The Judicial Independence of Canadian Forces General Court Martials: An Analysis of the Supreme Court of Canada Judgment in R. v. Genereux

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I. Introduction

In *R. v. Genereux*, the Supreme Court of Canada reviewed the structure of a Canadian Forces General Court Martial and found it to incorporate features which reasonably called its judicial independence into question.¹ This was held to violate the rights of accused military personnel to a fair trial under sub-section 11(d) of the *Canadian Charter of Rights and Freedoms*.  

¹ *Special thanks to Ford Wong and Edward Tsai for their assistance in preparing this article.

1. *R. v. Genereux* (1992), 88 D.L.R. (4th) 110 (S.C.C.), [hereinafter *Genereux*]. The accused, a Corporal in the Canadian Forces, was charged with several narcotics-related offenses contrary to s.4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 [punishable under former s.120(1) (now s. 130(1)) of the *National Defence Act*, R.S.C. 1985, c. N-5], and one count of desertion contrary to former s.78(1) [now s.88(1)] of the *National Defence Act*. He was convicted before a Canadian Forces General Court Martial, but on appeal to the Court Martial Appeal Court argued that his right to trial by an independent tribunal had been infringed, contrary to s.11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*], s. 11(d). [for details outlining the applicability of the *Charter* to Canadian Forces General Court Martial proceedings, see *infra*, note 33]. A majority of the Supreme Court of Canada held that then-existing Canadian Forces statutory provisions governing the convening of Court Martials were inappropriate to guarantee these tribunals sufficient independence from the executive branch of government. An identical appeal was raised in *R. v. Forster* (1992), 88 D.L.R. (4th) 169 (S.C.C.) [hereinafter *Forster*], which questioned the independence of Presiding Officers at a General Court Martial. In *Forster*, the Court adopted its reasoning in *Genereux* to quash previous statutory provisions which structured an insufficient degree of judicial independence for Court Martial tribunals from the Governor-in-Council.

Recent amendments to Canadian Forces statutory provisions appear to rectify this problem of judicial independence. However, these new provisos were not before the Supreme Court of Canada in *Genereux*, and are here referred to solely for purposes of completeness. For details of the amendments, see *infra*, note 53.
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In arriving at this conclusion, the Supreme Court of Canada questioned the legitimacy of Canadian Forces provisions which structure a judicial process governing service personnel as separate and distinct members from the rest of the general population. The Court also reviewed the validity of traditional military values, which contrast with civilian attitudes of contemporary Canadian society.

Unfortunately, the Supreme Court could not agree upon the extent to which military requirements should be considered in determining the constitutional legitimacy of Court Martial tribunals. The resulting division of opinion among the Justices was indicative of the controversial nature of military judicial proceedings which are intended to provide command authorities with a means of instituting disciplinary actions. This disciplinary process follows traditional military doctrine and encourages operational efficiency by compromising constitutional principles of juristic fairness. Despite having considered the contrasting nature between disciplinary and constitutional concerns over military judicial proceedings, the Court in Genereux failed to clearly define the

2. It was further held that such a breach could not be justified under the terms of s.1 of the Charter. A majority of the Supreme Court of Canada found that the General Court Martial's then-existing structure embodied features which reasonably questioned its judicial independence. The Supreme Court added that the features were not necessary to attain either military discipline or military justice, and thus could not be found to have impaired the appellant's s.11(d) Charter rights "as little as possible" as prescribed by the s.1 proportionality test in R. v. Oakes, [1986] 1 S.C.R. 103.

3. There are three judgments in the Genereux case:
   (i) Lamer, C.J.C. (Sopinka, Gonthier, Cory, and Iacobucci J.J. concurring);
   (ii) Stevenson J. (La Forest, and McLachlin J.J. concurring in part); and
   (iii) L'Heureux-Dube J. (dissenting).

4. For example, the current theoretical framework of Canadian Forces evidentiary rules surrounding the issue of self-incrimination is consistent with the belief that a strict level of discipline must be maintained to ensure operational efficiency. Provisions under the Military Rules of Evidence [Appendix XVII of Vol. II The Queen’s Regulations and Orders for the Canadian Forces, 1968 Revision, Amendment List No. 83, (Ottawa: Queen’s Printer, 19 February 1990)] fail to provide a defence mechanism for an accused against the compulsion of making self-incriminating confessions before trial to persons of higher military rank. The universal requirement that every service person answer questions of a superior derives its statutory authority from s.73 of the NDA [supra, note 1] which states:

   73. Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

Consequently, an accused’s right under s.13 of the Charter [supra, note 1] to freedom from self-incrimination may be breached by virtue of statutory provisions governing the conduct of military personnel. In contrast to military disciplinary considerations, Canadian social principles of justice are founded on the premise that fundamental Constitutional rights and freedoms should be preserved as indicators of inherent civil liberties, as a matter of paramount importance despite the competition of other values recognized by the legal system. For a review of this argument, see Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms” (1983), 61 Can. Bar Rev. 30.
role and priorities of Canadian military tribunals. Consequently, the judicial and disciplinary roles of Canadian Forces General Court Martials remain largely undefined, which obfuscates a determination of their constitutional legitimacy within the operational context of the Canadian Forces.

The following analysis of Genereux will examine the function of military tribunals, and the requirements that these tribunals must meet to legitimately exercise their authority. The discussion will begin by reviewing the disciplinary foundation of Canadian military law, and the nature of military tribunals which contemplate the military context of the Canadian Forces in applying military law to maintain self-discipline and organizationally-imposed disciplinary standards. Following this background analysis, s.11(d) of the Charter will be examined to derive the standard of judicial independence formulated by the majority judgment of the Supreme Court of Canada in Genereux. Ultimately, a determination of this issue will require a conclusion to be drawn regarding the extent to which the Canadian Forces should differ from civilian society on the basis of its military context, and the necessary limits that Canadian society may impose on the legal rights of service personnel.

II. The Military Context of the Canadian Forces

1. The Disciplinary Foundation of Canadian Military Law

In 1868, Canada established its first codification of military law regulating matters of national defence. This statutory framework governed Canadian troops as a legally distinct and segregated entity from the civilian community. It was believed that this scheme would effectively inculcate a strict disciplinary standard within the services by inducing

5. The standard of military judicial independence in Genereux was established by applying the generic model of judicial independence outlined by Mr. Justice Le Dain in Valente v. R., see infra, note 30.
6. Section 91(7) of the Constitution Act, 1867, (U.K.), 30 & 31 Vict., c.3, grants Parliament the exclusive power to regulate military affairs in Canada. Originally, this power was manifested in three Canadian statutes: (i) The Militia Act, S.C. 1868, c.40, as later amended by S.C. 1947, c.21; (ii) The Naval Services Act, S.C. 1944-45, c. 23; and (iii) The Royal Canadian Air Force Act, R.S.C. 1940, c.15. Following World War II, Parliament reviewed all legislation applicable to the unified tri-service armed forces in Canada, and in 1950 enacted the National Defence Act, [now cited as R.S.C. 1985, c. N-4, hereinafter referred to as the NDA], which remains the primary statutory basis of the Canadian Forces. This enactment ended any direct application of U.K. military law in Canada.
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military personnel found in breach of military statutes, or subordinate regulations.7

This beginning led to the development of modern Canadian military law which incorporates a Code of Service Discipline to maintain a traditionally stringent disciplinary standard for regulating the conduct and deportment of Canadian Forces members.8 A military judicial structure was also created to exercise exclusive jurisdiction over service personnel. It is headed by the Judge Advocate General of the Canadian

7. Conventional wisdom generally upholds the importance of strict discipline as an operational requirement for any military organization. This theory is rooted in early British law with the Ordinance of Richard I (A.D. 1190), when the importance of maintaining order on the long voyage to the Holy Lands during the Crusades was proclaimed and entrenched. [Ordinance of Richard I - A.D. 1190, from Grose, History of the English Army, vol. 2, 63, in Wm. Winthrop, Military Law and Precedents (New York: Arno Press, 1979) 903.] Centuries later, the Mutiny Act (1662), 3 Charles II, c.3., restated the need to sustain combat effectiveness within the King’s Army by providing legal sanctions that severely discouraged desertion or other acts in defiance of the command hierarchy. Today, Canadian military law preserves these traditional objectives, per Canadian Forces Leader’s Handbook on Performance Guidance (Ottawa: Department of National Defence, 1984) 2-5 at para. 7. Also see: Lieutenant-Colonel (Ret’d.) J.B. Fay “Canadian Military Criminal Law: Examination of Military Justice” (1975), 23 Chitty’s L.J. 120 at 123-124.

8. The NDA [supra, note 6] provides a Code of Service Discipline, which outlines the standard of conduct and deportment for members of the Canadian Forces Regular component, as well as Militia and Reserve personnel. [Code of Service Discipline, per NDA Second Division, s.55-211 incl.] Accompanying regulations are found in The Queen’s Regulations and Orders for the Canadian Forces, 1968 Revision, Amendment List No. 83, (Ottawa: Queen’s Printer, 19 February 1990) [hereinafter referred to as QR&O’s], detailing the major policy regimes for the Canadian Forces. Although the NDA may apply to service-dependants, spies, or civilian-employees who submit to this jurisdiction, [NDA, s. 55(4)(c)], this paper will study the impact of military law on the service personnel of the Canadian Forces. For an organizational breakdown of the Canadian Forces in its contemporary form, see NDA, Pts. I and II of the First Division.
Forces, whose primary mandate is the prosecution of criminal-type charges against armed forces personnel.\textsuperscript{9}

By its nature as a professional military organization, the Canadian Forces is inherently required to maintain optimal task performance within combat units and combat-support services.\textsuperscript{10} As Chief Justice Lamer states:

To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.\textsuperscript{11}

This view reflects traditional military doctrine which regards discipline as a critical element of command and control. In turn, command efficiency promotes combat effectiveness, and largely determines the

\textsuperscript{9} For an examination of the appointment procedures, and official exercise of powers mandate governing the office of the Judge Advocate General of the Canadian Forces [hereinafter referred to as the JAG], see \textit{NDA} [\textit{supra}, note 6], s. 9 and s. 10.

A majority of military offenses prosecuted by the JAG are uniquely associated with the military context, and do not fall within the scope of civilian criminal jurisdiction. Sections 63 to 119 of the \textit{NDA} prescribe the various offenses which constitute "an act, conduct, disorder, or neglect to the prejudice of good order and discipline," which are subject to punishment prescribed under s.125 of the \textit{NDA}. [The same offenses are again listed in art. 103 of the \textit{Code of Service Discipline}, as found in ch.103 of \textit{QR&O's}, with corresponding punishments listed in art. 104(2) of the \textit{Code} and ch. 104 of \textit{QR&O's}. For an example of a military offence and corresponding punishment, consider the offence of failing to properly shine one's shoes for morning inspection under s.119(1) of the \textit{NDA}, which states as a military offence:

\begin{quote}
Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service \textit{or to less punishment}. [emphasis added]
\end{quote}

An appropriate punishment meted out to an irregular offender would typically involve [at the discretion of the commanding officer or his delegated authority, per s.121(2) of the \textit{NDA}] extra drill on the parade square the following morning. Within the civilian context, such an offence and punishment arrangement would simply be inconceivable.

\textsuperscript{10} This view was adopted by Ritchie J., speaking for the majority of the Supreme Court of Canada, in \textit{MacKay} v. \textit{R.}, [1980] 2 S.C.R. 370 [hereinafter \textit{MacKay}] at 400, where he states:

The \textit{National Defence Act} ... encompasses the rules of discipline necessary to the maintenance of morale and efficiency among troops in training. In my view these are some of the factors which make it apparent that a separate code of discipline administered within the services is an essential ingredient of service life.

\textsuperscript{11} \textit{Genereux}, \textit{supra}, note 1 at 135.
success of a military action. For this reason, the statutory entrenchment and exercise of rigid disciplinary standards arguably constitutes a legitimate application of military authority. Military tribunals are further justified in dealing with the particular disciplinary requirements of the Canadian Forces by nature of their familiarity with the structure of the armed forces. In contrast, any recourse to ordinary courts would likely yield less contextual appreciation of disciplinary mandates by civilian decision-makers lacking expertise with the Canadian military establishment. It is added that military tribunals are best able to comprehend the seriousness of a military offence within its context, which may be reflected by the availability of significant punishments to bolster deter-


Military law and its administration in armed forces has subsisted since time immemorial and it has subsisted in Canada since the first Canadian military force was organized one year after Confederation. ... [T]he ordinary law that applies to all citizens also applies to members of the armed forces but by joining the armed forces those members subject themselves to additional legal liabilities, disabilities and rights, that is to say to Canadian military law. [emphasis added]

14. Officers presiding over a military tribunal are particularly sensitive to the exigencies of military service, given their experience and training in the military environment. Consequently, Presiding Officers are uniquely well-suited to dispense a fair and just result at a military trial of an accused, in the context of enforcing disciplinary standards which are necessarily enforced by the military. For an analysis, see Lieutenant-Colonel R.A. McDonald (JAG), "The Trail of Discipline: The Historical Roots of Canadian Military Law" (1985), 1 Canadian Forces JAG J. 1; Wing Commander J.H. Hollies (JAG), "Courts Martial in the Canadian Forces" (1959-60), 2 Crim. L.Q. 67; and Brigadier W.J. Lawson, JAG "Canadian Military Law" (1951), 29 Can. Bar Rev. 3.
rence and underscore the value placed upon discipline by command authorities.15

Having reviewed the nature of Canadian Forces operational requirements and disciplinary provisions which govern the conduct of service personnel, it is further submitted that Officers and Non-Commissioned Members of the Canadian Forces should be held accountable to a different set of rules and regulations which set them apart from the mainstream of contemporary Canadian society.16 This equates to an understanding that enrolment in the Canadian Forces necessarily involves some relinquishment of personal rights and freedoms to preserve the requisite disciplinary agenda of the armed forces.17

15. To illustrate the degree of severity with which discipline is treated within the Canadian Forces, it is emphasized that whereas capital punishment has been abolished from the Canadian Criminal Code [R.S.C. 1990, c. C-46], the NDA cites thirty-four wartime offenses which may be punishable by execution. These offenses typically include:
   i. Misconduct in the Presence of the Enemy
   ii. Mutiny
   iii. Offenses Related to National Security, or Treason
   iv. Spying for the Enemy; etc.
For details, see Part V (ss. 63, 64, 65, 66, 68, 69, 70), and s. 175 NDA, [supra, note 6]. The NDA also provides for life imprisonment for twenty-five service-related offenses, including:
   i. Theft
   ii. Striking or Offering Violence to a Superior Officer
   iii. Offenses Related to Committing Violence Against an Ally
   iv. Desertion; etc.
For details, see ss. 67, 71, 72, 73, 74, 78, 88, 96, 97, 100 NDA.


17. For details on the clash between military and civilian juristic principles, see generally Brigadier-General (Ret’d) D. Broadbent, “Military Society: Change or Decay? Part I (1982), 11 Canadian Defence Quarterly (4th) 24; and “Part II” 12 Canadian Defence Quarterly (1st) 28; and P. Kasurak, “Civilization and the Military Ethos” (1982), 25 Canadian Public Administration 108. For a comparative Australian perspective, see J.D. Fine, “The Ascription of Jurisdiction to Courts-Martial” (1990), 20 Western Australian L.R. 34 at 44. For commentary on the military necessity for expeditious justice, see House of Commons Standing Committee on Justice and Legal Affairs, April 25, 1985 at 21.
2. The Nature of Canadian Forces Military Tribunals

Historically, disciplinary hearings before a military tribunal generally did not incorporate the juristic formalities of a trial. With the advent of the National Defence Act in 1950, informal disciplinary hearings were codified as Summary Trials. These tribunals were given limited statutory guidelines, which largely relied upon the prudent exercise of discretion by Presiding Officers. Formalistic Court Martial proceedings, which largely mirror civilian trials, were retained in the NDA to handle more significant service offences.

(i) The Summary Trial

The current statutory format of a Summary Trial proceeding is detailed in ch. 108 of QR&O's. A Summary Trial reviews complaints of relatively minor offenses which have allegedly been committed by a member of the Canadian Forces. The trial is presided by a single officer, who exercises wide-discretionary powers to ensure a balanced execution of judicial fairness and efficiency. Trials are short in duration, involve minimal juristic formalities, and may trigger sentences dispensing relatively minor forms of punishment.

This system grants an accused service person certain procedural rights which promulgate a sense of justice. The arrangement also provides an effective means of reminding an accused of the seriousness of poor
disciplinary conduct. It further defines the degree to which persons in command authority will enforce various rules, regulations, and responsibilities, to impose a strict disciplinary standard within his/her unit, without invoking the costs and highly significant ramifications of a full Court Martial.22

(ii) *The Court Martial*

Court Martials deal with breaches of a more serious nature, and are vested with weighty accompanying powers of punishment.23 In general, Court Martial rules and procedures mirror their civilian judicial counterparts by entertaining remarks, evidence, and examinations from the Prosecution and Defence Counsel in an adversarial setting. Given the seriousness and significance of Court Martials, these proceedings are well regulated by

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22. Statutory provisions governing Court Martials are generally found in chs. 111-114 in *QR&O's*, sup. note 8.
23. Part VIII arts.176-194 *NDA* [supra, note 6] outline the punishments which are at the disposal of the Presiding Officer(s). Art.176 specifically deals with incarceration. Further details on military detention are found at Appendix XVI *QR&O's* [supra, note 8], with chs. 5 and 6 detailing the harsh disciplinary measures employed.

The prospect of incarceration inside the Canadian Forces Prison Facility attached to Canadian Forces Base (CFB) Edmonton is an extremely compelling factor for an accused to avoid committing a serious offence, or to plead for leniency after having committed an offence. Unlike the routine at civilian jails, military prisoners are maintained on a highly regimented schedule of corporal punishment, including corrective drill and forced-labour. Consistent with this philosophy, inmates have no right to receive visitors (Appendix XVI “Regulations for Service Prisons and Detention Barracks” *NDA*, art. 4.15), an inmate is required to perform eight hours of “remedial training” per day (Sundays excepted) (Table A to art. 5.02), and an inmate who is cited for bad conduct may have food privileges denied except for fourteen ounces of bread per day and unrestricted quantities of water (arts. 6.13-No. 1 Diet, 6.14-No. 2 Diet).
statutory provisions which minimize the exercise of judicial discretion to ensure universal fairness.\(^{24}\)

(iii) Application of Military Tribunals

A military tribunal may be convened by the Minister of National Defence, or other authorities as he/she may appoint to manage this convening responsibility.\(^{25}\) Generally, a Commanding Officer is empowered to convene a military hearing at his/her discretion. Following an investiga-
tion into the charges, and a review of the evidence adduced, a Commanding Officer may decide to prosecute an accused service person.\textsuperscript{26}

Normally, military authorities prefer to handle disciplinary matters by employing traditional methods of command and control, and avoid the formality of Summary Trials.\textsuperscript{27} However, Summary Trials become a necessary procedure in instances of wrongdoing where the accused service person potentially faces more significant punishment falling short of the level necessitating the convening of a Court Martial.

This brief review of the nature of Canadian Forces military tribunals reveals that these forums are designed to expeditiously dispense with breaches of conduct or deportment committed by service personnel. Pursuant to s. 120 \textit{NDA}, a military tribunal is responsible for efficiently bringing a matter to trial, establishing whether the accused had committed the alleged offence, and imposing an appropriate penalty.\textsuperscript{28} This

26. Before charging an accused with an offence, a formal investigation is conducted by an \textbf{Investigating Officer} to determine whether there are sufficient grounds to justify the laying of a charge. [\textit{QR\&O's}, supra, note 8, art.107.03] Later, a \textbf{Charge Report} and \textbf{Charge Sheet} may be prepared when the first formal charge is laid against the accused. [See \textit{QR\&O's}, art. 106.04-09, Section 2.] A subsequent investigation may be instituted to delve further into the circumstances of the case, and further buttress the case for the prosecution.

An Investigating Officer is generally appointed from a current pool of commissioned officers or senior non-commissioned members who are serving with the accused's unit or formation. [\textit{QR\&O's}, art.107.05] An officer or senior non-commissioned member from outside the accused's unit may be ordered to conduct the investigation. However, factors of cost/efficiency reserve this provision only for cases where the accused faces serious charges before a Court Martial. In the case of Summary Trial offenses, it is common practice to detail an officer or non-commissioned member from the accused's unit to conduct the investigation. This fact may lead to a reasonable apprehension that an Investigating Officer does not begin his inquiries with an open and objective mind.

Generally, an Investigating Officer has little or no legal training, and is professionally ill-equipped to proficiently deal with the techniques of undertaking a police-styled investigation. \textit{QR\&O's} gives little guidance as to the methodology of properly conducting an investigation. Instead, \textit{QR\&O's} art. 107.05(2) gives unreasonably heavy emphasis on the Investigating Officer's ingenuity to determine and exercise proper procedures:

(2) The investigation may be made in such a manner as \textit{seems to the person conducting the investigation} to be appropriate in the circumstances. [emphasis added]

This practice also raises the spectre of bias entering into the investigation process.

27. For example, within the Land Combat-Arms (i.e. Infantry, Armour, and Artillery classifications), senior non-commissioned officers (i.e. Sergeant, Warrant Officer) routinely adopt the posture of verbally issuing corrective orders at lower ranks who marginally exceed tolerance levels of insubordination. Immediate corrections are meted out, and the generally intimidating hierarchial rank structure usually ends any immediate command difficulties. This avoids the consuming process of investigating an allegation of wrongdoing, issuing necessary paperwork, and convening a military tribunal for relatively minor offenses.

28. A synopsis of the objectives and procedures of every Canadian Forces military tribunal is set out in the First Division (Rules 1 - 21, Appendix XVII, \textit{Military Rules of Evidence, QR\&O's}).
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Statutorily endorsed practice underscores the clear intent of Parliament to structure a means for military officials to efficiently prosecute disciplinary matters, under circumstances where the stringent lifestyle of Canadian Forces personnel demands an equally demanding legal system to dispense justice in a manner deemed fair by those persons accustomed to such a regimented career. What must next be considered is the role of the Charter in establishing standards of judicial independence, in light of the disciplinary agenda of the Canadian Forces.

III. A Charter Analysis of Judicial Impartiality and Independence

In addition to reviewing Court Martial tribunals on the basis of their disciplinary disposition, the Supreme Court of Canada in Genereux considered Court Martials in light of the Canadian Charter of Rights and Freedoms, which has established caselaw parameters for judicial norms of impartiality and independence. From the perspective of administering justice, conformity with the Charter by military tribunals is integral to ensure that the Canadian military judiciary retains a high degree of respect amongst service personnel who must abide by judgments which ultimately govern their conduct and deportment.

1. Subsection 11(d) of the Charter

The landmark decision which established standards of judicial impartiality and independence was set by the Supreme Court of Canada in R. v. Valente, where the Court reviewed the legitimacy of Provincial Court (Criminal Division) benches under s. 11(d) of the Charter. After considering the tenure of provincial court judges, the method by which their salaries and pensions were fixed, and the extent to which they were dependent on the discretion of the executive branch of government for certain advantages and benefits, the Supreme Court formulated a tri-partite test to determine the impartiality and independence of a judicial tribunal within the meaning of s.11(d) of the Charter.

In his judgment, Mr. Justice Le Dain distinguished impartiality from independence by noting that these individual doctrines remain distinct, despite their close conceptual association. Impartiality was held to mean

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29. Former Assistant Judge Advocate General to Maritime Command, Colonel DesRouches, was quoted as saying, "[Military law] may be severe but it is knowingly severe. [Service personnel] know if they get involved in certain things they are going to get thumped." Halifax Chronicle Herald, February 27, 1985, cited in Andrew D. Heard, "Military Law and the Charter of Rights" (1988), 11 Dalhousie L.J. 514 at 530.

"the state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case."\footnote{31} In contrast, \textit{independence} was deemed to refer to the objective status of the judiciary in relation to other Canadian institutions, particularly to the executive branch of government.\footnote{32}

This analysis was adopted in \textit{Genereux} by the Supreme Court of Canada, which reviewed the characteristics of military tribunals to determine that members of the Canadian Forces who preside over General Court Martials fail to remain sufficiently independent from the Governor in Council to pass the scrutiny of judicial review under s.11(d) of the \textit{Charter}.\footnote{33} In its examination, the Court in \textit{Genereux} followed the analysis described by Le Dain J. in \textit{Valente} to assess the judicial independence of Presiding Officers under the following three criteria: security of tenure, financial independence, and institutional independence.

2. \textit{The Impartiality of Military Tribunals}

Subsection 11(d) of the \textit{Charter} guarantees that any person charged with an offence has the right:

\begin{quote}
"to be presumed innocent until proven guilty according to law in a fair and public hearing by an \textit{independent and impartial} tribunal."\footnote{34} [emphasis added]
\end{quote}

As Le Dain J. pointed out, the concept of impartiality under subsection 11(d) guarantees the right of an accused to have his/her matter decided before a tribunal free of judicial bias. A tribunal is charged with the responsibility of rendering a judgment based solely on the merits of the

\footnote{31. \textit{Ibid.}, at 685.}
\footnote{33. Writing for the majority of the Court in \textit{Genereux} [\textit{supra, note 1} at 125-126], Chief Justice Lamer indicated that provisions under the \textit{Charter} were applicable to the proceedings of a General Court Martial by virtue of the judgment in \textit{R. v. Wigglesworth}, [1987] \textit{2 S.C.R.} 541, \textit{hereinafter Wigglesworth}. There, Wilson J. held for the majority that a concern was subject to \textit{Charter} review if it was related to a matter of a public nature intended to promote public order and welfare within a public sphere of activity, or if it involved the imposition of true penal consequences in redress of a wrong done to society at large. \textit{Wigglesworth}, 560-561.] In adopting this reasoning, Lamer C.J.C. found that the \textit{Code of Service Discipline} provided in the \textit{NDA} went beyond merely regulating military conduct which impeached discipline and command, as it served a public function by punishing conduct of military personnel which posed a threat to public order. [\textit{QR&O}'s arts. 102.23, 103.60, 103.60, 103.62.] Thus, the Court was able to consider the question of whether the accused's constitutional right to an impartial and independent trial under s.11(d) of the \textit{Charter} had been infringed.}
\footnote{34. \textit{Supra}, note 2.}
case before it.\textsuperscript{35} In the context of a military tribunal, the Presiding Officer is required to be free of influence from outside parties, such as superiors or Commanding Officers who may hold a concerned interest in the outcome of the trial. In view of the disposition of military officers towards strict enforcement of discipline over military personnel, and the close association between the Judge Advocate and the Prosecution, the ability of a Presiding Officer to independently and objectively decide a case appears suspect.

The model of impartiality developed by Chief Justice Lamer in \textit{Genereux} is based on the definition provided by Le Dain J. in \textit{Valente}, where he described impartiality as:

\begin{quote}
\begin{itemize}
\item a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “impartial” ... connotes absence of bias, actual or perceived.\textsuperscript{36}
\end{itemize}
\end{quote}

While the Appellant in \textit{Genereux} did not directly question the impartiality of the Court Martial by which he was tried, and did not suggest that the tribunal was biased against him, the issue of impartiality deserves attention in the context of analyzing the credibility of the Canadian Forces judicial structure. By way of example, a Commanding Officer may appear to exert undue influence in the proceedings of a service prosecution. Given discretionary powers to authorize an investigation, and a perceived disposition derived from the responsibilities of command to eradicate disciplinary problems by prosecuting an accused on limited evidence, it would not be unreasonable to find that a Commanding Officer may appear to over employ his/her prosecutorial discretion and

\textsuperscript{35} Le Dain J., speaking on behalf of a unanimous Supreme Court of Canada, noted in his decision in \textit{Valente}:

Impartiality refers to a \textit{state of mind} or attitude of the tribunal in relation to the issues, and the parties in a particular case. The word “impartial” ... connotes absence of bias, actual or perceived. [emphasis added]

\textit{Valente, supra}, note 30 at 685.

The question of bias was also dealt with by the Court Martial Appeal Court in \textit{Schick v. R.}, [1987] C.M.A.C. 265. In that case, Mr. Justice Cavanagh affirmed the view (at p. 266) that:

the apprehension of bias must be a reasonable one held by reasonable and right minded persons applying themselves to the question and obtaining therein the required information. ... [T]he key operative word is reasonable and it must be based on information.

\textsuperscript{36} \textit{Valente, supra}, note 30 at 685.
fuel bias against an accused. Similarly, the apprehension of bias may further be developed through the exercise of authority by a Commanding Officer to lay charges after reviewing an Investigation Report. A Commanding Officer may also recommend the appropriate type of Court
Martial proceeding to be executed\(^9\), and file a letter to his/her superior officer detailing the past conduct of the accused with a brief account of the accused’s service history. The impact of these submissions will vary, although their prejudicial value is apparent in situations where such documents may indicate an intent to convict the accused for disciplinary purposes.\(^4\) In such instances, it is unlikely that this meaning would go unnoticed by a Presiding Officer, who would review the accused’s file before and during the course of a trial.\(^1\)

In consideration of the Canadian Forces as a highly trained military organization designed for efficient deployment under severely adverse tactical conditions, it is submitted that the harshly regimented Canadian Forces disciplinary structure is appropriate to maintain a necessarily high degree of operational readiness and proficiency.\(^2\) In her dissent, Madame Justice L’Heureux-Dube argued this view by encouraging the use of a highly contextual study to assess the military exigencies of a Canadian Forces Court Martial.\(^3\) Whereas Chief Justice Lamer placed emphasis in

39. The choice of Court Martial directly impacts on the maximum punishment that the tribunal is empowered to prescribe. A General Court Martial may impose any of the service punishments which are detailed in the specific statutory provisions of the NDA [per QR&O’s art. 111.17; ch 104 arts. 104.02 - 104.12 (inclusive)], although it may not dispense minor corrections such as a caution. [QR&O’s art.111.17] This reflects the understanding that an accused standing trial before a Court Martial cannot expect to be granted leniency, or avoid penal consequences. The powers of punishment for a Disciplinary Court Martial are limited to two years imprisonment, and it may not try a commissioned officer of or above the rank of Major [per QR&O’s art. 111.36(a)]. Notably, this tribunal also may not pass a minor punishment [QR&O’s art. 111.36(b)]. A Standing Court Martial holds the same powers of punishment as the Disciplinary Court Martial, and was designed to try cases dealing with accused service personnel stationed abroad [S.C. 1966-67 c. 96, s. 42; QR&O’s art. 113.5; s. 154 NDA]. Rarely applied is the Special General Court Martial which only tries civilians, where powers of punishment are outlined at s. 55, 125(1)(a),(b),(d) and (k) NDA; and QR&O’s art. 104.02.

40. For details, see QR&O’s arts. 109.02 - 109.05.
41. QR&O’s art. 111.50 (a),(b), and (d).
42. For an official description of this operational mandate of the Canadian Forces, see: Department of National Defence, Challenge and Commitment: 1987 White Paper on Defence, (Ottawa: Minister of Supply and Services, 1987).
43. See Genereux, supra, note 1 at 152-153. For an analysis of the contextual approach as a doctrine of interpreting the Charter (or any other constitutional provision), see Re B.C. Motor Vehicles Act, [1985] 2 S.C.R. 486; Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; R. v. Wholesale Travel Group Inc. (1991), 130 N.R. 1 (S.C.C.); Kindler v. Canada (Minister of Justice) (1991), 129 N.R. 81 (S.C.C.). This review of caselaw indicates that a constitutional right will undergo transformation in different circumstances, and consequently will adopt a different meaning consistent with each situation in which it is applied. This requires a contextual background analysis when making a determination as to the appropriateness of any given Charter application, and the importance or purpose attached to the constitutional right in accordance with public policy values which are directly related to the specific circumstances of the case.
his judgment on the judicial nature of these military tribunals, Madame Justice L’Heureux-Dube’s dissent underscored the paramount importance of accommodating military requirements imposed on service tribunals, which she described as a fair and necessary disciplinary mechanism of the Canadian Forces.

After reviewing relevant caselaw, Madame Justice L’Heureux-Dube concluded that the nature of military tribunals does not breach the right of an accused service person to an impartial trial under section 11(d) of the Charter. This opinion was supported by Mr. Justice McIntyre, in the pre-Charter decision of MacKay v. R.:

Since very early times it has been recognized in England and Western European countries which have passed their legal traditional and principles to North America that the special situation created by the presence in society of an armed military force, taken with the special need for the maintenance of efficiency and discipline in that force, has made it necessary to develop a separate body of law which has become known as military law.... [T]his body of law has included ... a judicial role for the officers

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44. It is significant to note that a Judge Advocate is statutorily required to maintain an impartial disposition prior and during a trial by Court Martial. [QR&O's, supra, note 8, art. 112.(1).] As well, every Judge Advocate swears an oath, at the start of each trial, to perform his/her duties without partiality or favour.[QR&O's arts. 112.15, 112.16.]

45. The need to consider the military context of the Canadian Forces is emphasized by s.11(f) of the Charter which provides an exception to the right to a trial by jury where an offence under military law is to be tried before a military tribunal. This illustrates that legislative intent had contemplated a separate system of military justice in drafting the provisions of the Charter, which underscores the need to account for the special circumstances that arise in relation to a military tribunal.

It is with this understanding that the judgment of Madame Justice L’Heureux-Dube is emphasized, for its argument that the facts of a case must be considered in their context at the outset of a trial. This practice would ensure that a court fully appreciates the contextual realities of a case when evaluating its merits against the Charter. In R. v. Keegstra, [1990] 3 S.C.R. 697 at 733, Chief Justice Dickson (as he then was) supported the view that this kind of contextual analysis was best left for a s.1 Charter review (seeking to allow a breach of a Charter right on the grounds that such a breach was demonstrably justified in a free and democratic society, per R. v. Oakes, [1986] 1 S.C.R. 103.) which would follow a ruling on the immediate Charter provision being weighed by a court. In disagreement, Madame Justice L’Heureux-Dube’s theory states a rational need to determine the appropriateness of a Charter provision in light of its contextual setting. The impact of such a perspective in the majority ruling in Genereux would have been for the Supreme Court to acknowledge greater understanding and empathy to the role of military tribunals, which were designed to accommodate the prementioned operational objectives of the Canadian Forces.

46. In R. and Archer v. White, [1956] S.C.R. 154, the Supreme Court of Canada conducted an analysis of the possibility of the appearance of bias arising from the involvement of a Commanding Officer in the prosecution of a service offence. The majority held that a Commanding Officer must act in the best interest of the Canadian Forces’ general mandate to ensure operational effectiveness, while balancing this objective with an exercise of fair and reasonable treatment in disciplinary actions.
of the military force concerned [which] arose from practical necessity and, in my view, must continue for the same reason.\textsuperscript{47} [emphasis added]

In his dissent in \textit{MacKay}, Chief Justice Laskin speaking for himself and Estey J. disagreed with McIntyre J. and argued that the exigencies of the Canadian Forces failed to justify the practice of holding military personnel to a higher standard of conduct than civilians in Canadian society: "I cannot conceive that there can be in the country two such disparate ways of trying offenses against the ordinary law, depending on whether the accused is a member of the armed forces or not."\textsuperscript{48} Notably, however, this perspective appears to not fully consider the rationale behind Parliament’s enactment of the \textit{National Defence Act}, which was to maintain a stringent disciplinary nexus within the armed forces as a valid federal objective pursuant to s. 91(7) of the \textit{Constitution Act, 1867}.

In his judgment accompanying \textit{Genereux}, Mr. Justice Stevenson agreed with L’Heureux-Dube J. and decided that a Canadian Forces tribunal may adjudicate from the disposition of enforcing strict disciplinary standards that are institutionalized in the Canadian Forces by operation of its military nature. This view is also shared by a number of authors writing on the demands of military law, which is structured to accommodate the stringent disciplinary curriculum of the Canadian Forces.\textsuperscript{49}

In conclusion, a contextual analysis of military tribunals may determine that any real or apparent judicial bias is justifiably valid, in consideration of the military nature and special disciplinary requirements which arise from the operation of the Canadian Forces. This kind of legitimacy requires a number of procedural safeguards to ensure that a minimum standard is set for the protection of an accused’s rights. Such mechanisms would serve to secure an apprehension of legitimacy and fairness within the Canadian Forces, and the general civilian public. While a direct analysis of the specific nature of procedural safeguards is beyond the scope of this paper, it is parenthetically suggested that procedures observed at Summary Trial exceed the parameters of any legitimate application of military justice, even with a considerable amount of weight attached to the contextual considerations of discipline and efficiency which remain paramount factors in any military institution. Procedures employed at Court Martials appear more consistent with the letter and spirit of fairness provided in s.11(d) of the \textit{Charter}.

\textsuperscript{47} Supra, note 10 at 402-404.
\textsuperscript{48} Ibid., at 381-382.
\textsuperscript{49} See Fay, supra, note 7 at 123; Heard, supra, note 29 at 514; and generally David J. Corry, "Military Law Under the Charter" (1986), 24 Osgoode Hall L. Rev. 67.
3. Independence of the General Court Martial

The unanimous judgment of Le Dain J. in Valente stipulated three criteria which must be fulfilled to establish that an adjudicatory bench constitutes a validly independent tribunal under s. 11(d) of the Charter. This analysis was adopted by all three Supreme Court judgments in Genereux which evaluated the independence of a General Court Martial. The first two criteria, security of tenure and financial independence, are evaluated according to a Presiding Officer’s personal connection with the military executive body of Canadian government (ie. the Department of National Defence). The last criterion, institutional independence, refers to the overall independence of Canadian Forces military tribunals from the executive branch of Canadian government, namely the Department of National Defence.

(i) Security of Tenure

Le Dain J. identified security of tenure as existing when:

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

50. In her dissent, Justice L’Heureux-Dube strongly opposed the application of Mr. Justice Le Dain’s three criteria from Valente to the factual scenario in Genereux. Claiming that the criteria could not find application to military tribunals which remain categorically distinct from other tribunals by nature of their unique requirements and purpose, L’Heureux-Dube J. quoted from Le Dain J. as follows:

The legislative and constitutional provisions in Canadian governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of s. 11(d) must bear some reasonable relationship to that variety. [emphasis added]

[Valente, supra, note 30 at 692-693.]

L’Heureux-Dube J. recognized that the process of evaluating the judicial independence of a Provincial Court Judge (as in Valente), is significantly different from the evaluation of a General Court Martial commissioned under the authority of the NDA. This difference arises due to the substantial contextual differences which exist between the two institutions. In her opinion, an application of Le Dain’s principles of judicial independence may not offer a rational standard for evaluating the constitutional legitimacy of certain tribunals. Notably, despite having recognized this fact, Madame Justice L’Heureux-Dube did provide analysis based on the principles detailed in Valente, in order for her dissent to contrast the decisions of Lamer C.J.C. and Stevenson J. on their merits.
Judicial Independence

against interference by the executive or other appointing authority in a
discretionary or arbitrary manner.\(^{51}\)

In his majority judgment in *Genereux*, Lamer C.J.C. held that a Judge
Advocate sitting on the bench at a General Court Martial (as where the
Appellant was tried) fails to hold sufficient security of tenure to satisfy
this requirement.\(^{52}\) It is important to note that all types of Court Martial
and Summary Trials temporarily employ Presiding Officers to oversee
the proceedings. Consequently, all forms of military tribunals completely
fail to satisfy the requirement for security of tenure under conditions
where a Judge Advocate’s ability to retain his status as a Presiding Officer
is contingent upon a series of temporary appointments.

At the time when this case was being considered by the courts, a Judge
Advocate at a General Court Martial was appointed from the division of
Chief Judge Advocates of the office of the Judge Advocate General. The
Judge Advocate General was empowered with the authority to appoint a
Judge Advocate to a General Court Martial, generally on the recommen-
dation of the Chief Judge Advocate.\(^{53}\) Lamer C.J.C. found that this
appointment procedure did not independently guarantee sufficient secu-
ritv of tenure for a Judge Advocate, as the Judge Advocate General forms

\(^{51}\) Valente, *supra*, note 30 at 698.

This criteria conforms with the generally perceived uniform standards of judicial indepen-
dence found under ss. 99(1) and (2) of the *Constitution Act, 1867* which states:

99(1) Subject to subsection two of this section, the Judges of the Superior Courts shall
hold office during good behaviour, but shall be removable by the Governor General on
Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into
force of this section, shall cease to hold office upon attaining the age of seventy-five
years, or upon the coming into force of this section if at that time he has already attained
that age.

For comparative analysis, see s.4 and 5(4) of the *Provincial Courts Act*, R.S.O. 1980, c. 398,
and *Courts of Justice Act*, 1984, 1984 (Ont.), c.11.

52. *Genereux, supra*, note 1 at 142.

53. For an analysis, see Colonel H.G. Oliver “Canadian Military Law” (1975), 23 Chitty’s L.J.
109 at 116. Recent amendments to QR&O’s which came into force on January 22, 1991,
subsequent to the trial in *Genereux*, correct the problems related to a judge advocate’s security
of tenure. Per s.4.09 QR&O’s, any officer who may act as judge advocate at a General Court
Martial is first appointed as a military trial judge for a period of two to four years. Under
s.111.22 QR&O’s, the Chief Military Trial Judge, and not the Judge Advocate General, has
formal authority to appoint a judge advocate at a General Court Martial. These provisions were
not before the Supreme Court of Canada in *Genereux*, and are included here for purposes of
completeness.
part of the executive from which he/she is held responsible for supervising all Canadian Forces prosecutions.54

In addition to this finding, Chief Justice Lamer referred in Genereux to the fact that at the time of the Appellant’s trial, a Judge Advocate was appointed to the bench periodically whenever a trial arose in the course of events. It was therefore conceivable that a Judge Advocate’s ability to return to the bench hinged on the kinds of opinion rendered at trial, or the conviction record attained in the course of his/her performance as a Presiding Officer. In the opinion of Lamer C.J.C., this process would lead a reasonable person to entertain an apprehension that a Judge Advocate had been chosen for a particular trial because he/she had proven to not disappoint the executive’s interests in convicting an accused. As a result, Lamer C.J.C. held that the criterion of security of tenure was again infringed:

Nothing ... suggest[s] that judge advocates in fact are influenced by career concerns in the discharge of their adjudicative duties. ... [However] any system of military tribunals which does not banish such apprehensions will be defective in terms of s.11(d). At the very least, therefore, the essential condition of security of tenure, in this context, requires security from interference by the executive for a fixed period of time. An officer’s position as military judge should not, during a certain period of time, depend on the discretion of the executive.55 [emphasis added]

Stevenson J. agreed with Chief Justice Lamer, adding that providing security of tenure for a specific Court Martial is insufficient to satisfy the requirement for security of tenure under s.11(d) of the Charter.56 Lamer C.J.C. pursued this view of tenure for the Court Martial system, stressing that security of judicial tenure must extend over the course of time in which a Judge Advocate would be eligible to be called to the military bench.57 This belief recognizes that Judge Advocates operate on an ad hoc basis, and must feel confident in expressing their opinions without fearing consequences which would hinder their ability to preside in the future, or otherwise negatively impact their career. In his judgment, Mr. Justice Stevenson took this argument to its logical extension by realistically stating that an apprehension of undue influence from the executive

54. To underscore this alliance with the executive, it is noted that the Judge Advocate General reports on the administration of military justice directly to the Minister of National Defence, and on other matters of military law to the Deputy Minister of National Defence. [s. 9 NDA, supra, note 6.]
55. Genereux, supra, note 1 at 142-143. For a discussion on the appropriate length of time for a Judge Advocate to enjoy tenure, see R. v. Ingebrigtsen (1990), 61 C.C.C.(3d) 541 at 555-556. 56. Genereux, supra, note 1 at 167. For details, see Valente, supra, note 30 at Part IV of the judgment of Le Dain J. p. 694 - 704.
57. Genereux, supra, note 1 at 142-144.
may inevitably arise when a Judge Advocate seeks reappointment or other career advancement within the office of the Judge Advocate General, or the legal branch of the Canadian Forces. Under these conditions, it would necessarily follow that the best interests of the Judge Advocate would not insignificantly hinge upon his/her performance as a military judge based upon evaluation by the executive (ie. Judge Advocate General), who would largely determine any future career opportunity.\textsuperscript{58}

L'Heureux-Dube J. addressed this issue in her dissent, by indicating that the ad hoc nature of convening a Court Martial will legitimize the granting of security of tenure on a “specific adjudicative task” basis as contemplated by Le Dain J. in \textit{Valente}.\textsuperscript{59} Since the \textit{NDA} clearly provides for interim CourtMartials to be held whenever a matter arises, and the \textit{Constitution Act, 1867} empowers the executive to appoint the judiciary, L'Heureux-Dube J. found that Canadian legislation recognizes the legitimate entity of Court Martials as individual occurrences which are to be singularly convened in the course of events. This excludes an interpretation that Court Martials are part of a “recurring affair”, or a continuing institution in their own right. Consequently, she concluded that ad hoc Court Martials constitute an anomaly to the general pattern of civilian tribunal operations. Therefore, L'Heureux-Dube J. decided that the executive was free to grant Judge Advocates specific tenure which expired when a military tribunal adjourned.\textsuperscript{60}

In her dissent, Madame Justice L'Heureux-Dube also indicated that procedural safeguards existed to guarantee tenure of a Judge Advocate.\textsuperscript{61}

In her opinion, this provided:

\begin{quote}
\textit{QR&O's [supra, note 8] art. 112.64(2) states:}

(2) If a judge advocate has been appointed and is for any cause unable to attend, the president shall adjourn the court and report the circumstances to the convening authority. The convening authority may authorize the court to stand adjourned until the judge advocate is able to attend. If the judge advocate is unable to attend or if the convening authority considers delay to be inexpedient, the convening authority may:

(a) if the court is a General Court Martial

\begin{itemize}
\item[(i)] request the Judge Advocate General to appoint another judge advocate and, after the Judge Advocate General has appointed the other judge advocate, direct the trial to proceed, or
\item[(ii)] dissolve the court
\end{itemize}

Thus, once appointed, a Judge Advocate is effectively granted complete security of tenure, absent grounds for removal for cause. For analysis, see \textit{Schick v. R.} (1987), 4 C.M.A.R. 540 at 548-551.
\end{quote}
sufficient insulation to the judge advocate to perform his or her duty because it means that, to interfere, the convening authority or other member of the executive would have to act unlawfully.\textsuperscript{62}

A contextually sensitive analysis of the procedure for appointing Judge Advocates favours the view adopted by Madame Justice L’Heureux-Dube, which responds to the need for an efficient means of convening Court Martials to grapple with the inconsistent and unpredictable caseload of the Canadian Forces. In his judgment, Stevenson J. suggested that the only way to ideally achieve security of judicial tenure would be to institute a professional military judiciary.\textsuperscript{63} However, he immediately acknowledged that cost factors would fail to justify such a mechanism for the Canadian Forces, which exists as a relatively under-resourced institution with limited capacity. Thus, it is submitted that criticism of the appointment process of Judge Advocates, in the face of clear legislative intent by Parliament to institute such proceedings, is unrealistic and unwarranted.\textsuperscript{64}

Although the Supreme Court discussed the attributes of appointing Judge Advocates in great detail, mention of the appointment of the other members of the Canadian Forces who compose a Court Martial tribunal was omitted.\textsuperscript{65} In this regard, it is submitted that the practice of appointing non-legal officers to preside over a Court Martial does not invoke a conflict based on tenure, for the reasons of legislative contemplation offered by L’Heureux-Dube J. in her dissent. The possibility for bias may be greater when authorizing senior officers to determine the outcome of a disciplinary proceeding, in light of their engrained disposition towards a harsh disciplinary response to service offenses. However, the likelihood of such participation in a Court Martial affecting their careers is marginal, given their limited opportunity to sit on a tribunal and the relatively minor consequence that such activity has in relation to the wide scope of their

\textsuperscript{62} Genereux, supra, note 1 at 161.
\textsuperscript{63} Ibid. at 168.
\textsuperscript{64} Amendments to QR&O’s, of January 22, 1991, reinforce this view by securing the tenure of Judge Advocates for a statutory period of two to four years. [QR&O’s, supra, note 8, art. 4.09] As well, provisions have shifted the authority for appointing Judge Advocates from the Judge Advocate General to the Chief Judge Advocate, which marginalizes any link between the executive and the military judiciary. [QR&O’s art. 111.22].
\textsuperscript{65} The composition of a Court Martial varies, depending on the type of Court Martial being convened. A Court Martial generally consists of one JAG Presiding Officer who imparts knowledge of substantive and procedural law. The rest of the bench is normally composed of non-legal senior officers, who are tasked to the bench on an ad hoc basis with the duty of determining questions of fact. For details, see supra, note 24.
normal duties and responsibilities. With this understanding, it is submit-
ted that Presiding Officers at Court Martials enjoy a sufficiently degree
of secured tenure that assures a level of impartiality under s.11(d) of the
Charter and operates to fairly rebut any reasonable apprehension of
undue executive influence.

(ii) Financial Security

The second condition of the Valente test for judicial independence under
s.11(d) of the Charter is financial security, which indicates 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.” This proviso seeks to ensure that a right to
salary or pension is not contingent upon grace or favour towards or from
the executive.

Under s.35 NDA, Presiding Officers are not compensated for their
participation on military tribunals, over and above their regular salaries
and allowances which are prescribed by Treasury Board rates. This
practice significantly reduces the applicability of the financial security
criterion devised by Le Dain J. in Valente to evaluate judicial indepen-
dence from the executive branch of Canadian government. It also
reinforces the primary contention of the dissent in Genereux by
L’Heureux-Dube J., by demonstrating that the Valente test is inapplicable
to cases dealing with the independence of military tribunals in light of the
uniquely anomalous nature of the Canadian Forces.

66. Over 98 per cent of all military prosecutions are dealt with by Summary Trial, which
significantly reduces the number of Court Martials to be convened. [see A.D. Heard, supra,
note 29.] This trend is accounted for by the fact that a Court Martial is granted greater powers
of punishment than that of a Presiding Officer at Summary Trial, and has a general disposition
to more strongly punish an offender of military law in light of the severity surrounding such
a disciplinary occasion. [QR&O’s, art. 108.03(8) Note 2.] Thus, an accused is unlikely to opt
for a Court Martial, for fear of invoking a harsher punishment and alienating him/herself of the
opportunity to appeal for leniency before a relatively informal and sympathetic Summary Trial.
67. Valente, supra, note 30 at 704. This theory of financial security follows s. 100 of the
Constitution Act, 1867 which holds:

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District,
and County Courts ... and of the Admiralty Courts in Cases where the Judges thereof
are for the Time being paid by Salary, shall be fixed and provided by the Parliament of
Canada.

Support is similarly found with s.34(1) of the Provincial Courts Act, and s.87(1) of the Courts
of Justice Act, 1984 (in tandem with s.2 of Regulation 811 of the Revised Regulations of
Ontario, and with recommendations from the Ontario Provincial Courts Committee) which
secures a judge’s salary for the duration he/she sits on the bench. [Supra, note 51].
Chief Justice Lamer argued in *Genereux* that a Presiding Officer's annual performance evaluation report filed by a superior officer could "potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a court martial." On this basis, he found that the process of career promotion to a higher rank based on performance evaluation reports gave the executive a means to potentially reward or punish a Presiding Officer for his judgments or opinions expressed at a Court Martial, contrary to s.11(d) of the *Charter*. Stevenson J. shared this opinion, noting that "there was nothing to prevent those who made decisions in relation to salaries and promotions from taking into consideration the outcome of a court martial." Unfortunately, this reasoning fails to account for the fact that a Presiding Officer’s salary is significantly determined by a multiplicity of factors beyond one’s rank, such as time served, location of service-posting, and other considerations. Thus, command discretion to promote an officer is sufficiently broad-based to avoid an apprehension of judicial interference by the executive. Le Dain J. addressed this issue in *Valente*, when he discounted the effect of the executive holding marginal control over discretionary benefits or allowances:

Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government ... I do not think that [this] feature should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s.11(d) of the *Charter*. ... The essential point, in my opinion, is that the right to salary of a [judge] is established by law, that there is no way in which the executive could interfere with that right in a manner to affect the independence of the individual judge.

Given this reasoning, it is difficult to establish that a person would hold a reasonable apprehension that the executive could effectively employ this device and violate the independence of a Presiding Officer in breach of s.11(d) of the *Charter*.

68. *Genereux*, supra, note 1 at 144.
69. The salary of a member of the Canadian Forces is determined in part by the rank he/she holds, pursuant to *QR&O's* [supra, note 8] art. 204.218. In *Genereux* [supra, note 1 at 145], Lamer C.J.C. added that his remarks were not meant to suggest that the executive actively sought to influence the outcome of a Court Martial, but rather were intended to illustrate the grounds upon which an apprehension of undue influence could reasonably be drawn to impeach the independence of a military tribunal under s.11(d) of the *Charter*.
70. *Genereux*, supra, note 1 at 168-169.
71. For details, see *Canadian Forces Administrative Orders*, Volume III (Financial), NDA [supra, note 6] ch. 203; 204; 205.
73. *Valente*, supra, note 30 at 706.
(iii) **Institutional Independence**

The third condition advocated by Le Dain J. in *Valente* was institutional independence, which he described as a requirement that a tribunal hold a degree of control over administrative matters "bearing directly on the exercise of its judicial function."\(^74\) This involved such things as judicial control over the assignment of judges, sittings of the court and court lists, "as well as matters of allocation of court-rooms and direction of the administrative staff engaged in carrying out these functions [which have] generally been regarded as the essential or minimal requirement for institutional or collective independence."\(^75\)

Lamer C.J.C. made a number of observations in his majority judgment in *Genereux* which support the theory that Presiding Officers lack a sufficient degree of institutional independence. In particular, he noted that the entire process of prosecuting a charge against an accused appeared to have too close an association with the executive, which allowed for an unreasonably high degree of involvement by superior commanding officers in the proceedings of a Court Martial.\(^76\) This, he found, reasonably casted doubts as to the independence of a Presiding Officer under s.11(d) of the *Charter*. In agreeing with Lamer C.J.C. on this issue, Mr. Justice Stevenson indicated that the concept of institutional independence was difficult to apply in this case because of an inherent difficulty in establishing a working definition of the term "executive". As his judgment indicates, the entire institution of the Canadian Forces may, in varying degrees, be seen as responsible for the upkeep of discipline and morale. This could constitute grounds for defining the entire institution as part of the executive. Carried to its extreme, this notion could require a permanent and completely autonomous judicial branch within the Canadian Forces, although Stevenson J. himself acknowledged the impracticality of this suggestion. To circumvent this issue, Mr. Justice

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75. *Ibid.*, at 709. For an explanation of the distinction between administrative and adjudicative independence, see *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417 (Ont. C.A.) at 432-433. 76. For details, see *R. v. Genereux* 114 N.R. 321 (C.M.A.C.) at 372-374. Chief Justice Lamer noted that process of permitting a Convening Authority (generally an officer superior in rank to the Commanding Officer of the accused) to decide to prosecute a case [*QR&O's*, supra, note 8, art. 111.05], to appoint members to the bench and decide their number and type of tribunal [*QR&O's* art. 111.06(1)], and concurrently appoint the prosecutor for trial [*QR&O's* art. 111.23], is inherently unjust and constitutes an unacceptable breach of judicial independence under the terms of s.11(d) of the *Charter*. He also states that the appointment of the Judge Advocate by the Judge Advocate General [*QR&O's* art. 111.22] further undermines the independence of the tribunal, by nature of the inherently close ties between these positions. Such appointments should be done by an independent and impartial judicial officer [as required under the revised *QR&O's* arts. 4.09 and 111.22]
Stevenson applied the reasoning of Dickson C.J.C. (as he then was) in *Beauregard* v. *R.* where the core conceptual value of institutional independence was defined as "the ability of individual judges to make decisions ... free from external interference or influence." 77 By employing this rationale, Stevenson J. shared the view of Lamer C.J.C. in holding that the dual authority of the Convening Authority (which constituted part of the executive by nature of its significant role in enforcing discipline), to appoint the bench and prosecution from the same office of the Judge Advocate General, constituted grounds for a significant and reasonable appearance of undue influence by the executive, in contravention of s.11(d) of the *Charter*.

In her dissent, L’Heureux-Dube J. reiterated her position that it is unrealistic to expect a separation of the judiciary from the executive branch of government. To contrast the view offered in *Beauregard*, she referred to the judgment of McLachlin J. in *MacKeigan v. Hickman* which interprets *Beauregard* as having contemplated:

not the absolute separation of the judiciary, in the sense of total absence of relations from the other branches of government, but separation of its authority and function. It is impossible to conceive of a judiciary devoid of any relationship to the legislative and executive branches of government. 78

This suggests that absolute separation of a tribunal from the executive is not essential. Instead, a determination as to the sufficiency of institutional independence may be made based on the degree of remoteness between the executive and judges. Under this analysis, the innate connection of a Presiding Officer to the Minister of National Defence is conceded, leaving the issue of a Presiding Officer’s institutional independence to be determined by a review of the degree of connection between

77. *Beauregard* v. *R.*, [1986] 2 S.C.R. 56 at 69. Chief Justice Dickson (as he then was) continued at 69 by stating:

> the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual, or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principles of judicial independence. [emphasis added]

78. *MacKeigan* v. *Hickman*, [1989] 2 S.C.R. 796. This view was shared by Chief Justice Lamer in *R. v. Lippe*, [1991] 2 S.C.R. 114, where it was conceded that this kind of relatively inconsequential conflict between the judiciary and the executive government necessarily presented itself in certain situations. The rationale employed to overcome this technical inconsistency with *Valente* was the theory that judicial independence was sufficiently met where the judicial structure was fashioned in a way as to place it beyond the reasonable scope of government pressure.
the Presiding Officer and military officials responsible for the prosecution of the accused.\textsuperscript{79}

Madame Justice L'Heureux-Dube proceeded from this definition of institutional independence to argue the legitimacy of the existing process of appointing a Presiding Officer. Her judgment was based on the rationality of the disciplinary nexus which inherently governs all members of the Canadian Forces, and necessitates the institutionalization of a command hierarchy which places a Presiding Officer under the purview of the Minister of National Defence and the executive branch of government.\textsuperscript{80} Consequently, L'Heureux-Dube found that the association between the military judiciary and the executive was a necessary characteristic of the military chain of command, which was contemplated by legislation and sufficiently met the requirement of institutional independence under s.11(d) of the Charter.

It is suggested that the analyses undertaken by Lamer C.J.C. and Stevenson J. are noncontextual because they do not view the apparatus of a Court Martial from a military perspective. In contrast, the approach of Madame Justice L'Heureux-Dube appears most capable of allowing a degree of flexibility to be imparted to the structure of Canadian Forces Court Martials, to accommodate the innate hierarchical command nature of the armed forces. It is conceded s.11(d) of the Charter would likely fail to support a civilian system where the executive body directly appointed both prosecution and judicial members. However, this dual-appointment characteristic reflects the integral hierarchical command structure of the Canadian Forces which inevitably leads to the Minister of National Defence and the Governor in Council. In recognition of the nature of military institutions, and the legislative intent of Parliament to provide a statutory framework for a structure of Canadian national defence, it is

\textsuperscript{79} Section 147 \textit{NDA} [\textit{supra}, note 6] stipulates restrictions as to who shall not sit as a member of a General Court Martial:

(a) the officer who convened the court martial;
(b) the prosecutor;
(c) a witness for the prosecution;
(d) the commanding officer of the accused person;
(e) a provost officer (ie. Military Police Officer);
(f) [repealed]
(g) an officer below the rank of captain (naval lieutenant)
(h) any person who prior to the court martial participated in any investigation respecting the matters upon which a charge against the accused person is founded.

These provisions appear to establish a degree of remoteness between the accused and the bench, which lends credibility to the assumption that a Court Martial is an objective tribunal.

\textsuperscript{80} Section 4 of the \textit{NDA} empowers the Minister of National Defence with the control and management of the Canadian Forces, and of all matters relating to national defence.
submitted that the institutional independence requirement was adequately met by virtue of the military context in which the Court Martial tribunal was exercised.

4. **Section 1 of the Charter**

Having established that the practice of appointing Presiding Officers to Canadian Forces General Court Martials violated subsection 11(d) of the Charter, Chief Justice Lamer turned in his majority judgment to assess the possibility of justifying the s. 11(d) infringement under section 1 of the Charter. Reverting to the three-part test for Charter-infringement justification developed by Chief Justice Dickson in the landmark decision of *R. v. Oakes*, Lamer C.J.C. proceeded to apply the facts in *Genereux* to this analysis.\(^{81}\)

Lamer C.J.C. acknowledged that maintaining a strict disciplinary regimen within the Canadian Forces constituted a sufficiently substantial societal objective to satisfy the proportionality arm of the *Oakes* test.\(^{82}\) However, he found that the means by which the Canadian Forces sought to achieve this disciplinary standard gave rise to disproportional Charter infringements, in relation to the objective of promoting operational efficiency through the disciplinary adjudication of service offenses by Court Martials.\(^{83}\)

This finding established that factors surrounding military tribunal structure of the Canadian Forces failed to demonstrate the necessity of Charter infringements of the rights of service personnel.

According to Chief Justice Lamer:

It is not necessary, under normal circumstances, to try alleged military offenders before a tribunal in which the judge, the prosecutor, and the triers of fact, are all chosen by the executive to serve at that particular trial. Nor can it be said to be necessary that promotional opportunities and hence the financial prospects within the military establishment, for officers serving on such tribunals should be capable of being affected by senior officers’ assessments of their performance in the course of the trial.\(^{84}\)

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82. *Genereux*, supra, note 1 at 150.
83. Despite his ruling, Lamer C.J.C. indicated that the existence of certain extreme conditions would legitimize such an infringement of a person’s Charter rights and freedoms:

I am of the opinion that a trial before a tribunal which does not meet the requirements of s.11(d) of the Charter will only pass the second arm of the proportionality test in *Oakes* in the *most extraordinary circumstances*. A period of war or insurrection might constitute such circumstances. [emphasis added]

*Genereux*, supra, note 1 at 150.
Consequently, the scheme of the Canadian Forces General Court Martial as established at the time of the appellant’s trial was held to unconstitutionally breach the appellant’s s.11(d) *Charter* right to appear at a fair and public hearing by an independent tribunal.

Contrary to this judgment, it is submitted that s.1 of the *Charter* should serve to justify the scheme of General Court Martial as a reasonable limit in a free and democratic society, given the logic of the disciplinary objective and the reasonableness of implementing military tribunals to adjudicate service offenses. It is emphasized that service personnel in the Canadian Forces are accustomed to fair yet stringent dispensations of justice, and generally view such disciplinary procedures as warranted. Perhaps, it is fair to conclude that a process which enables the executive to choose the prosecution, judge, and jury, is inherently inclined against an accused. However, in view of the Canadian Forces as a military institution which is most effectively controlled through a regimen of discipline, it is suggested that such an inclination reasonably conforms with the character and function of service personnel.

IV. Conclusion

"Discipline is the soul of an army."

General George Washington (1732-1799)

- *Letters of Instruction to the Captains of the Virginia Regiments*, July 29, 1759

Conventional military doctrine encourages the maintenance of strict discipline within the ranks of a fighting force.\(^85\) This practice optimizes the exercise of military command and control, which largely contributes to the success of a military action. In recognition of this basic principle, Canadian military law holds armed forces personnel accountable to a special series of statutory provisions designed to maintain a strict standard of discipline within the Canadian Forces.\(^86\) Consequently, enlistment in the Canadian Forces involves submission to a legal jurisdiction which remains separate and distinct from its civilian counterpart by virtue of its militarily stringent and demanding nature.

The underlying question raised by the anomalous jurisdiction of Canadian military law is the extent to which a service person may be

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\(^{86}\) For a review, see *supra*, notes 7 and 8.
required to sacrifice his/her constitutionally entrenched rights to pursue a career in the armed forces. This issue was raised in *Genereux* by the Supreme Court of Canada in its analysis of existing Canadian Forces General Court Martial procedures. In deciding an appeal from Corporal *Genereux* who challenged the validity of Court Martial tribunals under s.11(d) of the *Charter*, the Supreme Court examined a number of different approaches to understand the character and nature of the Canadian Forces as a national defence military institution. The Court considered the inherent means by which a military organization carried out its primary role as a fighting force, and the necessary functional implications which such a combat role demanded. Conversely, the Court also examined the universality of *Charter* rights, and the preservation of those fundamental rights within the operational context of the Canadian Forces. In the course of balancing these competing values, a majority of the Court found that the procedures and processes used to adjudicate service offence at Canadian Forces Court Martials exceeded the parameters which define one’s right to a fair and reasonable trial. Specifically, the Supreme Court of Canada led by Chief Justice Lamer concluded that Court Martial tribunals convened by the Canadian Forces were insufficiently independent from the executive branch of government to survive *Charter* scrutiny under subsection 11(d).

In structuring a s.11(d) *Charter* review of the juristic fairness embodied in the Canadian Forces Court Martial process, the Court applied its reasoning expressed by Le Dain J. in *Valente*. The first of two criteria established by *Valente* involved a review of the tribunal on the grounds of judicial impartiality. This analysis went to determine the degree of bias harboured by Presiding Officers, who allegedly remained unfairly pre-disposed towards a strict disciplinary prosecution of military law by virtue of their command or leadership roles in the Canadian Forces. Lamer C.J.C., writing for the majority in *Genereux*, restated a previous judgment of the Supreme Court of Canada in *MacKay* which decided that a notional existence of limited judicial bias towards strict interpretations of Canadian Forces statutory provisions was legitimate, in view of the authoritative command nature of the military hierarchy. This opinion embraced a contextual interpretation of the Canadian Forces as a unique national institution which deserved distinct legal status from the mainstream of Canadian society on account of its role to take up arms for the

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87. See *supra*, note 11.
88. See *supra*, note 34 and accompanying text.
defence of Canada. This role was found to require a stringent application of regulations and laws to rigidly enforce a necessarily stringent level of discipline. Reference was also made to subsection 11(f) of the Charter, which signalled legislative intent that such a perspective, given the distinct character of the Canadian Forces, was to be adopted and maintained. Thus, a contextual and legislative review of the Canadian military complex supported the legitimate existence of circumscribed judicial bias at Court Martial tribunals.

The dissenting judgment by L’Heureux-Dube J. in Genereux fully acknowledged the fundamental necessity of evaluating the conditions and circumstances surrounding the Canadian Forces before undertaking a review of its military tribunals. In strongly proposing a contextual approach to the analysis and evaluation of military regimen factors, Madame Justice L’Heureux-Dube went further than Lamer C.J.C. by proposing that the Court carefully deliberate the operational nature of the Canadian Forces when reviewing all of the criteria which constitute the Valente test for judicial fairness under s.11(d) of the Charter. This opinion demonstrates a valuable awareness of the need for sensitivity to the issues and underlying rationale of the military infrastructure. Such understanding would avoid deriving a juristic opinion which could potentially impose inappropriately “civilian” values upon members of the Canadian Forces, to the detriment of traditional military principles which effectively meet the exigencies of warfare. For this reason, it is submitted that a comprehensive and legitimate review of Court Martials must begin with a contextual study of the military institution in Canada.

In discussing the necessity of undertaking a contextual assessment of the Canadian Forces as a legally distinct entity of Canadian society, L’Heureux-Dube J. found that the criteria of Valente were rendered inapplicable because of the strictly civilian context envisioned by Le Dain J. in assessing the impartiality and independence of Provincial Court judges. The inappropriateness of the this test was apparent when the Supreme Court of Canada evaluated the independence of a Court Martial Presiding Officer using the criteria set out in Valente. In consideration of the Valente criteria of security of tenure, and financial security, a review of Canadian Forces administrative and financial procedures reveals that such assurances are substantially provided to all officers by the inherent structure of term-employment contracts used by the Canadian Forces.

In contrast, Lamer C.J.C. found that security of tenure was not provided for a Judge Advocate, who was periodically appointed to a military tribunal on an ad hoc basis as an additional responsibility to his/her contemporaneous duties with the legal branch of the Judge Advocate
General's office. As Judge Advocates were appointed by the JAG acting on behalf of the executive who retained the discretion to re-appoint the military judges, it was conceivable that a Judge Advocate’s ability to be re-appointed was contingent on the kinds of decisions rendered as a Presiding Officer. Thus, Lamer C.J.C. saw a reasonable possibility for undue executive influence.

In support of the judicial appointment system which existed in the Canadian Forces, L’Heureux-Dube J. argued in her dissent that statutory provisions for judicial tenure spanning the entire length of any one particular trial constituted sufficient tenure to meet the requirements of s.11(d) of the Charter, in light of the ad hoc nature of military trials which arise on an infrequent and irregular basis. This opinion clearly rested on strong contextual grounds, which recognized that military prosecutions were only periodically instituted on an ad hoc series of singular occurrence trials. In consideration of this fact, an offer of limited tenure on a case-by-case basis (as then existed) arguably provided a reasonable means of ensuring judicial independence. The alternative to this scheme required the implementation and maintenance of a permanent military judiciary which would inefficiently generate significant collateral spending on the Canadian Forces, disproportionate to other areas of military spending in view of the limited scope of responsibility. Madame Justice L’Heureux-Dube also pointed to a number of statutory safeguards which appeared to not insignificantly provide tenure for all Presiding Officers. On this basis, it is argued that the military judicial structure challenged in Genereux sufficiently maintained an acceptable degree of judicial independence.

Chief Justice Lamer’s main basis for contention lay with the Personal Evaluation Reports filed by a Presiding Officer’s superiors, which largely determine a Presiding Officer’s financial status by defining career advancement potential to a higher rank. Given that a Presiding Officer’s performance at a Court Martial constituted a military duty which was subject to evaluation by a superior officer, it was suggested that a Presiding Officer could have been reasonably motivated to render judicial decisions in accordance with known interests held by his/her superior officers. Thus, an improperly close association was maintained between the executive and judicial branches of the Canadian Forces, which could reasonably lead to an apprehension of undue influence.

In addressing this argument, it is suggested that a number of independent factors exist beyond a reviewing officer’s ambit of authority. When viewed together, these factors collectively preclude the existence of a reasonable apprehension of undue influence being maintained through the evaluation process. Moreover, a duty to preside over a Court Martial
is simply one of many responsibilities assumed by a JAG officer in the exercise of his multi-faceted role as a member of the legal branch. Consequently, the remoteness between an annual Personal Evaluation Report and the infrequent performance as a Presiding Officer renders contentious any apprehension of undue influence.

The important criteria considered by the Court in assessing the judicial independence of Court Martials involved a determination of their institutional independence. This factor was contingent upon the exercise of Court Martial judicial control over administrative matters which affected the tribunal’s exercise of its adjudicatory functions. By addressing the extremely close nexus between the prosecutory and judicial functions of the JAG office, Lamer C.J.C. made a compelling case against the legitimacy of presiding Judge Advocates by impeaching the sufficiency of their independence from the prosecution. Overshadowed by the involvement of superior commanding officers, the methodology of prosecuting service offenders was held to violate the requirement of judicial independence under s.11(d) of the Charter.

To illustrate the conceptual difficulty in arriving at an agreeable definition of what constitutes sufficient judicial independence, Mr. Justice Stevenson described the problems of distinguishing the role of the executive in the military context. This complication derives from the fact that the Canadian Forces is a direct extension of the Governor in Council. A review of the National Defence Act reveals that the Cabinet appointee holding the portfolio of Minister of National Defence has statutorily entrenched authority to personally direct the actions of the Canadian Forces as its commander-in-chief. Within the parameters of the rigidly observed command hierarchy which characteristically reflects the military nature of an armed force, a descending leadership influence from the executive permeates all areas and levels of the Canadian Forces.

Pursuant to this concept of executive influence, it is submitted that a theoretically absolute separation of military tribunals from the executive is inconsistent with the nature of the Canadian Forces. Instead, executive influence is a necessary characteristic of the military chain of command, and was contemplated by Parliament when it devised statutory provisions to accommodate a degree of judicial independence for military tribunals.90 By nature of their status as service personnel, Presiding Officers are necessarily subject to the command and control of military superiors who hold their authority from executive decrees. To suggest that this

90. Supra, note 45.
process is improper goes to criticize the concept of permitting democratically-elected politicians to govern the military institution. It further attacks the concept of creating military tribunals to prosecute service offenses as disciplinary actions within the operational context of the military environment.

Returning to Madame Justice L'Heureux-Dube’s contextual analysis theory in applying s.11(d) of the Charter to review the legitimacy of military tribunals, it is suggested that the exigencies of the Canadian Forces necessitate a marginal infringement of an accused’s Charter rights before a Court Martial. Contrary to the majority judgment of Lamer C.J.C. which rejected this framework and denied the ability of s.1 of the Charter to permit such a breach as a necessary and demonstrably justified practice, it is submitted that an acceptance of this military structure would more realistically accommodate the competing concerns before the Court. Namely, this option balances the need to extend fundamental Charter rights to all Canadians irrespective of their occupation/profession, against the compelling practical requirement of preserving an effective command hierarchy to fulfil operational requisites of military doctrine and combat.

The real issue in Genereux and the major theme of this paper questions the appropriateness of maintaining a separate legal structure to govern members of the Canadian Forces. From a public policy perspective, the appropriateness of employing the Supreme Court of Canada as a forum for making such a determination is questionable, particularly in light of the need to evaluate the military as a unique and fundamental Canadian institution deserving special status. In a much narrower sense, it is submitted that the prosecution of service offenses by Court Martial is a legitimate exercise of the disciplinary review mechanism of the Canadian Forces, which lends objectivity and fairness to the process by virtue of the tribunal’s comprehensive level of service knowledge. In many respects, this virtue could prove to be a fairer mechanism for imposing justice than could be achieved by a civilian tribunal. This fact was generally recognized and acknowledged in all three Supreme Court judgments in Genereux, although each judgment varied in its willingness to allow the Canadian Forces wider or narrower latitude in defining an ambit of legitimacy to discipline its members.

Ultimately, an opinion of the fairness imparted by a Court Martial revolves around one’s perception of how differently members of the Canadian Forces should be treated from the rest of society, in pursuit of rigid disciplinary standards which contrast established civilian legal norms. In all likelihood, this contentious debate will continue in various political or legal forms. Regardless, it is hoped that Presiding Officers at
military tribunals will continue to exercise balanced discretion to support the legitimacy and fairness of these disciplinary proceedings. It is also hoped that future judicial or statutory challenges against the inherent disciplinary mechanism of the Canadian Forces will be reviewed from a contextual perspective. This would guard against the possibility that the functional command nature of the Canadian Forces could become diluted, whereupon its ability to successfully maintain a military campaign would be compromised.