

3-1-1988

Military Law and the Charter of Rights

Andrew D. Heard
University of Toronto

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Military, War, and Peace Commons](#)

Recommended Citation

Andrew D. Heard, "Military Law and the Charter of Rights" (1988) 11:2 Dal LJ 514.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

I. *Introduction*

Substantial re-evaluations of the rules ordering many facets of Canadian society have been required since the introduction of the *Charter of Rights and Freedoms*, both as a consequence and in anticipation of challenges in the courts. The military community in particular has been faced with extensive difficulties because of the adoption of the *Charter of Rights* by its parent civilian society. The dilemma the military finds itself in stems from the creation of the *Charter* by civilian politicians and lawyers who had the problems of a civilian society and legal system in mind; yet it applies equally to the military.¹ Although the Forces have adopted a number of changes in order to accommodate the *Charter*, there still remains a broad range of long-established military policies which could face challenges in the courts for limiting the enumerated rights in the *Charter*. Not only may a number of administrative practices and specific military offences be open to question, but so may the tribunals which form the very basis of military justice. Serious problems arise in trying to resolve these apparent contraventions because this conflict represents more than just a discrepancy between a particular set of laws and the *Charter*; rather, it is generated by a fundamental clash between the values of the military community and those of the Canadian society at large.

The Canadian Forces, like those of any country, are maintained through a much more rigid discipline of its members than is expected of the general citizenry. Such a discipline is necessitated by the end object of all military forces: combat. This discipline is instilled and enforced by a body of military law which encompasses a wide set of prohibitions to which civilian society is not normally subject, relatively harsh punishments, and expeditious procedures in the military tribunals that enforce those rules. When individuals enlist in the Forces, it is assumed that they voluntarily relinquish much of their personal freedom and agree to submit themselves to the military justice system. This autonomous legal system, designed to maintain a rigid order of discipline, is bound to give rise to a number of possible infringements of the *Charter*, which

* Ph.D. (Political Science), University of Toronto.

I would like to thank Prof. Peter Russell for his helpful comments on an earlier draft.

1. The single concession made by the farmers of the *Charter* to the uniqueness of the military legal system is found in s. 11(f), which provides that the right to trial by jury does not apply to the prosecution of a military offence in a military tribunal.

reflects the liberal values of the general civilian society. The resolution of these *Charter* infringements involves not only questions of legal interpretation but also basic political questions regarding the degree to which the military should differ from civilian society, what rights of service personnel can reasonably be limited in order to maintain an effective fighting force, and who should make these determinations.

II. *The Scope of Canadian Military Law*

Before examining the general question of the application of the *Charter of Rights* to military law, however, one must have a clear appreciation of the range of matters covered by military law and the people subject to it. The Code of Service Discipline (CSD), contained in the *National Defence Act*, provides the backbone of a body of military law that is fleshed out principally by the Queen's Regulations and Orders (QR&Os), Canadian Forces Administrative Orders (CFAOs), and a host of orders issued at the command, base, and unit levels. The CSD provides for specific military offences whose nature and penalty are detailed there. These offences involve both purely disciplinary matters, such as insubordination or failure to carry out orders properly, and offences that mix disciplinary and criminal elements, such as striking an officer. The serious nature of the specific military offences created in the *National Defence Act* should be emphasised from the outset; while capital punishment has been abolished from the *Criminal Code*, the *National Defence Act* still includes eight sections outlining 34 offences relating to wartime activities which are punishable by death.² The CSD also includes two general provisions which add offences from other pieces of legislation to the military legal system. Section 120 brings virtually all offences punishable under any federal statute, including the *Criminal Code*, within the purview of military law; this section also provides that the whole range of military offences continue to apply when a person subject to the CSD is outside the country.³ Furthermore, the CSD stipulates that all laws of a foreign country where members are serving may be enforceable under Canadian military law.⁴ Thus Canadian military law encompasses a tremendous range of offences and punishments.

2. Sections 63 - 66, 68 - 70, and 95 of the *National Defence Act*, R.S.C. 1970, c. N-4 detail the capital offences. These offences deal with various manifestations of traitorous actions, cowardice, mutiny, spying, and the dereliction of duty in action.

3. Section 60 of the *National Defence Act* excludes several offences under the *Criminal Code* from being tried in a military tribunal; these crimes include murder, manslaughter, various charges of sexual assault, abduction of a minor, and abortion. However, service tribunals have jurisdiction to try these offences when they are committed outside Canada.

4. S. 121 of the *National Defence Act*.

The expansive domain of military law, however, has been greatly restricted by the courts in recent years. In one of only two cases involving military law to be settled by the Supreme Court of Canada, Mr. Justice McIntyre wrote a concurring opinion in which he said that an offence should only fall within the realm of military justice "when committed by a serviceman if such an offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service".⁵ Since this decision, the Court Martial Appeal Court has enforced a requirement that a "military nexus" must be present in an offence before it can be tried in a military tribunal.⁶ One should note, however, that this rule has only been applied to offences committed within Canada.⁷

Canadian military law is remarkable in the range of people subject to the Code of Service Discipline and when they are subject to it.⁸ Members of the Regular Forces are subject to the provisions of the CSD at all times, whether on or off duty, while members of the Reserve are basically subject only when on duty, in uniform, or on base. However, the CSD also provides that various groups of civilians are also directly subject to military law while abroad; in this respect Canadian military law differs from both the British and American military legal systems. The most important group of civilians who are subject to the CSD are the roughly 1900 families who live with members of the Forces serving abroad. In addition, those civilians who "accompany" military units while they are on service or who are provided food or shelter by the Forces overseas are covered by the CSD. For example, about 300 civilian school teachers who work in military schools in Europe are also included within the ambit of military law. During the period 1971-80, 13.8 per cent of all courts martial were convened in order to try civilians; the vast majority

5. *MacKay v. The Queen* (1980), 54 C.C.C. (2d) 129 at 162 (S.C.C.).

6. Military nexus was first applied by the Court Martial Appeal Court in *R. v. MacDonald* (1984), 6 C.C.C. (3d) 551, enforced again in *R. v. Catudal* (1985), 18 C.C.C. (3d) 190, discussed further in *R. v. MacEachern* (1986), 24 C.C.C. (3d) 439, and expanded upon in *R. v. Sullivan* (1986), 65 N.R. 48. The most recent case to deal with the issue is *Ionson and the Queen*, CMAC File # 259, March 10, 1987. Only brief mention of the issue was made of military nexus by the Supreme Court of Canada in *Nolan and the Queen* (unreported), June 25, 1987.

7. Two cases have been settled by the CMAC since *MacDonald* which have involved civil offences committed off-base by Canadian military personnel stationed overseas. In *Dube and The Queen*, CMAC File # 188, Dec. 2, 1983, a serviceman was charged with assaulting a German civilian in an off-base bar in Inchenheim, West Germany. In *Gregoire and The Queen*, CMAC File # 209, Dec. 10, 1984, the accused was charged with impaired driving on a public highway in West Germany. In neither case did the CMAC discuss the existence of a military nexus.

8. Section 51 of the *National Defence Act* details precisely who is subject to the CSD and when.

of these cases involved dependents, rather than civilian employees. The importance of the extension of military law to civilians overseas is underlined by the fact that over 40 per cent of all courts martial held overseas involved civilian defendants.⁹

Apart from those directly subject to the offences contained in the CSD, many civilians in Canada are indirectly subject to other provisions of military law. All dependents of Forces personnel who live in on-base housing in Canada must respect a range of regulations and administrative policies regarding the use of base facilities and behaviour on the base (such as the prohibition against political activity on military bases). These policies can be enforced administratively by the Base Commander, ultimately through his power to evict and thereafter exclude anyone from the base. Such evictions would cause a family considerable upheaval in remote postings.¹⁰ A significant number of civilians are affected in this manner, since over 24,000 families live in military housing in Canada.¹¹ The Organizational Society of Spouses of Military Members launched a challenge in Alberta to this aspect of the application of military law in September 1985, after the Base Commander of C.F.B. Penhold prohibited them from holding meetings on the base and from circulating petitions. This group had been involved in trying to generate support on the base for such issues as day-care facilities, giving priority to wives in job hirings, and the establishment of a women's resource centre.

III. *Possible Conflicts with the Charter*

When the *Charter of Rights* is compared with the specific provisions of Canadian military law, a wide array of *prima facie* infringements of the enumerated rights can be identified. A brief review of these apparent contraventions will indicate the variety of challenges the Canadian military may face through *Charter* litigation. The discussions which follow might appear to cast Canadian military law in an unfair light, because they concentrate on the possible infringement of the *Charter* by a particular provision of military law when viewed in isolation, often without considering what mitigating factors, or balancing benefits, might also be involved. However, this approach has been deliberately chosen, and without any intent to colour the reader's view of military law.

9. The figures relating to civilians appearing before courts martial are calculated from information provided in *Hansard*, July 9, 1981, at 11368.

10. S. 245 of the *National Defence Act* also makes it an offence for any person to contravene "regulations respecting the access to, exclusion from, and safety and conduct of persons in, on or about any defence establishment, work for defence or material . . ."

11. *Toronto Star*, October 19, 1985.

Rather, the following examination of the application of the *Charter of Rights* to military law aims to reveal the variety of *possible* infringements, in order to provide a clear appreciation of the scope of the issues involved. Once the potential conflicts with the *Charter* have been reviewed, the general principles which would provide a common basis for the justification of any military infringement will then be dealt with.

The equality provisions of s. 15 of the *Charter* seem to provide the most fertile ground for challenging aspects of military law. Inequality is generated by Canadian military law in two respects: both between different groups within the armed forces, and between members of the military as a group and civilians as a group. The issues which have become the most politically controversial involve the treatment of two groups within the forces: women and homosexuals. Women have been excluded from roughly a quarter of the job categories available in the Forces, since these were designated as combat positions. As a result, women have faced tremendous disadvantages compared to men in being promoted to staff ranks, because these senior command positions usually require some career experience in the combat trades. However, the Forces are now undertaking trials which are supposed to lead to the elimination of gender-based occupational barriers. The Forces have always maintained a general policy of excluding open homosexuals from enlistment and administratively discharging any who are found to be already in the service.¹² The Task Force set up within the Forces to review the ramifications of the *Charter of Rights* defended this policy and concluded that, "the overall effect of the presence of homosexuals would be a decrease in the operational effectiveness of the Canadian Forces".¹³ Another problem posed by the policies of the Forces is their failure to recognize common-law relationships in their allocation of on-base housing and a variety of other benefits. Thus the five per cent of Forces personnel who have "alternative living arrangements" are deprived of many of the benefits extended to legally married couples.¹⁴ One apparent

12. During 1981-4 there were 154 members of the Forces dismissed for this reason under CFAO 19-20. *Minutes of Proceedings and Evidence of the Sub-committee* (of the House of Commons Standing Committee on Justice and Legal Affairs) on *Equality Rights*, Issue No. 18, June 19, 1985, at 32. Although it is not clear whether s. 15 of the *Charter* protects against discrimination on the grounds of sexual orientation, this policy has become a matter of political debate and is raised by the Armed Forces as a possible area of conflict with the *Charter*. See, e.g., the evidence of the Forces' senior legal officers before a parliamentary committee: *Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Justice and Legal Affairs*, April 25, 1985, at 14-6.

13. Canadian Forces' *Charter* Task Force, *Final Report*, Vol. 1, September 1986, Part 4, at 21.

14. *Equality Issues in Federal Law: A Discussion Paper* (Ottawa: Dept. of Justice, 1985) at 61-2.

violation of s. 15 which the military shares with many civil employers is the maintenance of a mandatory retirement age. A number of Forces' policies also discriminate between personnel on the basis of their rank. For instance, one variation in punishment that depends on the rank of an offender is found in s.125(6)(b) of the *National Defence Act*, which provides that no officer can be sentenced to detention.

The Code of Service Discipline contains several provisions that also might be challenged for creating inequality between those subject to the Code and the rest of civilian society. The inclusion of such a broad range of civil offences in the CSD, which are then tried in military tribunals, may be vulnerable since the procedures and composition of military tribunals are quite different from those of the civil courts that would try the same offences when committed by a civilian in Canada. Although two court systems may have distinct structures and procedures and yet provide equal protection of rights, it is not certain that such a justification could be used here; the discussion later in this paper reveals that the basic structure of military tribunals may fail to guarantee the independent and impartial hearings set out in s. 11(d) of the *Charter*. In addition, liability for the summary offences of the *Criminal Code* is extended under the CSD well beyond the period provided for in the *Criminal Code* itself; a person is liable for any offence under the CSD for three years, while the civil population is liable for summary offences under the *Criminal Code* only for six months after the act was committed.¹⁵ The extra-territorial extension of all federal laws also involves liabilities to which the vast bulk of the Canadian populace are not subject, especially since the limiting principle of military nexus does not apply to offences committed abroad. It should be noted that this extension may in some circumstances also be beneficial for those subject to the CSD, because they could be tried by Canadian law instead of the harsher laws of a foreign country. Ironically, even this advantage might be vulnerable to a *Charter* challenge since most Canadians are denied "the equal protection and equal benefit" of this law.

This discussion of the inequalities generated by Canadian military law reveals a range of discriminatory policies that relates to groups who are not specifically mentioned in s. 15(1) of the *Charter*. There is considerable debate within academic and judicial circles as to the degree of protection which the *Charter* affords to groups who have not been

15. The CMAC looked at this problem in *Rutherford and the Queen*, CMAC File # 173, June 24, 1983. Although the Court questioned the scope of this extended period of liability, it would not rule the provision unconstitutional in general application. The court did disallow the application of this liability in the particular circumstances of the case at hand.

specified. Thus it is not certain that membership in the Forces, marital status, sexual orientation, or rank are matters covered by the *Charter*. Although it is generally agreed that the list of grounds upon which discrimination cannot be based is not exhaustive, it is unclear what principles should operate to determine the range of other types of discrimination which would contravene the *Charter*. Nevertheless the full spectrum of discriminatory policies have been included here in order to underline the potential conflict between the *Charter of Rights* and military law.¹⁶

Several other sections of the *Charter of Rights* also appear to be infringed by Canadian military law. One of the most frequently prosecuted offences, s. 119 of the *National Defence Act*, may well infringe the rights guaranteed by s. 7 and s. 9 of the *Charter*. S. 119 provides that "Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence" punishable by up to a two-year prison sentence and dismissal with disgrace. Such an offence may contravene the *Charter* by including a penalty of incarceration for an offence which is so vague as to allow unacceptably wide discretion to prosecuting authorities.¹⁷ In addition, the prohibition against political activity on a military base contravenes the freedom of expression found in s. 2(b). The ban against a trade union for members of the Forces constitutes a *prima facie* infringement of the freedom of association in s. 2(d). The right to be secure against unreasonable searches may also be violated by the recently introduced policy of mandatory urine tests for drug use.

IV. *Military Tribunals*

Apart from specific offences under the Code of Service Discipline and general administrative policies, *prima facie* contraventions of the *Charter* also arise with respect to the tribunals which enforce military law. These infringements and violations of the *Charter* would fundamentally alter

16. Two recent decisions reveal the differing approaches taken by the courts towards discrimination based on grounds not mentioned in the *Charter*. A quite restrictive approach to non-enumerated grounds of discrimination was taken by Strayer J. in *Smith, Kline & French Laboratories Ltd. et al. v. A.G. Canada* (1985), 24 D.L.R. (4th) 321 (F.C.T.D.). However, MacDonald J. claimed that the equality provisions of the *Charter* prohibit any discrimination which offend the "underlying values of a fair and democratic society". *Kask v. Schimizu et al.* (1986), 28 D.L.R. (4th) 64 (Alta.Q.B.).

17. The Federal Court of Appeal allowed an appeal against a similar provision of the Penal Service Regulations, which makes an offence of an act "calculated to prejudice the good order and discipline" of a penitentiary. Thurlow C.J. characterized this offence as a "notoriously vague and difficult charge for anyone to defend". *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1985), 19 C.C.C. (3d) 195 at 212. The Supreme Court of Canada has granted leave to appeal this decision.

the Canadian military legal system if they could not be saved under s. 1; they thus merit close attention. Before the infringements of the *Charter* can be analysed, however, a brief description of the various tribunals which enforce military law is necessary.

Military offences are tried in a variety of tribunals, each empowered to try offenders of different ranks and hand down different ranges of punishments. These tribunals fall within two general categories — Summary Trials and Courts Martial. The vast majority of offences are dealt with by Summary Trial, where a single officer conducts a hearing involving a non-commissioned member of his own unit, ship, regiment, or command.¹⁸ The legal procedures, although not the atmosphere, in these hearings are relatively informal, and are not governed by the Military Rules of Evidence; a plea as to guilt is not heard, and evidence is not always taken under oath. Despite the procedural informalities, the punishments range up to 90 days detention (which automatically includes a reduction of rank down to Private for any member below a Warrant Officer) and a fine of up to 3 months' basic pay.¹⁹ An accused has no right to be represented by legal counsel at a Summary Trial; at the discretion of the presiding officer, however, this representation may occasionally be permitted as a privilege. An accused is otherwise always provided with an Assisting Officer to help prepare his or her case. These Assisting Officers are regular line officers usually drawn from the accused's unit, and do not have any formal legal training. The decision of a Summary Trial can only be appealed by the accused through the Forces' administrative grievance procedures. These reviews do not involve any further hearings, but are administrative decisions based on written submissions. There is no procedure for a judicial release of an offender pending the outcome of an appeal; an offender may only apply for an administrative release.

The second type of military tribunal is the Court Martial, which is a formal judicial body. A court martial differs markedly from a Summary Trial in its composition, procedures, and powers of punishment. While a Summary Trial resembles a hearing by an inquisitorial magistrate, a court martial proceeds in an adversarial manner with the defence and prosecuting counsels leading the presentation and examination of

18. There are three types of Summary Trial: Trial by Delegated Officer, Trial by Commanding Officer, and Trial by Superior Commander. Chapters 108 and 109 of the QR&Os describe in detail the offences and offenders which may be tried by each type of Summary Trial, as well as their powers of punishment.

19. A fine in excess of \$200, a reduction in rank, or detention cannot be meted out in a Summary Trial unless the accused had been given the chance to elect a Court Martial at the outset. In addition, a sentence by a Commanding Officer for detention over 30 days must be approved by a superior authority.

evidence, and the court restricts itself mainly to questions of clarification. *Strict procedural rules apply in courts martial, through the Military Rules of Evidence.* Indeed, some of the procedural rules, especially relating to prior disclosure of prosecution evidence, afford in theory at least greater opportunities for defence counsel than do civilian procedures. As with Summary Trials, there are several types of courts martial, each empowered to try different classes of offenders and impose different punishments.²⁰ Unlike Summary Trials, an accused is entitled to legal counsel in all trials by court martial. Indeed, the Forces provide paid legal officers to conduct the defence as a matter of course, although an accused can opt to pay for his own civilian counsel instead. Court martial judgements can be appealed judicially, first to the Court Martial Appeal Court, which is comprised of judges selected from the Federal Court and some provincial superior courts, and then to the Supreme Court of Canada. Offenders may also apply to the court martial that tried them or to the Court Martial Appeal Court for bail pending the outcome of the appeal process. Civilians who are subject to the CSD can only be tried by court martial.

The two types of military tribunals provide trials which are in some ways analogous to the distinction in the civil courts between summary trials and trials by indictment of criminal offences. Major offences carrying serious punishments are generally prosecuted in courts martial while a range of minor offences are dealt with by Summary Trial. This distinction is either detailed by law for serious offences or is made at the discretion of the convening authority. Military law also creates a middle ground of offences, where the accused is given the right to choose between a trial by court martial or a Summary Trial. All foreign and federal offences, the most serious of the specific military charges, and any offence which would likely result in incarceration provide an accused with the automatic right to make this choice. However, the choice is only extended if the commanding officer has decided against recommending a court martial trial, because he feels that the powers of punishment open to him with a Summary Trial are sufficient. The accused has to balance the particular benefits and risks of the two types of tribunal. The Summary Trial is quickly disposed of and is limited to punishments of 90 days in detention or less, but there is no right to legal counsel during the

20. There are four types of Court Martial: Disciplinary Court Martial, Standing Court Martial, General Court Martial, and Special General Court Martial. The offenders who may be tried, and punishments awarded, all vary with each type of Court Martial; civilians may only be tried by General Court Martial or Special General Court Martial. See Chapter 111 of the QR&Os for the details of the composition, jurisdiction and powers of punishment of the various Courts Martial.

hearing and no judicial appeal of the result. On the other hand, a court martial provides the benefits of the right to legal counsel, procedural guarantees, judicial appeals, and judicial release pending the appeal; but an accused runs the risk of a harsher sentence being imposed by a court martial. In practice, the overwhelmingly majority opt for the lesser possible punishments of a Summary Trial over the legal rights available in a court martial.

The only decision given by the Supreme Court of Canada dealing with the scope of military law and the composition of military tribunals came in 1980. At that time the Supreme Court of Canada considered the appeal of a serviceman who argued that his prosecution by court martial for an offence under the *Narcotics Control Act* violated the *Bill of Rights'* equality provisions and the right to a trial before an independent and impartial tribunal. In this case,²¹ the Court ruled that the existence of a body of military law, and specialized courts martial to enforce it, did not infringe upon the *Bill of Rights*. The majority decision, written by Mr. Justice Ritchie, held that Parliament could validly construct the CSD, because it was necessary in order to put into effect the jurisdiction given to it by s. 91(7) of the *Constitution Act, 1867* to deal with "Militia, Military and Naval Service, and Defence". The Supreme Court upheld not only the existence of separate military tribunals to try military offences, but also the particular composition of courts martial presently provided for under the *National Defence Act*. In essence, the Court declared that courts martial constituted independent and impartial tribunals, as set out in the *Bill of Rights*.

The Supreme Court of Canada's recent decision in *R. v. Valente*,²² however, raises fresh grounds for a challenge to the system of military tribunals. In this case the Supreme Court dealt with a provincial court judge's refusal to try a provincial traffic offence on the grounds that his court was not an independent tribunal, and that to proceed with the trial would violate the accused's rights found in s. 11(d) of the *Charter*. Justice Le Dain wrote the unanimous decision which outlined three elements comprising "a standard that reflects what is common to, or at least at the heart of, the various approaches to the essential conditions of judicial independence in Canada."²³ The first factor he identified was the security of tenure, which he said existed when:

21. *Supra*, note 5. For a full criticism of this decision's treatment of the application of the *Bill of Rights* to military law, see the case comment written by Marc Gold in (1982), 60 Can. Bar Rev. 137.

22. (1986), 23 C.C.C. (3d) 193 (S.C.C.).

23. *Id.*, at 208.

. . . the judge [is] removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for the purposes of s. 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.²⁴

The other two conditions he outlined were financial security and administrative independence:

The second essential condition of judicial independence for the purposes of s. 11(d) of the *Charter* is, in my opinion, what may be referred to as financial security. . . . The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence. . . . The third essential condition of judicial independence for purposes of s. 11(d) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. . . . Judicial control over . . . assignment of judges, sittings of the court and court lists — as well as related matters of allocation of court-rooms and direction of the administrative staff engaged in carrying out these functions, has generally been regarded the essential or minimal requirement for institutional or “collective” independence.²⁵

In its specification of these three conditions for judicial independence, the *Valente* decision presents a far more rigorous basis for resolving the issue of a tribunal’s independence than did *MacKay*. Both Summary Trials and courts martial appear to be very vulnerable to challenges under these tests set out in *Valente*. All types of court martial fail completely to satisfy the first condition for judicial independence specified by Le Dain in *Valente* — security of tenure. There is no permanent and independent judicial branch within the Canadian Armed Forces. Although trial-level courts martial are presided over by senior officers with full-time judicial duties, these individuals only serve three or four years as military judges before being transferred to another section of the Judge Advocate General’s branch. Furthermore, both the majority and concurring decisions in *MacKay* stressed that the existence of an independent Court Martial Appeal Court, composed of civilian judges, served to protect the rights of an accused to a trial by an independent tribunal.²⁶ However, the members of the Court Martial Appeal Court (CMAC) serve only at the pleasure of the Crown, since the relevant section of the *National Defence Act*, s. 209, which provides for their appointment is silent on their

24. *Id.*, at 212-3.

25. *Id.*, at 216, 219, 220.

26. *Supra*, note 5 at 154, 157.

removal. Thus there is no stipulation that judges sitting on the CMAC are removable only for cause. This lack of tenure in the CMAC, and in all trial-level courts martial, clearly poses a *prima facie* infringement of the *Charter*. As Le Dain J. wrote in *Valente*, a judge who serves only at pleasure “cannot reasonably be perceived as meeting the essential requirement of security of tenure for purposes of s. 11(d) of the *Charter*”.²⁷

The challenges which can be made under the *Charter* to the system of Summary Trials pose the most fundamental problems for the military system of justice. The *prima facie* contraventions of the *Charter* evidenced by Summary Trials are clear and carry considerable consequences for the enforcement of Canadian military law, since over 98 per cent of all military prosecutions are dealt with by Summary Trial. If these challenges to Summary Trials were to be upheld in the courts, the military system of justice would face a significant transformation. Thus, these issues require particular attention.

The right to trial by an impartial and independent tribunal appears to be violated by several aspects of a Summary Trial. Since the officer presiding at a Summary Trial is almost invariably someone in direct command over the accused, it must be assumed that a personal acquaintance between the officer and the accused can often exist. An accused may have faced the presiding officer on previous occasions in the course of his regular duties and received informal, or even formal, warnings from the officer about his behaviour or attitudes. In such circumstances the presiding officer may well approach the trial with the intention of “teaching Cpl. X a lesson this time”. While this may be a legitimate consideration for purely disciplinary offences, it is wholly undesirable for any trials dealing with offences of a criminal nature. An accused simply cannot be guaranteed an impartial hearing in a Summary Trial. As Le Dain, J. wrote in his unanimous decision in *Valente*:

Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and parties in a particular case. The word “impartial” . . . connotes absence of bias, actual or perceived.²⁸

Summary trials also appear to fail any test of independence set out in *Valente*. These trials are conducted by line officers as part of their regular duties. Commanding Officers of a unit conduct trials *ex officio*, while the officers in charge of the sections within that unit are usually designated as Delegated Officers by the Commanding Officer. Thus a change in posting for a senior officer may automatically include, or remove, the

27. *Supra*, note 22 at 215.

28. *Id.*, at 201.

responsibilities of conducting Summary Trials. All officers presiding over these tribunals are subject to performance evaluations for their career promotions, and, hence, a portion of their salary increases. These evaluations could include their performance in Summary Trials. Any officer is open to censure from his superiors for his handling of Summary Trials. This raises a particular concern for an officer who might take a fundamentally different view concerning the nature of Summary Trials than do his superiors. For instance, if a Base Commander were to emulate Judge Sharpe of the *Valente* case and refuse to allow any Summary Trial to be held because he viewed these tribunals to be in violation of the *Charter of Rights*, there is little doubt that he would very quickly be told by his superiors to cease his obduracy; indeed, he could open himself to the charge of failing to carry out his duties. Finally, Summary Trials are run as an integral part of the every day functioning of a military unit. Thus there is no sense of an "independent administration" of matters relating to the holding of a Summary Trial. Since there is no guaranteed security of tenure, or financial and administrative independence, Summary Trials appear to fail all three of the tests found in *Valente*.

Another major problem with Summary Trials is the denial of the right to legal counsel during their proceedings. As Article 108.03, Note B, of the QR&Os now states, "An accused person does not have a right to be represented by legal counsel at a summary trial". At a Summary Trial, an accused only has the right to the aid of an Assisting Officer, who is a regular officer with little or no legal training. The Assisting Officer ensures that the accused understands the discipline process, especially the choice to be made between Summary Trial proceedings and Courts Martial, and generally helps in the preparation for the hearing. In addition, the Assisting Officer is allowed "to assist the accused during the trial to the extent requested by the accused".²⁹ However, a new provision came into effect in October 1986 to allow the occasional appearance of legal counsel to represent an accused in a Summary Trial.³⁰ It is entirely up to the discretion of the presiding officer whether to allow a request for legal counsel, although the officer is bound by the new provisions to consider the nature and complexity of the offence, the interests of the accused, where justice lies, and military exigencies.³¹ The presiding officer may also decide to suspend the trial and recommend that the proceedings be completed in a Court Martial instead. In a case before the CMAC in

29. Art. 108.03(5) of the QR&Os.

30. Art. 108.03, Note C, of the QR&Os.

31. Art. 108.03, Note D, of the QR&Os.

1983,³² it was argued that the denial of representation by legal counsel in a Summary Trial contravened the right to counsel contained in s. 10(b) of the *Charter*. However, the CMAC unanimously agreed that this section only pertained to a right to counsel at the time of arrest or detention, and not during a trial. Nevertheless, a right to be represented by legal counsel at a trial might still be invoked through the “principles of fundamental justice” referred to in s. 7 of the *Charter*. A closely related case is presently before the Supreme Court of Canada regarding the right to counsel before the disciplinary tribunals of federal penitentiaries. The Federal Appeal Court ruled in its determination of this case that a right to counsel did lie in s. 7. Chief Justice Thurlow concluded:

It is undoubtedly of the greatest importance to a person whose life, liberty or security of the person are at stake to have the opportunity to present his case as fully and adequately as possible. The advantages of having the assistance of legal counsel for that purpose are not in doubt.³³

The Forces would likely respond that any person charged with a serious offence, including any which could involve incarceration, does in fact have a right to counsel under the present system. If such an offence is set for trial before a Summary Trial, the accused is formally given the choice of electing trial by court martial where he or she will be represented by a lawyer. This election is made a matter of deliberate consideration, because an accused must wait 24 hours before he can announce his choice. However, an offender can be punished with confinement to ship or barracks by a Summary Trial, without having been offered the choice of trial by court martial. Moreover, the benefits of a much quicker trial and the strict limitation on the powers of punishment in a Summary Trial persuade virtually all those faced with the choice to forgo the right to legal counsel. Thus the exercise of that right involves significant disincentives. The main issue to be resolved, therefore, is whether the right is effectively infringed by automatically exposing an accused to greater punishment for choosing to be represented by legal counsel.

A further challenge can be made to Summary Trials because the presiding officers usually have had only minimal, if any, legal instruction. This is of particular concern since Summary Trials deal with many charges of a criminal nature. One might wonder at the competence of regular officers to preside at trials where complex legal arguments should, in theory, be presented. Section 129 of the *National Defence Act* now provides, “All rules and principles from time to time followed in civil

32. *R. v. Robertson* (1983), 9 C.C.C. (3d) 404, (C.M.A.C.).

33. *Supra*, note 17 at 210.

courts that would render any circumstance a justification or excuse for any act or omission or a defence to any charge are applicable in any proceedings under the Code of Service Discipline". The essential problem of Summary Trial is the complete absence of legally trained personnel in the proceedings, since neither the presiding officer nor the assisting officer appointed to help the accused has any proper legal training. In such circumstances it is unclear that an accused fully enjoys the rights of defence outlined in s. 129 when the offence is prosecuted by Summary Trial. However, it should be noted that all decisions of Summary Trials are reviewed administratively as a matter of course, in order to guard against gross miscarriages of justice. But this process may provide only the barest of visible protection. The lack of legally trained presiding officers is also directly linked to the reluctance to allow legal counsel to appear at Summary Trials. The lack of any legally trained personnel in these trials might well be in contravention of s. 7 of the *Charter*, where the charges carry punishments which affect the liberty of the accused.

Another fundamental challenge to the system of military justice can be based on s. 15 of the *Charter*, since the three types of Summary Trials, and their punishments, all vary according to the rank of the accused. Anyone below the rank of warrant officer can be tried by his Commanding Officer and sentenced to maximums of three months detention, a fine of three months pay, or a stoppage of up to 30 days leave; in addition privates can be confined to ship or barracks (for up to 21 days) or be forced to do extra work and drill.³⁴ A warrant officer, or a commissioned officer below the rank of Colonel, can only be prosecuted summarily in a trial by Superior Commander, whose powers of punishment are limited to reprimands or a fine of up to 60 per cent of one month's pay. However, no officer with the rank of Lieutenant-Colonel or higher can be tried before any Summary Trial or lose the rights to legal counsel and procedural protections afforded by a court martial. Thus the military justice system discriminates among those subject to the CSD purely on the basis of their rank; the tribunal which tries an offender, the punishment which can be awarded, and the procedural safeguards necessarily enjoyed by the accused all vary according to rank. This distinction among ranks, however, has been upheld by the CMAC.³⁵

34. Officer cadets are also included in the group who can be tried by their Commanding Officer.

35. *Vaillancourt and The Queen*, CMAC File # 226, January 14, 1985.

V. *Civilian and Military Values in Conflict*

The many possible infringements of the *Charter of Rights* which have been reviewed here serve to highlight the contrasts between the particular society of the military and the general civil society, through the nature of particular offences, the tribunals which try those charged, and the rights of an accused. Indeed, most of the apparent contraventions of the *Charter* arise because the military system of justice differs so profoundly from the civil system. These differences reflect the particular sets of values fostered by the military, and by the civilian society at large. It is necessary to appreciate that military law is not just a disciplinary code administered by tribunals within the profession, such as rules governing the legal profession or even the police. Rather, military law can be characterized as a complete legal system for a military society which exists fairly autonomously within the greater civil society.³⁶

Canadian military law fosters and maintains two values, hierarchy and discipline, which pervade the Armed Forces to a degree that is quite foreign to civil society.³⁷ These two values underlie much of the off-duty, as well as on-duty, life of members of the Forces. While the application of hierarchy and discipline appears self-evident during duty hours, one must understand the ways in which hierarchy also operates in the social relations between members of the military. Members of the Forces have their social life directly affected by such means as the Mess system, which provides social facilities only within particular rank groupings. Furthermore, "fraternizing" (read romance) among the ranks is still heavily discouraged. The emphasis placed on hierarchy also affects those military personnel and their families who live on base. On large bases, military housing may be geographically organised according to rank; thus Captains and Lieutenants can live on different streets from more senior officers, while quarters for warrant officers, NCOs, and enlisted ranks may be kept distinct.

36. The notion of a military "society" may be contentious, but the discussions which follow underline the distinctness of the military community. Brig.-General (Ret'd.) David Broadbent also refers to military "society" throughout his discussion in "Military Society: Change or Decay? Part One" (1982), 11 *Canadian Defence Quarterly* (4) 24; Part Two in (1982), 12 *Canadian Defence Quarterly* (1) 28. The U.S. Supreme Court also refers to a separate, military society; see especially *Parker v. Levy* (1974), 417 U.S. 733 at 743.

37. Hierarchy and a unique discipline are far from the only particular values which distinguish military society from the general civil society. Peter Kasurak has compiled a list of values which he feels comprise a "military ethos": "The group is valued over the individual; soldiering is a vocation, a calling, rather than an occupation; honour is more highly regarded than material gain; the military community is paternalistic; symbols, ritual and myth are valued; and the military community is necessarily separate from the civilian society which it protects"; in P. Kasurak, "Civilianization and the Military Ethos: Civil-Military Relations in Canada," (1982), 25 *Can. Pub. Admin.* 108 at 124.

Military law also generates a particular kind of discipline, in its reliance on quick trials of an offender by a superior officer. In general, one may characterise military discipline in Canada as being enforced expeditiously, with fairly harsh punishments, and in tribunals which rely on the hierarchy of the Forces. The harshness and expediency of military law has been underlined in some public statements by senior officers. For instance, a former Assistant Judge Advocate General to Maritime Command, Colonel DesRouches, has said of military justice: "It may be severe but it is knowingly severe. The guys know if they get involved in certain things they are going to get thumped".³⁸ The expeditious nature of military justice was underlined by the previous Vice Chief of Defence Staff, Vice Admiral Mainguy, when he told a parliamentary committee that, "in our system justice is speedily and properly done".³⁹ And, as we have seen, the military justice system reinforces the value of hierarchy, both in its provision for different tribunals and punishments according to the rank of the offender and in the basic organisation of tribunals where superior officers try subordinates.

The hierarchy and the particular sort of discipline fostered within the military run counter to values which have gained increasing prominence in Canadian civic society. The past several decades have witnessed both a growing assertion in Canadian political culture of egalitarianism and the enactment of legal protections for a range of civil rights. The importance of equality issues in Canadian political culture is readily illustrated by the introduction of such social welfare measures as state medical insurance and legal aid, by the heightened priority of women's issues on the national political agenda, as well as by the fierce defence of universality in recent debates concerning family allowances. During this period, civil rights have come under an increasing range of legal protections, starting with the federal *Bill of Rights* in the 1960s, the provincial and federal Human Rights Acts which were passed since then, and, finally, in the constitutional entrenchment of the *Charter of Rights*.⁴⁰ The *Charter* represents a fusion of the trends towards greater equality and the protection of civil rights.

The clash between military and civilian values lies at the root of the contraventions of the *Charter* posed by the military legal system. Since the *Charter* presents the courts with powers of substantive review, the

38. *Halifax Chronicle Herald*, February 27, 1985.

39. *Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Justice and Legal Affairs*, April 25, 1985 at 21.

40. For a further discussion of the growth of legal protection of civil rights, see: Cynthia Williams, "The Changing Nature of Citizen Rights," in A. Cairns and C. Williams, *Constitutionalism, Citizenship and Society in Canada*, 1985.

military is faced with the possibility of having important pillars of military society and discipline questioned, and perhaps invalidated, by civilian judges. The military may lose control of the distinctiveness of its society because of *Charter* litigation, since civilian values may come to be imposed upon the military by the civil courts.

The acquisition and imposition of civilian values is a sensitive issue in Canadian military circles and had become a bone of contention even before the advent of the *Charter*. The potential for change to be forced upon the military by *Charter* decisions may well exacerbate the resentment of "civilianization" already felt in many quarters of the Forces. The federal government's Task Force which in 1979-80 reviewed the unification of the armed services found extensive evidence of a feeling among military personnel that civilianization, especially at the National Defence Head Quarters in Ottawa, was eroding the effectiveness of the Forces:

Some witnesses claimed that too many decisions affecting the daily lives of service personnel were being made by civilians who were not sufficiently familiar with the details of service life. . . .It was also held that this perceived civilianization had resulted in a loss of focus on the "sharp end".⁴¹

The Armed Forces set up a Review Group to study the report of the Task Force. The Review Group, headed up by Major General Vance, also stressed the problem of civilianization, although their report suggested the Task Force had missed the real nature and gravity of this threat:

The source of concern is not, as was reported by the Task Force, the large number of civilians involved in military business. Rather, it is the gradual imposition upon the Department as a whole, including military members, of civilian standards and values in managing the Forces and in assessing their needs and goals. The dilemma facing the Forces as a profession is that civilian standards and values are displacing their proven military counterparts and, in the process, are eroding the basic fiber of Canadian military society. At the risk of overstating the situation, the Forces are facing a crisis of the military ethos.⁴²

The problem, as perceived by the Review Group, is a matter of clashing values that has caused a "difficulty in reconciling operational effectiveness under war conditions with the demands of socialization in areas like human rights and freedom of information". The long-term

41. Task Force on the Review of Unification of the Canadian Forces, *Final Report* (Ottawa: Department of National Defence, 1980).

42. Review Group of the Report of the Task Force on Unification of the Canadian Forces, *Report* (Ottawa: Department of National Defence, 1980) at 18.

effects of this clash of values were viewed as posing a serious threat to the capabilities of the Forces:

The issue facing the Forces is simply put: in the absence of clearly defined and defensible military values, the Canadian Forces are steadily turning to civilian values. If this trend persists, the continued weakening of the military profession as it has been known is predictable.⁴³

Thus, the concern of a number of senior officers in the Forces is to maintain combat effectiveness in the face of the pressures of civilianization. The challenges posed by the *Charter* to long-standing military policies, especially with respect to combat roles for women and the system of Summary Trials, are viewed as serious threats to the Forces' ability to remain effective in the field. The civilian penchant for expanding civil rights is regarded by many senior officers as not readily applicable to the Forces. Indeed, when the *Charter* was first enacted the military apparently sought a general exemption to the *Charter*, but this move was resisted by the Justice Department.

Once it was clear that the military would not gain a blanket exemption from the *Charter*, however, the Forces began a comprehensive evaluation of their policies in order to determine what changes would be necessitated. In 1982 and 1983 the Forces implemented a number of changes to the departmental regulations, the QR&Os, in order to accommodate the *Charter*. These new regulations were mainly concerned with the s. 10 rights of an accused upon arrest or detention. More extensive amendments to Canadian military law were effected in 1985 when the *National Defence Act* was amended as part of the omnibus bill which brought greater conformity to the *Charter* among a wide range of federal laws. These changes included: the provision of bail pending appeals to the CMAC; guarantees of speedy release, where feasible, after someone has been taken into custody; search warrants and arrests were to be made on "reasonable grounds" rather than "suspicion"; all defences available to an accused in the civil courts were extended to military trials; military personnel were no longer subject to the double jeopardy of being liable to trial and punishment in both civil and military courts for the same offence; some measures of discrimination were removed — previously, the application of the CSD to females was amended by regulation⁴⁴; and the age barrier to members of a court martial was removed. Some of these changes were adopted directly as a result of some criticisms levelled at the military justice system by Justice

43. *Id.*, at 19.

44. The regulations which amended the application of the CSD to women were, for the most part, paternalistic measures to "protect" women from the harshness of military discipline. For example, no woman could be sentenced to detention.

McIntyre in his concurring opinion in *MacKay*. These legislative amendments were put into effect in changes made to the QR&Os in October, 1986. Provision was also made at that time for the discretion to permit legal representation in a Summary Trial. The Chief of Defence Staff declared that these amendments “represent the best balance that could be achieved between the *Charter* rights of individuals and the need to maintain the operational effectiveness of the CF”.⁴⁵ Thus, it is unlikely that more changes will be made in the near future to further accommodate the military justice system to the *Charter*.

Potentially the most far-reaching change to the Forces’ administrative policies came with the announcement in February, 1987 by the Minister of Defence, Perrin Beatty, that women would no longer be excluded, in principle, from the “combat trades”. Instead, he declared, “Acceptance for employment in specific occupations must be based on gender-free physical standards which accurately reflect the nature of employment in them”.⁴⁶ This new policy will be phased in after extensive trials have been held in order to test the efficacy of gender-free physical job requirements and the integration of women into existing combat units. This elimination of (sexual discrimination in job classifications came about after the *Charter* Task Force, set up within the Forces under the direction of Brig.-Gen. McLellan, presented its final report in the Fall of 1986; this report contained a comprehensive examination of the role of women in the Forces, which concluded with the recommendations that are now being implemented.⁴⁷ Just with this one policy change, the *Charter of Rights* will have forced a fundamental readjustment of values in the military community.

Despite the changes in policy which the Forces have initiated, there still remains, as we have seen, a wide variety of other apparent infringements of the *Charter*. A number of dilemmas arise in determining whether these infringements should be considered to be justifiable limitations on the rights in the *Charter*, or whether the military must adapt its policies even further. Two issues in the application of the *Charter of Rights* relate to its impact on morale and effectiveness. On the one hand, the Forces are concerned that major amendments to military law might weaken morale among service personnel because of the resentment towards civilianization; furthermore, there is the concern that some measures would directly erode the ability to maintain the level of

45. CFAO 1600-48-86, 19 September 1986, p.4.

46. Speech delivered by Hon. P. Beatty, Minister of National Defence, at the University of Toronto, February 5, 1987, p.12.

47. *Charter Task Force, Final Report*, September 1986, Vol. 1, Part 3.

discipline required for combat effectiveness. As Major R.G. Rousseau cautioned in his study of military discipline:

En essence, la discipline militaire à laquelle tous doivent adhérer volontairement est l'outil essentiel de l'efficacité des forces armées. A notre avis, son abandon, ou quelque relâche qu'on pourrait être tenté de lui apporter, resulterait rapidement en un désordre et une anarchie générale.⁴⁸

Thus, any substantial changes to military law should be resisted, in this view. On the other hand, morale amongst service personnel might also be threatened if it is perceived that they are being denied valuable rights which the rest of Canadian society enjoys. As a former Assistant Judge Advocate General, Lt.-Colonel J.B. Fay, wrote in criticizing the military justice system as it existed in the early 1970s:

When the serviceman has confidence in his commanders and believes in the organization, there is discipline. . . . It is from military law that the serviceman receives his most tangible indication of the relationship between himself and those who command. It is under military law that he is tried and punished. If the military law system is a just system, then it will be recognized as such by the serviceman and thus it will promote and support the discipline upon which the military organization is based.⁴⁹

If the military justice system fails to accommodate the *Charter* to the greatest extent possible, there is a danger that military discipline would be undermined in the long-term by the perception that military justice is unjust. At some point the efficiency of the Forces and the recruitment of quality personnel will be eroded by the perception that members of the military are unfairly deprived of benefits enjoyed by civil society. Indeed, a certain amount of attrition among Forces personnel is already attributable to discontent with the differences between service and civilian life.

Although there is general agreement that there must be some difference between military and civil society, and thus between the military and civilian justice systems as well, there is little agreement on the scope of that difference.

VI. *The Challenge of Judicial Review*

Serious difficulties arise in trying to settle the criteria upon which to balance an acceptable variation between military and civil norms. It is also unclear who should make this determination. Initially, the courts will play a pivotal role as challenges are made to military law through the

48. Maj. R.G. Rousseau, "La Discipline et le Sens de l'Humain" (1984), 14 *Le Revue Canadienne de Défense*, (3) 30 at 33.

49. Lt.-Colonel J.B. Fay, "Canadian Military Law: An Examination of Military Justice" (1975), 23 *Chitty's Law Journal* 120 at 123.

Charter. This situation puts both the military and the courts into a new relationship in which neither party appears comfortable. The Forces are used to being controlled by civilian authority through Cabinet and Parliament, but they are not used to being the subject of substantive judicial review. Neither are the courts used to dealing with military values. In the past, civil courts appear to have charted a course of deference to the military's own assessment of what is necessary to the effective functioning of the Forces. The courts may continue to defer to the judgment of military leadership and excuse military infringements of the *Charter*. If, however, the courts use the *Charter* to strike down important elements of military law, then Cabinet and Parliament may eventually be forced to review the place of military values in modern society. Former Defence Minister Eric Nielsen told a parliamentary committee in 1985 that the government might consider exempting certain aspects of the Forces from the *Charter*.⁵⁰ The government has apparently decided to wait until the courts have pronounced upon the military's administrative policies and legal system before deciding upon further action.

As a result, the discrepancies between military and civil society that are reflected in clashes with the *Charter* will be resolved in the first instance by the courts. The judiciary will have to resolve the conflicts between civilian and military values through a consideration of arguments raised under s. 1 of the *Charter*. This section states, "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." Thus the courts will decide whether or not the infringements of the *Charter* posed by the military are reasonable limits and demonstrably justified.

In *R. v. Oakes*⁵¹, the Supreme Court of Canada provided a framework of analysis for the consideration of whether specific contraventions of the *Charter* may be saved under s. 1. Chief Justice Dickson wrote the majority decision, which stated, "The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation";⁵² thus the burden falls squarely on the Forces to justify the contraventions of the *Charter* posed by their policies. The court held that two "central criteria" must be fulfilled by a party seeking an exemption under s. 1. The first stipulation is that the

50. *Minutes of Proceedings and Evidence of the Sub-Committee* (of the House of Commons Committee on Justice and Legal Affairs) on *Equality Rights*, June 19, 1985, at 10-11.

51. (1986), 24 C.C.C. (3d) 321 (S.C.C.).

52. *Id.*, at 346.

objective which gives rise to the limitation must be important enough to weigh against the rights guaranteed by the *Charter*. "It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important".⁵³ Since the object of any aspect of military law is to provide an organized and disciplined force to defend the nation, this criterion appears to be amply satisfied. The other criterion raised by the Chief Justice actually is a proportionality test comprised of three points:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 at 352. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".⁵⁴

The tests laid out in *Oakes* bear a striking resemblance to the questions proposed earlier by McIntyre J., in his concurring opinion in *MacKay*, for determining whether a separate body of military law strayed unacceptably from "the equal application of the law". He said that one needs to inquire:

. . . Whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious or based upon some ulterior motive or motives offensive to the provisions of the *Canadian Bill of Rights*, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. . . [D]epartures 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.⁵⁵

Dickson C.J.C., however, seems to have signalled a more stringent application of his test in *Oakes*, by stressing that a rigorously applied "preponderance of probability" should be the standard of proof used to settle the questions raised:

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where

53. *Id.*, at 348.

54. *Id.*

55. *Supra*, note 5 at 159-60.

evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. . . . A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.⁵⁶

The *Oakes* decision also placed the discussion of s. 1 in the context of its existence as a *guarantee* of the rights included in the *Charter*. The only limits to those rights that can be tolerated are those which are justifiable in a democratic society: "The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."⁵⁷ Thus, it would seem that the values against which a contravention of a *Charter* right by military law must be balanced are those of the general civil society, and not those of the military society itself. As a result it would not be open to a court to utilize the sort of logic used in *R. v. Vadeboncoeur*, where the CMAC denied bail on the grounds that it was not a part of customary military life:

When a person enlists or accepts a commission, he or she submits to all the laws, rules, conditions, traditions and customs of military service. Among those is the well-accepted tradition that no judicial procedure exists for bail either before or after conviction.⁵⁸

The general approach which the Supreme Court of Canada may adopt in future challenges to military law is unclear. The Court's composition has changed significantly since *MacKay* was decided in 1980. Only Beetz J. remains from the majority that upheld all aspects of military law. The other three of the four remaining members of the Court took quite critical approaches to military law. The present Chief Justice Dickson supported McIntyre J.'s concurring opinion which said, "The principle which should be maintained is that the rights of servicemen at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service".⁵⁹ The fourth justice who remains from the *MacKay* decision is Estey J., who supported the strong dissenting opinion written by the then Chief Justice Laskin in which trial-level courts martial were castigated for lacking sufficient independence to try offences against the ordinary criminal law.⁶⁰ The addition of five new

56. *Supra*, note 51 at 347-8.

57. *Id.*, at 346.

58. (1982), 69 C.C.C. (2d) 439 at 440 (C.M.A.C.).

59. *Supra*, note 5 at 160.

60. *Id.*, at 137.

members to the Court, however, makes it quite difficult to foresee the direction of the Court. Little indication of the Supreme Court's view of military law was revealed in the Court's recent decision in *R. v. Nolan*⁶¹, which was a non-*Charter* case dealing with the powers of military police to enforce the *Criminal Code* with respect to off-base offences committed by civilians. In limiting the general powers of military police to enforce the *Criminal Code* only with respect to those subject to the CSD, the Court relied upon the application of fairly clear statutory provisions. Unfortunately, the denial of leave to appeal in the first two *Charter* challenges, *Muise* and *Sullivan*⁶², has deprived us of the opportunity of receiving some early guidance from the Court on the relationship between military law and the *Charter of Rights*.⁶³

VII. *The Ambiguity of Military Necessity and Military Nexus*

Although individual provisions of military law depend on their own particular justifications, all arguments to be made in answer to the *Oakes* tests under s. 1 are tied to the central theme of military necessity; *i.e.*, certain deviations from the civilian norms expressed in the *Charter* are *necessary* to the basic organization and efficient functioning of the armed forces. While the concept of military necessity seems simple enough, profound differences of interpretation and scope can abound, even within the military itself. These differences are amply demonstrated in two articles written by some senior Canadian officers. Major-General D.C. Loomis and Lt.-Colonel D.T. Lightburn strongly argued that battlefield requirements must form the basis for all policy decisions. Since modern civilian society does not promote the attitudes necessary in combat, effectiveness on the battlefield can only be guaranteed when the military is set aside from the greater society in order for it to foster the sorts of values needed. They claim that the opposite has occurred in Canada, to the detriment of the fighting ability of the Forces:

What appears to have happened during the last decade in Canada is that an attempt has been made to integrate our military sub-culture into the main body of Canadian society: the sharp-toothed guard dog has been taken into the home to be made a family pet, so to speak.⁶⁴

61. *Supra*, note 6.

62. *Id.*

63. Beetz J. was joined by three of the newer members of the Court on the panels which refused leave to appeal in *Muise* (Le Dain and Lamer JJ.) and *Sullivan* (Le Dain and LaForest JJ.). *Supreme Court of Canada Bulletin*, December 23, 1985, p.1476; June 27, 1986, p.916.

64. Maj.-Gen. D.C. Loomis and Lt.-Col. D.T. Lightburn, "Taking into Account the Distinctness of the Military from the Mainstream of Society" (1980), 10 *Canadian Defence Quarterly* (2) 16 at 19.

Thus, Loomis and Lightburn would argue that military necessity would lead to the Forces being kept as distinct as possible from civil society. Brig.-General (Ret'd) David Broadbent, however, holds a rather different perspective. Although he fully agrees that for changes implemented in the armed forces "the basic test has to focus on the demands of future conflict", he does not feel that this consideration necessitates a deep division between the military and civil societies.⁶⁵ Indeed, he contends that "military forces are generally in greater danger of failing to adapt to changed circumstances than of adopting changes that imperil military effectiveness".⁶⁶ While he recognizes that the military is essentially conservative and reluctant to adopt new values, he asserts that it is vital for the Forces to recognize the changes which do arise in Canadian society and adapt to them as closely as possible:

A military force exists to safeguard the interests and values of the society it defends. Thus, if the force is to be more than a mercenary attachment, it would be foolish to assert that its value structure can be in opposition to that firmly established in the society it serves to protect. . . . [In] the longer run either there is a close affinity of values or the military ceases to be a group of citizens-in-arms and becomes estranged from its parent society.⁶⁷

Finally, Broadbent makes an observation about military necessity which is all the more germane in the light of *Vadeboncoeur*. "At root, the management of change in the affairs of armed forces requires a willingness to differentiate between 'traditional necessities' and 'necessary traditions'".⁶⁸

These two contrasting approaches to military necessity are clearly reflected in assessments of the sort of military discipline that must be maintained, and the kind of tribunals that must try offenders. For example, the previous Judge Advocate General, Brig.-General Karwandy, defended the existing structure of Summary Trials, and the lack of legal counsel in their proceedings, on the grounds of military necessity. Karwandy once told a Senate committee, "The system of summary trials is central to the whole idea of discipline within the Canadian Forces", and "the system simply could not operate if an accused were to be represented by counsel".⁶⁹ His argument relied mainly on the difficulty of providing counsel to units who are overseas on peace-keeping duties, or to ships at sea; he added that in wartime these

65. *Supra*, note 36, Part One, at 26.

66. *Id.*, Part Two, at 28.

67. *Id.*, Part One, at 25-6.

68. *Id.*, at 30.

69. *Minutes of Proceedings and Evidence if the Senate Committee on National Defence*, May 19, 1981, at 11.

difficulties would mount tremendously. However, these considerations of military necessity may have been over-emphasised. As a former Assistant Judge Advocate General, Lt.-Colonel Fay, pointed out:

Assistance of any nature can be dispatched by air at short notice. A military president of a Standing Court Martial can leave Ottawa on a Friday night and try a case in Cyprus on Monday and be back into his Ottawa office on Wednesday morning. There is no real isolation of units, men, or commanding officers.⁷⁰

Although there may still be instances where practical difficulties are insurmountable, one must wonder whether the whole system of justice must operate as if the problems of those particular situations apply constantly throughout the military. The great majority of Canadian service personnel are stationed in Canada, and yet they are all dealt with by a system of justice that is geared to meet the problems of isolated units on extended duty or in some future combat. As Brig.-General Broadbent has argued, one can “bring the normal code of military discipline into closer harmony with the civil code, but with provision, under emergency conditions, for the quicker justice and simpler process required by the circumstances of combat”.⁷¹

Unfortunately, the related notion of “military nexus” does not appear any more amenable to general agreement than military necessity. Military nexus is a pivotal concept, since the legal grounds for prosecuting a civil offence in a military tribunal depends upon the existence of a clear connection between the offence and the dictates of military discipline. At present, there is no set of guidelines with which to establish objectively whether a military nexus pertains to an individual case. The military leadership is against enacting a dividing line between offences which can or cannot be tried under military law. Vice-Admiral Mainguy testified before a parliamentary committee that, “Trying to draw a line by some sort of legislation as to what is military and what is civilian in our view is virtually impossible”.⁷² The CMAC has been equally reticent to draw up a test to aid in determining military nexus, even on a case-by-case basis. In *R. v. MacEachern*, Mr. Justice Addy deliberately refused to adopt the guidelines used by American courts to establish a military nexus. The American courts employ a 12-point test, known as the Relford factors, which gives a fairly clear method for

70. *Supra*, note 49 at 163.

71. *Supra*, note 36, Part Two, at 29.

72. *Minutes of Proceedings and Evidence of the Standing Committee of the House of Commons on Justice and Legal Affairs*, April 25, 1985, at 21.

prosecuting authorities and judges alike to determine whether a case should be tried in a military tribunal.⁷³ Nevertheless, Addy, J. opined:

I do not feel, however, that the Relford factors or anything approaching a comprehensive series of tests listing the existence of various factors should be laid down. On the contrary, each case should be considered according to its particular circumstances. Suffice it to say that the nexus must be real; although it need not be physical or tangible. In my view, a nexus capable of truly affecting the morale, the discipline or the efficiency of the military would suffice.⁷⁴

Unfortunately, as we have seen, there is considerable disagreement about what is or is not necessary to maintain the morale, discipline, or efficiency of the military. In the next case in which the CMAC had to determine the existence of a military nexus, *R. v. Sullivan*⁷⁵, a different panel of judges adopted the core of *Relford*'s rationale, although not the 12-point test itself, to settle the particular case at hand. In the most recent case to deal with the substance of military nexus, *Ionson and The Queen*⁷⁶, yet another panel of judges ignored the Relford factors completely, and settled the matter for the particular case by citing previous decisions which underlined the military's profound interest in eradicating the use of drugs among service members. It remains to be seen, however, if the CMAC will consider the Relford factors determinative in future cases. Much of the uncertainty on this point seems to arise because the *ad hoc* appointment of panels of judges to hear cases in the Court Martial Appeal Court leads to inconsistencies.

VIII. *Military Law and Civil Rights in the United States*

As the Relford factors illustrate, Canadian courts might find helpful guidance in their new relationship with the military by referring to the experience of the American Supreme Court in weighing the military law of that country against constitutional rights. The provisions of the U.S. Uniform Code of Military Justice (UCMJ) and the American Bill of

73. This test comes from the U.S. Supreme Court's decision in *Relford v. Commandant of the U.S. Disciplinary Barracks, Fort Leavenworth* (1971), 401 U.S. 355 at 365-366. See the discussion of this issue, in relation to the *MacKay* case, by Marc Gold, *supra*, note 231, at 144-6.

74. (1986), 24 C.C.C. (3d) 439 at 443 (C.M.A.C.).

75. (1986), 65 N.R. 48 (C.M.A.C.).

76. CMAC File # 259, March 10, 1987.

The Supreme Court of Canada briefly mentioned military nexus in the concluding paragraph of *Nolan*, *supra*, note 6. In that case the accused had been seen speeding on a base, was stopped just outside the gates by military police, and subsequently charged with refusing the breathalyser. The Court held that these circumstances created a sufficient military nexus for the military police to lay criminal charges against the accused, a civilian.

Rights differ in many respects from Canadian law, but a comparison may nevertheless provide some insight into which military infringements of civil rights might be considered “demonstrably justified in a free and democratic society”.⁷⁷ An example of the statutory differences between the CSD and the UCMJ is the absence in the American code of any inclusion of foreign laws. However, what is perhaps of more interest are the measures which have been studied by the U.S. Supreme Court to determine whether they are invalid for infringing upon the Bill of Rights. The scope and application of military law were progressively limited by several decisions in the 1950s and 1960s. In 1950, the Court denied the military authorities jurisdiction to try service personnel who had left the armed forces before they were charged for the offence.⁷⁸ In a series of cases in 1957 and 1960, the Court ruled that neither civilian employees overseas⁷⁹, nor civilian dependents accompanying service members overseas⁸⁰, can be prosecuted for military offences during peacetime. The case which restricted military jurisdiction the most, *O’Callaghan v. Parker*, was decided by the Warren Court in 1969. Justice Douglas wrote the majority opinion which made a number of derogatory remarks about the standards of military justice, such as “a military trial is marked by the age-old manifest destiny of retribution justice”. He added that “history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty”.⁸¹ As a result the court laid down that, although the UCMJ included all federal offences and many state crimes in its general clause, the military could only try offences with a “service connection”, *i.e.*, military nexus. This notion of a service connection was further refined in 1971 by the Burger court in the *Relford* case mentioned earlier.⁸²

Since the *Relford* decision, however, the Court has made a series of decisions that have upheld the precedence of military interests over a number of civil rights. For instance, a commander’s ability to regulate the freedom of speech by civilians on military installations⁸³, or by service personnel⁸⁴, was upheld by the Court in several cases. In a decision in

77. For a general overview of the provisions of U.S. military law see: D.A. Schlueter, *Military Criminal Justice: Practice and Procedure* (Charlottesville, 1982).

78. *Toth v. Quarles* (1950), 350 U.S. 11.

79. *Mckelroy v. Gugliardo* (1960), 361 U.S. 281; *Grasham v. Hagan* (1960), 361 U.S. 278.

80. *Kinsella v. Singleton* (1960), 361 U.S. 234; *Reid v. Covert* (1957), 354 U.S. 1.

81. (1969), 395 U.S. 258 at 265-6.

82. *Supra*, note 73.

83. *Greer v. Spock* (1976), 424 U.S. 828.

84. *Parker v. Levy* (1974), 417 U.S. 733; *Brown v. Glines* (1980), 444 U.S. 348; *Secretary of the Navy v. Huff* (1980), 444 U.S. 453.

1976,⁸⁵ the Court upheld the constitutional validity of Summary Courts Martial, despite the denial of a right to legal counsel before these bodies. In this case, the majority decision ruled that the participation of legal counsel would unnecessarily draw out the proceedings of these trials: "Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline".⁸⁶ It would be rather surprising, however, if defendants would agree with the Courts that time could normally be better spent than in defending themselves against a period of incarceration for an offence they might not have committed. In *Parker v. Levy*, the Court rejected the arguments that a general article of the UCMJ, which is similar in effect to a combination of sections 119 and 120 in the CSD, was void because of its vagueness. The broad attitudes of the Court towards the relationship between military law and the constitutionally entrenched rights were summarized by some passages in this case:

The Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise". *Toth* (1950), 350 U.S. 11 at 17. . . .The fundamental necessity for obedience, and the consequent necessity for imposition of discipline may render permissible within the military that which would be constitutionally impermissible outside it.⁸⁷

Thus, the American Supreme Court has become much more deferential to the military over the course of the 1970s.⁸⁸ The Supreme Court has built up a considerable body of case law in which the notion of military necessity has been given a very wide application in justifying infringements of civil rights by the military. Indeed, Major Stanley Levine

85. *Middendorf v. Henry* (1976), 425 U.S. 25. It should be noted that the Summary Court Martial has no direct equivalent in Canadian military law. It is most like a Summary Trial, but it is not conducted by an officer normally in command over the accused. The range of punishments are more restricted (to a maximum of one month's incarceration) than those of the Summary Trial. Article 15 of the UCMJ also provides for "non-judicial" punishments to be given out in a hearing by a commanding officer. Although a great range of offences may be disposed of in these Art. 15 tribunals, the powers of punishment are severely limited, i.e., "corrective custody" may be imposed for up to seven days.

86. *Id.*, at 45.

87. *Supra*, note 84 at 743, 758.

88. For a comprehensive review of the American Supreme Court's approach to military law during the 1970s see: S.J. Kaczynski, "From *O'Callaghan* to *Chappell*: The Burger Court and the Military" (1984), 18 U. of Richmond L. Rev. 235.

notes that many of that Court's decisions that upheld military interests over civil rights were actually in opposition to the more liberal positions taken in those cases by the Court of Military Appeals; as a result, fewer appeals are being taken from the CMA to the Supreme Court.⁸⁹

Canadian courts could rely on the logic of these American decisions if they wished to maintain the uniqueness of military society and uphold particular provisions of Canadian military law in the face of challenges under the *Charter*. Nevertheless, a comparison with American military law would also open the CSD to challenges relating to the inclusion of civilians and foreign laws within its ambit, as well as to the extended period of liability for criminal offences to which a person is subject under the Code.

IX. Conclusion

The application of the *Charter of Rights* to military law presents a great range of apparent contraventions. At the heart of any justification for these infringements lies the fundamental issue of how different the military society should be from the general civil society. Initially, at least, this issue will rest with the judiciary. If the courts do strike down elements of the military legal system, the government will face the dilemma of either exempting these measures from the *Charter* or introducing further amendments to ensure compliance. The Canadian Forces will need to present the courts with coherent arguments based on what measures are necessary in order for the military to function effectively in the defence of the nation. However, assessments of military necessity and military nexus involve not only concrete calculations, but questions of emphasis, preference, and conjecture as well. Even among the military, there are clear differences of opinion. If the courts merely defer to the assessments of the military, there is a danger that these issues, which involve the subjective balancing of civilian values against military interests, will be settled by the chain of command; thus the views of the most senior officers may prevail by virtue of their positions alone. Therefore, the courts should be encouraged to require detailed arguments from the Forces when they seek to justify a limitation of the *Charter of Rights* under s. 1. Indeed, under the test set out in *Oakes*, the direct connection between the infringing policy and military necessity must be clearly established. Furthermore, the Forces may have to explain why some other arrangement, which did not infringe the *Charter* to the same extent, would not be suitable. The justification for an infringement of the

89. Major S. Levine, "The Doctrine of Military Necessity in the Federal Courts" (1980), 79 *Military L. Rev.* 3 at 24.

Charter by the military should be made on the grounds of necessity, rather than expediency, convenience, or tradition. As Wilson J. wrote in *Singh*, “Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so”.⁹⁰ In the end other courts will have to strike a balance that represents the military’s need to maintain the structures and level of discipline necessary to wage war, while protecting the civil rights that can in fact be enjoyed by service personnel and their dependents.

90. *Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 at 469 (S.C.C.).