CHARTER IMPLICATIONS FOR MILITARY JUSTICE: A COMMENTARY ON ZILLMAN AND BLAIR

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This paper concerns the impact of the *Canadian Charter of Rights and Freedoms*[1] on Canadian Military Justice. My interest in this subject stems from my membership in the Canadian Armed Forces as a reserve armoured officer. I must add, however, that I have never practised military law, and have only rarely come in contact with this area of the law in my role as a reserve sub-unit commander. As a result, I speak strictly as a generalist and not as an authority on the subject.

Charter Impact on Military Law

The *Charter* has had a major impact on the Canadian legal system. It has provided Canadians with new and expanded rights. There has been significant jurisprudential modification and structural evolution over the past decade to bring Canadian law into conformity with the *Charter*. However, not all aspects of Canadian law have received the same degree of attention before the courts. Military law has been sitting on the sidelines for most of the past decade, probably wondering what kind of damage would be wrought when the tidal wave of *Charter* reform would finally and inevitably hit. Would the wave come ashore with hurricane-force winds destroying everything in its path, producing an immediate need for an extensive and urgent reconstruction package, or would Supreme Court of Canada decisions be like the storm that missed landfall, thereby causing only a ripple instead of a downpour?

I think it is fair to say that military lawyers and academics knew that change would come. But until the Supreme Court of Canada had a chance to examine the military justice system in light of the *Charter*, no one really knew what would be the nature and extent of the modification. Military lawyers were holding their breath and legal academics were rubbing their hands. Scholarly writing on this subject pointed to an apprehension within the military community as to the possible outcome.[2] The ultimate fear was the possible dismantling of the military

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[1]Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2]A. Heard, "*Military Law and the Charter of Rights*" [1988] Dalhousie L.J. at 514. This article sets the stage for the need for a considerable re-examination of military law in light of the *Charter*. It aptly describes the number and magnitude of apparent conflicts with the *Charter* and urges reform. It is also relevant because it deals with aspects of United States' Military Law alluded to by Dean Zillman

justice system through a *Charter*-led "civilianization" of the process. This, military lawyers suggested, would have had a very serious impact on military effectiveness and ultimately risk destroying the governance of military society itself. After ten years of *Charter* experience, it is only now that some of these issues are being dealt with by the Supreme Court of Canada.

The *Charter* and the Court-Martial

While the military justice system has two main litigation processes, court-martial and summary trial, only the former has been the subject of close scrutiny by the Supreme Court. The Supreme Court of Canada in *R.* v. *Généreux*[3] and its companion case *R.* v. *Forster*[4] examines, for the first time, the impact of the *Charter* on the court-martial process.

In these landmark decisions, the Court, to the relief of many within the military community, concluded that the military justice system, as it relates to court-martial, does not need a radical reform to permit it to comply with the *Charter*. This decision is consistent with the court's traditional approach to the *Charter* and its impact on Canadian law. The Supreme Court of Canada has made it quite clear in the past that the *Charter* was not designed to stand the Canadian legal system on its end, nor to undermine the existence of organizations such as the Canadian Armed Forces or the RCMP.[5] It was quite rightly thought, however, that organizations having internal justice systems, such as the Canadian Armed Forces and the RCMP, would put this approach to its most rigorous test.

Because of the patent conflicts which existed with the *Charter*, many military lawyers were unsure as to how the court would apply the *Charter* to the justice systems found in these organizations. They took solace from the fact that the drafters of the *Charter* recognized the importance of maintaining and enforcing the internal codes of discipline in these organizations. Explicit reference is made to the system of military tribunals in s. 11 of the *Charter*.[6] This led many military

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in his presentation during the Viscount Bennett Symposium.

[3][1992] 1 S.C.R. 259 [hereinafter *Généreux*].

[4][1992] 1 S.C.R. 339 [hereinafter *Forster*].

[5]*R.* v. *Wigglesworth* [1987] 2 S.C.R. 541.

[6]*Supra*,, note 1 at s. 11(f). This sub-section provides a recognition that military justice and its uniqueness can co-exist with the *Charter* guarantees. Section 11(f) states that any person charged with an offence has the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury when the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

jurists to conclude that the drafters envisaged an accommodation between the *Charter* and military law.

The objective of avoiding upheaval to the military justice system is emphasized clearly in the decision of the Supreme Court of Canada in *Généreux*[7]. The question for decision was whether s. 11 of the *Charter* was applicable to the General Court-Martial, or was a General Court-Martial an infringement of s. 11(d), and if so, whether the infringement was justifiable under s. 1 of the *Charter*.

In its inquiry, the court had to decide whether the General Court-Martial was an independent and impartial tribunal.[8] In other words, is the court-martial process legitimate, and can it continue to be an integral part of the military justice system in light of the *Charter*?

The Supreme Court of Canada in *Généreux* clearly and unequivocally provided for the applicability of the *Charter* to military justice and certainly to the court-martial component of the system. While the court accepted modifications which would bring the court-martial process into conformity with the *Charter*, the court did not go as far as to advocate wholesale change. The court went to great length to reassure the military that its justice system could co-exist with the civilian system, and that the military need not fear a major "civilianization" of military law. It concluded that the *Charter* applied to military law, and that its system was not inconsistent with the *Charter*. For example, the court stated that an accused's right to an impartial and independent hearing must be interpreted in light of the fact that military justice is deeply entrenched in Canadian history, and its existence supported by "compelling principles."

The Supreme Court also indicated that an accused's right to a fair trial before an independent and impartial tribunal must be interpreted within the military context. The court accepted that this right may well be different in the military situation, as compared to a civilian situation. These conclusions indicate that the court accepts the social and military justification for an alternate system of justice coupled with alternate standards. The court, however, stressed that this process must take into account the principles of the *Charter* and find ways to accommodate

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[7]This case involved a corporal in the Canadian Armed Forces who was charged with possession of narcotics for the purpose of trafficking contrary to s. 4 of the *Narcotic Control Act* and desertion under the *National Defence Act*. The accused was tried and convicted by a General Court-Martial. An appeal was heard and dismissed by the Court Martial Appeal Court. An appeal was made to the Supreme Court of Canada.

[8]*Supra*, note 1 at s. 11(d). Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

its guarantees. In *Généreux*, the Supreme Court concluded that these guarantees were not respected. The court-martial process which existed at the time of trial was deemed to offend the *Charter* in that the method of selecting the trier of fact did not guarantee independence and impartiality. The court went on to say, however, that the modifications to the court-martial procedure introduced since the trial would have complied with the *Charter* had they been in place at the time of the trial. The issue is whether these modifications amounted to "tinkering" with the system or major surgery.[9]

The court said that in order to meet the criteria of independence and impartiality imposed by the *Charter*, the military justice system must respect the principles set out in the case of *Valente* v. *the Queen*.[10] The system must ensure an impartial and independent decision maker by providing for tenure, financial security and institutional independence. While the court stressed these requirements, it accepted that they may be complied with in a manner different than one would expect in a civilian court setting. For example, with respect to tenure, the court stressed that the independent tribunal be appointed for a fixed term. Because Canadian military law employed a process whereby the presiding officer at a court-martial was appointed on a case by case basis, the court concluded that this selection process did not amount to sufficient independence.

The court accepted the recent modification, which stipulated that a hearing officer or military lawyer be appointed to act as a military judge for a two to four

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[9]Changes were introduced in January 1991 in an attempt to deal with these issues. Amendments to the Canadian Forces Queens Regulations and Orders were designed to have the court-martial process meet the criteria of the *Charter*. QR&O art. 4.09 states (1) Every officer who performs any of the following judicial duties shall be posted to a military trial judge position established within the Office of the Judge Advocate General: (a) Judge advocate of a General Court Martial or a Disciplinary Court Martial, (b) president of Standing Court Martial, (c) presiding judge of a Special General Court Martial. (2) Every posting to a position referred to in paragraph (1) shall be for a fixed term. (3) The fixed term under paragraph (2) shall normally be four years and shall not be less than two years. (4) No officer posted to a position referred to in paragraph (1) shall perform, or be directed to perform, duties other than the duties associated with that position. (5) An officer is eligible to be posted again to a position referred to in paragraph (1) on the expiration of any first or subsequent term (a) in the case of the Chief Military Trial Judge, upon the recommendation of the Judge Advocate General, and (b) in any other case, upon the recommendation of the Chief Military Trial Judge. (6) The posting of an officer to a position referred to in paragraph (1) may only be terminated prior to the expiration of its fixed term upon (a) the written request of the officer, (b) the officer's acceptance of a promotion, (c) commencement of retirement leave prior to a release under Item 4 (Voluntary) or Item 5(a) (Service Completed, Retirement Age) of the table to article 15.01 (Release of Officers and Non-commissioned Members), or (d) direction by the Minister, under paragraph (10) of article 101.16 (Conduct of Inquiry), that the officer be removed from the performance of judicial duties.

[10]*Valente* v. *The Queen*, [1985] 2 S.C.R. 673. This case set out the issue and principles relating to the independence of the judiciary. The Supreme Court of Canada discussed this issue in a case involving the Provincial Court Judiciary.

year term. Although one might consider this as an absolute minimum for the independence requirement, in the context of the *Valente* case, the court indicated that the modification would respond adequately to the *Charter* requirement in a military situation. The issue of financial security had to be complied with as well. However, within the military justice system there was no provision for financial security other than the military judge continuing to receive his or her salary, while conducting a court-martial, at a level commensurate with the rank held by that person. This provision, according to the court, was not sufficient protection to allow a military judge to arrive at a decision, which some might consider unfavourable, without fear of losing his or her appointment, rank and benefits. Some guarantee of maintenance of remuneration throughout the term of the appointment had to be established.

The court concluded that the new provision in the regulations was an acceptable form of financial security.[11] The provision prohibited the performance of an officer, while acting as a military judge, from being used to determine his or her qualifications for a later promotion. Ultimately, this new provision guaranteed the military judge full pay and benefits for the rank held during the course of his or her appointment.

With respect to institutional independence, the court stressed that administrative issues, such as court lists, assignment of cases, and appointment of judges must be independent of the executive power. In the military, the executive power is considered to be the chain of command. As a result, the appointment of a military judge, the determination of case lists, and the assignment of cases must be done outside the chain of command applicable to the accused. Therefore, appointment of a military judge by the command process is not acceptable under the *Charter*. A process similar to the civilian court system has been implemented; all such administrative matters are now determined by the military judiciary independent of all other factors. For example, the court accepted the recent modification to the *Queen's Regulations and Orders* found in article 111.22 which provides authority for the chief military judge to appoint a judge, from a pool of military judges, to preside at a court-martial. While these steps appear to be the minimum required under the *Charter*, it is clear that the court accepted these

[11]The new provisions in the Queens Regulations and Orders relating to financial security are not so much based on the financial aspect, but rather on promotional security and a fixed term of office (see QR&O 26.10 & 26.11). Remuneration in the military is based chiefly on rank coupled with seniority benefits for time in rank. The new modifications to the Queen's Regulations and Orders for the Canadian Forces provide that the performance of an officer as a military judge, as it relates to his or her judicial functions, cannot be used to determine qualification for promotion. (see QR&O 26.10 and 26.11).

modifications as sufficient to satisfy the criteria of independence and impartiality.

One has to ask whether the court will accept these provisions as the minimum or if it will require further expansion of them in the future. In an appropriate case the court might require more. Clearly, there were members of the court who would have preferred a completely independent military tribunal.[12] While this may be the ideal, those judges were not prepared to proceed that far at this point.[13]

The court followed the reasoning in the pre-*Charter* decision of the Supreme Court of Canada in *MacKay* v. *the Queen*.[14] In that case, the majority concluded that in criminal prosecutions involving military personnel, a system of justice independent of the military establishment was not necessary. Chief Justice Laskin, in his dissent, expressed the view that such an independent system was preferable. In light of the support from a number of judges for the concept of a greater degree of independence for military tribunals, it is interesting to speculate as to the nature and structure of such a tribunal. Were these judges thinking of a fully independent tribunal for a court-martial? It is suggested that a military tribunal, staffed with a cadre of professional military judges appointed from the military justice establishment as a career position, would better serve the criteria of independence and impartiality. The process could very easily parallel the civilian structure already in place but remain in the military tradition.

The appointment of the military judges would be similar to appointments made under the s. 96 federal appointment power, and reserved for those military officers who have, as military lawyers, achieved sufficient experience and professional standing to prepare them to become members of a full-time military judiciary for the remainder of their career. The military tribunal could, for example, become the military division of the Federal Court of Canada with judges appointed to that division as full members of that court. This element is not unlike certain parts of the military justice system found in the United States.

There would be many advantages to such a structure. Military tribunals would have a greater degree of independence and impartiality, thereby ending any question of apprehension of bias, which some perceive as remaining within the current system regardless of the new provisions.[15] This proposed appointment

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[12]La Forest, McLachlin & Stevenson JJ.

[13]*Supra*, note 3 at 317.

[14]*MacKay* v. *the Queen*, [1980] 2 S.C.R. 673.

[15]It is interesting to note the paradoxical approach taken with respect to the permanency of appointments for military judges in the United States and Canada. In the American system, an appointment as a military judge is far more permanent and long term than the limited or temporary

process is worth considering. At the very least, it would receive the approval of a significant number of Supreme Court judges and may be the approach the court would take at some future point. For the present, however, it appears that the court will not alter the court-martial system, but will require modification to ensure it "accommodates" the *Charter*.

It is also clear that some of these modifications need not be extensive. A major re-drafting or restructuring of the court-martial system in the short term is unlikely. Change will accrue incrementally as various courts deal with individual issues and features of the system on a case by case basis.

The *Charter* and the Summary Trial

Whether the same can be said for the summary trial component of the military justice system is far less certain. There are not, as yet, decisions which suggest how a court might decide the constitutionality of the summary trial process in light of the *Charter*. There is no question that the most common form of military trial is the summary trial process, but it is a process that is in direct conflict with the *Charter* on a number of fronts.

Because of the role and use of the military summary trial process, it is highly unlikely that mere "tinkering" would allow it to accommodate the *Charter* or to escape its impact.[16] Summary trials appear to fail the test set out in *Valente* and endorsed in *Généreux* because of the absence of any element of tenure, independence or financial security in its procedure. Historically, the process went as far as denying an accused the right to legal counsel. The current procedure gives the officer conducting the summary trial discretion to allow representation by legal counsel.[17] Some authors have strongly criticized the lack of

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approach provided for under the Canadian system. The American approach is not unlike that of a Canadian civilian federal judicial appointment while the Canadian approach is not unlike some state and local judicial appointment procedures found in the United States.

[16]For a discussion of the nature and role of the summary trial process and its obvious conflicts with the *Charter*, see Heard, *supra*, note 2.

[17]Article 108.03 *Queen's Regulations and Orders*. The October 1986 amendment made provision to allow occasional appearance of legal counsel as an option. Section 8(b) of art. 108.03 states that an accused has the right to be represented by legal counsel at a court martial but not at a summary trial, however, the assisting officer would assist the accused in preparing his case and presenting it at a summary trial; Notes (C) and (D) to art. 108.03 clarify the issue. Note (C) states: An accused person does not have a right to be represented by legal counsel at a summary trial. However, if an accused requests such representation, the officer conducting the summary trial has the discretion to (i) permit representation by legal counsel; (ii) proceed without representation by legal counsel; or (iii) apply for disposal of the charges against the accused by a court martial. Note (D) states: In the exercise of his discretion under Note (C), the officer conducting a summary trial should consider at least the

independence and impartiality that exists within the summary trial process. David Corry, in his article entitled "Military Law Under the *Charter*," provides nothing short of a total condemnation of the summary trial process when he states:

> 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.[18]

Be that as it may, there is some evidence to suggest that the Supreme Court of Canada may uphold the summary trial process with some modification. It is clearly the most common application of military law and very important to the governance of a military society. This fact may be its saving grace.

The summary trial process, from an operational point of view, is so fundamental to the military system that, quite possibly, a military society could not govern itself without it. It is the crucial structure upon which the discipline of military society is based. Historically, in the United States and Canada, courts have tended to characterize the summary trial as more of a disciplinary procedure than a criminal proceeding. The Supreme Court of Canada, when faced with the question of the constitutionality of the summary trial process, could very well use this "window" to allow it to survive. If this were to take place, modifications would be required to ensure its use as a purely disciplinary procedure and nothing more.

The United States Supreme Court followed this approach in *Middendorf* v. *Henry*[19] and upheld the summary trial on the basis that the procedure was enough of a departure from a civilian criminal proceeding to dispense with constitutional protections, notwithstanding the imposition of military penalties. It was an attempt to distance the process from a criminal proceeding which would necessarily invoke strict constitutional guarantees. This approach suggests that if the summary trial process were limited to non-criminal matters, its constitutionality and compatibility with the *Charter* would be confirmed. This proposed jurisdiction may be the only way to preserve the summary trial process.

While the viability of the summary trial process has not been dealt with by the Supreme Court of Canada, it was considered by the Court-Martial Appeal Court

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following (i) the nature of the offence; (ii) the complexity of the offence; (iii) the interest of justice; (iv) the interest of the accused; and (v) the exigencies of the service. An Officer conducting a summary trial who is considering the exercise of this discretion to permit representation by legal counsel should consult with a representative of the Judge Advocate General.

[18]D. Corry, (1987) 70 Osgoode Hall L.J. 67.

[19](1975), 425 U.S. 25.

in the case of *R.* v. *Robertson*.[20] This was a summary trial situation which involved a request pursuant to s. 10(b) of the *Charter* for the right to civilian counsel. This request had been denied by the commanding officer of the accused. The Court-Martial Appeal Court held that s. 10(b) of the *Charter* was not applicable to summary trial proceedings. In the court's opinion, the right to counsel provided by the *Charter* applied only in respect to loss of liberty through arrest or detention itself, or for certain penalties similar to sanctions imposed by a civilian court in a regular criminal matter.

Whether or not military remedies, such as open or closed custody, or confinement to base or barracks, would attract the protection of the *Charter* is very open to question. A more fundamental issue involves a consideration of the notion that summary trials would be unaffected by the *Charter* if the process was strictly considered a disciplinary tool, as opposed to one providing for the determination of criminality, or one providing for the imposition of "true penal consequences" for an offence.

This would have significant consequences for the *Code of Service Discipline*[21] because it deals with military offences and criminal law, and reaches beyond military personnel. The *Charter* may require that all offences within the *Code of Service Discipline*, punishable by incarceration of a purely penal nature, be dealt with solely through the court-martial process, as opposed to the summary trial process. The same would be true for non-military personnel who may be charged with a summary trial offence. Such offences would have to be transferred out of the realm of the summary trial and into that of the court-martial.

In *Robertson*, the court followed historical convention and characterized the summary trial as a discipline procedure rather than a criminal proceeding. It is clear, however, that this will be the starting point of the debate. Corry in his article,[22] criticizes this distinction. He argues that because military discipline has the ability to order various types of confinement, it will inevitably collide with the *Charter* protection and subject the process to *Charter* applicability.

Taken to the extreme, the argument suggests that all disciplinary matters involving any type of confinement would invoke the *Charter*. An alternative view is that the *Charter* applies only to those prohibitions that are purely criminal in nature, and necessarily involve incarceration or the imposition of true penal consequences. Whether or not the Supreme Court of Canada would uphold this latter view is not clear. There is an indication in *Généreux* that the court accepts

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[20](1983), 9 C.C.C. (3d) 404 (C.M.A.C.) [hereinafter *Robertson*].

[21]*National Defence Act*, R.S.C. 1985, c. N-5, parts IV-IX [hereinafter *Code of Service Discipline*].

[22]*Supra*, note 18.

two functions within the *Code of Service Discipline*. Chief Justice Lamer states:

> Although the *Code of Service Discipline* is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. *The code serves a public function as well by punishing specific conduct which threatens the public order and welfare* [emphasis added].[23]

One of the reasons the *Charter* applied in the *Généreux* case was the possibility of the imposition of a term of imprisonment. The *Charter* applied "by virtue of the potential imposition of true penal consequences."[24] One can conclude that if the *Code of Service Discipline* provided for a sanction involving "true penal consequences" to a purely military offence, as opposed to a purely criminal one, the *Charter* would also apply.

If this is true, the only way to insulate the summary process component of the military justice system would be to ensure that the punishment for the summary trial offence would not include a sanction amounting to "true penal consequences."[25] This reinforces the need for the transfer of all summary trial offences involving "true penal consequences" to the court-martial process in order to avoid collision with the *Charter*.

Precisely how the court will deal with the impact of the *Charter* on the summary trial is far from clear. The summary trial process may need to be realigned to ensure that it is confined to a purely disciplinary procedure, relating to military offences involving military personnel, with sanctions that do not include "true penal consequences" in the strictest sense of the term.[26] All other offences would have to be dealt with through the court-martial process, or some other mechanism to be developed for this purpose. It is clear that in order to survive, the summary trial will have to be the subject of considerable thought and reassessment.

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[23]*Supra,* note 3 at 281.

[24]*Supra* note 3 at 282.

[25]There are other distinctions that can be used as well. The article by Corry, *supra*, note 18, deals with some of these points.

[26]A literal interpretation of the term "true penal consequences" would entail a full loss of liberty through incarceration in a military prison or jail. It is not yet known whether the Supreme Court of Canada would accept something less than this definition. The military uses other forms of restricted activity as sanctions within its justice system. These can include open arrest, which is arrest and detention without confinement or closed arrest which might include restrictions on activity such as confinement to base or barracks. These forms of detention for Summary Trial Offences might be more palatable to the court as a military necessity and not considered as "true penal consequences" thereby not attracting the *Charter*.

The American Experience

As military lawyers and academics in Canada search for the answers to these questions, an examination of the American experience may prove helpful. Keep in mind that the Canadian and American military justice systems bear striking resemblances to each other, as do their civilian justice counterparts. The American system has had far more experience with the impact of constitutional rights legislation on military justice. This is true, both in terms of the length of time with which it has had to deal with this issue, as well as the number of court challenges generated by the size of its armed forces.

The military justice system of the United States was the subject of a major restructuring in 1968 to accommodate the emergence of individual rights as a result of constitutional legislation. For example, the issue of impartiality surfaced early on, and was dealt with by the new *Uniform Code of Military Justice*.[27] The comment of Zillman identifies a significant change in philosophy:

> A major change from old codes to the new *UCMJ* was the lessening of the criminal justice system as an instrument of military command ... The Uniform Code of Military Justice and its amendments in 1968 created a model that moved in the direction of greater rights to the accused's individual rights at the expense of command control.[28]

The scope and the application of American military law were progressively limited by decisions in the 1950s and 1960s. However, since 1970, the United States Supreme Court has rendered a number of decisions that have upheld the precedence of military interests over civil rights.[29] The court has recognized the role and importance of the military and the fundamental necessity of preserving the military system. It has established a body of case law in which:

> ... the notion of military necessity has been given very wide application in justifying infringements of civil rights by the military.[30]

Canadian courts could rely on the reasoning of these decisions. This approach seems to have been adopted in the *Généreux* case with respect to the court-martial process. The same approach could be applied to the summary trial process. However, the decisions have also tended to narrow the focus of American military law to military personnel.[31] The Canadian *Code of Service Discipline* goes beyond

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[27]10 U.S.C. § 801-94 (1992) [hereinafter *UCMJ*].

[28]Zillman, *supra*, note 2.

[29]Heard, *supra*, note 2 at 542.

[30]*Ibid.* at 543.

[31]Canadian Military law has not become this restricted. Civilians who violate the *Code of Service Discipline* are subject to its provisions and can be prosecuted before military tribunals.

this point and is more inclusive. Some might argue it is too broad and constitutes an incursion into mainstream Canadian society.

Conclusion

I agree with Blair when he opines that military justice and military efficiency are not contradictory.[32] As a process and as a structure, Canadian military justice is capable of being exercised in a qualitative manner. Commanders today are well-educated and sensitized to social issues, human rights and geo-politics. They are fair and try to provide the social and human support troops require in order to be an effective military force. It is no accident that the Canadian Armed Forces are regarded among the best of the world's peacekeeping forces, and are currently performing this role in many corners of the world. Regardless of the quality of the Forces, there is still the requirement for a military justice system to dispense real justice and to be seen to do so. Most military jurists seem to accept the military law structure as it is and attempt to defend it as being one that works. The Canadian Military Justice System has been slow to react to the *Charter*, and appears only to do so when prodded by one court decision or another.

There does not appear to be a great deal of leadership, creative thinking or innovation coming from military jurists in response to the implications of the *Charter* at a time when most scholarly writing on the subject suggests that the *Charter* implications are quite significant.

Is the *Généreux* case the beginning or the end of *Charter* consideration of military justice issues? What is the impact of the *Charter* on the summary trial process? Will the Canadian Military Justice System acquire a fully independent judiciary composed of professional judges, either civilian or military, as some jurists prefer.[33]

In light of *Généreux*, it is clear that the Supreme Court of Canada will strive to maintain military society and the values on which its justice system is based. However, the court may follow the lead of its American counterpart, and restrict military law to a purely military offence involving military personnel.

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[32]"Military Efficiency and Military Justice: Peaceful Co-Existence?" 42 U.N.B.L.J. 237.

[33]D. Zillman interestingly points out the United States Court of Military Appeals created by the *UCMJ* (see UCMJ Art.67, 10 U.S.C. s. 867) by statute requires the members of the Court of Military Appeals to be civilians and not uniformed members. This is support for the principle that matters criminal in nature do not have to be tried by a military officer as judge, but could be done by any civilian court. This view would probably be supported by La Forest, McLachlin, Stevenson JJ. as per their opinions in the *Généreux* case and Laskin C.J. in the *McKay* case who appear to subscribe to the notion that a violation of the *Criminal Code* no matter where effected, military base or otherwise, is an offence against the State which should be dealt with similarly in all circumstances.

It is expected that the court will force the military justice system to become more focused. It will permit a *Charter* infringement only in those circumstances where there is a clear military nexus and military necessity. The court will also insist that modifications and mechanisms be employed to make the military justice system as compatible as possible with the *Charter*. However, it is clear that the Supreme Court of Canada will not proceed to the point where the military would lose control of its society and the values upon which it is built. The court will not impose broad civilian values on the military justice system. *Généreux* has seen to that.