of military law at the discretion of officers ensured that the troops carried out their duty. This type of discipline — a discipline of fear — is only effective so long as it is powerful enough to overcome the countervailing fear and the arduous conditions that the troops face in combat. The moment that discipline of fear breaks down, the troops will mutiny.²⁰²

Discipline is equally important in the modern military, particularly in combat positions. However, it is a discipline of a very different nature. In a modern armed force, discipline and morale go hand in hand. Even if a modern army has the most up-to-date equipment and the most arduous training, without both discipline and morale that army is destined to failure.

Military law is essential for discipline in today's armed forces, but only as the means of last resort. If morale is high, the service personnel will be motivated to carry out their duties, and there will be little need to resort to the military law. However, if morale is low and the service personnel do not believe in the cause for which they are fighting, discipline can only be maintained by frequent resort to a harsh system of military law.

Morale will only be high in an armed force that upholds the ideology and values of its personnel. The modern military is no longer a separate community in any real sense. Therefore, the military cannot develop a separate ideology and system of values, but rather must reflect those of the society of which it is a part. Today there is far more pressure on the military to foster a harmonious relationship with the civilian community. The armed forces is controlled by civilian politicians. Volunteers are drawn from a civilian labour force. The armed forces must rely on the support of the civilian community. If military values are radically different from civilian values, the civilian community may withdraw its support and the military will suffer. There will be fewer volunteers to fill the ranks and, because morale will be low, disgruntled personnel will leave. Furthermore, there will be considerable political pressure on the military organization. Government funds will be chan-

²⁰² Corry, *supra*, note 199.

nelled elsewhere and the civilian politicians may lobby for a restructuring of the armed forces.²⁰³

The point is that the application of constitutional norms should help to foster the necessary harmony between the forces and civilian society rather than hamper military efficiency. The Constitution reflects those values that are most fundamental in Canadian society. If the military system of justice is unfair and arbitrary, or if it is unnecessarily disrespectful of constitutional rights, this will have a profound effect on the morale of service personnel.

Another concern about the separate community doctrine relates to the opinion of military experts. The primary objective of military leaders is to control their personnel in the interests of military efficiency. This includes controlling the views, attitudes, and conduct of personnel who do not share the personal or bureaucratic preferences of the military hierarchy.²⁰⁴ The officers justify this in the name of military discipline and efficiency, yet there may be other appropriate courses of action available that are less offensive to the rights of the service personnel.

Finally, why should greater deference be granted to decisions that affect the rights of service personnel than to any other claim involving the exercise of legislative power? In the United States for example, one would think that matters of internal security are equally as important as matters of external security. Yet in *United States v. United States District Court* (1972),²⁰⁵ the Supreme Court recognized a legitimate government need to safeguard domestic security through wiretapping but held that this need did not prevent scrutiny under the provisions of the *Bill of Rights*, particularly when the surveillance threatened the right to privacy and free expression under the First Amendment. The Court held that the government's concerns did not justify departure from the customary requirement to obtain judicial approval prior to surveillance. Nor did the Court find that this requirement would impair surveillance powers to any significant degree.

Certainly the goals of the military are important and few would support interference by the civil courts in military matters when there is a genuine threat to discipline and efficiency. However, the separate community doctrine does not strike the proper balance between military discipline and constitutional rights. The difficult task that the Canadian

²⁰³ G.G. Simmonds, "Commentary and Observations" in H.J. Massey, ed., *The Canadian Military: A Profile* (Toronto: Copp Clark, 1972) at 267-90.

²⁰⁴ For example, during the Vietnam War years, there were considerable political and legal challenges to the American military. Some of the anti-military sentiment spilled over into Canada, and the Canadian Forces faced chronic recruiting problems.

²⁰⁵ 407 U.S. 297.

courts face is devising a test under section 1 of the *Charter* that strikes the appropriate balance. In my opinion, a test has been employed by the courts that does meet this difficult challenge: the least restrictive means test.

This test has been applied by the U.S. Supreme Court in military cases prior to 1974. In *Toth v. Quarles* (1955),²⁰⁶ Black J., writing for the U.S. Supreme Court, held that:

There are dangers lurking in military trials which were sought to be avoided by the *Bill of Rights* and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the *narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.*²⁰⁷ [Emphasis added.]

The principles recited by the Court in *Toth v. Quarles* were applied by the Supreme Court, in 1957, in *Reid v. Covert*²⁰⁸ and, in 1969, in *O'Callahan v. Parker*.²⁰⁹ These cases, also discussed earlier, considerably narrowed the jurisdiction of military law over civilian personnel and over offences that were not service connected.

The least restrictive means test was also suggested by McIntyre J. in *MacKay v. The Queen*²¹⁰ as an appropriate test under section 2(f) of the *Canadian Bill of Rights*. McIntyre J. pointed out that the valid federal objective test employed by the majority in *MacKay* did not consider whether subjection of service personnel to military trials for offences under the general law could be justified as valid under the *Bill of Rights*. He stated the following as an appropriate formulation of what constitutes a valid federal objective:

The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.²¹¹

McIntyre J. then proposed the following test:

I would be of the opinion . . . that as a minimum it would be necessary to inquire whether any inequality . . . has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to provisions of the *Canadian Bill of Rights*, and whether it is a necessary departure

²⁰⁶ *Supra*, note 132.

²⁰⁷ *Ibid.* at 22.

²⁰⁸ *Supra*, note 137.

²⁰⁹ *Supra*, note 141.

²¹⁰ *Supra*, note 40.

²¹¹ *Ibid.* at 423.

from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the *Canadian Bill of Rights*.²¹²

He then added that departures from the principle of equality before the law "should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives."²¹³ Applying this principle to the military, McIntyre J. emphasized that the civil rights of service personnel "should be affected as little as possible considering the requirements of military discipline and the efficiency of the service."²¹⁴

In my view, McIntyre J. has proposed an accurate and workable test for the application of constitutionally enshrined rights to the military. He recognizes that no such right is absolute and must, therefore, be limited in some circumstances. However, infringement or denial of such rights should only be done for reasons of public policy, and then only to the extent necessary to attain the desired objective. Section 1 of the *Charter* provides that the *Charter* is only subject to such reasonable limits as can be demonstrably justified in a free and democratic society. At the very least, section 1 requires the courts to engage in a balancing test that weighs the rights in question and the needs of the military. The word 'demonstrably' suggests that cogent evidence must be tendered that upholds the contribution of military law to military efficiency and discipline, in the particular case before the court.²¹⁵ Of the different doctrines considered, only the least restrictive means test provides sufficient protection for important constitutional guarantees, while at the same time permitting some departure from those absolute principles when necessary.

Based on this analysis, many aspects of the present system of military justice are an infringement under section 11(d) of the *Charter*. The summary trial and the court-martial process do not provide a fair hearing by an independent and impartial tribunal.

²¹² *Ibid.* at 423.

²¹³ *Ibid.* at 424.

²¹⁴ *Ibid.* at 424.

²¹⁵ Recent decisions of the Court Martial Appeal Court have not applied the least restrictive means test in the case of challenges to military jurisdiction. Rather, the court has adopted the military nexus test. Where there is some connection between the offence charged and military efficiency, morale, and discipline the courts refuse to intervene in military affairs. This approach is akin to the separate community approach adopted by the U.S. courts. See *R. v. Sullivan*, *supra*, note 169; *R. v. Catudal*, *supra*, note 168; *R. v. MacEachern*, *supra*, note 167; and *R. v. MacDonald*, *supra*, note 162.

VI. PROPOSALS FOR REFORM

A reformed system of military justice must consider the right of service personnel to a fair hearing before an independent and impartial tribunal. At the same time, the system proposed must ensure that military discipline and efficiency are maintained at an optimal level.

Minor offences of a military nature must remain within the jurisdiction of the Commanding Officer. He or she is responsible for the troops under his or her command. However, as the summary trial infringes the *Charter*, the Commanding Officer's powers of punishment must be limited in order to exclude them from the scope of section 11(d). If the powers of punishment were limited to disciplinary powers only, then the Commanding Officer could be said to be exercising jurisdiction over disciplinary matters rather than criminal offences. As section 11(d) only applies to persons charged with an 'offence', the section would not apply to disciplinary matters. Therefore, the Commanding Officer should not be able to sentence an offender to a period of detention; sentences of this nature should be imposed by court martial only. The Commanding Officer would still be able to pass sentences such as limited fines, confinement to barracks, extra work and drill, reprimands, and other punishments that are clearly disciplinary rather than criminal in nature.

The experiences of other jurisdictions are noteworthy. For example, following the bitterness of World War II, most West Germans blamed the system of military justice for many of the injustices of Nazi authoritarianism. It was, therefore, felt that reforms of the military justice system were necessary to achieve the goal of a democratic army of "citizens in uniform."²¹⁶ In 1954, the West German Constitution was amended to permit the re-establishment of the Armed Forces. Shortly after that, in 1956, the West German Parliament enacted the *Soldiers Act*, which grants service personnel the same rights and duties as other citizens, subject only to specified restrictions in the *Act* that are justified by military necessity. Under the *Act*, 'soldiers' representatives' in each unit must be consulted by the Commanding Officer in matters of discipline. One of the reforms carried out in Germany was to restrict the powers of the commander in matters of discipline. Under the *Military Disciplinary Regulations*, a company commander has jurisdiction for minor offences. Disciplinary punishments which include a reprimand, limited fines, imposition of curfews, and up to seven days' disciplinary arrest may be administered. Punishment of disciplinary arrest must be approved by a judge of the service court, who is a civilian. Also, when the judge

²¹⁶ See E.F. Sherman, "Military Justice Without Military Control" (1973) 82 Yale L.J. 1398.

so approves, there is a right of appeal to the full service court, which is a civil court specializing in military law.

In spite of these reforms, the West German Armed Forces has a good record, and has experienced no significant morale and disciplinary problems.²¹⁷

Reform of the court-martial system should also be considered. One of the problems with the current system is that its jurisdiction extends beyond the enforcement of military offences. The jurisdiction of the *Code of Service Discipline* should be limited to military personnel only. Furthermore, it should apply only to military offences. Offences under the general law should be handled by the civil courts.²¹⁸

Another problem with the court-martial process is that it is totally dominated by officers. The judge, the prosecutor, the court, and often the defence counsel are all military officers. There is a need to establish an independent legal branch to administer military law.

Certain reforms of the British system of military justice are worthy of consideration,²¹⁹ although I would suggest that they must be extended over all forms of court martial. In 1946, the *Report of the Army and Air Force Courts-Martial Committee* recommended a separation of functions in courts martial. Following this report, in 1947, the British legal-aid program was extended to provide for civilian representation for personnel facing court martial. In 1948, the Directorate of Army and Air Force Legal Services was established as an independent prosecutorial agency of military lawyers. Also in that year, a separate *civilian* Judge Advocate General's Office was created to provide judicial officers for courts martial. The Office is composed of the civilian Judge Advocate General and some twenty judicial officers or Judge Advocates, who are also civilians. In 1972, only 28 per cent of the courts martial had a Judge Advocate presiding.

Canada should follow the model of the British reforms, but should also provide a broader role for the Judge Advocates. The Office of the Judge Advocate should be expanded and a Judge Advocate should preside over all courts martial.

In addition, the Judge Advocate should control the conduct of the trial and rule on procedural motions, the admissibility of evidence, and motions in which the prosecution has failed to establish a *prima facie* case. He or she should be the sole judge on matters of law and should

²¹⁷ *Ibid.* at 1412-13.

²¹⁸ Specifically, s. 120 of the *National Defence Act*, *supra*, note 4 should be repealed or struck down.

²¹⁹ Sherman, *supra*, note 216 at 1403ff.

be responsible for a summation to the court at the end of the trial. After a finding of guilt, the Judge Advocate will impose the sentence. In fact, the Judge Advocate should be a specialist in military law and perform the same functions as a judge at a criminal trial.

In order to ensure that the Judge Advocate's Office remains independent of all military control, the Judge Advocates should be appointed as judges under section 96 of the *Constitution Act, 1867*. This would provide all the necessary safeguards enjoyed by civilian judges of the high courts.

All courts martial should be presided over by a Judge Advocate. He or she should sit alone for minor offences, in which case powers of punishment should be restricted to two years or less. For more serious offences, a jury-like system should replace the current officer-dominated court martial. The Judge Advocate will preside; however, a full twelve-person jury should be selected from officers and enlisted personnel of the Armed Forces who have had some years of service. All will have expertise in military matters to some extent, and yet will form a reasonably independent panel to establish questions of fact.

VII. CONCLUSION

The present system of military justice in Canada violates section 11(d) of the *Charter*. The summary trial process is completely controlled by the Commanding Officer who has extensive powers of punishment over the personnel under his or her command. The court-martial system is command dominated. It is instituted by a convening officer, often with the recommendations of a Commanding Officer. The Judge Advocate, if there is one, is an officer. The prosecutor is a member of the Forces. Finally, the court martial is composed of a panel of officers. By majority decision, they control all matters including findings of law, findings of fact, and the sentence imposed. This system provides service personnel with an inferior system of criminal justice.

The *Charter of Rights and Freedoms*, as it applies to the Canadian Forces, dictates that reforms of the military system of justice must be undertaken. The proposed reforms would provide a fair and impartial system of military justice for service personnel and yet would provide military discipline and efficiency. Many of these reforms have been carried out effectively in Great Britain and West Germany. The result would be an improved system of military justice that safeguards the constitutional rights of service personnel and one that is compatible with the modern military organization.