Chapter 1

Executive Summary and Recommendations

1. Executive Summary

(a) Reasons for Reviewing the Summary Trial System

(i) Constitutional Challenges

The Summary Trial Working Group was established to assess the ability of the Canadian Forces (CF) summary trial system to withstand a Charter challenge. Both the Standing Court Martial and the General Court Martial have been challenged in recent years and were not able to survive Charter scrutiny. The adverse rulings in Ingebrigtson v. R, involving the Standing Court Martial, and in Genereux v. R, involving the General Court Martial, resulted in changes to the military justice system. The Genereux decision is particularly instructive since it was the Supreme Court of Canada which ruled the General Court Martial did not meet the requirements of judicial independence set out is s. 11(d) of the Charter.

The Genereux decision strongly supported a separate military justice system administered by military officers. The Supreme Court of Canada also recognized that the enforcement of discipline must be speedy, efficient and effective. However, the court found that the lack of a security of tenure for military judges; the lack of a protection against removal from judging duties, except for cause; the influence which the "executive" could have on a trying officer's PER; and a blurring of prosecutorial and judicial functions, meant that General Courts Martials were not constitutional. Furthermore, the Supreme Court of Canada was only willing to consider a deviation from the Charter protected rights during periods of war or insurrection.

(ii) Effect on Summary Trials

It is the opinion of the Summary Trial Working Group that the summary trial system cannot meet the Charter standards as set out by the Supreme Court of Canada in Genereux. Guaranteed fixed terms of service, removal only for cause and a separation of prosecutorial and judicial functions of commanding officers or other trying officers, is not consistent with the other military functions those officers are required to perform. While the summary trial system has not been directly attacked, there have been a number of cases in which service members who have been convicted by a summary trial have successfully challenged the "lack of release pending review" provisions following summary trials. In Glowczeski v. Canada (Minister of National Defence), Fontaine v. Canada (Minister of National Defence), Vielleux v. Canada (Minister of National Defence), Belzile v. R and Dufour v. R, CF personnel have been released from service detention pending a review of the constitutionality of summary

proceedings. While no action challenging the proceedings themselves has occurred, it is only a matter of time until a court will be asked to rule on the constitutionality of summary trials, and the CF will be required to defend that system of trials.

If the summary trial system, as it is presently constituted, cannot be justified under the Charter, then potentially a number of drastic changes may have to be made to the military justice system. Those changes could include:

a) The trial by court martial of all service offences presently found in the National Defence Act.

b) The relegation of summary trials to largely administrative tribunals.

c) The limitation of summary trial jurisdiction to infractions similar to, but distinct from the public order offences found in the National Defence Act, or the restriction of summary trial jurisdiction to "purely" military offences.

d) A restriction on the powers of sanction available to trying officers at summary trial. The imposition of "penal sanctions" could be curtailed to restrict punishments involving a loss of liberty (such as detention or confinement to ship or barracks). Punishments might be limited to sanctions such as severe reprimand, reprimand, small fines and reduction in rank.

Such changes would not only result in a significant alteration in the way in which discipline is presently maintained, they could also have a catastrophic impact on the operational capability of the CF.

(iii) Goal of Report

In addition to assessing the summary trial system in terms of its defensibility under the Charter, it was also recognized that the review provided an opportunity to attempt to "modernize" and streamline the summary trial process. The goals of the Summary Trial Working Group can be summarized as follows:

i) identify potential Charter challenges to the summary trial system;
ii) To identify the evidence outlining the role of, and the requirement for, summary proceedings in the CF, including evidence which could support a reasonable limit on Charter rights;
iii) ascertain what, if any, changes can or should be made to the summary trial system to allow it to survive a constitutional challenge;
iv) identify what, if any, changes to the summary trial process not mandated by a constitutional challenge should be considered; and
v) recommend changes to the CF summary trial system to enhance its ability to withstand a Charter challenge, and to ensure it meets the disciplinary requirements of the CF in the 1990s.

The Working Group prepared this report in consultation with the Commands and Canadian Forces Training System. The feedback was universally positive with only a number of limited points requiring further consideration by the Working Group. The comments by the Commands are incorportated in the report. In addition, as the Summary Trial Working Group was completing the report an updated CFAO 19-25 was instituted. This CFAO was prepared without consultation with either the Working Group or the Commands. While CFAO 19-25 reflects some of the recommendations found in this report there are significant variations. The report addresses those areas where there are particular concerns including the requirement for a record or reasons, pre-trial disclosure and the oath to be taken by trying officers.

(b) Principles Applied

(i) Effectiveness

In assessing the summary trial system it was considered essential that the principles of effectiveness, fairness and legality be applied throughout the review. The requirement of an effective military justice system was recognized in Genereux. In order to be effective, summary proceedings must be speedy, portable, universally applicable and enhance both the "habit of obedience" and the personal nature of discipline.

(ii) Fairness

Fairness is assessed from both a legal and a military perspective. Fairness, and in particular, procedural fairness, during the past 20 years has taken on increased importance in Canadian society. Fairness consists of two main components: trial by an independent and impartial tribunal, and allowing an accused to meaningfully participate in proceedings. The purpose of procedural fairness is to limit the arbitrary use of authority by persons in power. It is directed towards developing structural safeguards which limit the opportunity for capricious or arbitrary action. The importance placed on procedural fairness is reflected in the Charter. Many of the individual rights protected by that enactment deal with elements of procedural fairness. From a military perspective, every commander knows the importance of not only treating subordinates fairly, but also of being perceived to be fair. The right to elect court martial, to the extent it acts as a "safety valve" for persons who want to be tried by the more procedurally developed court martial system, is an example of the premium which is placed on fairness from a military perspective.

(iii) Legality

The principle of legality is assessed in terms of the Charter and how it applies to the military justice system. That enactment is one of the processes by which civilian institutions oversee the military. An analysis of Charter rights is carried out by first determining if

individual rights are breached, and then assessing if such a breach is justifiable in relation to valid "community interests". The individual rights protected by the Charter which are reviewed in this report are:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11. Any person charged with an offence has the right...
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
> (e) not to be denied bail without just cause....
>
> 15(1) Every individual is equal before and under the law and has the rightto equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The justification and balancing of community interests, in this case the maintenance of the military disciplinary system, is carried out in the context of s. 1 of the Charter. That section states:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it <u>subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society</u>.
>
> (emphasis added)

There is no breach of the Charter if a reasonable limit is established in respect of an individual right. In other words, if the community interest being met by the summary trial process outweighs the individual right in question then the trial process will be held to be constitutional.

(iv) <u>Application of ss. 7 & 11 of the Charter</u>

An analysis of the Supreme Court of Canada decision in <u>Wigglesworth v. R</u>, a case dealing with the R.C.M.P. disciplinary system, determines that s. 11 of the Charter applies to the present CF summary proceedings. The <u>Wigglesworth</u> decision indicated that s. 11 of the Charter did not apply to internal disciplinary systems if those systems did not try "public order" offences, or award "penal consequences". In the opinion of the Working Group since summary trials deal with criminal-type offences and award penalties which potentially involve a loss of liberty, Charter scrutiny under s. 11 cannot be avoided. Similarly s. 7 of the Charter applies to summary proceedings since the punishments such as detention, and

potentially confinement to ship or barracks, stoppage of leave, and extra work and drill involve a loss of liberty. Therefore the constitutionally protected principles of fundamental justice (procedural fairness) will be applied to summary trials.

(v) Legal Justification

The basic framework of the s. 1 justification analysis is also set out. It can be summarized as follows:

1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify an objective limiting a Charter right.

2. Rational connection: The law must be rationally connected to the objective.

3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.

4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.

The identification of the legislative objective of summary proceedings and the application of the rational connection, least drastic means and proportionality tests is an integral part of the analysis undertaken in this report.

(vi) Change, the Military and Civilian Courts

Finally, the requirement for both the military and the civilian judicial system to deal with change in assessing the constitutionality of the summary trial system is explored. For the military, there is a need to accept that a challenge to the summary trial system is inevitable. The options are to:

i) be proactive and attempt to change the system now in order to survive Charter scrutiny;
ii) prepare changes and implement them after a court has ruled on the deficiencies; or
iii) do nothing and let the courts mandate change.

Of the three options, only the first choice enhances the ability of the military to control change rather than have it imposed by a civilian court which may not completely understand the needs of military discipline.

From the civilian judicial perspective there is a requirement that civilian courts look behind the terms "effective" and "efficient" and truly assess what is needed to maintain a disciplined armed force. Courts martials are not necessarily speedy or effective from a

military point of view. They are in effect the exception rather than the rule, dealing with the most serious offences and acting as a safety valve for an accused who desires greater procedural fairness than can be provided under ordinary circumstances. It is the summary trial system which is best suited to the general disciplinary requirements of the CF. Civilian courts should also avoid trying to recreate the military justice system in their own image. The requirements of the civilian and military justice systems are radically different. Finally care should be taken to ensure civilian courts understand that military, police and prison disciplinary systems cannot be lumped together for purposes of a Charter review. Each system has different goals which operate against too close a comparison.

(c) Approach to Analysis and the Legislative Objective

(i) Approach to Analysis

It is obvious from even the most cursory review of summary proceedings that they lack the procedural fairness safeguards mandated for a civilian court. The weakness of the summary trial process was recognized as early as 1959, when the right to elect court martial was moved from the end of the trial to the beginning in order to allow the election to act as a waiver of rights proposed for, and eventually incorporated in, the Canadian Bill of Rights.

An assessment of the extent to which an accused service member can waive Charter rights in deciding to remain within a trying officers summary jurisdiction is a key element in determining the overall defensibility of the summary trial system. However, the questions of whether the summary trial can be exempted from the application of the Charter by means of a "disciplinary exemption" (ie. Wigglesworth), or the degree to which summary proceedings do, or need to, breach Charter rights, must also be considered. The question of the degree of any breach of Charter rights is particularly important when considered in conjunction with the ability to waive those rights. Identification of Charter breaches, and the extent of the breach assists in determining what information needs to be passed to an accused to make an informed and valid waiver of the right to elect court martial.

Ultimately the defensibility of the summary trial system will depend upon a global assessment of three things: the degree to which summary proceedings should retain jurisdiction over "criminal" offences and maintain powers of punishment affecting liberty interests; the extent to which summary trials can integrate "fair" procedures and maintain an effective and speedy trial process; and whether the right to elect court martial provides an acceptable waiver of constitutional rights.

(ii) Legislative Objective

The military justice system has a unique objective in Canadian society. The legislative objective of summary proceedings, for the purpose of a s. 1 Charter review, is to enforce discipline effectively and efficiently thereby maintaining an operationally ready armed force. It is this objective which is weighed against the individual rights protected under the Charter

in order to determine whether the summary trial system is unconstitutional. However, in assessing whether a limit on individual rights is designed to meet that objective, there are clarifying questions which must be answered to provide a more accurate evaluation of the limit. Those questions are:

i) Does the trial structure and procedures assist in producing a "speedy" resolution?
ii) Can it be applied regardless of geographic location?
iii) Is there a minimum of details or formality?
iv) Can the trial system be used equally in times of conflict as in times of normality? In other words, can it be "universally" applied regardless of the level of conflict?
v) Does the type of trial enhance the "habit of obedience"?
vi) Does the trial enhance the personal contact between the person responsible for conducting operations and subordinate responsible for carrying out orders?

It is the responses to these questions that will clarify the degree to which a particular limit meets its objective, and ultimately help determine whether the summary trial system can survive Charter scrutiny.

(d) Disciplinary Exception

(i) Jurisdiction Over Offences

Accepting that trying officers at summary trials presently have a broad jurisdiction over public order offences and can award penal sanctions, the question remains as to whether such broad powers are necessary or defensible. There is particular concern that the broad jurisdiction over offences could result in abuse, since under the present legislation, a commanding officer could dismiss a murder charge against an accused, and that charge could not be dealt with by court martial or civilian criminal court. Under both British and American military law summary proceedings have a considerably more restricted jurisdiction. Generally, officers are restricted to trying offences for which the governing legislation provides the lowest penalties. For example, unlike Canadian military law, there is no jurisdiction under British or American law over any offence which attracts the death penalty or life imprisonment.

The effect of Wigglesworth is that, if summary proceedings were considered to be "internal" disciplinary proceedings, then s. 11 of the Charter would not apply. The two tests applied in determining the applicability of s. 11 of the Charter are whether summary trial proceedings need to be criminal, quasi-criminal or regulatory in nature, and whether penal sanctions should be awarded.

Regarding the nature of the proceedings the Working Group considered a number of options for making summary proceedings internal disciplinary matters. Those options included removing summary trial jurisdiction over any offence the same as, or similar to, a

civilian criminal offence; creating a separate Code of Conduct for summary trials; and, removing the bar from prosecuting an accused at a court martial or civilian court for an offence for which that accused had been convicted at summary trial. These options were rejected for a number of reasons. First, the resulting increase in courts martial would be counter to the goal of maintaining a speedy, efficient and effective military justice system. Second, the decrease in the authority of the trying officer would undermine the ability of that officer, who would be responsible for military operations, to maintain the "habit of obedience", and therefore the discipline of subordinate personnel. Finally, the removal of any bar on a subsequent trial by a court martial or civilian criminal court on a charge dealt with by summary trial would potentially place an accused in the position of losing liberty twice for the same offence.

(ii) Restricting Jurisdiction

It was determined that the present broad jurisdiction of trying officers should be restricted. The military justice system was designed to be a two-level system with courts martials at the top dealing with the most serious offences. It is recommended that summary trial jurisdiction be restricted to the least serious service offences (those offences for which the National Defence Act provides for a maximum punishment of imprisonment of two years or less), a number of more serious offences considered crucial to the maintenance of order and discipline at the unit level, and specified incorporated criminal offences relating to drugs, alcohol, violence and weapons infractions. Commanding officers and certain superior commanders would continue to have jurisdiction over the same offences, while delegated officers would not have jurisdiction over any s. 130 offences or specified serious operational offences.

(iii) Punishments

In terms of punishments there was a particular concern over the punishment of detention. While imprisonment and detention are separate punishments under the National Defence Act, they are served in an identical fashion. As was noted by the Supreme Court of Canada, a punishment of imprisonment is the most serious deprivation of liberty known to Canadian law, and therefore attracts the most stringent procedural safeguards. The practice of serving detention in the same manner as imprisonment not only runs against the purpose for which detention was created in the early 1900s, but is also contrary to the manner in which similar punishments are served under American and British military law. Detention was first established as a "remedial" punishment providing re-training for service personnel who were considered to be salvageable for military service. Both British "detention" and American "correctional custody" are run primarily as re-training programs where detainees are kept separate from prisoners, and given enhanced training that emphasizes basic military skills such as drill, PT, etc.

It was the determination of the Working Group that the "re-training" of service personnel who have breached the Code of Service Discipline is an essential punishment for summary trying officers. Therefore, it is recommended that detention be removed from the scale of punishment and replaced with a punishment to be known as "correctional custody". The new punishment is to stress re-training, with the maximum time of sentence awardable by either a summary trial or court martial to be determined by a separate study group focusing on the time needed for re-training. However, the maximum length of the punishment should not exceed the period of recruit training (8 weeks).

It was further felt by the Working Group, in consultation with the Commands, that unlike detention, the punishment of reduction in rank should not be included in the punishment of "correctional custody". While undergoing remedial training the offender would be deemed to hold the rank of private. Upon completion of training the offender would automatically revert to the previously held rank. It was felt that the considerable financial loss associated with an automatic reduction in rank would discourage Commanding Officers from awarding the necessary re-training. Similarly it is recommended that an offender underoing "correctional custody" would be paid at the deemed rank of private for the period of the punishment. Full pay would be re-instated upon completion of "correctional custody". The recommendation to continue paying an offender was based on the view that the complete stoppage of pay which presently occurs with the punishment of detention often penalizes an offender's dependants in addition to the service member, and can create an administration burden for the unit.

The punishment of confinement to ship or barracks, stoppage of leave and extra work and drill were also analyzed. Like detention, it was determined that re-training should be a primary goal of confinement to ship or barracks, and therefore a new punishment to be known as "unit corrective training", which would concentrate on re-training, is recommended. The other punishments such as reprimands, severe reprimands, and cautions were largely retained as presently constituted. It was recommended that the punishment of forfeiture of seniority be deleted because of its limited effectiveness and applicability (only subordinate officers) when awarded at a summary trial. With respect to fines, however, it was recommended that the $200 limit on delegated officers be removed and replaced with a maximum fine of 25% of an offender's pay.

iv) <u>Penal Consequences</u>

A review of decisions of the European Court of Human Rights and American courts reveals that the deprivation of liberty in a military context has been generally viewed by courts as being different than the loss of liberty in civilian society. A key principle applied in assessing the loss of liberty in military society was the substance of the punishment. In other words its goal. In cases where the punishment allowed the offender to continue to participate in the "ordinary framework of military life" while undergoing sentence the resulting loss of liberty was found to be acceptable. In effect if the offender continued to perform ordinary duties, while required to undergo extra training there was no loss of liberty so as to invoke "constitutionally" protected rights. Applying these principles in a Canadian context would mean that punishments such as "unit corrective training", stoppage of leave

and extra work and drill as contemplated by this report would not constitute a serious enough loss of liberty in a military context to invoke the protection of the Charter.

In conclusion, it was determined that trying officers at summary trial need to maintain a broad jurisdiction over service offences including "public order" offences. Similarly, it is necessary for those officers to be able to award penal consequences. However, both the jurisdiction and the "penal" nature of the sanctions can be limited while still maintaining an operationally effective armed force.

(e) Fairness

(i) Independence

The analysis of the fairness of summary proceedings is divided into two parts: independence and impartiality, and procedural fairness. It was the opinion of the Summary Trial Working Group that the summary trial system cannot meet the requirements of independence set out in s. 11(d) of the Charter. In that respect CF summary trials are virtually identical to their British and American counterparts. A number of options were considered to provide for independent tribunals. Those options included all trials by court martial, the adoption of the American style Summary Court Martial, and enhanced protection for existing summary trials. The enhanced protection for summary trials included regulatory protection for the trying officer from unwarranted interference, and the requirement for trying officers to take an oath.

The Working Group is strongly of the view that commanding officers, delegated officers and superior commanders must remain as the trying officers at summary trials. Therefore, the third option of attempting to provide some "independence" for those officers is recommended. Ultimately the ability of the summary trial system to withstand a Charter challenge will depend on convincing a civilian court that summary trials are the only proceedings which can provide the speedy, efficient and effective proceedings required by armed forces on a general scale. In effect, summary trials are uniquely suited to meet the objective of the military justice system, and that objective outweighs the right of individual service members to a trial before an independent tribunal. In light of the Genereux decision, that argument may not be an easy one to make. However, if the s. 1 defence is not available, then reliance will have to be placed on the right to elect court martial as a waiver of an accused's right to trial by an independent tribunal.

(ii) Procedural Fairness

In terms of procedural fairness the Working Group looked at the right to counsel, pre-trial disclosure, notice, oral or written submissions, rules of evidence, general trial procedures, reasons or record of trial and pre-trial custody. It appears that present

procedures meet the requirements of procedural fairness in respect of notice, and oral or written submissions. There should continue to be no right to counsel at a summary trial. Such a position can probably be justified under s. 1 of the Charter as long as there continues to be a right to an assisting officer, and where feasible, an opportunity provided to an accused to consult with a lawyer prior to trial. Due to the recent Supreme Court of Canada decision in Stinchcombe v. R, it is recommended that the right to pre-trial disclosure be expanded and specifically explained in QR&O.

It was recognized that military rules of evidence cannot be applied at a summary trial. The requirement to apply rules of evidence would defeat the speed, efficiency and effectiveness of summary proceedings. However, it was recognized that there is a need to amend CFAOs to provide guidance to trying officers regarding the purpose of cross-examination, the requirement that all evidence be taken under oath or affirmation and to limit the admissibility of some documentary evidence.

The general trial procedures were reviewed and it is recommended that the sequence of trial set out in QR&O be simplified and put in a more logical sequence. Further it is recommended that the "admission of particulars" provisions be removed and replaced with the requirement to plead guilty or not guilty. Finally, it is recommended that QR&O be amended to provide a definition of "proof beyond a reasonable doubt".

It was recognized that a requirement of a record of trial, or reasons for conviction would defeat the purpose of "summary" trials. However, at a minimum, a trying officer should be required to orally relate to an accused why he or she is being convicted or acquitted of a service offence.

Finally, the present release pending trial provisions of QR&O were reviewed. It was recognized that from a Charter standpoint, the review of pre-trial custody by a non-independent officer is just as objectionable prior to trial as it is during trial. However, it is recommended that either the commanding officer or a designated officer retain that responsibility. This recommendation stems in part from the practical viewpoint that in many cases the commanding officer will be the only military authority in the area at the time an individual is taken into custody. It is recommended that the commanding officers, designated officers or convening authorities empowered to review pre-trial custody, be required by regulation to seek the representations of the person in custody prior to exercising their discretion.

After reviewing the Charter requirements of fairness, it is clear that the summary trial system will be hard pressed to survive Charter scrutiny. The lack of independent trying officers alone will be very difficult for civilian reviewing courts to understand. It is essential that, when a challenge occurs, the civilian court be "educated" about the unique requirements of military society, and the manner in which discipline is developed and maintained. However, the defence of the summary trial system may ultimately hinge on the effectiveness of the right to elect court martial as a waiver of constitutional rights, together with the efforts of service authorities to provide the greatest degree of procedural fairness that is possible while still maintaining operational effectiveness. Included in the procedural protection available to an accused is the right to appeal to an independent tribunal for a review of summary proceedings.

(f) Appeal/Release Pending Appeal

(i) Appeal

There is no right of appeal from a summary trial. The review of summary proceedings is conducted largely by means of punishment warrants and the redress of grievance system. However, as is evidenced by the Glowczeski, Fontaine, Vielleux, Belzile and Dufour cases, service members are demonstrating an increased willingness to go to civilian courts to have a judicial review of summary proceedings.

The American Article 15 hearings do provide for a right to "appeal" directly to the next level of command. It is in a sense an abbreviated grievance procedure. In the British Army and the Royal Air Force the right to elect court martial is placed at the end of the trial as a form of appeal to a court martial. However, the right of appeal is only extended when a financial penalty or detention is being considered. When that right is exercised, it is in effect a right to a trial de novo by court martial.

It is not clear at this stage of Charter development whether there is a constitutional right to appeal to a court. However, it is clear that, in creating punishment warrants and the grievance system, the military has considered a review of the decisions of trying officers an important safeguard against abuse.

(ii) Create a New "Appeal"

The options considered by the Working Group for an appeal from summary proceedings were: a "paper" appeal to a Review Court Martial; an appeal to a court martial for a trial de novo; the granting of prerogative relief (supervisory legal authority) by military courts; and, the maintenance of non-judicial review. An appeal to a Review Court Martial was not considered to be viable because it was dependent upon the creation of a record of trial, albeit an abbreviated one, which was to be faxed/sent by message to a military judge in Ottawa. The Working Group and the Commands were strongly of the view that the potential requirement to create a record for each trial would have an undesirable, and indeed unacceptable, effect on the administration of summary trials. In addition, the transmission of summary trial records to a central authority was seen to be administratively cumbersome in light to the circumstances and locations under which many trials are held.

Accepting that a review by an independent tribunal could enhance the justification of the summary trial system the Working Group determined that offering a re-trial by court martial of any offence for which "correctional custody", reduction in rank or a substantial fine was awarded offered the best means of attaining that end. This trial de novo is similar to having the right to elect court martial at the end of the trial, as is presently done in the British army and RAF, and was used by the Canadian military prior to 1959. Such a re-trial does not appear to have unduly complicated the British summary trial process, and is particularly attractive because it does not require the creation of a record.

It is recommended that the power to grant prerogative relief be extended to the Court Martial Appeal Court or a military judge. The primary means of reviewing summary trial proceedings should continue to be by means of non-judicial review.

The punishment warrant is a prime example of the historical "baggage" which remains part of summary proceedings as a result of the unification of the disciplinary system in 1950. The Royal Canadian Navy used punishment warrants, while the Canadian Army and the Royal Canadian Air Force used the right to elect court martial at the end of summary proceedings as the primary review procedures. Upon unification both forms of review were retained. However, the punishment warrant process is flawed, since the intervention of the approving authority prior to the completion of the trial raises the issue of "command influence". The punishment warrant should be abolished and replaced with a post trial confirmation of any sentence involving "correctional custody", reduction in rank or a significant fine. Therefore for any offence for which "correctional custody", reduction in rank or a significant fine is proposed a trying officer would after advising the offender of the finding and proposed sentence, seek the representations of the offender, and then refer the matter to a superior officer for confirmation of the proposed sentence. Once confirmation is received the sentence would then be carried out, subject to any request for an appeal and release pending appeal.

The grievance process also raises a concern as it is not clearly linked in regulations to the summary trial process. The grievance process should be retained as a means of reviewing summary proceedings in those cases where there is no right of appeal by trial de novo, however, it should be clearly linked in the regulations to the summary trial process.

(iii) Release Pending Appeal

At present, there is no release pending review once an offender has been convicted. As a result, the offender serves the sentence even if the conviction is ultimately overturned on review. While it is easy to reimburse a service member for any financial loss, it is not possible to return lost liberty for a wrongly convicted person. The lack of a right of release from detention pending appeal/review appears to be a breach of s. 11(e), and has already prompted criticism of the summary trial system in the Glowczeski, Fontaine and Vielleux cases. It is recommended that release from "correctional custody" pending appeal procedures similar to those applicable post-court martial be instituted. However, the deciding authority for such releases should be the trying officer at the summary trial. A review of the decision of the trying officer by a superior officer should be instituted.

(g) Right to Elect Court Martial

(i) The Status Quo

Presently the right to elect court martial is provided in a manner which is consistent with the nature of the offence/penal consequences test which is an integral part of the s.

11(d) Charter test. There is a mandatory right to elect court martial for "serious" service offences, the majority of which resemble civilian criminal code offences. For the remainder of the less serious offences, the right to elect court martial is provided, depending upon the "consequences" which might result from a conviction. If it is anticipated an accused would receive detention, reduction in rank or a fine in excess of $200.

Both the British and American summary proceedings provide for a right to elect court martial. The right to demand court martial is provided at American Article 15 hearings and Summary Courts Martial. With respect to Article 15 hearings, no right to demand court martial has to be provided where an accused is "attached to or embarked on a vessel". As has been noted, under British military law the army and air force provide the right to elect court martial at the end of the summary proceeding prior to a finding of guilt. The right to elect is provided depending upon the sentence being considered by the commanding officer (financial consequences or detention). In the Royal Navy the right to elect court martial is provided at the commencement of the trial where a punishment of imprisonment, detention, disrating or stoppage of pay is being considered.

(ii) Expanded Right to Elect Court Martial

Due to changes in the law it was decided that the thresholds presently set out in regulations for the exercise of discretion to provide a right to elect court martial for less serious offences were not broad enough. With the exception of a limited number of minor service offences it is recommended that the right to elect court martial be extended to all accused at summary trial. The right to elect court martial would not have to be provided where a punishment other than "correctional custody", reduction in rank or a significant fine was being considered for the following offences:

s. 85- Insubordinate Behaviour
s. 86- Quarrels and Disturbances
s. 90- Absence Without Leave
s. 97- Drunkenness
s.129- Conduct to the Prejudice or Good Order and Discipline (only when the offence relates to training, dress and deportment, drill and inspections).

It is recognized that the extension of the right to elect court martial in almost all summary trials will create a number of potential problems. There will undoubtedly be an increase in the number of courts martial and some accused may attempt to delay disciplinary action by electing trial by court martial. It was felt that any increase in the number of courts martial would be short-lived and easily absorbed by the military justice system without creating any adverse effect on the administration of justice. With respect to the delaying of disciplinary action the accused ultimately would not avoid trial. An accused who continued to flaunt rules, regulations and orders could be dealt with by means of pre-trial confinement.

Ultimately, a decision had to made as to whether the effectiveness of the right to elect court martial as a form of waiver outweighed the potential increase in the number of courts

martial. The determination of the Working Group is that the vast majority of accused will continue to elect summary trial because it is a fast, effective and fair process.

Consideration was given to adopting the American "embarked on a vessel" exception regarding offering the right to elect court martial. However, such a provision was rejected because it was not consistent with the long standing tradition of a universal application of disciplinary proceedings to all parts of the CF. In addition, granting the right to elect court martial in respect of more serious offences, which has been in existence since 1959, does not appear to have caused any noticeable problems for the navy. The Working Group considered that any attempt to create an exception would have to be based on documented problems created by the expanded right to elect court martial.

Finally, the effectiveness of the right to elect court martial as a form of constitutional waiver was reviewed. While some of the differences between summary proceedings and courts martial are presently explained to the accused, the right to elect court martial, as it is now constituted, does not act as a complete and valid waiver. QR&O should be amended to make it mandatory for both the assisting officer and the trying officer to confirm that an accused has been informed of, and understands, the effect of not exercising the right to elect court martial.

(h) Equality

The right to equality set out in s. 15 of the Charter was assessed in terms of discrimination on the basis of rank, and on the basis of membership in the military. Discrimination on the basis of rank arises from summary proceedings being primarily applicable to junior NCMs. However, it was determined that the holding of a particular rank did not make a service member part of a "discrete and insular" minority and therefore does not attract the protection of s. 15 of the Charter.

In light of the Genereux decision, it is possible that discrimination based on membership in the military can fall within s. 15 of the Charter. In Genereux, the Supreme Court of Canada indicated that discrimination against someone because of their membership in the military during a time of demobilization could result in Charter protection. While membership in a voluntary armed force is different than having that status during times of conscription, there is an argument that the restricted ability to resign combined with limited political involvement could apply to make a service member a part of a "discrete and insular minority".

Even if present day membership in the military attracts protection under s. 15 of the Charter, the ability of the summary trial system to withstand review under that section will hinge on the assessment of whether it is sufficiently procedurally fair under ss. 7 and 11 of the Charter, or whether such constitutionally protected rights can be validly waived by declining to elect court martial. Therefore, the constitutionality of the summary trial would depend upon procedural fairness and waiver, rather than a denial of equality rights.

(i) Miscellaneous

A number of miscellaneous provisions were reviewed, including the power to dismiss charges, responsibility for supervising the summary trial system, training and publications, and the charge report. It is recommended that the delegated officer be given the authority to dismiss charges. The present lack of a power to dismiss charges is inconsistent with the delegated officer's responsibility to try to convict or acquit an accused. In addition, the requirement to refer a charge to a commanding officer to have it dismissed again raises the issue of command influence. If the delegated officer can be trusted to acquit or convict, that officer should also be able to dismiss a charge.

It was further decided that, in light of the recommended restrictions on the trying officer's jurisdiction over service offences, such officers should only have authority to dismiss charges they are empowered to try. Charges which would now have to be dealt with by court martial could be dismissed by the convening authority.

It was noted that there appears to be no existing authority with a clear mandate to oversee the summary trial system. It is recommended, in light of the responsibility of JAG to supervise the military justice system, that the mandate to oversee summary trials be clearly placed within the authority of the legal branch. In addition, there should be an annual review of the summary trial system and provision made for the collection of statistics concerning the effectiveness of punishments awarded at summary trials.

The present lack of training for all participants in the summary trial system is a serious deficiency. Training on summary trials should be integrated into all levels of officer and senior non-commissioned officer development. In addition to amending QR&Os and updating CFAO 25-6, it is recommended that a comprehensive manual on summary trials be produced as a CF publication. That publication should include guidance on the conduct of summary trials, pre-trial and post-trial procedures, the roles of trial participants, and trial procedure checklists.

Finally, the charge report should be expanded to include a record of an accused having been advised of the differences between a court martial and summary trial, whether that accused has been provided with and exercised the opportunity to consult counsel; and act as a record for the appeal by trial de novo.

(j) Conclusions

The maintenance of an operationally effective armed force requires a disciplinary system which is speedy, efficient and effective. The summary trial is the only system of trial which offers the necessary speed, portability, universality of application, efficiency and enhancement of the "habit of obedience" to enable the officers responsible for military operations to develop and maintain a disciplined armed force. In assessing the constitutionality of the summary trial system, it must be looked at as a whole. It is unlikely that the right to elect court martial or any particular part of the trial process on its own will ensure that trial process survives Charter scrutiny. The conclusion of the Working Group is that an acceptable compromise between the military's need for an effective disciplinary system and an accused's right to a fair trial can only be attained by broadening and

enhancing the right to elect court martial as a form of constitutional waiver, providing for a right of appeal to an independent review body and increasing the level of procedural fairness provided in the trial process itself. By civilian standards, the summary trial will not and cannot meet the level of procedural fairness applied to a civilian court or a court martial. However, much can be done to improve the present system. The question which is left to be resolved is whether the inevitable change to the summary trial system will mandated by a civilian court or instituted under the control of the military.

2. Recommendations

RECOMMENDATION 1

The jurisdiction of Commanding Officers and Superior Commanders to try service offences should be limited as follows:

National Defence Act - ss. ~~74~~(a)(c)(f)(h), ~~75~~(c)(d)(e)(f)(g)(h)(i), ~~77~~, 83-87, 89-91, 93, 95-103, 106-118, 120, 126, 127, 129.
124,

Criminal Code/
National Defence Act s. 130 -ss. 82, 86, 87, 89, 90, 91, 104, 129, 253, 254, 266, 267, 270, 334, 335, 430, 437.

Narcotic Control Act/
National Defence Act s. 130 - ss. 3.

Food and Drugs Act/
National Defence Act s. 130 - ss. 39(2), 48(2).

RECOMMENDATION 2

Delegated Officers should have jurisdiction over the same offences as Commanding Officers and Superior Officers except for ss. 74, 75, 77 and 130 of the National Defence Act.

RECOMMENDATION 3

It is recommended that the punishment of detention be abolished and replaced with "correctional custody", the primary purpose of which is to re-train, as opposed to, penalize the service offender.

RECOMMENDATION 4

Correctional custody should not be carried out in contact with service prisoners, and the maximum punishment awardable by a commanding officer or a court martial should be set at the level necessary to re-train an offender as determined by a review team specifically tasked to determine the length and composition of the re-training program. Consistent with the "re-training" goal of correctional custody, the maximum length of the punishment should not exceed the present period of recruit training (8 weeks).

RECOMMENDATION 5

The Commanding Officer should be the only summary trying authority who has the power to award correctional custody.

RECOMMENDATION 6

Training at a correctional custody facility should be full-time and directed towards re-instilling discipline in the service member through programs such as intensive drill, PT and military training programs.

RECOMMENDATION 7

The punishment of correctional custody should not include the punishment of reduction in rank. Instead the offender would have the "deemed" rank of private while undergoing sentence. Upon completion of the sentence the previously held rank would be automatically re-instated.

RECOMMENDATION 8

The service member undergoing correctional custody should receive pay as a private for the period of the sentence. Upon completion of the sentence, full pay should be automatically re-instated.

RECOMMENDATION 9

The punishment of reduction in rank should be retained as presently provided for under the National Defence Act and QR&O.

RECOMMENDATION 10

The punishment of "confinement to ship or barracks" should be retained, but it should be re-titled "unit corrective training", with greater emphasis being given to the re-training component of the sentence. The drill, inspection, military training components of the sentence should be stressed.

RECOMMENDATION 11

The present powers providing for the award of punishment of "unit corrective training" 21 days and 14 days respectively for the Commanding Officer and Delegated Officer should be retained, however, the punishment should also be made applicable to corporals. The extension of the punishment to Corporals should be delayed until a final decision is made on the Master Corporal/Corporal appointment/rank.

RECOMMENDATION 12

The "re-training" goal of "unit corrective training" should be clearly set out in regulations, with the term "defaulters" being defined in QR&O.

RECOMMENDATION 13

The punishment of a fine should be retained. However, the limit on Delegated Officers of awarding a maximum fine in the amount of $200 should be removed. Commanding Officers and Superior Commanders should continue to be able to award fines of up to 60% of an offender's basic monthly pay with the Delegated Officer's authority to award a fine being capped at 25% of an offender's basic monthly pay.

RECOMMENDATION 14

The punishment of extra work and drill should be retained. However, extra work and drill not exceeding two hours per day should be removed. Commanding Officers should be able to award a maximum of 14 days punishment while, Delegated Officers should be limited to 7 days.

RECOMMENDATION 15

The punishment of stoppage of leave should be retained, however, the restrictions placed on personnel undergoing that punishment should not result in a person being effectively confined to quarters.

RECOMMENDATION 16

The punishments of reprimand and severe reprimand should be retained as presently provided for in the National Defence Act and QR&O.

RECOMMENDATION 17

The punishment of forfeiture of seniority should be removed.

RECOMMENDATION 18

The punishment of a caution should be retained as it is presently provided for under the National Defence Act and QR&O. However, QR&O art. 108.53 Note A should be removed.

RECOMMENDATION 19

Commanding Officers, Delegated Officers and Superior Commanders should remain as the trying officers at summary trial.

RECOMMENDATION 20

QR&O art. 26.11 should be amended to prohibit a superior authority from intervening in the conduct of a specific summary trial.

RECOMMENDATION 21

All trying officers should be required to take an oath upon taking up duties requiring them to conduct summary proceedings.

RECOMMENDATION 22

There should be no right to counsel at summary trial. Assistance to an accused should continue to be provided by means of a right to an assisting officer.

RECOMMENDATION 23

The assisting officer should be provided a privilege against testifying at any service tribunal concerning information relevant to a matter dealt with at any summary trial which was provided to that officer while assisting an accused.

RECOMMENDATION 24

An aide-memoire should be prepared as a CF publication, outlining in detail the responsibilities of an assisting officer.

RECOMMENDATION 25

All junior officers should receive training in how to fulfil their responsibilities as assisting officers.

RECOMMENDATION 26

The notes to the regulations in QR&O Chap 103 setting out the service offences should be expanded to outline the essential elements of all service offences, including the s. 130 offences over which summary trying officers have jurisdiction.

RECOMMENDATION 27

Provision should be made to allow an accused an opportunity, where feasible, for access to a military lawyer prior to the commencement of a summary trial. It must be noted that in order to carry out this recommendation there would have to be an increase in JAG resources.

RECOMMENDATION 28

QR&O should be amended to mandate the release of the following information, if available, to the accused:

a) investigation conducted pursuant to QR&O, art 107,03;
b) statements by the accused and other witnesses; and
c) all documentary evidence to be relied on at trial.

RECOMMENDATION 29

Where there is no written documentation relating to a charge to be disclosed, an accused shall upon request be provided with a summary of the evidence prior to trial.

RECOMMENDATION 30

Additional guidance should be provided in CFAOs outlining the principles to be followed in admitting evidence at summary trial, particularly with respect to the right to cross-examine, admissibility of statements, the meaning of relevant evidence and the admissibility of documentary evidence.

RECOMMENDATION 31

All oral evidence at a summary trial should be taken on oath or solemn declaration and no portion of a military police report should be used as evidence at a summary trial other than statements from an accused.

RECOMMENDATION 32

The reference in the present trial procedure to "admitting the particulars of the offence" should be removed.

RECOMMENDATION 33

Provision should be made in the summary trial procedures for entering a plea of guilty or not guilty. When a plea of guilty is entered, the trying officer should require some information to be presented indicating that the accused committed the offence(s) as charged. That information could be documentary in nature or be a brief oral explanation outlining the incident resulting in the trial proceedings. If the accused refuses to plead, or if the information presented does not convince the trying officer of guilt, then the trial should be conducted.

RECOMMENDATION 34

The trial procedures in QR&O should be streamlined and set out in sufficient detail to ensure the sequence followed at the trial will guarantee the presentation of a full answer and defence to the charges.

RECOMMENDATION 35

A definition of "proof beyond a reasonable doubt" should be provided in QR&O.

RECOMMENDATION 36

QR&O should be amended to require a trying officer to orally advise an accused of the reasons for conviction and sentence. There should be no requirement for written reasons or a record of trial.

RECOMMENDATION 37

The power to decide whether a person should remain in pre-trial custody should continue to remain the responsibility of a Commanding Officer, a Designated Officer and the convening authority.

RECOMMENDATION 38

QR&O should be amended to make it a requirement for a Commanding Officer, Designated Officer and convening authority to seek the representations of the detained person prior to determining if a continuation of pre-trial custody is required.

RECOMMENDATION 39

QR&O, art. 105.16 should be amended to remove the criteria of "the interest of the public or the Canadian Forces". Retention in custody should only be based upon specific criteria listed in that regulation.

RECOMMENDATION 40

The power to issue prerogative relief in respect of summary trials should be given to the Court Martial Appeal Court, and possibly in exceptional circumstances a court martial.

RECOMMENDATION 41

The provisions for the use of punishment warrants prior to the completion of a summary trial should be removed, and in its place confirmation of any sentence involving a significant punishment (correctional custody, reduction in rank or a significant fine) by a superior authority within the chain of command should be instituted. The sentence proposed by the trying officer would not take effect until confirmation has been received by a superior authority.

RECOMMENDATION 42

The use of the redress of grievance to review summary proceedings should be continued only for those matters in which there is no right to appeal by way of trial de novo. There should be specific reference in QR&O Chap 108 to the grievance system as a method of review for a summary trial.

RECOMMENDATION 43

A right to appeal to an independent court martial (trial de novo) should be instituted for a re-trial of any offence for which an accused was awarded a punishment of correctional custody, reduction in rank or a significant fine.

RECOMMENDATION 44

There should be a mandatory review of all charge reports by a military legal officer.

RECOMMENDATION 45

Trying officers at summary trial should be given the authority to grant release pending appeal.

RECOMMENDATION 46

The decision of a trying officer to deny release pending appeal should be reviewable by a superior officer in the chain of command, and by a court martial convened for an appeal by way of trial de novo.

RECOMMENDATION 47

The right to elect court martial should be expanded so that it is made mandatory to provide the opportunity to elect court martial to all accused except when the punishments of "unit corrective training", stoppage of leave, extra work and drill, severe reprimand, reprimand, a fine in the amount of 25% of the monthly pay or less or a caution is being considered in respect of the following offences:

s. 85- Insubordinate Behaviour
s. 86- Quarrels and Disturbances
s. 90- Absence Without Leave
s. 97- Drunkenness
s.129- Conduct to the Prejudice or Good Order and Discipline (only when the offence relates to training, dress and deportment, drill and inspections).

RECOMMENDATION 48

The assisting officer should be required to inform the accused fully regarding the difference between courts martial and summary trials, including:

a) the right to legal counsel;
b) the greater powers of punishment of a court martial;
c) the application of the Military Rules of Evidence;
d) the right to appeal in all cases;
e) the right to challenge members of the court martial;
f) the more detailed review procedures;
g) the provision of a transcript of the proceedings; and
h) a prosecutor will be appointed to present the case at a court martial;

RECOMMENDATION 49

There should be a requirement that the trying officer must confirm with the accused at the commencement of the summary trial that the accused has been properly informed of, and understands, the differences between a court martial and a summary trial.

RECOMMENDATION 50

The rank levels over which Delegated Officers, Commanding Officers and Superior Commanders presently have jurisdiction should be maintained.

RECOMMENDATION 51

Delegated officers should be given the authority to dismiss charges.

RECOMMENDATION 52

No summary trying officer should have jurisdiction to dismiss offences which they cannot try. Offences which would now be required to be tried by court martial should only be able to be dismissed by a person having the powers of a convening authority.

RECOMMENDATION 53

The responsibility for superintending the summary trial system should be clearly defined and placed under the authority of the Office of the Judge Advocate General.

RECOMMENDATION 54

In order to assist in a meaningful review of the summary trial system, the following should be considered:

i) an annual review of the summary trial system resulting in a report to the CDS; and
ii) preparation of a statistical reporting system in conjunction with social science input to assess not only the frequency with which trials are conducted, but also the effectiveness of various punishments.

RECOMMENDATION 55

Training in the conduct of summary trials and the roles and responsibilities of summary trial participants should be integrated into all levels of professional development for officers and senior non-commissioned members.

RECOMMENDATION 56

The relevant QR&O and CFAO 19-25 should be updated on a regular basis.

RECOMMENDATION 57

A comprehensive CF publication outlining all aspects of summary trial administration, trial procedures, responsibilities of trial participants and rights of an accused, should be prepared.

RECOMMENDATION 58

A publication outlining the rights of a service member subject to summary trial should be prepared and issued to all service members charged with an offence.

RECOMMENDATION 59

The charge report should set out the basic constitutional rights being waived by an accused when the right to elect court martial is offered; provide a means of recording that the accused understands those rights and indicate whether an accused had an opportunity to consult counsel; and operate as the "appeal" form.