



# The Revival of a Service Connection Test in Canadian Military Law?

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**19 May 2015  
Washington, D.C.**



# Overview

- History of the Service Connection Test in the US
- History of the Military Nexus Test in Canada
- Current appeals to the SCC
- Closing Thoughts
- Questions

# History of the Service Connection Test in the U.S. – The ‘Relford Factors’



- The serviceman's proper absence from the base
- The crime's commission away from the base
- Its commission at a place not under military control.
- Its' commission within our territorial limits and not in an occupied zone of a foreign country.
- Its commission in peace time and its being unrelated to authority stemming from the war power
- The absence of any connection between the defendant's military duties and the crime
- The victim's not being engaged in the performance of any duty relating to the military.
- The presence and availability of a civilian court in which the case can be prosecuted.
- The absence of any flouting of military authority.
- The absence of any threat to a military post
- The absence of any violation of military property
- The offense's being among those traditionally prosecuted in civilian courts

# *Solario v. United States, 1987*



Rehnquist CJ:

A plain reading of the clause 14 Constitutional power “surely embraces the authority [of Congress] to regulate the conduct of persons who are actually members of the Armed Services”

- A “dearth of historical support for the *O’Callahan* holding.”
- Noted that the *O’Callahan* decision had wrought confusion.

# The Defence Power & the National Defence Act



National Defence Act, s.130: Service trial of civil offences

**130. (1) An act or omission**

(a) that takes place in Canada and is punishable under Part VII, the Criminal Code or any other Act of Parliament, or

(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the Criminal Code or any other Act of Parliament,

is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

# *MacKay v the Queen*, [1980] 2 SCR 370



The five judge Majority opinion:

- Section 91(7) power of federal Parliament to legislate in relation to “militia, military and naval service, and defence”:  
“must include the authority to enact legislation for regulation and control of the behaviour and discipline of members of the service and to include the making of provision for the establishment of Courts to enforce such legislation.”

# *MacKay v the Queen*, [1980] 2 SCR 370



Dissenting opinion of Laskin, CJ and Estey J:

- Equality before the law:

“I regard the provisions of the *National Defence Act* as inoperative in so far as they provide for the trial of offences against the ordinary law by service tribunals.”

# *MacKay v the Queen*, [1980] 2 SCR 370



Concurring minority opinion of McIntyre and Dickson JJ):

“In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is **so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service.**”

# *R v MacDonald*, [1983] 4 C.M.A.R. 277



- *Charter*, s. 11(f): Everyone charged with an offence has the right:
  - “except in the case of **an offence under military law** tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.”
- “**An offence that has a real military nexus** and falls within the letter of subsection 120(1) of the National Defence Act **is an offence under military law** as that term is used in paragraph 11(f) of the Charter of Rights.”

# *R v MacEachern*, [1986] 24 CCC (3d) 439



“[T]he nexus must be real; although it need not be physical or tangible. In my view, a nexus capable of truly affecting the morale, the discipline or the efficiency of the military would suffice.”

# *R v Lonson*, [1997] 4 CMAR 433

## Minority opinion factors



- What is the nature of the offence?
- Did the offence occur on military premises?
- Did the offence involve other service personnel?
- Were the Military Police involved from the beginning of any investigation relating to the offence? Were they already suspicious of or investigating the accused in relation to similar type offences committed previously?
- In drug cases, is there any evidence indicating that the accused was a frequent user or that his past performance had been impaired by alcohol or drugs?
- At the time the offence was committed, was the accused on duty, off-duty, or on leave?
- At the time of commission of the offence, was the accused in a civilian environment?
- If the Military Police had not been notified would the charge against the accused have been proceeded with in a civilian court?

# *R v Brown*, [1995] 5 CMAR 280



“[...] well settled that the exception to the guarantee of the right to a jury is triggered by the existence of a military nexus with the crime charged.”

“[...] after the coming into force of the *Charter* the [nexus] requirement was adopted and elaborated for the purposes of paragraph 11(f) of the *Charter* by this Court.”

# *R v Reddick*, [1996] CMAJ No 9



“[H]ere the application of the *Charter* depends on *non-Charter* standards, just as it does for example under section 6 [of the *Charter*] which guarantees certain rights to ‘citizens’: citizenship itself is surely determined by the *Citizenship Act*, not the *Charter*.”

**“[T]he nexus doctrine has no longer the relevance or force which influenced many of the earlier decisions of this Court.”**

## *R v St. Jean*, [2000] CMAJ No 2



“Lamer C.J. did not say [in *Généreux*] that more severe punishment is required in every case. In addition, there has to be a breach of military discipline. [...] I do not think, however, that he intended the rule to apply to offences punishable by ordinary law, such as *Criminal Code* offences, where these offences are committed outside the military context, in what I would call civilian-like circumstances.

## *Nystrom v R*, 2005 CMAAC 7



“I am not certain that the military nexus doctrine has been abolished for all purposes, as the appellant’s counsel contends, given the significant consequences that result for members of the Canadian Armed Forces.”

# *Moriarity v Canada, 2014 CMAAC 1*



Section 130(1)(a) is constitutionally valid because, when properly interpreted, its scope is limited by a military nexus requirement.

“While the provision is broad enough to include virtually all federal offences, only those whose commission is **directly connected to discipline, efficiency and morale** in the military may be prosecuted as service offences under the CSD.”

# *Arsenault v Canada*, 2014 CMAAC 8



Section 130 (1)(a) is unconstitutional, but is remedied by adding the military nexus test formulated by McIntyre J. in his concurring opinion in *MacKay v. The Queen*.

“An offence under section 130 of the NDA may be tried under the Code of Service Discipline when 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. Such an offence... falls within the jurisdiction of Canadian military tribunals because it pertains directly to discipline, efficiency and morale of the military..”

# *Arsenault v Canada, 2014 CMAAC 8*



Paragraph 130(1)(a) of the NDA must now be read as follows:

130. (1) An act or omission which 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 of the Canadian Forces

(a) that takes place in Canada and is punishable under Part VII, the Criminal Code or any other Act of Parliament ... is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

# Draft Principles Governing the Administration of Justice Through Military Tribunals



8. The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel
  
8. In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations

# Closing Thoughts



- Military vs. Civilian justice: **Different ≠ Deficient**
- Nexus obscures more foundational questions about fairness and effectiveness



# Questions?

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