NATIONAL DEFENCE COLLEGE OF CANADA

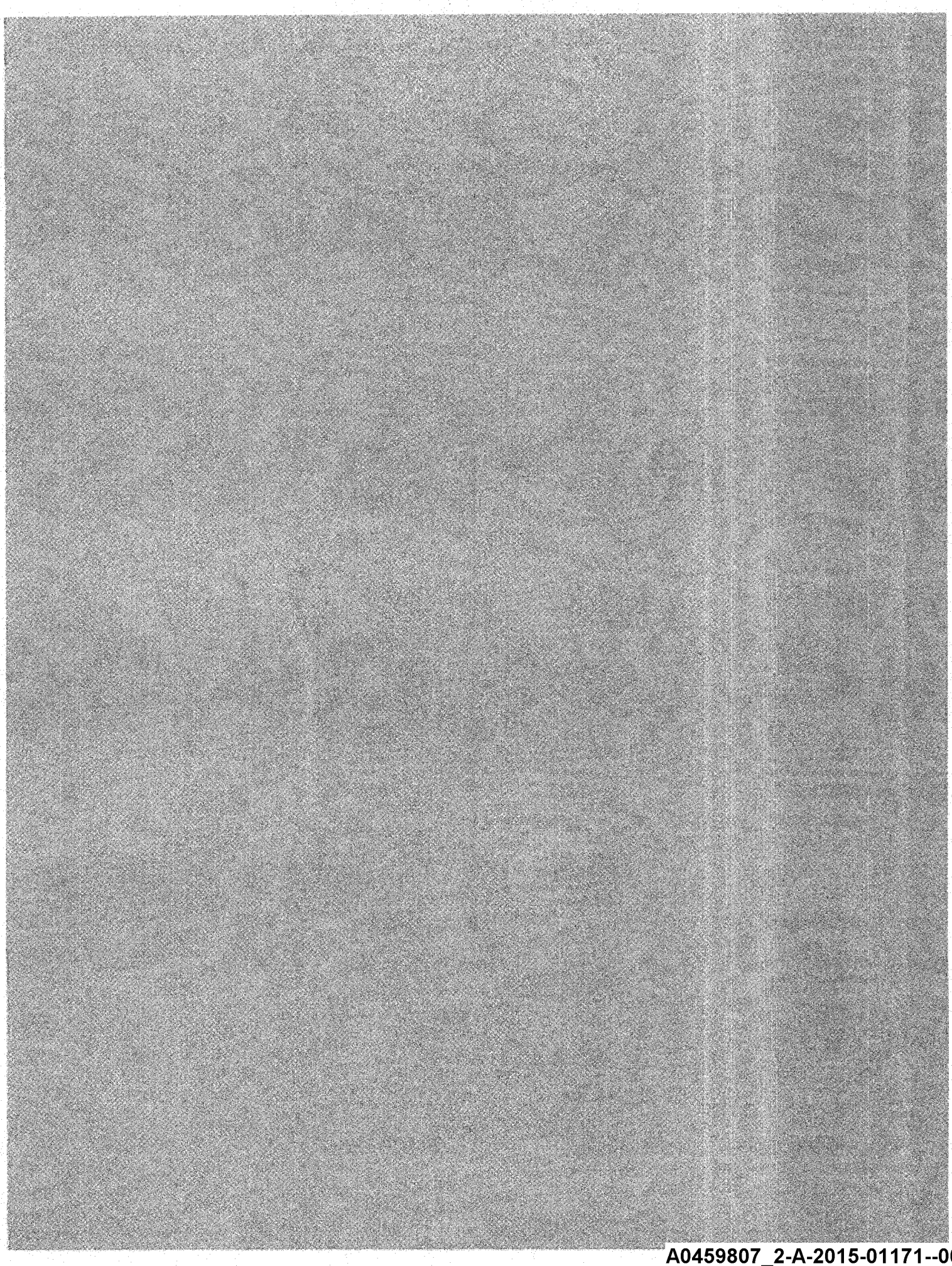
COURSE PAPER

THE EMPLOYMENT OF THE CANADIAN ARMED FORCES IN THE MAINTENANCE OF LAW AND ORDER IN CANADA

by

Robert L. Martin, OMM, CD

March 1986



THE EMPLOYMENT OF THE CANADIAN ARMED FORCES IN THE MAINTENANCE OF LAW AND ORDER IN CANADA

by

Robert L. Martin, OMM, CD
Colonel, Canadian Armed Forces

Submitted in partial fulfillment of the
requirements of the programme of studies

at the

NATIONAL DEFENCE COLLEGE, Kingston.

March 1986

ABSTRACT

The employment of members of the Canadian Forces in the maintenance of law and order in peacetime, in Canada, since World War II, is reviewed with a brief exposé on the history and the existing legislation. Reference is made to specific operations, i.e., the 1969 Montreal 'Police Strike', the 1970 October Crisis, the 1971 Kingston Penitentiary Riots, and the 1976 Montreal Summer Olympic Games and the major problems which arose during these operations are analyzed. Basic principles, instructions and orders are reviewed for their adequacy in 1986. The status of soldiers vis-à-vis military orders is also reviewed, general observations are made, a conclusion is drawn and recommendations are formulated. The basic thrust of the paper is for the retention of the existing legislation.

RÉSUMÉ

L'auteur examine l'emploi des militaires des Forces canadiennes dans le maintien de l'ordre en temps de paix, au Canada, depuis la Seconde Guerre mondiale et fait un bref exposé de l'historique et des lois en vigueur. Il cite des opérations précises : la grève des policiers de Montréal en 1969, la crise d'octobre en 1970, les émeutes au pénitencier de Kingston en 1971 et les jeux olympiques d'été à Montréal en 1976 et il analyse les grands problèmes soulevés pendant ces opérations. Il examine les principes élémentaires, les instructions et les ordres en fonction de leur pertinence en 1986. Il examine aussi la situation des soldats vis-à-vis des ordres militaires, il fait des observations de nature générale, il tire une conclusion et il formule des recommandations. Dans le présent mémoire, il propose essentiellement que l'on garde les lois en vigueur.

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"A society that fails to protect itself, a society that cannot manifest the will to protect itself, is a society that does not deserve to be preserved ..."

John Turner
Minister of Justice
House of Commons 1970[1]

The internal security of Canada is paramount if Canada is to remain a free and democratic country. The Canadian Armed Forces have, through appropriate legislation, been employed in the maintenance of law and order in Canada pursuant to a requisition by a Provincial Attorney General; pursuant to a request by the Federal Solicitor General or other Federal Minister, or pursuant to the proclamation of the War Measures Act.

This paper is an examination of the employment of the Canadian Armed Forces in the maintenance of law and order in Canada with particular emphasis on the historical background and present legislation relating to aid of the civil power; armed assistance to other federal departments; War Measures Act; military orders; general observations; conclusion and recommendations. Martial law will not be discussed in this paper for, since Confederation, there has not been any actual experience with martial law in Canada and, in any event, martial law is to be sharply distinguished from military law or from aid by the military to civilian authorities for the purpose of quelling a disorder or riot.

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HISTORICAL BACKGROUND

In Canada, the Canadian Armed Forces have been employed to reinforce or supplement the civilian law enforcement agencies in preventing, suppressing or controlling real or apprehended riots, insurrections and other disturbances of the peace whenever civilian resources were inadequate or not available to do so. Since Confederation the Canadian Forces have been employed in aid of the civil power on over 110 occasions. In addition, the Armed Forces have also been employed on over 10 occasions in controlling riots in federal penitentiaries. The Canadian Forces also protect defence establishments and, when required, have been employed to protect other federal properties, and persons for whose safety the federal government has an obligation to provide.

The Militia Act passed by the Nova Scotia Assembly in 1758 provided for a compulsory Militia and, although not mentioned specifically, the Militia was no doubt, under British Common Law, available to aid in the maintenance of law and order in Nova Scotia.

Pre-Confederation Militia Acts in New Brunswick (1865) and Prince Edward Island (1866) empowered the Commander-in-Chief of the Military, the Lieutenant-Governor, to call out the Militia whenever, in his opinion, it was advisable to do so by reason of "war, invasion, insurrection or imminent danger". The first reference to the call out of the Militia in Canada for the "maintenance of law and order" was in the Militia Act of Upper Canada (1838) which permitted the Lieutenant-Governor to call out the Militia for any purpose connected with the preservation of the public peace. The phrase "Aid of the Civil Power" was first mentioned in the Militia Act of 1855 of the Province of Canada which provided that volunteer companies "shall be liable to be called in aid of the ordinary civil power in case of riot or other emergency requiring such services".

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One year after Confederation the Militia Act of 1868 required the troops to be called out by a local militia commander when required, in writing, by the mayor, warden, etc. In 1924, the Militia Act was amended to provide that the Attorney General of a province was the only authority who could requisition troops in aid of the civil power.

Recently, members of the Canadian Forces were employed in the maintenance of law and order in Canada pursuant to a requisition or request during the 1969 Montreal "Police Strike"; in October, 1970, as a result of the FLQ activities in the Province of Quebec; in April 1971 during the Kingston Penitentiary Riots; and during the 1976 Montreal Summer Olympic Games.

In Canada, the use of the Armed Forces in the maintenance of law and order originates in three main principles of British Constitutional and Common Law. These are:

(a) that in instances of civil disturbances the civil power is supreme and has a primary responsibility to act;

(b) that every citizen is bound to assist in the maintenance of law and order when necessary; and

(c) that no one is allowed to use more force than is absolutely necessary.

AID OF THE CIVIL POWER

Aid of the civil power is connected with the law from start to finish. The primary task is, therefore, to see that operations are not only successful, but that they are carried out within the law. The salient points governing the employment of the Canadian Forces in "aid of the civil power" are as follows:

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(a) the provinces, which are primarily responsible for the maintenance of law and order, do not have armies to use when a riot or disturbance occurs or is likely to occur, that is or is expected to be beyond the powers of provincial and other civil police forces to suppress or prevent. Part XI of the National Defence Act, therefore, empowers Provincial Attorneys General to requisition military aid directly from the Canadian Forces;

(b) the requisition of an Attorney General of a Province has to be directed to the Chief of the Defence Staff in writing who must, under Section 236 of the National Defence Act, respond;

(c) the Chief of the Defence Staff has the power and discretion to determine the number of troops which will be necessary from time to time in the circumstances, as well as the type of equipment that should be made available;

(d) members serving in aid of the civil power have, in addition to their normal powers and duties, the powers and duties of constables; while so employed they are peace officers under Section 2 of the Criminal Code of Canada; however they must act only as a military body under the orders of their military superiors; and

(e) the employment of the Canadian Forces in aid of the civil power continues until notification is received, from the Provincial Attorney General concerned, that they are no longer required in aid of the civil power.

The present law raises important issues. The most important being whether the mandatory provisions of Part XI of the National Defence Act according to the Attorneys General of provinces the <u>right</u> to requisition

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federal troops in aid of the civil power should be maintained. If this right is to be maintained should the Chief of the Defence Staff be the only authority empowered to respond to a requisition, and to determine from time to time the size and disposition of the forces made available for employment in aid of the civil power? In examining the right to requisition by the Attorney General of a province it is apparent that under the present provisions the Federal Government does not become politically involved in imposing military force upon civilians who are involved in a riot or disturbance that is primarily of provincial concern. Since the Provincial Attorney General is the Minister responsible for the administration of justice he is the appropriate person to determine whether members of the Canadian Forces should be requisitioned.

It is also very important that a requisition, by a Provincial Attorney General, that is directed to the Chief of the Defence Staff be actioned within a very short time. If the same requisition was directed to, for example, the Solicitor General for Canada, or the Minister of National Defence, a political decision would have to be made and then, if it was for the employment of federal troops, that decision would have to be transmitted to the Chief of the Defence Staff resulting in delay which would probably result in an increased threat to life and property.

Although not legally required, normally, there are discussions between the Chief of the Defence Staff and the Minister of National Defence, when a requisition is received by the Chief of the Defence Staff. On balance, it is preferable that the Chief of the Defence Staff receive the requisition and decide alone, on the advice of his subordinates, experienced in that field, on the degree of response, i.e., the number of troops and the materiel to be provided. On a matter of this importance requiring a prompt response you cannot have a sharing of responsibility

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between the Minister of National Defence and the Chief of the Defence Staff.

If the law was amended requiring a requisition to be directed to the Minister of National Defence rather than the Chief of the Defence Staff, it is reasonable to assume that situations similar to the refusal by the Diefenbaker government to send an additional 50 members of the RCMP to Newfoundland in 1959 could occur.

Pursuant to an agreement between Newfoundland and Canada, clause 13 provided as follows:

> "Where, in the opinion of the attorney general of the province, an emergency exists within the province requiring additional members of the force to assist in dealing with such emergency, Canada shall, at the request of the attorney general of the province addressed to the commissioner, increase the strength of the division as requested if, in the opinion of the Attorney General of Canada, having regard to other responsibilities of the force, such increase is possible."

Because of Province wide labour disputes resulting in ever increasing violence beyond the capacity of the civil authorities, including the RCMP serving in Newfoundland and Labrador to deal with, clause 13 was invoked. The Commissioner of the RCMP pre-positioned members of the Force in Moncton, New Brunswick, but the federal Cabinet decided not to send the additional members. In reality the issue became a political one between Prime Minister Diefenbaker and Premier Smallwood. Because of the federal refusal, the Commissioner of the RCMP L.H. Nicholson, resigned.

It is generally conceded that the failure to authorize an increase in RCMP strength in Newfoundland in 1959 resulted in an escalation of the

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conflict and to increased violence. The Chief of the Defence Staff should not be placed in such a situation and, more important, the life and safety of the general public must always take precedence over political factors. Why the Canadian Forces were not requisitioned in aid of the civil power is not known for this would have been an appropriate case to do so.

This reluctance to requisition troops was to change in the late 60s. In March, 1969, the Attorney General for the Province of Quebec refused to requisition members of the Canadian Forces when separatists and student radicals led by a member of the FLQ organized a massive demonstration outside McGill University in Montreal, in an attempt to convert the University into a French institution. There were over 9000 demonstrators, many armed with sticks, chains, rocks and gasoline bombs. A senior government official had stated that the Province of Quebec would have to answer and bear responsibility for failing to requisition federal troops if as a consequence of that failure, deaths, injuries and/or damage to property ensued. However, only a few months later, in September 1969, the same Minister signed a requisition when the 3700 Montreal Police Force staged a "wildcat strike" for higher wages.

Members of the Canadian Forces had not been requisitioned by a Provincial government since 1945; the 1969 Quebec government requisition was a breakthrough in the sense that in the future provincial governments would not be as reluctant to requisition troops; it was now politically acceptable to do so.

Soon after a requisition had been signed by the Provincial Attorney General for the Province of Quebec, in 1969, resulting from the Montreal "Police Strike" two issues of significant importance arose. The first was the propriety of having provincially appointed magistrates as representa-

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tives of the civil power accompany the officer in the immediate command at the scene of the riot or disturbance, and the second was the interpretation to be given to the statutory phrase "members of the Canadian Forces, when called out in aid of the civil power ... shall act only as a military body". On the first point it became apparent that as a civilian, a "magistrate" is not readily identifiable as a representative of the civil power; he has no special training or experience to determine when the military should take action; his age or physical condition could make it difficult for him to accompany the troops; and, he should be in court to handle the influx of cases to be tried rather than on the street.

The Regulation dealing with the presence of a representative of the civil power is one imposed upon the Canadian Forces by the Minister of National Defence and is to demonstrate the primacy of the civil power. Representations were made to the Minister of National Defence and within a very short time the applicable regulation was changed and senior Quebec Provincial Police officers were appointed as representatives of the civil power. Under present regulations the representatives of the civil power shall be present with the officer in immediate command at the scene of a riot or disturbance and shall determine and advise the officer in immediate command when the riot or disturbance is beyond the power of the civil police, or other civil authority, to suppress or deal with, and decide that action by the Canadian Forces is essential. This request for action should, if practicable, be made in writing. The representative of the civil power does not indicate to the officer in command the type of action which must be taken. This is the responsibility of the military officer in immediate command. This does not mean that if there is no representative of the civil power that an officer in immediate command cannot act. He must take such action as is reasonably necessary in the

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circumstances to maintain law and order.

The second issue, as stated above, related to the interpretation of the statutory phrase "... shall act only as a military body". Under Section 239 of the National Defence Act officers and men, when called up for service in aid of the civil power, "... shall act only as a military body ...". The legal opinion is that officers and men, while acting in aid of the civil power, have and may exercise all of the powers and duties of constables, but are not to be considered constables in the service of the civil authorities. They continue to be part of the Canadian Forces, and to be governed as such by the ordinary norms of Service Discipline, and are liable to obey the orders of their superior officers. They may perform patrol duties ordinarily performed by members of a police force. However, the performance of such duties must be related to an actual or likely riot or disturbance contemplated by a requisition made by an Attorney General. Furthermore, they must at all times, operate under the military chain of command and do not take orders from the civil authorities.

The 1970 October Crisis presented other problems. Prior to the promulgation of the War Measures Act a requisition had been signed by the Provincial Attorney General for the Province of Quebec requisitioning troops and most troops had been deployed to the Montreal Region. At the same time, the Solicitor General for Canada, on the advice of the Commissioner of the Royal Canadian Mounted Police, approached the Minister of National Defence and requested the assistance of members of the Canadian Forces in Ottawa and other areas in the Province of Ontario to protect VIPs, and property for which the federal government had an obligation to protect. The Minister agreed and directed the Chief of the Defence Staff to so provide. Since there had been no requisition signed

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by the Attorney General for the Province of Ontario, and none was ever signed, the members of the Canadian Forces deployed to protect civilians and property in the Province of Ontario did not have the duties and powers of constables, and were considered soldiers with Common Law rights, duties and responsibilities. Therefore, the Commissioner of the Royal Canadian Mounted Police was approached and, by unit, appointed members of those units special constables under the provisions of the Royal Canadian Mounted Police Act; this general appointment gave the officers and men the status of peace officers under the Criminal Code of Canada. Therefore, in 1972, in order to avoid relying on the uncertainty of the Common Law, senior officials in both the Department of Justice and the Department of National Defence recommended that the Criminal Code of Canada definition of peace officer be amended to include "officers and men of the Canadian Forces who are employed on duties that the Governor-in-Council, in Regulations made under the National Defence Act, for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers."

Parliament accepted the recommendation and the Criminal Code was so amended. The Regulations passed by the Governor-in-Council prescribed that any lawful duties performed as a result of a specific order, or established military custom or practice, that are related to any of the following matters, or of such a kind as to necessitate that the officers and men performing them have the powers of peace officers:

(a) the maintenance or restoration of law and order;

(b) the protection of property;

(c) the protection of persons;

(d) the arrest or custody of persons;

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(e) the apprehension of persons who have escaped from lawful custody or confinement;

(f) the enforcement of warrants issued by the Minister pursuant to Section 218 of the National Defence Act;

(g) the enforcement of the Customs Act and Regulations made thereunder; or

(h) the enforcement of the Boating Restriction Regulations and the Small Vessel Regulations.

The enforcement of the Customs Act and Regulations made thereunder, and the enforcement of the Boating Restrictions and the Small Vessel Regulations in (g) and (h) above were added to the Regulations to ensure that members of the Canadian Forces had jurisdiction to enforce the Act and the Regulations so cited during the 1976 Montreal Summer Olympic Games. It should also be noted that during the "April 71 Kingston Penitentiaries Riots" the legal status of members of the Canadian Forces employed pursuant to a request from the Solicitor General of Canada had also been in question, therefore the amendment to the Criminal Code and the passing of the Governor-in-Council Regulations gave definite legal status to members of the Canadian Force employed in the maintenance of law and order other than pursuant to a requisition under Part XI of the National Defence Act.

Because of the amendment to the Criminal Code definition of peace officer and also to ensure that members of the Canadian Forces employed in Aid of the Civil Power Operations, or in other situations where armed force could be applied were fully aware of their duties and responsibilities, aide-memoires were prepared. The first aide-memoire, Part IV to Canadian Forces Publication 302(8), was issued to all members of the Canadian Forces who are susceptible to being called out in Aid of the Civil Power; this

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aide-memoire is also applicable to other civil emergency operations. The aide-memoire was intended to assist members in situations where they may be acting alone under-circumstances not otherwise covered by explicit orders and instructions. It emphasized the supremacy of the civil authority; the fact that they were not under the command of the civil authority, and that they should only follow orders from their military superior. It covered the use of firearms, the warning before firing, the authority to fire, restrictions on firing, and on the opening of fire. Another aide-memoire[4] was prepared for officers of the Canadian Forces engaged in Aid of the Civil Power Operations. Similarly this was also applicable to other civil emergency operations. This aide-memoire was to guide officers in the proper conduct of their duties. It emphasized the following:

(a) the supremacy of the civil authority;

(b) the use of minimum force necessary to achieve an aim at all times;

(c) the accountability of all ranks for their actions under both Civil and Military Law;

(d) the affording of maximum cooperation to civil authorities, including police;

(e) the maintenance of the military chain of command;

(f) the requirement of the military to have the confidence of the public at all times;

(g) the necessity for security of their own troops, other personnel, and installations under their military protection; and

(h) the keeping of accurate records and accounts.

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These aide-memoires are used by members of the Canadian Forces to assist them in situations where they may be acting alone or under circumstances not otherwise covered by explicit orders and instructions. These aide-memoires are not orders in themselves unless they have been so designated by superiors and, therefore, do not replace orders and instructions issued in the normal manner.

ARMED ASSISTANCE TO OTHER FEDERAL DEPARTMENTS

There are two recent events where substantial numbers of members of the Canadian Forces were employed in armed assistance to another federal department. The first was in 1971 to quell the Kingston Penitentiary Riots, a lawful duty and a federal responsibility. The second was in support of the Solicitor General for Canada, and more particularly the Royal Canadian Mounted Police, on the occasion of the 1976 Montreal Summer Olympic Games. The Quebec and Ontario Provincial Governments had formally requested such military assistance through the Solicitor General for Canada and the Minister of National Defence.

Soon after the arrival of the main body of troops at the Kingston Penitentiary two important issues arose; the first was the propriety of using FN machine guns in an enclosed space that would likely result in the use of excessive force and possible serious injuries to penitentiary guards, inmates and members of the Canadian Forces; and the second was the requirement of clear and distinct standing orders on the use of firearms by members of the Canadian Forces. The Canadian Penitentiary Service guards had no such standing orders.

The first issue was resolved by the obtention of shotguns thereby ensuring that the means of using varying degrees of force existed depending on the requirements of any given situation.

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The second issue was also resolved by the immediate issuance of a standing order on the use of firearms by the Force Commander, which read as follows:

"Standing Order for the Use of Firearms by Troops Employed in the Assistance to the Kingston Federal Penitentiary Authorities

General

1. This order relates to the use of firearms by members of the Canadian Forces who are providing assistance to the Kingston Penitentiary authorities.

Use of Firearms

2. (a) Only the Commanding Officer, Deputy Commanding Officer, or Company Commanders shall order the use of firearms. When an order to fire is given it must be done in such a manner as to be able to cease fire immediately. If a general order to fire is given you will only fire upon those persons who seem to be implicated in the disturbance.

(b) Since a Federal Penitentiary Guard is a Peace Officer he may require you to come to his assistance and this could result in the use of firearms or lesser force by you.

(c) You may use firearms or lesser force as required in self-defence or to protect the lives of others.

(d) In all circumstances you may only use the force that is reasonably necessary.

(e) Unless the situation requires more drastic action, fire for effect means fire to disable."

The text of the Standing Order shows clearly the degree of control exercised over the troops in regard to the use of force.

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The requests from the Quebec and Ontario governments for military armed assistance during the 1976 Montreal Summer Olympic Games were directed to the Solicitor General for Canada who, in turn, requested the Minister of National Defence to provide armed assistance to the Royal Canadian Mounted Police in Montreal, Bromont and Kingston. Without the formal Provincial requests armed assistance would not have been provided by the Department of National Defence. There were no legal or major operational problems faced by the Canadian Forces during the Olympic Games.

WAR MEASURES ACT

Sub-section 3(1) of the War Measures Act provides, in part that the Governor-in-Council may:

> "... do and authorize such acts and things, and make, from time to time, such orders and regulations as he may, by reason of the existence of real and apprehended war, invasion or insurrection, deem necessary, or advisable for the security, defence, peace, order and welfare of Canada ..."

When the War Measures Act came into force on 16 October 1970, the Governor-in-Council passed the Public Order Regulations, but these regulations did not include provisions which altered or superseded the provisions of Part XI of the National Defence Act, nor did the regulations rescind or revoke the requisition that had been made by the Attorney General for Quebec, or suspend the application of Part XI of the National Defence Act to troops called out in aid of the civil power in accordance with that requisition. The Public Order Regulations, 1970, provided simply, in respect of the Canadian Forces, that

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"In these regulations ... peace officer ... includes a member of the Canadian Forces."

Therefore, members of the Canadian Forces called out in aid of the civil power by the Attorney General for Quebec in October 1970 had, pursuant to the National Defence Act, all the normal powers and duties of constables, and, in addition, those powers given to peace officers in the Public Order Regulations, 1970.

The Public Order (Temporary Measures) Act 1970 was passed on 1 December, 1970, replacing the War Measures Act and the Public Order Regulations, 1970.

Members of the Canadian Forces throughout Canada, who were not called out in aid of the civil power in the Province of Quebec, had only those particular powers of peace officers prescribed in the Public Order Regulations, 1970, and in the Public Order (Temporary Measures) Act 1970.

The War Measures Act is an act assigned to the Governor-in-Council and not the Minister of National Defence. In 1970, the Act came into force and Regulations were passed at the insistence of the Premier of the Province of Quebec and the Mayor of the City of Montreal. Although members of the Canadian Forces were given additional powers primarily in the areas of arrest without warrant and detention without charges, these extraordinary powers were exercised mainly by civil police. Unfortunately, the name 'War Measures Act' is inappropriate when there is no 'War' either real or apprehended. Appropriate 'Emergency Legislation' has been discussed since 1970 and is now in Committee in the House of Commons.

MILITARY ORDERS

Perhaps one of the most difficult issues, particularly in the

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maintenance of law and order operations in Canada, is for a soldier who has received an order from a superior to decide whether the order is 'lawful' or 'unlawful', or, 'manifestly unlawful', and depending on his decision, whether to obey or disobey the order.

The Criminal Code of Canada makes special provision for the position of members of the Canadian Forces acting in the suppression of a riot. Under sub-section 32(2) of the Criminal Code it is provided that

> "Everyone who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot, unless the order is manifestly unlawful."

It would appear that under this sub-section a soldier who receives an unlawful order relating to the suppression of a riot may legally obey that order. Section 74 of the National Defence Act provides

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

It has been stated, by Dicey, a noted legal author,[5] that

> "When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence ... A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in a bona fide obedience to the orders (say) of the commander-in-chief."

Hence the position of a soldier is, in theory, and may be in practice, a difficult one. During a riot, an officer orders his

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soldiers to fire upon rioters. The Command to fire is justified by the fact that no less energetic course of action would be sufficient to put down the disturbance. The soldiers are, under these circumstances, clearly bound, from a legal as well as from a military point of view to obey the command of their officer. It is a lawful order and the men who carry it out are performing their duty, both as soldiers and as citizens. An officer orders his men to fire on a crowd who, he thinks, could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The order, therefore to fire is not in itself a lawful order, i.e., the Colonel or other officer who gives it is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view, the duty of the soldiers? The matter is one which has never been absolutely decided; the following answer, given by Mr. Justice Stephen, is, it may fairly be assumed, as nearly correct a reply as the state of the authorities makes it possible to provide:

"Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be, at that moment, engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier

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> is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the Colonel by the orders of the Captain, or in deserting to the enemy, on the field of battle, on the order of his immediate superior ... The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. In convenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the Army."

In attempting to clarify the Canadian position in respect of lawful commands and orders Queen's Regulations and Orders Article 19.015 was amended on 31 January, 1972, to read:

> "Every officer and man shall obey lawful commands and orders of a superior officer."
>
> In the Notes to this Article it is provided
>
> "Usually there will be no doubt as to whether a command or order is lawful or unlawful. In a situation, however, where the subordinate does not know the law, or is uncertain of it, he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful."

It is also provided in the Notes that an officer or man is not justified in obeying a command or order that is manifestly unlawful. In other words, if a subordinate commits a crime in complying with a command that is manifestly unlawful, he is liable to be punished for the crime by a civil or military court. A manifestly unlawful command or order is one that

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would appear to a person of ordinary sense and understanding to be clearly illegal. For example, a command by an officer or man to shoot another officer or man for only having used disrespectful words, or a command to shoot an unarmed child.

Research has failed to bring out a Canadian case where a member of the Canadian Forces was charged with either disobeying a lawful order or with obeying an unlawful or manifestly unlawful order in the carrying out of his duties which resulted in the use of excessive force causing death or injuries. Therefore, it is probably indicative of the quality of the training received by members of the Canadian Forces, and the command and control exercised by officers and senior non-commissioned officers when employed in the maintenance of law and order.

Brigadier-General H.H. McLearn, a former Judge Advocate General of the Canadian Forces, in an article on Canadian Arrangements for Aid of the Civil Power,[6] summed up the issue as follows:

> "... the horns of the dilemma upon which a serviceman may find himself cannot be removed, but the consequences of a wrong decision on his part can be, and doubtless would be, ameliorated. In such a situation, if he erred by failing to obey a lawful order of a superior officer, he would undoubtedly be treated by military authorities with such leniency as the circumstances would justify. If he erred by obeying an unlawful order of a superior officer and thereby committed a criminal offence, there are many ways whereby officers of the Crown charged with application of the criminal law could ensure that the action to be taken would be in consonance with justice."

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GENERAL OBSERVATIONS

The sole object of military intervention in civil disputes, or in dealing with general unrest or even widespread insurrection or violence, is the restoration of law and order by military means when other methods have failed, or appear certain to fail. Failure to intervene militarily, in such situations, could endanger Canada's national security.

A soldier is a soldier, first, and, at times, is a peace officer, second. He is trained to fight offensively and has the weapons at his disposal to do so. The use of these weapons may, in certain cases, result in excessive force being applied. Fortunately, the training and field experience acquired by members of the Canadian Force on United Nations Peace-keeping Missions, in NATO, etc., ranging from high to low intensity 'conflicts' have ensured that when employed in Canada in the maintenance of law and order members of the Canadian Forces have performed effectively and efficiently without endangering lives or property unnecessarily.

Finally, it must be remembered that when employed in the maintenance of law and order in Canada members of the Canadian Forces are not facing an enemy; they are facing other Canadians or persons lawfully in Canada and, therefore, must act accordingly.

CONCLUSION

The existing legislation, including regulations, orders, and instructions relating to the maintenance of law and order in Canada, when interpreted and applied with common sense, is fully adequate and has served Canada and Canadians well.

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RECOMMENDATIONS

(1) The present provisions of the National Defence Act, particularly Part XI, and the Regulations and Orders passed pursuant to that Act and other legislation relating to the provision of armed assistance by the members of the Canadian Forces should be retained in their present forms.

(2) Continued varied training should be provided to members of the Canadian Forces in the maintenance of law and order operations.

(3) The responsible Provincial Ministers, and their alternates, should be briefed on Part XI of the National Defence Act as soon as they assume office.

(4) A requisition signed pursuant to Part XI of the National Defence Act should be examined by a military legal officer to ensure that the document has been properly executed and meets the legal requirements of the National Defence Act.

(5) An experienced military legal officer should accompany the senior military officer in charge of members of the Canadian Forces called out in aid of the civil power, or in support of another federal department.

(6) Accurate logs and records should be maintained, including photographs, whenever possible.

(7) Legal briefings should be given to members of the Canadian Forces on the provisions of the National Defence Act and Queen's Regulations and Orders relating to the maintenance of law and order, with particular emphasis on use of force, obedience of lawful commands and duties and responsibilities of a peace officer.

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(8) Ensure that military command and control over members of the Canadian Forces are maintained at all times and that they act as a military body, and

(9) Reimburse the legal fees and disbursements of soldiers charged and tried in civil court for incidents arising from a maintenance of law and order operation in Canada to the same degree that would be done when members are tried by court martial.

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FOOTNOTES

1 Canadian Parliamentary Proceedings: Hansard Debates of the House of Commons, Vol 1-2, 28th Parliament, 1970, 3rd Session, pp 212-216.

2 Canadian Parliamentary Proceedings: Hansard Debates of the House of Commons, March 11, 1959, pp 1825-1828; March 12, 1959, p 1864; March 16, 1959, pp 1959-1966; March 16, 1959, pp 2005-2007; April 8, 1959, pp 2346-2348.

3 Canadian Forces Publication 302(8), Part Five.

4 Canadian Forces Publication 302(8), Part Five.

5 Dicey, Law of the Constitution, 1939, p 302 et seq.

6 Defence Review Magazine: Canadian Arrangements for Aid of the Civil Power by Brigadier-General H.A. McLearn, 1971, pp 26-31.

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