1992 CarswellNat 668, [1992] 1 S.C.R. 259, 133 N.R. 241, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, 8 C.R.R. (2d) 89, J.E. 92-287, 15 W.C.B. (2d) 84, EYB 1992-67222

1992 CarswellNat 668, [1992] 1 S.C.R. 259, 133 N.R. 241, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, 8 C.R.R. (2d) 89, J.E. 92-287, 15 W.C.B. (2d) 84, EYB 1992-67222

R. v. Généreux

Michel Généreux, Appellant v. Her Majesty the Queen, Respondent

Supreme Court of Canada

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

Judgment: June 5, 1991
Judgment: February 13, 1992
Docket: 22103

Proceedings: On Appeal from the Court Martial Appeal Court of Canada

Counsel: *Guy Cournoyer, Jean Asselin* and *Sylvie Roussel,* for the appellant.

Jean-Marc Aubry, Q.C., Richard Morneau, Bernard Laprade, Lt. Col. K.S. Carter and *Maj. M.H. Coulombe,* for the respondent.

Subject: Criminal; Public

Armed Forces --- Proceedings before military tribunals — Constitutional safeguards — Charter of Rights and Freedoms — Conduct of proceedings

General court martial lacking sufficient judicial independence — Canadian Charter of Rights and Freedoms s. 11(d), (f).

Accused was charged with trafficking and desertion. Accused was convicted by a general court martial and the conviction was upheld by the Court Martial Appeal Court. Accused appealed on the ground that the nature of the court martial system did not afford him a fair trial. Held, the appeal was allowed. Accused's right to a fair trial under s. 11(d) of the Charter was violated by the trial before the general court martial. The system in place at the time of accused's trial lacked sufficient judicial independence. The Judge Advocate did not have sufficient security of tenure. The Judge Advocate was appointed on an ad hoc basis and, after the hearing, returned to his legal duties within the Office of the Judge Advocate General. There was no guarantee that the Judge Advocate's career as a military Judge would not be affected

by decisions tending to favour accused. A reasonable person could have entertained the apprehension that the Judge Advocate selected had not disappointed the executive's expectations in the past. The Judge Advocate did not have sufficient financial security as the executive was in the position to reward or punish the conduct of the members of the court martial and the Judge Advocate by granting or withholding benefits in the form of promotions and salary increases. Furthermore, the hearing lacked sufficient institutional independence. The executive appointed the prosecutor and the members of the court martial and the Judge Advocate General appointed the Judge Advocate.

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory and Iacobucci was delivered by:

Lamer C.J.

This appeal involves a constitutional challenge, under ss. 7, 11(*d*) and 15 of the *Canadian Charter of Rights and Freedoms*, to the proceedings of a General Court Martial convened under the *National Defence Act*, R.S.C., 1985, c. N-5. The principal question raised in this case is whether a General Court Martial is an independent and impartial tribunal for the purposes of s. 11(*d*) of the *Charter*.

The Facts

On September 20, 1988, the appellant, a corporal with the Canadian Armed Forces and stationed at the military base at Valcartier, Quebec, was charged with a breach of the military's Code of Service Discipline. Specifically, the appellant was charged with three counts of possession of narcotics for the purpose of trafficking contrary to s. 4 of the *Narcotic Control Act*, R.S.C., 1985, c. N-1, and punishable under former s. 120(1) (now s. 130(1)) of the *National Defence Act*. He was also charged with one count of desertion contrary to former s. 78(1) (now s. 88(1)) of the *National Defence Act*. The indictment was authorized by the appellant's commanding officer, Lieutenant-Colonel J. H.P.M. Caron.

The following circumstances gave rise to the charges against the appellant. On September 15, 1986, police officers searched the appellant's residence and found 110 grams of hashish, 5 grams of cocaine and 113 grams of phencyclidine. The search was conducted pursuant to a search warrant. The appellant's residence was located outside the Valcartier military base.

The search warrant had been obtained by one Officer Denis Ross of the Royal Canadian Mounted Police. Officer Ross sought the warrant on September 11, 1986, on the basis that he had reasonable and probable grounds to believe that a narcotic would be found in the residence of the appellant. Officer Ross testified at trial that, to obtain the search warrant, he followed the practice that was normally followed by the police at the time. He consulted an attorney in the Crown's office and informed him of the grounds upon which he believed the search warrant should be issued. The attorney agreed, in this case, that the grounds were sufficient to support the issuance of a warrant. The attorney then wrote certain information on a piece of paper that was given to his secretary. The secretary typed the contents of this information on the form used to request a search warrant. Officer Ross took the form to the office of a justice of the peace. The justice of the peace, as was the usual practice, confirmed that Officer Ross

had consulted the Crown attorney and then had Officer Ross swear out the information. The sworn information mentioned only the following grounds in support of the warrant: [Translation] "Information from a trustworthy person following investigation".

On October 8, 1986, following the search and the discovery of the narcotics in his residence, the appellant unlawfully left the military base. This departure appears to have been the basis for the charge of desertion.

On August 31, 1988, prior to the laying of the charges, military police arrested the appellant and took him to the military prison at the Valcartier base. Immediately after charges were laid, on September 21, 1988, the appellant made a motion for a writ of *habeas corpus* before the Superior Court of Quebec. This motion was dismissed.

The appellant subsequently appeared before his commanding officer, Lieutenant-Colonel Caron. On the same day, September 23, 1988, Lieutenant-Colonel Caron recommended to the Brigadier-General of the Valcartier military base, P.-J. Addy, that the appellant be tried by a court martial. Brigadier-General Addy then asked Lieutenant-General Fox, the commanding officer of the Mobile Command at St. Hubert, to convene a court martial to hear the charges against the appellant. Lieutenant-General Fox ordered that a General Court Martial be convened on October 18, 1988. The members of the General Court Martial were specified in the convening order. The judge advocate of the court martial, Lieutenant-Colonel B. Champagne, was appointed at a later date by the Judge Advocate General, Brigadier-General R.L. Martin.

On October 12, 1988, the appellant applied to the Federal Court Trial Division for a writ of prohibition to prevent the General Court Martial from proceeding to hear the charges against him. The appellant sought this remedy on two principal grounds. First, the appellant claimed that the General Court Martial was not an independent and impartial tribunal for the purposes of ss. 7 and 11(*d*) of the *Charter*. Secondly, the appellant claimed that allowing the General Court Martial to consider the charges under the *Narcotic Control Act* would violate his equality rights guaranteed by s. 15 of the *Charter*. The president of the General Court Martial adjourned the proceedings until the Federal Court rendered its decision on this application. The application was dismissed by Dubé J. on January 16, 1989, [1989] 2 F.C. 685. The appellant initiated an appeal of Dubé J.'s judgment to the Federal Court of Appeal. A notice of appeal was filed with the Federal Court registry, Lieutenant-General Fox ordered the General Court Martial to continue its proceeding on March 14, 1989. An application by the appellant to stay proceedings until resolution of the appeal was dismissed by the Federal Court.

A further application by the appellant to the Federal Court Trial Division, under ss. 18 and 50 of the *Federal Court Act*, R.S.C., 1985, c. F-7, to suspend proceedings before the General Court Martial was dismissed by Denault J. on May 8, 1989, [1989] 3 F.C. 352. On May 11, 1989, the Federal Court of Appeal scheduled the appellant's appeal from Dubé J.'s judgment to be heard on June 20, 1989.

The appellant's trial before the General Court Martial was held from May 23 to 27, 1989, at the Valcartier base. On the first day of the trial, the appellant requested that the proceedings be adjourned until the Federal Court of Appeal dealt with his appeal from Dubé J.'s decision.

This request was denied. The appellant was subsequently found guilty on one count of simple possession and on two counts of possession for the purpose of trafficking. He was acquitted of the charge of desertion but was found guilty, under s. 90(1) of the *National Defence Act*, of being absent without leave. The appellant was given a dishonourable discharge from the Forces and was sentenced to fifteen months' imprisonment. The appellant subsequently waived his appeal to the Federal Court of Appeal from Dubé J.'s judgment.

The appellant appealed as of right, under s. 230 of the *National Defence Act*, to the Court Martial Appeal Court in respect of the legality of the General Court Martial's findings and the legality of the sentence. This appeal was dismissed (*per* Pratte and Barbeau JJ., Décary J. dissenting) on September 12, 1990: (1990), 5 C.M.A.R. 38, 114 N.R. 321, 75 D.L.R. (4th) 207, 4 C.R.R. (2d) 307, 60 C.C.C. (3d) 536.

The appellant was granted leave to appeal the decision of the Court Martial Appeal Court to this Court on February 7, 1991, [1991] 1 S.C.R. ix.

Judgments Below

General Court Martial (Judgment of the Judge Advocate)

Before the General Court Martial, the appellant requested an order under s. 24(1) of the *Charter* prohibiting the tribunal from hearing the charges against him. This motion was based on two grounds: first, that the General Court Martial was not an independent and impartial tribunal for the purposes of s. 11(*d*) of the *Charter*, and, secondly, that the appellant's equality rights guaranteed by s. 15 of the *Charter* would be violated if the tribunal proceeded to hear the charges under the *Narcotic Control Act* since a civilian, charged with the same offences, would be tried by the ordinary criminal courts. The judge advocate accepted, referring to *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, that the *Charter* applied to the proceedings of the court martial. He dismissed, however, the argument that the General Court Martial did not meet the standards of independence and impartiality required by s. 11(*d*). He emphasized from the outset that the appellant was challenging the institutional independence of the General Court Martial and not the impartiality of the specific court martial that was assembled to hear the charges against him. He then applied the conditions of independence described by Le Dain J. in *Valente v. The Queen*, [1985] 2 S.C.R. 673. Relying substantially on the judgment of the Court Martial Appeal Court in *Schick v. The Queen* (1987), 4 C.M.A.R. 540, he held that the General Court Martial did not infringe s. 11(*d*) because the judge advocate and the members of the tribunal had sufficient security of tenure and financial security. Once the membership was constituted, it could only be interfered with upon objection for cause or because of a member's death or inability to act. In addition, the members were paid as officers of the Canadian Forces irrespective of their court martial duties; their pay was established by regulation and could not be affected by the executive. The judge advo cate did not believe that the condition of institutional independence was applicable to the court martial since its members were only appointed for a specific case.

The judge advocate also held that the court martial proceedings did not violate the appellant's equality rights under s. 15 of the *Charter*. He admitted that there were differences between the

procedures contemplated by the *Criminal Code* and the procedures contemplated by the *National Defence Act* and regulations enacted thereunder. The appellant failed, however, to establish that the different treatment under the *National Defence Act* and regulations was discriminatory, that is, disadvantageous to his interests. The judge advocate emphasized that the appellant's rights were fully protected under the *Charter*, that the court martial had a duty to render justice impartially and that s. 129 (now s. 151) of the *National Defence Act* guaranteed to the appellant all defences available in the regular criminal courts. The judge advocate concluded that even if s. 15 of the *Charter* was infringed in this case, such discriminatory treatment was justified under s. 1.

The appellant also claimed that certain evidence had been improperly admitted. He submitted that the search of his residence infringed his rights under s. 8 of the *Charter* because of the manner in which the search warrant was obtained. The judge advocate rejected this submission. He reviewed the information and testimony carefully and concluded that Officer Ross had reasonable and probable grounds to believe that an offence had been committed and that evidence would be found in the appellant's residence. He also concluded that the issuance of the warrant conformed to the principles enunciated in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and that the search was reasonably executed. Even if there had been a violation of s. 8, however, the judge advocate would not have excluded the evidence under s. 24(2) of the *Charter*. He referred, in this regard, to *R. v. Collins*, [1987] 1 S.C.R. 265 , and *R. v. Strachan*, [1988] 2 S.C.R. 980. Lastly, the judge advocate held that he had no authority to exclude the evidence since the motion for exclusion had been made at the end of the trial, after the evidence had already been admitted.

Court Martial Appeal Court (Pratte, Barbeau and Décary JJ.) (1990), 114 N.R. 321

The appellant raised six principal matters before the Court Martial Appeal Court, including his right to be tried by an independent and impartial tribunal, his right to equality before the law and the legality of the search made at his residence. The court, as Décary J. explained in his dissenting reasons, dismissed the latter two grounds from the bench. With respect to the legality of the search and the admissibility of the evidence obtained, the court concluded that there had indeed been an infringement of s. 8 but that the admission of the evidence, in light of *R. v. Collins*, *supra*, would not bring the administration of justice into disrepute. The court did not deal with s. 15 of the *Charter* since it did not conclude that the provision could be of assistance, in addition to s. 11(*d*), to the appellant in this case. If the General Court Martial was found not to be independent for the purposes of s. 11(*d*), the appellant could gain no further advantage by invoking s. 15. If the General Court Martial were found to be independent, however, the appellant's argument with respect to s. 15 would undoubtedly fail since he could hardly claim to be a member of a "discrete and insular minority" as described by this Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, and *R. v. Turpin*, [1989] 1 S.C.R. 1296. In addition, the court did not wish to deal with s. 15 of the *Charter* in the absence of evidence, which was not before the court in this case, concerning relevant social, political and legal circumstances.

In its written reasons, therefore, the court dealt only with the appellant's submission that the General Court Martial did not meet the standards of independence and impartiality required

by s. 11(*d*) of the *Charter*.

Barbeau J.

Barbeau J. dismissed the appellant's claim that the General Court Martial was not an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. He noted that this Court had decided, in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, that the service tribunals established and governed by the *National Defence Act* did not infringe an individual's rights, under ss. 1(*b*) and 2(*f*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, to equality before the law and to be tried by an independent and impartial tribunal. After citing extensive passages from *MacKay*, Barbeau J. stated that he was satisfied that the General Court Martial had, in this case, acted in an independent and impartial manner (at pp. 326-27):

> I would add to these observations of the Supreme Court that in the case at bar there is no evidence on which this court can arrive at the conclusion that the members of the General Court Martial at issue acted in any way other than an independent tribunal would have done, or that any of its members was unfitted or incompetent to perform the duties of the position held by him on that court as a consequence of being a member of the Armed Forces. It is not the function of this court to dispose of such a question solely on the basis of legislation and *Regulations* which have been duly adopted and the implementation of which, in the absence of any evidence to the contrary, discloses no deficiencies in this regard.

Barbeau J. thus declined to examine the independence of the General Court Martial in the abstract, on the basis of the legislation and regulations, and instead considered its actual independence in the specific circumstances of the case at bar.

Barbeau J. then discussed the judgments of this Court in *Valente, supra*, *Beauregard v. Canada*, [1986] 2 S.C.R. 56, *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, and *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282. He did not believe that these judgments qualified the clear holding of this Court in *MacKay*. Most importantly, he was of the opinion that the essential conditions of judicial independence described by Le Dain J. in *Valente*, that is, security of tenure, financial security and institutional independence, were satisfied in this case.

Pratte J.

Pratte J. agreed that there was no violation of the appellant's s. 11(*d*) right to be tried by an independent and impartial tribunal in this case. He noted that for members of a General Court Martial, unlike "ordinary" judges, security of tenure and financial security were not essential guarantees of independence. The situation is necessarily different for members of a court martial, in his view, since they are appointed for a single case and receive no remuneration for their duties in addition to their regular salary.

Nonetheless, Pratte J. considered it necessary to decide whether the independence of a court martial was threatened by other dangers. He expressed the view that the only danger that could possibly threaten the independence of the General Court Martial was the appointment

by the military authorities of their subordinates as military judges. These same military authorities, because they are responsible for maintaining discipline in the Forces, act as prosecutors. Pratte J. concluded, however, that these "dangers" were not so serious as to threaten the independence of the tribunal. He emphasized that the military judge's superiors did not have the power to take away his salary or rank. Furthermore, the power of the military authorities to deny a military judge a promotion could not be said to threaten, in itself, the judge's independence. If it was believed otherwise, Pratte J. was of the view that the independence of most trial judges would be suspect; trial judges could arguably be hesitant to render judgments contrary to the inter ests of the executive for fear of losing the chance to be appointed to an appellate court.

Décary J. (dissenting)

Décary J., in dissenting reasons, held that the appellant's rights under s. 11(*d*) of the *Charter* were violated in this case. He believed that the advent of s. 11(*d*) of the *Charter*, as well as this Court's interpretation of the provision in *Valente*, required a reconsideration of *MacKay*. This reconsideration was necessary since *MacKay* focused on the "subjective aspect of independence", while *Valente* focused on the "objective aspect of independence". He also believed, unlike the judge advocate in this case, that the decision of the Court Martial Appeal Court in *Schick* was of limited import. *Schick* was distinguishable from the case at bar, in his opinion, since it was concerned more with impartiality than independence and involved the Disciplinary Court Martial rather than the General Court Martial.

After a careful review of this Court's judgments in *Valente, Beauregard* and *Hickman*, Décary J. stated that a flexible approach must be taken to the application of s. 11(*d*). Where s. 11(*d*) applies, the courts must ensure that the essence of judicial independence is protected. The form of the protection, however, will necessarily vary because of the diversity of tribunals subject to the *Charter*. He stated (at p. 364):

> I accordingly conclude from the Supreme Court rulings that the concept of judicial independence developed thus far is a pattern rather than a strait-jacket and that what the courts must ensure in a given case is that the "essence" ... of judicial independence has been preserved, that is, ensure that the tribunal is secure from any possibility of arbitrary interference by an outsider ... in the exercise of its essential authority and function ....

Décary J. concluded that the General Court Martial failed to meet the standard required by s. 11(*d*) of the *Charter*. Given the strong institutional links between the General Court Martial and the Ministry of Defence, there was a reasonable apprehen sion that the tribunal was subject to the influence and control of the executive. In brief, he believed that "there is such institutional connivance and vulnerability between the Canadian Forces and the General Court Martial that the latter's independence within the meaning of the Charter is seriously compromised" (p. 374). The Department of National Defence, as prosecutor, is in a position to exert pressure on or control the charge, investigation, custody, decision to proceed, convening of the tribunal, composition of the tribunal and officers of the tribunal. Specifically, Décary J. thought it was unacceptable that the Minister, or a member of the Canadian Forces, had authority to decide who shall sit in a particular case. The situation was aggravated by the fact

that military judges do not belong to an independent judiciary, but are in the service of the military during the trial and return directly to the service following the conclusion of the trial. Décary J. declined to consider, given the paucity of evidence, whether the existing court-martial system was justified under s. 1 of the *Charter*.

Décary J. concluded that although the *Charter* permits the existence of a separate system of military law and military tribunals, the distinct system must nonetheless comply with s. 11(*d*). An individual who is charged with a breach of the Code of Service Discipline has the right to be tried by a military tribunal that is independent and impartial.

Issues

The following constitutional questions were stated by Lamer C.J. on February 22, 1991:

> 1. Do ss. 166 to 170 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, and the Queen's Regulations and Orders, inasmuch as they allow an accused to be tried by General Court Martial, restrict the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the answer to question 1 is yes, are they reasonable limits in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?
>
> 3. Does s. 130 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, restrict the right to equality protected by s. 15 of the *Canadian Charter of Rights and Freedoms* in that it confers jurisdiction over a person subject to the *National Defence Act* for offences pursuant to the *Narcotic Control Act*, R.S.C., 1985, c. N-1, as amended, thereby depriving the accused of the procedure normally applicable to such offences?
>
> 4. If the answer to question 3 is yes, is it a reasonable limit in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

The appellant was also granted leave to appeal with respect to the following issue:

> [TRANSLATION] Given its finding that s. 8 of the *Charter* was breached in this case, did the Court Martial Appeal Court err in law in declining to exclude, under s. 24(2) of the *Charter*, the evidence obtained by the police in the search of the appellant's residence on September 15, 1986?

Analysis

1. Introduction

The fundamental issue raised in this appeal is whether the appellant's rights under s. 11(*d*) of the *Charter* were violated by the trial before the General Court Martial in this case.

I wish to note from the outset that I have no doubt, in view of the judgment of this Court in *Wigglesworth, supra*, that s. 11(*d*) of the *Charter* is applicable to the proceedings of a General Court Martial. In *Wigglesworth*, the Court considered whether s. 11 of the *Charter* applied to proceedings of the Royal Canadian Mounted Police Service Court. The Service Court in that case was convened to try an inspector on a charge of a "major service offence" under the *Royal Canadian Mounted Police Act*. If found guilty of the offence, the inspector was liable to a penalty of imprisonment for one year. Wilson J., for the Court, stated that, in general, a matter could fall within the scope of s. 11 of the *Charter* for one of two reasons. First, she held that s. 11 applies to proceedings that are concerned with offences of a public nature, that is, breaches of rules that are "intended to promote public order and welfare within a public sphere of activity" (p. 560). She noted that such hearings are to be distinguished from private, domestic or disciplinary hearings which are intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a private sphere of activity. Secondly, Wilson J. stated that a matter falls within s. 11, notwithstanding that merely private activity is concerned, if the imposition of "true penal consequences" is involved.

It is clear to me that the proceedings of the General Court Martial in this case attract the application of s. 11 of the *Charter* for both reasons suggested by Wilson J. in *Wigglesworth*. Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline. Indeed, three of the charges laid against the appellant in this case related to conduct proscribed by the *Narcotic Control Act*. Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Dis cipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*). For these reasons, I find that the appellant, who is charged with offences under the Code of Service Discipline and subject to the jurisdiction of a General Court Martial, may invoke the protection of s. 11 of the *Charter*.

In any event, the appellant faced the possible penalty of imprisonment in this case. Even if the matter dealt with was not of a public nature, therefore, s. 11 of the *Charter* would nonetheless apply by virtue of the potential imposition of true penal consequences.

It is therefore necessary for this Court to turn its mind to the resolution of the constitutional question, that is, whether the appellant's right to be tried by an independent and impartial tribunal was violated in this case. To resolve this question, I propose first to examine the criteria that have been set out by this Court to give meaning to the principles of independence and impartiality embraced by s. 11(*d*) of the *Charter*. I will then review the structure of the General Court Martial to determine whether the requirements of s. 11(*d*) are met. It will be helpful, at this later stage, to reconsider the judgment of this Court in *MacKay v. The Queen*,

supra.

2. The Right to be Tried by an Independent and Impartial Tribunal

Section 11(*d*) of the *Charter* guarantees a person who is charged with an offence the right

> to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

I emphasize that the principles of independence and impartiality embraced by s. 11(*d*) seek to achieve a twofold objective: first, to ensure that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute. Secondly, however, irrespective of any actual bias on the part of the tribunal, s. 11(*d*) seeks to maintain the integrity of the judicial system by preventing any reasonable apprehensions of such bias.

This Court has had the opportunity, recently, to define more precisely the content of the right to be tried by an independent and impartial tribunal. In particular, the Court has drawn a firm line between the concepts of independence and impartiality. In *Valente*, Le Dain J. described the fundamental difference between these concepts. He noted that although the basic concerns of independence and impartiality are the same, the focus of each concept is different (at p. 685):

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to 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. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

To assess the impartiality of a tribunal, the appropriate frame of reference is the "state of mind" of the decision-maker. The circumstances of an individual case must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be subjectively biased in the particular situation. The question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups. (See, for example, the recent judgment of this Court in *R. v. Lippé*, [1991] 2 S.C.R. 114). Dickson C.J. aptly summarized the essence of independence in *Beauregard*, *supra*, at p. 69:

> Historically, 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 principle of judicial independence.
>
> . . . . .
>
> The ability of individual judges to make decisions in discrete cases free from external interference or influence continues ... to be an important and necessary component of the principle.

Dickson C.J. noted that an additional purpose of judicial independence, over and above the principle that a tribunal have complete decision-making liberty in individual cases, is to allow the courts to fulfil their historical role as protector of constitutional law and values (p. 70).

It is important to note, at this stage, that the appellant does not question the impartiality of the General Court Martial by which he was tried. He does not suggest that the court martial was actually biased against him. Instead, his challenge is focused exclusively on the independence of the tribunal, in that under the structure of the court martial system as it existed at the time of his trial, a reasonable person would not have been satisfied that the General Court Martial was independent.

The essential conditions of independence, or basic mechanisms by which independence can be achieved, were discussed by Le Dain J. in *Valente*. He emphasized that a flexible standard must be applied under s. 11(*d*). Since s. 11(*d*) must be applied to a variety of tribunals, it is inappropriate to define strict formal conditions as the constitutional requirement for an independent tribunal. Mechanisms that are suitable and necessary to achieve the independence of the superior courts, for example, may be highly inappropriate in the context of a different tribunal. For this reason, the Court chose to define three essential conditions of independence that can be applied flexibly, being capable of attainment by a variety of legislative schemes or formulas (at p. 694):

> The standard of judicial independence for purposes of s. 11(*d*) cannot be a standard of uniform provisions. It must necessarily be a standard that reflects what is common to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada.

The first essential condition of judicial independence, as defined in *Valente*, is security of tenure. This condition, like the other two, can be satisfied in a number of ways. What is essential is that the decision-maker be removable only for cause. In other words, at p. 698,

> [t]he essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

Similarly, s. 11(*d*) of the *Charter* requires that a decision-maker have a basic degree of financial security. The substance of this condition is as follows (at p. 704):

> The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

Within the limits of this requirement, however, the federal and provincial governments must retain the authority to design specific plans of remuneration that are appropriate to different types of tribunals. Consequently, a variety of schemes may equally satisfy the requirement of financial secur ity, provided that the essence of the condition is protected.

The third essential condition of judicial independence is institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function. It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution. (See *MacKeigan v. Hickman, supra, per* McLachlin J.)

A tribunal will not satisfy the requirements of s. 11(*d*) of the *Charter* if it fails to respect these essential conditions of judicial independence. Although the conditions are susceptible to flexible application in order to suit the needs of different tribunals, the essence of each condition must be protected in every case.

I emphasize that an individual who wishes to challenge the independence of a tribunal for the purposes of s. 11(*d*) need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent. This approach was justified by this Court in *Valente* (at p. 689):

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

With respect to the case at bar, therefore, the question is not whether the General Court Mar-

tial actually acted in a manner that may be characterized as independent and impartial. The appropriate question is whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence.

I will now consider the General Court Martial system as it existed at the time of the appellant's trial in order to assess its consistency with s. 11(*d*) of the *Charter*. I should add, however, that since the appellant's trial took place various amendments have been made to the *Queen's Regulations and Orders for the Canadian Forces* ("Q.R. & O.") concerning the constitution of the General Court Martial. These have gone a considerable way towards addressing the concerns I express below.

3. Were the Appellant's Rights under Section 11(d) of the Charter Infringed in the Proceedings of the General Court Martial in this Case?

(a) Introduction

The appellant concedes that a separate system of military law, along with a distinct regime of service tribunals to apply this law, is consistent with s. 11(*d*) of the *Charter*. He agrees it is necessary that military discipline be enforced effectively and speedily by tribunals whose members are associated with the military and therefore sensitive to its basic concerns. At the same time, he submits that, within the inherent limits of an institution having the power to discipline its own members, the adjudicative or disciplinary body must meet the standards of independence and impartiality required by s. 11(*d*). The General Court Martial, in his view, fails this test.

I agree that this issue gives rise to two distinct questions. First, is a parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns, *by its very nature* inconsistent with s. 11(*d*) of the *Charter*? Secondly, if the first question is answered in the negative, is the General Court Martial, as constituted at the time of the trial under the *National Defence Act* and regulations, an independent tribunal for the purposes of s. 11(*d*)? The appellant correctly, in my opinion, concedes that the answer to the first question is no. Nonetheless, I believe that it is useful to consider the extent to which, and the reasons why, the *Charter* permits a parallel system of justice, such as that found under the *National Defence Act*, to exist alongside the ordinary criminal courts. Indeed, the reasons for the existence of such a parallel system of courts provide guides as to the system's proper limits. It is appropriate to commence this inquiry with a brief examination of the reasons of this Court in *MacKay v. The Queen, supra*.

(b) The General Position of Military Law and Tribunals Under Section 11(d) of the Charter

In *MacKay v. The Queen, supra*, a majority of this Court found that the trial of a member of the Canadian Armed Forces by a Standing Court Martial does not violate his or her rights under ss. 1(*b*) and 2(*f*) of the *Canadian Bill of Rights*. Sections 1(*b*) and 2(*f*) guarantee an individual the right to equality before the law and to be tried by an independent and impartial tribunal.

MacKay had been charged and convicted by a Standing Court Martial of certain offences un-

der the *Narcotic Control Act*. He argued that his right to a fair hearing by an independent and impartial tribunal had been violated as a result of the close involvement of the military in the proceedings against him. Ritchie J., for the majority, dispensed with this issue summarily. It was entirely appropriate, in his view, that military officers be responsible for disciplining personnel who commit military offences. Furthermore, he found no lack of independence or impartiality in the circumstances of the case (at p. 395):

> An officer [having some years of military service and a familiarity with military law] whose occupation is closely associated with the administration of the law under the *National Defence Act* and whose career in the army must have made him familiar with what service life entails would, with all respect to those who hold a different view, appear to me to be a more suitable candidate for president of a court martial than a barrister or a judge who has spent his working life in the practice of non-military law. There is no evidence whatever in the record of the trial to suggest that the president acted in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed.
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> . . . . .
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> I can find no support in the evidence for the contention that the appointment of the president of the Court resulted or was calculated to result in the appellant being deprived of a trial before an independent and impartial tribunal.

Ritchie J. also found that MacKay's trial before the Standing Court Martial, rather than before the ordinary criminal courts, did not infringe his equality rights. He based this conclusion on the understanding that legislation dealing with a distinct class of people is not inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* if it is enacted for the purpose of achieving a valid federal objective. Parliament enacted the *National Defence Act*, in his opinion, for the purpose of achieving a valid federal objective pursuant to s. 91(7) of the *Constitution Act, 1867*. Consequently, the provisions of the Act regarding service tribunals did not violate MacKay's equality rights.

In concurring reasons, McIntyre J. agreed that the provisions of the *National Defence Act* authorizing the proceedings of the Standing Court Martial were consistent with the *Canadian Bill of Rights*. In concluding that the relevant provisions of the Act did not deny MacKay his right to a fair hearing by an independent and impartial tribunal, McIntyre J. emphasized the historical role of military officers in dispensing justice in accordance with military law. He admitted that an officer's association with the military hierarchy would colour his or her attitude when serving on a court martial. He did not believe, however, that this fact would lessen the independence or impartiality of the tribunal (at pp. 403-4):

> From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason. It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to

> some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline — which includes the welfare of their men — are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.
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> . . . . .
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> I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions.

McIntyre J. also found that the parallel system of service tribunals did not violate MacKay's equality rights. He did not, however, apply the same test as the majority. To determine whether an individual's equality rights are infringed, in this case the rights of a member of the Armed Forces, McIntyre J. posed the following question (at p. 406):

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

McIntyre J. concluded that the creation of special military tribunals to interpret and apply a distinct body of military law was not arbitrary or capricious. The unique disciplinary concerns of the military, different from our society's general concerns with social order and discipline, necessitate a separate and parallel system of military justice. McIntyre J. believed that the principle of equality before the law, however, demanded that the jurisdiction of military tribunals be no broader than what is necessary to achieve legitimate ends. For this reason, he stipulated that an offence should only fall within the jurisdiction of a military tribunal if it "is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service" (p. 410). He concluded that the offences with which MacKay was charged, trafficking and possession of narcotics, which were committed in a military establishment, undermined the standards of discipline and efficiency of the Forces and therefore properly fell within the jurisdiction of the Standing Court Martial.

Laskin C.J., in dissent, found that MacKay's rights under ss. 1(*b*) and 2(*f*) of the *Canadian Bill of Rights* were both violated in the proceedings of the Standing Court Martial. MacKay's right

to be tried by an independent and impartial tribunal was violated because of the close connection, which was not justified in this case, between the tribunal and the prosecution, that is, the Department of National Defence (at p. 380):

> In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, *he or she is entitled to be tried before a court of justice, separate from the prosecution and free from any suspicion of influence or dependency on others.* There is nothing in such a case, where the person charged is in the armed forces, that calls for any special knowledge or special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved. It follows that there has been a breach of s. 2(*f*) of the *Canadian Bill of Rights* in that the accused, charged with a criminal offence, was entitled to be tried by an independent and impartial tribunal. [Emphasis added.]

Similarly, Laskin C.J. found that MacKay's equality rights were violated in this case. The relevant provisions of the *National Defence Act*, in his opinion, subjected "members of the armed forces to a different and, indeed, more onerous liability for a breach of the ordinary law as applicable to other persons in Canada who are also governed by that law" (p. 386). He did not believe that the harsher treatment of military personnel is justified when the charge relates to a breach of the ordinary law which applies to all persons in Canada.

MacKay v. The Queen assists us by revealing various concerns with the independence and impartiality of the court martial system. The question raised in this appeal, however, is not resolved by this earlier case. First, the majority of this Court in *MacKay* seems to have applied a subjective test. It asked whether the Standing Court Martial actually acted in an independent and impartial manner. This is not, in light of *Valente*, the appropriate test. Secondly, we must, in this appeal, apply the jurisprudence of this Court with respect to s. 11(*d*) of the *Charter*. We must now therefore undertake an analysis that was not undertaken in *MacKay*.

(c) The Purpose of a System of Military Tribunals

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. 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. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military. I agree, in this regard, with the comments of Cattanach J. in *MacKay v. Rippon*, [1978] 1 F.C. 233 (T.D.), at pp. 235-36:

> Without a code of service discipline the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obe dience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.
>
> Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.

Such a disciplinary code would be less effective if the military did not have its own courts to enforce the code's terms. However, I share the concerns expressed by Laskin C.J. and McIntyre J. in *MacKay v. The Queen* with the problems of independence and impartiality which are inherent in the very nature of military tribunals. In my opinion, the necessary association between the military hierarchy and military tribunals — the fact that members of the military serve on the tribunals — detracts from the absolute independence and impartiality of such tribunals. As I shall elaborate in greater detail below, the members of a court martial, who are the triers of fact, and the judge advocate, who presides over the proceedings much like a judge, are chosen from the ranks of the military. The members of the court martial will also be at or higher in rank than captain. Their training is designed to insure that they are sensitive to the need for discipline, obedience and duty on the part of the members of the military and also to the requirement for military efficiency. Inevitably, the court martial represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military. In my opinion, a reasonable person might well consider that the military status of a court martial's members would affect its approach to the matters that come before it for decision.

This, in itself, is not sufficient to constitute a violation of s. 11(*d*) of the *Charter*. In my opinion the *Charter* was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces and the Royal Canadian Mounted Police. The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above. An accused's right to be tried by an independent and impartial

tribunal, guaranteed by s. 11(*d*) of the *Charter*, must be interpreted in this context.

In this regard, I agree with the conclusion reached by James B. Fay in Part IV of his considered study of Canadian military law ("Canadian Military Criminal Law: An Examination Of Military Justice" (1975), 23 *Chitty's L.J.* 228, at p. 248):

> In a military organization, such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.

In my view, any interpretation of s. 11(*d*) must take place in the context of other *Charter* provisions. In this connection, I regard it as relevant that s. 11(*f*) of the *Charter* points to a different content to certain legal rights in different institutional settings:

> *11.* Any person charged with an offence has the right
>
> . . . . .
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> (*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

Section 11(*f*) reveals, in my opinion, that the *Charter* does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law. The s. 11(*d*) guarantees must therefore be construed with this in mind. The content of the constitutional guarantee of an independent and impartial tribunal may well be different in the military context than it would be in the context of a regular criminal trial. However, any such parallel system is itself subject to *Charter* scrutiny, and if its structure violates the basic principles of s. 11(*d*) it cannot survive unless the infringements can be justified under s. 1.

The first step in our inquiry, therefore, must be to consider whether the proceedings of the General Court Martial infringed the appellant's rights under s. 11(*d*) of the *Charter*. The status of a General Court Martial, in an objective sense, as revealed by the statutory and regulatory provisions which governed its constitution and proceedings at the time of the appellant's trial, must be examined to determine whether the institution has the essential characteristics of an independent and impartial tribunal. In the course of this examination the appropriate test to be applied under s. 11(*d*) should be borne in mind: would a reasonable person, familiar with the constitution and structure of the General Court Martial, conclude that the tribunal enjoys the protections necessary for judicial independence?

4. The Institutional Background

(a) The National Defence Act: Code of Service Discipline

The Code of Service Discipline defines the standard of conduct to which military personnel and certain civilians are subject and provides for a set of military tribunals to discipline breaches of that standard. The system of military courts is governed not only by the statutory provisions contained in the Code but also by related regulations contained in the Q.R. & O. and the *Canadian Forces Administrative Orders*.

Under the Code of Service Discipline, a person who commits an offence may be tried by summary trial or by a court martial. The punishments that an officer conducting a summary trial is authorized to impose are limited to the penalties listed in s. 163(2) of the Act. Detention for a period of 90 days is the most serious penalty that an officer may impose in this context. As a result, the disciplinary powers available to an officer conducting a summary trial will be inadequate with respect to certain serious offences. In many cases, therefore, an accused will be tried by a court martial, which generally has the power to impose more serious penalties.

The Act provides for four types of courts martial: the General Court Martial, the Special General Court Martial, the Disciplinary Court Martial and the Standing Court Martial. Each type of court martial is different in terms of the offenders who are subject to its jurisdiction and the punishments which it is authorized to impose. The General Court Martial has jurisdiction over the most serious offences and has the power to impose the most serious penalties.

When a member of the Canadian Forces breaches the Code of Service Discipline, his or her commanding officer is initially responsible for disciplining that member. The commanding officer may deal with the matter by summary trial if the powers of punishment available on summary proceedings are suitable. If the commanding officer believes that these powers of punishment would be inadequate considering the gravity of the offence, he or she shall apply to a higher authority for disposal of the charge (arts. 108.30 and 109.01 Q.R. & O.).

If the higher authority concludes that its powers of punishment are inadequate to deal with the matter, it is then ordered that the offender be tried by court martial. If the higher authority lacks the power to convene a court martial, the matter is referred to the next superior officer who has the power to convene a court martial (art. 110.06 Q.R. & O.).

(b) The Structure of the General Court Martial

The Act and regulations stipulate who has the authority to convene a General Court Martial. This person is called a "convening authority". The following persons have the authority to convene such a court martial (s. 165 of the Act and art. 111.05 Q.R. & O.): the Minister of National Defence, the Chief of the Defence Staff, an officer commanding a command, upon receipt of an application from a commanding officer, and any other service authorities that the Minister may prescribe or appoint.

The principal actors at a General Court Martial, aside from the accused, are the prosecutor, the judge advocate and the president and other members.

(i) *Prosecutor*

The role of the prosecutor is self-evident. He or she is responsible for making the case against the accused, that is, for proving that the accused committed a breach of the Code of Service Discipline. The prosecutor at a General Court Martial is appointed by the convening authority. He or she will be a commissioned officer from the office of the Judge Advocate General, who is himself or herself a barrister, and who chairs the selection board that chooses candidates to become military judges. With the consent of the Judge Advocate General, civilian counsel may be appointed as prosecutor: art. 111.23 Q.R. & O.

(ii) *President and Other Members*

A General Court Martial may consist of not less than five and not more than nine members (s. 167 of the Act and art. 111.18 Q.R. & O.). The members of the court martial are effectively the triers of fact. They determine, by majority vote, the guilt or innocence of the accused. The members also, unlike a jury in an ordinary court of law, determine the sentence in the event that the accused is found guilty (s. 192 of the Act). One of the members of the court martial acts as president of the court (s. 168 of the Act). The role of the president is to ensure that the trial is conducted in an orderly and judicial manner and to be responsible for the proper performance of the duties of the court (art. 112.54 Q.R. & O.). The following persons are prohibited, under s. 170 of the Act, from sitting as a member of a General Court Martial: the officer who convened the court martial; the prosecutor; a witness for the prosecution; the commanding officer of the accused person; a provost officer; and any person who was involved in the investigation with respect to the charge in question. The members of a General Court Martial should not normally be of a rank lower than that held by the accused (art. 111.21 (Note A) Q.R. & O.). No members of the court martial can be below the rank of captain (s. 170(*g*) of the Act). The president cannot be below the rank of colonel (s. 168(1) of the Act). In addition, the members of the court should not be selected from the unit to which the accused belongs unless the demands of the military require otherwise (art. 111.06 (Note B) Q.R. & O.). An accused has the right to object to the selection of any members of the court (s. 187 of the Act).

(iii) *Judge Advocate*

Members of the Legal Branch of the Forces who have undergone special training to qualify as military judges may be appointed by the Judge Advo cate General to positions in the Chief Judge Advocate's Division within the Office of the Judge Advocate General. There, they perform legal duties related to the judicial function, and may be called upon to preside at courts martial. When it is proposed to convene a General Court Martial, the appointment of the judge advocate is made by the Judge Advocate General from officers serving in the Chief Judge Advocate's Division. The length of postings to the Chief Judge Advocate's Division is controlled by the Judge Advocate General. Officers serving in that Division may be re-posted to other legal duties within the Judge Advocate General's Office, or elsewhere within the Legal Branch of the Forces.

The judge advocate officiates at a General Court Martial much as a judge presides over a hearing in an ordinary court of law. He is not, however, the trier of fact. The judge advocate is

called upon to determine questions of law or mixed law and fact whether they arise before or after the commencement of the trial (s. 192(4) of the Act). If the permission of the president is obtained, he may address the members of the court martial on such matters as he deems necessary or desirable (art. 112.05(4a) Q.R. & O.). In certain circumstances, the president may direct the judge advocate to rule on a question of law or mixed law and fact (art. 112.06 Q.R. & O.). The court may only disregard the opinion of the judge advocate on questions of law and procedure "for very weighty reasons" (art. 112.54 Q.R. & O.).

Section 188 of the Act requires an oath to be taken by each of the members of the court martial and by the judge advocate before the commencement of proceedings. These persons must swear, in the relevant oath, to carry out their responsibilities "without partiality, favour or affection" (arts. 112.15 and 112.16 Q.R. & O.).

(c) The Independence of the General Court Martial

I will now examine the status of the General Court Martial in terms of the three conditions of judicial independence described in *Valente*. As noted above, these criteria are security of tenure, financial independence, and institutional independence. The first two criteria are personal to the adjudicator in terms of his or her direct relationship with the executive, while the third criterion relates to the independence of the tribunal considered as an institution.

(i) *Security of Tenure*

At the time of the appellant's trial, the Judge Advocate General had the authority to appoint the judge advocate at a General Court Martial (s. 169 of the Act and art. 111.22 Q.R. & O.). The Judge Advocate General is a barrister or advocate of not less than 10 years standing who is appointed by the Governor in Council (s. 9 of the Act). The Act does not require the Judge Advocate General to be a member of the Armed Forces, but, in practice, he has always been chosen from the ranks of the military. Captain Charles F. Blair, in an affidavit that was filed in this Court by the respondent, describes an important component of the Judge Advocate General's role as follows:

> 34. By historical custom of the service, and by written terms of reference, the Judge Advocate General is responsible for the provision of a military judiciary to take the judicial role in the military justice system provided for in the *National Defence Act*. To that end, he has established and maintains the Chief Judge Advocate's division of the Office of the Judge Advocate General.... [T]hat division consists of the Chief Judge Advocate (a military officer in the rank of Colonel or its naval equivalent Captain (N), a Deputy Chief Judge Advocate (Lieutenant-Colonel or Commander), and two Assistant Chief Judge Advocates (also Lieutenant-Colonels or Commanders). All of these officers have been formally qualified as military judges, through the process of qualification, training, and experience described below.

Captain Blair also indicates that the Office of the Judge Advocate General maintains a reserve of legal officers who are similarly qualified as military judges. Judge advocates at General Courts Martial are appointed from this pool of military judges. Captain Blair notes that although the Judge Advocate General formally appoints a judge advocate, this appointment is

made on the recommendation of the Chief Judge Advocate. Lastly, I note that officers holding a position with the Office of the Judge Advocate General are directly responsible to the Office for the performance of their responsibilities. They are, at the same time, subject to the orders of senior commanders in their region. No order by a senior commander, however, should interfere substantially with the primary functions of the officer. Furthermore, no such officer shall intermingle judicial and non-judicial functions; if an officer is consulted on a pre-trial matter, that officer shall not participate in the trial on that matter (*Canadian Forces Administrative Orders* 4-1).

Unlike the situation of the ordinary courts, a judge advocate is appointed to sit on a General Court Martial on an *ad hoc* basis. This temporary appointment reflects the nature of the General Court Martial, which is convened when necessary to deal with a breach of the Code of Service Discipline. At the conclusion of this type of court martial, the judge advocate and members return to their usual roles within the military. For the members of the General Court Martial, this means a return to their regular duties as officers. For the judge advocate, it means a return to legal duties within the Office of the Judge Advocate General.

It is my conclusion that this arrangement does not guarantee a judge advocate sufficient security of tenure to satisfy the requirements of s. 11(*d*) of the *Charter*. The *National Defence Act* and regulations fail to protect a judge advocate against the discretionary or arbitrary interference of the executive. The Judge Advocate General, who had the legal authority to appoint a judge advocate at a General Court Martial, is not independent of but is rather a part of the executive. Indeed, the Judge Advocate General serves as the agent of the executive in supervising prosecutions.

Furthermore, under the regulations in force at the time of the appellant's trial, the judge advocate was appointed solely on a case by case basis. As a result, there was no objective guarantee that his or her career as military judge would not be affected by decisions tending in favour of an accused rather than the prosecution. A reasonable person might well have entertained an apprehension that a legal officer's occupation as a military judge would be affected by his or her performance in earlier cases. Nothing in what I have said here should be taken to impugn the integrity of the judge advocate who presided at the appellant's trial, nor to suggest that judge advocates in fact are influenced by career concerns in the discharge of their adjudicative duties. The point is, however, that a reasonable person could well have entertained the apprehension that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings. 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.

It was stated in *Valente* that according a decision-maker tenure for a "specific adjudicative task" may be a sufficient guarantee of security of tenure. I do not believe that this statement is applicable in this context. Although a General Court Martial is convened on an *ad hoc* basis, it is not a "specific adjudicative task". The General Court Martial is a recurring affair. Military

judges who act periodically as judge advocates must therefore have a tenure that is beyond the interference of the executive for a fixed period of time. Consequently, security of tenure during the period of a specific General Court Martial, achieved by the fact that no provision of the statute or regulations allows for the removal of a judge advocate during a trial (except if the judge advocate is unable to attend: art. 112.64(2) Q.R. & O.), is not adequate protection for the purposes of s. 11(*d*) of the *Charter*.

I do not, however, consider that s. 11(*d*) requires that military judges be accorded tenure until retirement during good behaviour equivalent to that enjoyed by judges of the regular criminal courts. Officers who serve as military judges are members of the military establishment, and will probably not wish to be cut off from promotional opportunities within that career system. It would not therefore be reasonable to require a system in which military judges are appointed until the age of retirement. (See, in this regard, the judgment of the Court Martial Appeal Court in *R. v. Ingebrigtson* (1990), 61 C.C.C. (3d) 541, at p. 555.) The requirements of s. 11(*d*) are sensitive to the context in which an adjudicative task is performed. The *Charter* does not require, nor would it be appropriate to impose, uniform institutional standards on all tribunals subject to s. 11(*d*).

It may very well be true (and I am quite prepared to believe this) that, in practice, under the rules that were in effect at the time of the appellant's trial, the Judge Advocate General appointed a judge advocate for a General Court Martial only on the recommendation of the Chief Judge Advocate. The judge advocate would therefore be appointed on the basis of merit and not by the arbitrary decision of the executive, that is, the Judge Advocate General. I emphasize, however, that the independence of a tribunal is to be determined on the basis of the *objective* status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator. Practice or tradition, as mentioned by this Court in *Valente* (p. 702), is not sufficient to support a finding of independence where the status of the tribunal itself does not support such a finding.

I would therefore conclude that, at the time the appellant was tried, the judge advocate at the General Court Martial did not enjoy sufficient security of tenure to satisfy s. 11(*d*) of the *Charter*.

However, I would note that recent amendments to the Q.R. & O., which came into force on January 22, 1991, subsequent to the trial in this case, appear to correct the primary deficiencies of the judge advocate's security of tenure. Under new art. 4.09 Q.R. & O., any officer who may act as judge advocate at a General Court Martial is first appointed to the position of a military trial judge for a period of two to four years. In addition, art. 111.22 Q.R. & O. now provides that 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 are not before us and I refer to them solely for the purpose of completeness.

(ii) *Financial Security*

The promotions and pay rates of Canadian Armed Forces personnel are determined in accord-

ance with regulations adopted under the *National Defence Act*. Regulations governing promotions are made by the Governor in Council (s. 28 of the Act). Regulations governing pay and allowances are made by the Treasury Board (s. 35 of the Act).

The president and other members of a General Court Martial are not compensated, above their usual salary as officers in the Armed Forces, for serving at the court martial. It therefore appears that the criteria of financial security, as described in *Valente*, cannot be applied easily to the General Court Martial. This condition is, nonetheless, relevant in these circumstances. The requirement of financial security will not be satisfied if the executive is in a position to reward or punish the conduct of the members and judge advocate at a General Court Martial by granting or withholding benefits in the form of promotions and salary increases or bonuses.

There were no formal prohibitions, at the time that the appellant was tried by the General Court Martial, against evaluating an officer on the basis of his or her performance at a General Court Martial. An officer's performance evaluation could potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a court martial. Consequently, by granting or denying a salary increase or bonus on the basis of a performance evaluation, the executive might effectively reward or punish an officer for his or her performance as a member of a General Court Martial. This interference with the independence of the members of a General Court Martial would be an infringement of s. 11(*d*) of the *Charter*. Once again, this is not to suggest that the executive *in fact* sought to influence the outcomes of court martial proceedings by the granting or withholding of salary increases, but rather, that a reasonable person might have entertained such an apprehension under the system as constituted at the time of the appellant's trial.

Similar considerations apply in the case of the judge advocate. The executive's evaluation of a legal officer's performance as judge advocate directly affects his or her salary. The remuneration plan for legal officers is described in Captain Blair's affidavit:

> 45. Military judges, like all other legal officers in the Canadian Forces, are paid pursuant to regulations made by the Treasury Board and contained in Article 204.218 of Queen's Regulations and Orders for the Canadian Forces. ... That pay plan contemplates the establishment by Treasury Board of ranges of pay for legal officers in certain ranks, and for the movement of individual officers within those ranges, in accordance with both their time in rank, and their merit as assessed by a merit board. The pay of legal officers is reviewed annually, or sometimes less often, with the pay ranges and annual increase based on time in rank being set exclusively by the Treasury Board, without reference to any individual's performance.

A military legal officer's salary is thus determined in part, within the range established by the Treasury Board, according to a performance evalu ation. The executive's opinion of an officer's performance as a military judge may therefore be a factor in the final determination of his or her salary. Again, this possibility of executive interference is inconsistent with s. 11(*d*).

I note that the recent amendments to the Q.R. & O. now prohibit an officer's performance as a member of a General Court Martial or as a military trial judge from being used to determine

his qualification for a promotion or rate of pay (arts. 26.10 and 26.11 Q.R. & O.) In my view, this is sufficient to correct this aspect of the deficiencies of the system under which the appellant was tried.

I therefore conclude that the judge advocate and members of the General Court Martial did not enjoy sufficient financial security, for the purposes of s. 11(*d*), at the time of the appellant's trial. The executive clearly had the ability to interfere with the salaries and promotional opportunities of officers serving as judge advocates and members at a court martial. Although the practice of the executive may very well have been to respect the independence of the participants at the court martial in this respect, this was not sufficient to correct the weaknesses in the tribunal's status. A reasonable person would perceive that financial security, an essential condition of judicial independence, was not present in this case.

(iii) *Institutional Independence*

Many of the aspects of the General Court Martial that Décary J., dissenting in the Court Martial Appeal Court, found troubling relate to the tribunal's institutional independence. After a careful review of the relevant legislative provisions, Décary J. observed (at p. 372):

> This review of the manner of proceeding in a General Court Martial indicates that the system created by the *Act* and by the *Q.R.O.C.F.* clearly establishes close links of institutional dependence between the Minister of National Defence, the commanding officer who signs the charge sheet, orders custody, receives the investiga tion report and decides to proceed with the charge, the military authority who convenes the court, appoints its members and decides on its dates of hearing, the officers who make up the court and for all practical purposes sit as a jury, the officer who prosecutes and of course the accused. I note that the *Act* and the *Orders* do not expressly require that the judge advocate also be a member of the Canadian Forces, although in the case at bar the record indicates that he was. I nevertheless take account of this officer on the tribunal, whether or not he was an officer of the Canadian Forces, in the conclusion I have arrived at of an objective institutional dependence, since under the *Act* and the *Orders* his function and duties lead him to maintain close ties with the Canadian Forces.

I agree with the essence of Décary J.'s observations. An examination of the legislation governing the General Court Martial reveals that military officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. This close involvement is, in my opinion, inconsistent with s. 11(*d*) of the *Charter*. It undermines the notion of institutional independence that was articulated by this Court in *Valente*. The idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system. The principle of institutional independence, however, requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function. It is important that military tribunals be as free as possible from the interference of the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces.

In my opinion, certain characteristics of the General Court Martial system would be very likely to cast into doubt the institutional independence of the tribunal in the mind of a reasonable and informed person. First, the authority that convenes the court martial (the "convening authority") may be the Minister, the Chief of the Defence Staff, an officer commanding a command, upon receipt of an application from a commanding officer, or another service authority appointed by the Minister (art. 111.05 Q.R. & O.). The convening authority, an integral part of the military hierarchy and therefore of the executive, decides when a General Court Martial shall take place. The convening authority appoints the president and other members of the General Court Martial and decides how many members there shall be in a particular case. The convening authority, or an officer designated by the convening authority, also appoints, with the concurrence of the Judge Advocate General, the prosecutor (art. 111.23 Q.R. & O.). This fact further undermines the institutional independence of the General Court Martial. It is not acceptable, in my opinion, that the convening authority, i.e., the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as the triers of fact. At a minimum, I consider that where the same representative of the executive, the "convening authority", appoints both the prosecutor and the triers of fact, the requirements of s. 11(*d*) will not be met.

Secondly, the appointment of the judge advocate by the Judge Advocate General (art. 111.22 Q.R. & O.), undermines the institutional independence of the General Court Martial. The close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the executive, are obvious. To comply with s. 11(*d*) of the *Charter*, the appointment of a military judge to sit as judge advocate at a particular General Court Martial should be in the hands of an independent and impartial judicial officer. The effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence and impartiality of the tribunal. However, as I have concluded above, I consider that the new arts. 4.09 and 111.22 of the amended Q.R. & O. have largely remedied this defect to the extent required in the context of military tribunals.

I conclude, therefore, that the constitution and structure of the General Court Martial at the time of the appellant's trial did not meet the minimum requirements of s. 11(*d*) of the *Charter*. Unless this infringement of s. 11(*d*) can be justified under s. 1 the appeal must be allowed. However, before proceeding to s. 1, it will be convenient to deal with certain other submissions made by the appellant, which, while not strictly necessary to the outcome of this appeal, I feel should be dealt with in the interests of clarity.

5. Section 7 of the Charter

The appellant places reliance upon both s. 11(*d*) and s. 7 of the *Charter*. However, the s. 7 submission can be dealt with very briefly. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, this Court decided that ss. 8 to 14 of the *Charter*, the "legal rights", are specific instances of the basic tenets of fairness upon which our legal system is based, and which are now entrenched as a constitutional minimum standard by s. 7. Consequently, in the context of the appellant's challenge to the independence of the General Court Martial before which he was tried, s. 7 does not offer greater protection that the highly specific guarantee under s. 11(*d*). I do not wish to be understood to suggest by this that the rights guaranteed by ss. 8 to 14 of the

Charter are exhaustive of the content of s. 7, or that there will not be circumstances where s. 7 provides a more compendious protection than these sections combined. However, in this case, the appellant has complained of a specific infringement which falls squarely within s. 11(*d*), and consequently his argument is not strengthened by pleading the more open language of s. 7.

6. Section 15 of the Charter

The appellant sought as well to rely on s. 15 of the *Charter*. I think that this submission equally can be dealt with briefly. In my opinion, the appellant, in the context of this appeal, cannot claim to be a member of a "discrete and insular minority" so as to bring himself within the meaning of s. 15(1) of the *Charter: Andrews v. Law Society of British Columbia, supra*. For the purposes of this appeal, the appellant cannot be said to belong to a category of person enumerated in s. 15(1), or one analogous thereto.

I emphasize, however, that my conclusion here is confined to the context of this appeal. I do not wish to suggest that military personnel can *never* be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances. However, no circumstances of this sort arise in the context of this appeal, and the appellant gains nothing by pleading s. 15 of the *Charter*.

7. Evidence Discovered on the Search and Section 24(2) of the Charter

The police officer who conducted the search of the appellant's home testified at trial that he had attended on the Crown Attorney and explained to her the factual details from his investigation on which he was relying to establish "reasonable and probable grounds" for the issuance of the search warrant. The Crown Attorney's Office then prepared what at that time was the standard request for a search warrant by typing the words [Translation] "Information from a trustworthy person following investigation" on an information to be sworn before a justice of the peace. The officer then took this form before a justice of the peace, who merely confirmed that the officer had consulted the Crown Attorney and then had him swear out the information.

The appellant contended at trial, and the Crown concedes, that this procedure, by which the alleged "reasonable grounds" were revealed only to the Crown Attorney and not to the justice of the peace, was unacceptable, and constituted an infringement of the appellant's right against unreasonable search and seizure under s. 8 of the *Charter*. I agree that this procedure for obtaining search warrants, while standard in Quebec at that time, was unacceptable in terms of the *Charter*. The question is, therefore, whether the evidence of illegal drugs discovered in the appellant's home during the search ought to have been excluded under s. 24(2).

On the reasoning of this Court in *R. v. Collins*, and in particular in *R. v. Strachan, supra*, I agree with the courts below that this evidence was properly admitted at trial. The evidence in question is real evidence, which pre-existed the violation of s. 8, as opposed to evidence em-

anating from the accused, which was generated by the violation. There can be no question that the evidence was essential to substantiate a very serious criminal charge. Moreover, while the procedure followed by the police was unacceptable, there was a good faith attempt to comply with a procedure which was evidently believed to be correct.

For these reasons, in my opinion, the exclusion, rather than the admission, of the impugned evidence would have brought the administration of justice into disrepute. Consequently, this ground of appeal fails.

8. Section 1 of the Charter

The appellant's alternative grounds of appeal having been dealt with, we are left with the s. 11(*d*) violation flowing from the institutional setting in which he was tried. Unless this infringement can be justified under s. 1 of the *Charter*, this appeal must be allowed.

It is now settled that on an inquiry under s. 1 the appropriate starting point is the analysis of Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103. As I have already indicated in these reasons, the goal of maintaining order and discipline within the special regime constituted by the Armed Forces of this country is an important one. Indeed, the existence of a separate system of military tribunals with jurisdiction over matters governed by military law is contemplated in the wording of s. 11(*f*) of the *Charter*. In my view, the necessity of maintaining a high level of discipline in the special conditions of military life is a sufficiently substantial societal concern to satisfy the first arm of the proportionality test in *Oakes*.

However, I am equally convinced that the scheme of the General Court Martial as it existed at the time of the appellant's trial cannot pass the second stage of the test. I am prepared to admit that there may well exist a rational connection between the challenged structure of the General Court Martial and the goal of the maintenance of military discipline in the Armed Forces. However, it is not necessary for me to address this issue in any detail, because 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 of circumstances. A period of war or insurrection might constitute such circumstances. However, during periods of normality, the scheme of the General Court Martial, as it was at the time of the appellant's trial, went far beyond what was necessary to accomplish the goals for which it was established. Indeed, the amendments to the Q.R. & O. of January, 1991, which I have indicated constituted significant improvements over the regime under which the appellant was tried, attest to this fact.

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. I note again that the amendments to the Q.R. & O. which came into affect after the appellant's trial have alleviated this latter problem. However, this appeal falls to be decided on the constitutionality of the structure of the General

Court Martial in place at the time of trial.

In short, the structure of the General Court Martial with which we are here concerned incorporated features which, in the eyes of a reasonable person, could call the independence and impartiality of the tribunal into question, and are not necessary to attain either military discipline or military justice. This structure, therefore cannot be said to have impaired the appellant's s. 11(*d*) rights "as little as possible". The proportionality test prescribed in *Oakes* is thus not satisfied.

It follows that the General Court Martial before which the appellant was tried infringed the appellant's s. 11(*d*) right to a trial before an independent and impartial tribunal in a manner that cannot be justified under s. 1 of the *Charter*. The appeal must therefore be allowed.

Disposition

In conclusion, I would allow the appeal from the judgment of the Court Martial Appeal Court and direct that a new trial take place.

I would answer the constitutional questions as follows:

> 1. Do ss. 166 to 170 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, and the Queen's Regulations and Orders, inasmuch as they allow an accused to be tried by General Court Martial, restrict the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

> 2. If the answer to question 1 is yes, are they reasonable limits in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore are not inconsistent with the *Constitution Act, 1982*?

Answer: No.

> 3. Does s. 130 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, restrict the right to equality protected by s. 15 of the *Canadian Charter of Rights and Freedoms* in that it confers jurisdiction over a person subject to the *National Defence Act* for offences pursuant to the *Narcotic Control Act*, R.S.C., 1985, c. N-1, as amended, thereby depriving the accused of the procedure normally applicable to such offences?

Answer: No.

> 4. If the answer to question 3 is yes, is it a reasonable limit in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

This question does not arise.

The reasons of La Forest, McLachlin and Stevenson JJ. were delivered by *Stevenson J.*:

128 I have read the judgments of Lamer C.J. and while I agree with his conclusion, I do not share his reasoning.

129 I start with the acceptance of two propositions: The *Canadian Charter of Rights and Freedoms* contemplates the existence of a system of military tribunals and that courts martial, as such military tribunals, are staffed by officers of the Armed Forces in exercising the judicial functions entrusted to those tribunals.

130 I do not understand the Chief Justice's decision as disagreeing with these propositions, the latter of which is, I think, supported by the majority decision in *MacKay v. The Queen*, [1980] 2 S.C.R. 370. I refer particularly to p. 403 where McIntyre J. said:

> ...I am unable to conclude that a trial by court martial under the provisions of the *National Defence Act* of criminal offences, which are also offences at civil law, deprives the defendant of a fair hearing by an independent tribunal. From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function.

131 The court martial is not dissimilar from the disciplinary body of a self-governing profession which is often, ultimately, the executive board of the profession.

132 The appellant's argument would have us institutionalize the General Court Martial. In my view, we must examine that institution in the light of the fact that it is appointed for a single adjudicative task. We must also examine its two components: the military judge, or judge advocate, and the members of the tribunal. We must then ask whether this tribunal has the degree of institutional independence which the *Charter* mandates having regard to the considerations set down in *Valente v. The Queen*, [1985] 2 S.C.R. 673.

133 I agree that s. 11(*d*) imports a flexible standard which must take into account the nature of the tribunal under consideration.

Tenure

134 The requirement of flexibility led Le Dain J. to say that there could be security of tenure for a "specific adjudicative task". The Chief Justice concludes that because the General Court Martial is a recurring affair, military judges act periodically as judge advocates and must have a tenure beyond the interference of the executive. I admit the apparent attractiveness of this view. It is based on the assumption that a military judge would wish to please his superiors in order to continue that career. At the same time the Chief Justice accepts that military judges need not be accorded tenure until retirement because they may not wish to be cut off from promotional opportunities within the career military.

135 The difficulty I see is that as tenured terms draw to a close the military judges may

wish to secure a re-appointment or to advance their careers in some other respect. It would thus be in the interest of these judges to please the "executive". In my opinion, the only way that the ideal could be achieved is by tenured appointments roughly equivalent to those given to the professional judiciary. But, for the reasons given by the Chief Justice, I do not think this aspect of a military judgeship should be so institutionalized.

The Executive

136 The difficulty in applying the concepts in *Valente* to assess military tribunals is, I think, largely attributable to the difficulty in defining the concept of "the executive" from which there must be independence.

137 The core value with which we are concerned is summarized by Dickson C.J. in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, as "[t]he ability of individual judges to make decisions in discrete cases free from external interference or influence ..." (p. 69). Executive or legislative interference or the reasonable apprehension of such interference must be guarded against.

138 Carried to its logical conclusion, this concern would mandate a completely independent military tribunal. However attractive that argument might be, it was not made, and on the authority of the majority in *MacKay*, would be difficult to sustain.

Independence from the Executive

139 The legitimate concern of the appellant is, to use the Chief Justice's words, "...that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function" (p. 308). The entire military establishment must, in varying degrees, be responsible for maintaining the discipline, efficiency and morale of the Armed Forces. If the executive is defined to include the entire hierarchy, military tribunals will always be subject to executive influence.

Institutional Independence Within the Court Martial System

140 Given an *ad hoc* military tribunal, composed of military personnel, operating within a military hierarchy, what institutional independence should the *Charter* ensure?

141 The tribunal must be free to make its decisions on the merits.

142 Given that the members of the tribunal are necessarily operating within the military service, that means to me that no one who has an interest in seeing that the prosecution succeeds or fails should be in a position of influence.

143 Clearly, the accused and the "complainants" have that interest. That interest would, in my view, extend to the prosecutor and military personnel engaged in the investigation or in formulating or approving the charges.

144 I suggest that there must be found some point within the military hierarchy where the officer or official has no real or apparent concern about the outcome. There is, at that point,

sufficient independence. I leave aside cases in which it can be shown to the contrary because the *Charter* provisions would clearly apply in such a case. In my view, the convening authority is sufficiently far removed from the investigative and complaint stages to convene the court martial and appoint its members.

145 I am concerned that the convening authority also appoints the prosecutor. This is done with the concurrence of the Judge Advocate General. With the scheme in force when this matter was tried, the judge advocate also was appointed by the Judge Advocate General.

146 I agree with the Chief Justice that the convergence of responsibilities in appointing the prosecutor and judge advocate is objectionable as it fails to meet the requirement that those appointing the tribunal have no apparent concern in the outcome.

147 In saying this, I do not do so on the basis that the Judge Advocate General and the convening authority are all part of the executive, but that there is at least an appearance that those responsible for choosing the tribunal, namely the convening authority and the Judge Advocate General, have an interest in the nomination of the prosecutor and, in effect, in a successful prosecution.

Financial Security

148 Again, I view this issue not from the point of view of "executive independence", but from the point of view of sufficient independence in the setting of military tribunals. Under the scheme in force when these proceedings took place 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. This could well include persons with an interest in that outcome. In my view, those who could be seen as having some interest in the outcome could be excluded from the salary or promotion processes, or the performance of court martial duties could be readily excluded from consideration thus obviating any apparent infringement.

149 I would, with these modifications, concur in the Chief Justice's disposition of the appeal.

The following are the reasons delivered by *L'Heureux-Dubé J.* (dissenting):

150 I have had the benefit of reading the reasons of Lamer C.J. While I am in agreement with certain propositions he advances, with deference, my ultimate conclusion differs substantially from his. For the reasons which follow, I am of the view that the appellant was not denied his s. 11(*d*) rights at his trial before a General Court Martial for three counts of possession of a narcotic for the purpose of trafficking and one count of desertion. Accordingly, the appeal ought to be dismissed.

151 The pertinent facts as well as the basic structure of the General Court Martial at the time of the appellant's trial have been set out by my colleague and there is no need for me to recount either here. Instead, I intend to confine my opinion to the narrow legal issue of the structure of the General Court Martial and its relationship to the appellant's right to be judged

by an independent and impartial tribunal.

Contextual Approach

152 While the Chief Justice notes that one should not lose sight of the fact that this appeal arises in the context of a military tribunal (and I am in agreement with him on this point), I feel that he accords insufficient weight to this context in the course of his opinion. I also believe that one should generally keep the context in which appeals arise in mind although it is particularly important that this be done in the case of a military tribunal.

153 The contextual approach is a tenet of constitutional interpretation which is of paramount importance, and has found support in many judgments of this Court. Such an interpretation was at the heart of the reasons of Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where the right to strike of various essential services was at issue. At pages 365-66 and 368 Dickson C.J. notes:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.
>
> . . . . .
>
> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions.

154 While the former Chief Justice was speaking in dissent, his comments did not go unnoticed by Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. At page 1354 she cites the passage above and remarks:

> Chief Justice Dickson in his dissent clearly applied a combined purposive and contextual approach to the issue in that case. He asked himself what the purpose of freedom of association was *in the context of labour relations*. Why did workers associate to form unions? What was the aim and object? [Emphasis in original.]

Then, at pp. 1355-56, Wilson J. continues:

> *One virtue of the contextual approach, it seems to me, is that it recognizes that a particu-*

> *lar right or freedom may have a different value depending on the context*. It may be, for example, that freedom of expression has greater value in a political context that it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.
>
> *It is my view that a right or freedom may have different meanings in different contexts*. Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smoke-stacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context. This having been done, the right or freedom must then, in accordance with the dictates of this Court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee. [Emphasis added.]

155 I agree with these comments and would add that while the virtues of the contextual approach have been discussed principally with respect to s. 1 of the *Canadian Charter of Rights and Freedoms*, it is clear from the reasons given by Wilson J. in *Edmonton Journal*, from those of Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, and especially from those of Cory J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 224-27, that context is also important at the initial stage of deciding whether or not a breach of a given right or freedom has occurred. Context has been especially useful in determining the scope of "the principles of fundamental justice" for the purposes of s. 7. (Besides the reasons of Cory J. in *Wholesale Travel* see also *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 513 (*per* Lamer J.), *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pp. 848-50 (*per* McLachlin J.), and my dissenting reasons in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 647.) As Wilson J. pointed out, a right or freedom may have different meanings in different circumstances and to ignore these circumstances at the level of the substantive right or freedom would be to ignore a substantial amount of information at a critical stage of the analysis.

156 As I mentioned, while other pronouncements of this Court on the subject are entirely consistent with the contextual approach, in some circumstances it has been thought to be more advantageous to restrict consideration of context to the s. 1 analysis. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, for instance, due to the nature of the right at issue and the previous jurisprudence of this Court which had mandated an extremely broad interpretation of freedom of expression under s. 2(*b*), Dickson C.J. was of the view that contextual balancing was best left for a later point in the analysis (pp. 733-34). My own reasons in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at pp. 192-93, are to the same effect. However, there is nothing in this decision or any other by this Court to suggest that taking

context into account would be inappropriate when faced with an alleged violation of s. 11(*d*) and the right to be tried by an independent and impartial tribunal.

157 While such an approach would generally be considered to be of assistance when the Court is called upon to interpret the *Charter*, it is clearly required where military tribunals are at issue. As pointed out by Lamer C.J., the fact that s. 11(*f*) begins "except in the case of an offence under military law tried before a military tribunal" illustrates that the *Charter* contemplates a separate system of military justice. This, in fact, was conceded by the appellant. Hence, I am of the view that special note must be taken of the circumstances surrounding this appeal.

158 This means that at least a rudimentary understanding of the exigencies and goals of the military and its own particular system of justice must be attained. Only after an examination of what is at stake may we turn to the ultimate question of whether or not the appellant's right to be tried by an independent and impartial tribunal as guaranteed by s. 11(*d*) has been infringed. The answer to the latter question, of course, will be coloured by these preliminary observations.

Military Law

159 Judicial and academic consideration of the particular nature of military law, while not abundant, has brought certain basic principles to light. I would first take note of the observations of McIntyre J. in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, a pre-*Charter* decision of this Court in which the appellant alleged that his trial before a Standing Court Martial contravened the judicial independence guarantee of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. At page 402, McIntyre J. states:

> Since very early times it has been recognized in England and in Western European countries which have passed their legal traditions 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. The development of this body of law included, sometimes in varying degree but always clearly recognized, a judicial role for the officers of the military force concerned.

He elaborates at pp. 403-4:

> From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason. It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service of-

> ficers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline — which includes the welfare of their men — are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.
>
> Furthermore, *the problems and the needs of the armed services, being in many respects special to the military, may well from time to time require the special knowledge possessed by officers of experience who, in this respect, may be better suited for the exercise of judicial duty in military courts than their civilian counterparts*. It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions. The controlling bodies of most professions such as those of law, medicine, accountancy, engineering, among others, are given this power. I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions. It must also be remembered that while this appeal concerned only the armed services serving in Canada, the position of forces serving abroad not being in issue, it must be recognized that in service abroad the officers must assume the judicial role by reason of the absence of any civil legal processes. The character of the officer for independence and impartiality will surely not vary because he is serving overseas. The practical necessities of the service require the performance of this function by officers of the service.... [Emphasis added.]

160 I also wish to mention the following remarks made by J.B. Fay in Part I of "Canadian Military Criminal Law: An Examination Of Military Justice" (1975), 23 *Chitty's L.J.* 120, at p. 123:

> The ultimate objective of the military in time of peace is to prepare for war to support the policies of the civil government. The military organization to meet this objective requires, as no other system, the highest standard of discipline able to function under the most adverse of conditions. Discipline can be defined as an attitude of respect for authority which is developed by leadership, precept and training. It is a state of mind that leads to a willingness to obey an order no matter how unpleasant the task to be performed. This is not a characteristic of the civilian community. It is the ultimate characteristic of the military organization. It is the responsibility of those who command to instill discipline in those they command. In doing so there must be the correction and the punishment of individuals. Fairness and justice are indispensable.
>
> Military law achieves great importance when viewed in the context of the above. It is from military law that the serviceman receives his most tangible indication of the relationship between himself and those who command. It is under military law that he is tried and punished.

161 Finally, the words of A.D. Heard in "Military Law and the *Charter of Rights*" (1988),

11 *Dalhousie L.J.* 514, at p. 514, are apposite:

> The Canadian Forces, like those of any country, are maintained through a much more rigid discipline of its members than is expected of the general citizenry. Such a discipline is necessitated by the end object of all military forces: combat. This discipline is instilled and enforced by a body of military law which encompasses a wide set of prohibitions to which civilian society is not normally subject, relatively harsh punishments, and expeditious procedures in the military tribunals that enforce those rules.

162 There are, I think, two fundamental propositions respecting the military and its legal system which emerge from these passages. The first is that, above all, the Armed Forces depend upon the strictest discipline in order to function effectively. The reasons for this are obvious and were laid out by McIntyre J. in *MacKay, supra*. Clearly, without the type of rigorous obedience to a rigid hierarchy which the military demands of its members, our national defence and international peacekeeping objectives would be unattainable.

163 The second fundamental proposition is the need for this discipline to be maintained by the more senior members of the Forces which means that cases of alleged non-adherence to its rules need to be tried within the chain of command. As well as serving an important symbolic function by reinforcing the hierarchy on which discipline depends, this also ensures a sufficient degree of institutional knowledge on the part of those who would judge. The military is, after all, something of its own society within the greater one. While ultimately it must adhere to the expectations and carry out the policies of the civilian world, like any society it entails a certain number of traditions, rules, and taboos which are not within the normal ken of outsiders. These are the sort of considerations which must be kept in mind while measuring the General Court Martial against the requirements of the *Charter*.

Independence of the Judiciary

164 The seminal case pertaining to the *Charter* guarantees currently at issue is *Valente v. The Queen*, [1985] 2 S.C.R. 673. I should state at this point that the appellant frames his argument in terms of judicial independence as opposed to impartiality. That there is a significant distinction to be made between the two may be seen from the following extract from *Valente* at p. 685:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

165 In *Valente*, Le Dain J. goes on to establish what he calls three "essential conditions" of judicial independence. The independence of a given tribunal, apparently, will depend on an

objective assessment of the presence or non-presence of these conditions.

166 It is at this point that I differ significantly with the reasoning of the Chief Justice for I harbour serious concerns as to the applicability of these criteria to military tribunals. In fact, I doubt that Le Dain J. ever meant that they be applied to each and every form of tribunal. At pages 692-93 of *Valente*, he warns:

> It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada 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. Moreover, it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) and not any particular legislative or constitutional formula by which it may be provided or guaranteed.

167 At the very least, the above passage exhibits a concern for flexibility and a recognition that differences in tribunals form an acceptable and even desirable part of the Canadian legal landscape. Hence, it would be an error to adopt a uniform formula for the purposes of assessing their constitutionality. In the circumstances of this case, such flexibility might well mean arriving at the conclusion that the essential conditions generated in a case which arose in the context of evaluating the independence of the Provincial Court (Criminal Division) are ill-tailored to performing the same analysis on the General Court Martial as constituted under the *National Defence Act*, R.S.C., 1985, c. N-5, and its regulations.

168 In this regard I agree with Pratte J. in the court below (1990), 114 N.R. 321, who points out that for "ordinary judges" (such as, for example, those appointed to sit on the Provincial Court (Criminal Division)) factors such as security of tenure and financial security (two of the three criteria purportedly set down by Le Dain J.) are essential guaran tees of independence. However, he adds (at p. 334):

> The situation is different for judges who, like the members of a general court martial, are appointed to try a single case and receive no pay for the performance of duties which are in addition to their usual duties. Not only is it difficult in their case to speak of tenure and financial security, but it must be apparent that these guarantees are not necessary.

169 Pratte J. was further of the view that it cannot be assumed that military judges who derive no benefit from acting in a judicial capacity should wish to please their superiors in the hope of some sort of career advancement in the future. He continues, at p. 334:

> In reality, the fact that no pay or benefit is attached to the performance of judicial duties in the military is as effective a guarantee of independence as that of tenure and financial security to the "ordinary" judge.

170 For these reasons, I feel that there may well be occasions when it simply does not

make sense to evaluate a given tribunal according to the standards established by Le Dain J. in *Valente*. Indeed, this is one of those occasions. The criteria of security of tenure and financial security are especially ill-suited to the task given the transitory nature of the General Court Martial and peculiar circumstances surrounding the financial remuneration (or lack thereof) of its members.

171 Nonetheless, even if I am mistaken on the above and the three essential conditions as set down by Le Dain J. are accurate indicia of the constitutionality of the General Court Martial, it is my position, for the reasons which follow, that those criteria were amply satisfied by the structure of the General Court Martial as it existed at the time of the appellant's trial.

Security of Tenure

172 The first essential condition is security of tenure. I reproduce Le Dain J.'s formulation of it for the sake of convenience:

> The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, *or for a specific adjudicative task*, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner. [Emphasis added.]

(*Valente, supra*, at p. 698.)

173 The position of the Chief Justice, as I understand it, is two-fold. First, given that the judge advocate for a particular case was, at the time of trial, chosen by the Judge Advocate General who was in turn appointed by the Governor in Council, there is insufficient protection from arbitrary interference from the executive because the Judge Advocate General is part of the executive. Second, there are no guarantees that a judge's career will not be affected by his or her performance on tribunals. Hence, there exists a reasonable apprehension that the judge advocate was chosen because of an expectation that he or she would satisfy the interests of the executive. To be free from this apprehension, according to the Chief Justice, there would have to be security from this potential interference for a fixed period of time. He continues that the caveat contained in Le Dain J.'s formulation pertaining to a "specific adjudicative task" is inapplicable because the General Court Martial is "a recurring affair" (p. 303).

174 I respectfully disagree with this reasoning. With respect to the first concern, it seems to me that the Chief Justice is arguing that, by definition, the performance of a judge advocate cannot be free from arbitrary interference from the executive because he or she is appointed by the executive. I cannot bring myself to believe that this is sufficient to constitute a violation of s. 11(*d*). The framers of the *Charter* could not have intended that provision to prevent the executive from appointing members of the judiciary when other sections of the Constitution explicitly give the executive authority to do so. Turning then to the second argument, while in some respects career aspirations might somehow relate to the requirement of security of tenure, to my mind they are more properly dealt with under the notion of financial security and I will discuss them in due course.

175 My own view is that the General Court Martial is a "specific adjudicative task" as

contemplated by Le Dain J. in *Valente*. The *National Defence Act* and its accompanying regulations clearly call for the *ad hoc* convening of a General Court Martial, its functioning, and then its dissolution. While there may be various General Courts Martial sitting all over this country and even overseas, the legislation contemplates each as an entirely distinct entity. It simply does not reflect the Act and regulations to assert that each and every one of those General Courts Martial is part of a "recurring affair" as opposed to constituting a "specific adjudicative task" in its own right.

176 Furthermore, while the General Court Martial is taking place there are sufficient guarantees of the tenure of the persons involved from the executive. Article 112.64(2) of the *Queen's Regulations and Orders for the Canadian Forces* ("Q.R. & O.") provides, *inter alia*:

> (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,
>
> (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
>
> (ii) dissolve the court;

177 While of course conferring a certain amount of discretion on the convening authority, this article also acts as something of a limitation. Only if the judge advocate is, for some reason, unable to attend the General Court Martial, may the convening authority appoint a replacement judge advocate. Otherwise, once appointed, the judge advocate is at complete liberty to proceed with the undertaking with which he or she has been entrusted. No other provision in the Q.R. & O. allows for the removal of the judge advocate once he or she has been appointed. This provides 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. Similar views were expressed by Cavanagh J. in *Schick v. The Queen* (1987), 4 C.M.A.R. 540, at p. 548. I would conclude, therefore, that a reasonable person would not be given cause to question the independence of the General Court Martial based on a purported lack of security of tenure.

Financial Security

178 In *Valente, supra,* at p. 704, Le Dain J. enunciated this criterion in the following manner:

> The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could

affect judicial independence.

179 The Chief Justice is of the view that the provisions in place at the time of trial give rise to a reasonable apprehension that this essential condition was not met. He points out that promotions and pay rates are established according to regulations promulgated either by the Governor in Council or by the Treasury Board. Furthermore, since the President and the other members of the tribunal were not compensated above and beyond their usual salary, which depends upon their rank and therefore upon merit, the lack of formal prohibitions on taking performance on a military tribunal into account in assessing merit results in a reasonable apprehension that career concerns might motivate decisions favourable to the prosecution. The same difficulty, in his view, applied to judge advo cates. Again I respectfully disagree. In my view, this is not problematic in the least having already been contemplated in *Valente*.

180 In *Valente* the same type of issue was raised when the appellant argued that a provision which enabled Provincial Court (Criminal Division) judges to be reappointed at the pleasure of the Lieutenant governor in Council upon attaining the age of retirement violated the constitutional requirement of judicial independence because, *inter alia*, the need in some cases of such a reappointment to complete entitlement to a pension could give rise to a reasonable perception of dependence for one's financial well-being upon the executive (*Valente, supra*, at p. 698).

181 Le Dain J. took the position, and I agree with him, that the effect of the executive having control over certain discretionary benefits or advantages did not go to the heart of s. 11(*d*). At page 714 he states:

> While it may well be desirable that such discretionary benefits or advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschênes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*.

182 I read this statement as recognizing that, at a certain point, there will be elements of judicial remuneration which are in the hands of another party — possibly the executive. While in the best of all possible worlds this might not be the case, such potential discretion is not sufficient to constitute "arbitrary interference by the Executive in a manner that could affect judicial independence" and hence to give rise to a reasonable apprehension that the essential condition of financial security was not met at the time the appellant was tried.

Institutional Independence

183 The final essential condition as articulated by Le Dain J. is "institutional independence" which he defines as "the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function" (*Valente, supra*, at p. 708).

184 Unless I misapprehend his position, Lamer C.J. finds numerous provisions in the *National Defence Act* and its regulations problematic and tending to show that this final criterion

was not being fulfilled by the structure as it existed. Particularly offensive, in his view, was the dual role played by the convening authority who, as a member of the executive, decided when a General Court Martial would take place, the number of members who would take part in it, and appointed the prosecutor with the concurrence of the Judge Advocate General (arts. 111.05 and 111.23 Q.R. & O.). It is also repugnant to s. 11(*d*), he argues, that the Judge Advocate General (another member of the executive) appointed the judge advocate. Such institutional links, in his opinion, undermined the scheme to a point where a reasonable person would question the independence of the court.

185 As was the case with the conditions of security of tenure and financial security, I regret to say that I am unable to accede to his conclusion. I would begin by pointing out that this Court has recently recognized, in so far as the s. 11(*d*) guarantee to be tried by an independent and impartial tribunal is concerned, that it is unrealistic to demand the utter separation of the judiciary from the other branches of government. I recognize that some pronouncements of this Court may appear to go in the opposite direction, most notably perhaps those contained in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, where, at p. 69, Dickson C.J. remarks:

> Historically, 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 principle of judicial independence.

186 However, when the issue was once again before this Court in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, McLachlin J. took care to clarify the position. At page 827 she states:

> It is important to note that what is proposed in *Beauregard v. Canada* is 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. Statutes govern the appointment and retirement of judges; laws dictate the terms upon which they sit and are remunerated. Parliament retains the power to impeach federally-appointed judges for cause, and enactments such as the *Supreme Court Act*, R.S.C. 1970, c. S-19, stipulate on such matters as the number of judges required for a quorum. It is inevitable and necessary that relations of this sort exist between the judicial and legislative branches of government. [Emphasis in original.]

187 Similar sentiments are expressed by Lamer C.J. in *R. v. Lippé*, [1991] 2 S.C.R. 114. In assessing the constitutional validity of a Quebec statute which permitted part-time municipal court judges to continue to practice as lawyers, he notes at p. 142:

> I admit that a system which allows for part-time judges is not the *ideal* system. However, the Constitution does not always guarantee the "ideal". Perhaps the ideal system would be to have a panel of three or five judges hearing every case; that may be the ideal, but it certainly cannot be said to be constitutionally guaranteed. [Emphasis in original.].

188 On the basis of these remarks, it is apparent to me that absolute separation of a given tribunal from the executive is not to be expected. The question then becomes: what degree of connection between the executive and those who exercise a judicial role is permitted by the *Charter*?

189 It is at this point that the context in which this appeal arises becomes extremely significant. One must not lose sight of the fact that the judicial role being exercised in the case at bar is being exercised under the purview of the Canadian Armed Forces and at issue is the independence of a military tribunal. This means, as I have established earlier in these reasons, that it is essential both that discipline be maintained and that alleged instances of non-adherence to rules be tried by other members of the military. Section 11(*d*) might not condone a civilian system of justice where the same body which appointed the prosecutor also appoints the triers of fact, or where the executive and the presiding judge maintain close ties. However, in the context of the Armed Forces, these characteristics may well be a necessary part of the chain of command which, when followed link by link, ultimately leads to the same destination no matter where one begins. Hence, in my opinion, the *Charter* permits a sufficient degree of connection between the executive and the participants of a General Court Martial such that the third criterion of institutional independence was satisfied at the time of the appellant's trial.

190 By way of addendum, I wish to respond to the reasons of Stevenson J. which I have lately had the opportunity to read. I understand his position to be more functional in approach, demanding, in the framework of the criterion of institutional independence, that anyone with an interest in seeing the prosecution fail or succeed not be in a position to influence the proceedings. Consequently, in his view, the appointment of the prosecutor by the convening authority resulted in a violation of the appellant's rights under s. 11(*d*) of the *Charter*. In the framework of the criterion of financial security his view is that persons with an interest in the outcome of a particular case may have been in a position to reward or punish decisions favourable or unfavourable to them. Presumably this also amounted to a *Charter* violation. I respectfully disagree with his reasoning on both these points.

191 With respect to financial security, I am of the view that, as was the case with the deficiencies perceived by the Chief Justice, the difficulties expressed by Stevenson J. were contemplated and dismissed by Le Dain J. in *Valente*. I have already quoted an extract from that case to the effect that while ideally no elements of judicial remuneration would ever be in the hands of another party, such discretion is not necessarily sufficient to constitute a violation of s. 11(*d*). There is no need for me to recite that passage again here. Suffice it to say that I am of the view that it is also applicable to the concerns expressed by Stevenson J.

192 Turning then to institutional independence, I would reiterate my view relating to the importance of context. It must be remembered that the appellant's trial was taking place within the military and that the problems identified by my colleague are, to my mind, part and parcel of that context. While I might entertain doubts as to the constitutionality of a civilian system of justice where the entity who convenes the court also appoints the prosecutor, I feel that the constitutional standard applicable in the civilian world is wholly inapplicable to measuring a trial by General Court Martial. In short, I remain unpersuaded that the rights of the appellant were violated by the scheme under which he was tried.

1992 CarswellNat 668, [1992] 1 S.C.R. 259, 133 N.R. 241, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, 8 C.R.R. (2d) 89, J.E. 92-287, 15 W.C.B. (2d) 84, EYB 1992-67222

Conclusion

193 On the basis of the preceding analysis, I am of the view that there was no violation of the appellant's rights as guaranteed by s. 11(*d*) of the *Charter*. With respect to the alternative arguments advanced by the appellant, I agree with the Chief Justice that in these circumstances the guarantees offered by s. 7 of the *Charter* cannot be of more assistance to him than those contained in the more specific s. 11(*d*). I am also of the view, again for the reasons expressed by Lamer C.J., that the appellant is unable to avail himself of s. 15 of the *Charter* and that the evidence obtained was properly admitted at trial and ought not to have been excluded pursuant to s. 24(2). It is not necessary for me to consider s. 1 of the *Charter*.

194 I would accordingly dismiss the appeal and answer the constitutional questions as follows:

> 1. Do ss. 166 to 170 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, and the Queen's Regulations and Orders, inasmuch as they allow an accused to be tried by General Court Martial, restrict the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

195 *Answer*: No.

> 2. If the answer to question 1 is yes, are they reasonable limits in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

196 I need not answer this question.

> 3. Does s. 130 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, restrict the right to equality protected by s. 15 of the *Canadian Charter of Rights and Freedoms* in that it confers jurisdiction over a person subject to the *National Defence Act* for offences pursuant to the *Narcotic Control Act*, R.S.C., 1985, c. N-1, as amended, thereby depriving the accused of the procedure normally applicable to such offences?

197 *Answer*: No.

> 4. If the answer to question 3 is yes, is it a reasonable limit in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

198 I need not answer this question.

Appeal allowed and new trial ordered, L'Heureux-Dubé J. dissenting.

Solicitors of record:

1992 CarswellNat 668, [1992] 1 S.C.R. 259, 133 N.R. 241, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, 8 C.R.R. (2d) 89, J.E. 92-287, 15 W.C.B. (2d) 84, EYB 1992-67222

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