SUMMARY TRIAL WORKING GROUP REPORT

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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.

Chapter 2

Reasons for Reviewing the Summary Trial System

1. Introduction

The mandate of the Summary Trial Working Group was to review the summary trial system in light of existing and potential challenges under the Canadian Charter of Rights and Freedoms (the Charter). Before reviewing the report, it is necessary to have a basic understanding of the structure of the military justice system. To assist the reader, an outline of the summary trial system is provided at Annex A. For those personnel not familiar with the Canadian military justice system, it is strongly recommended Annex A be reviewed prior to proceeding with this report. The purpose of this Chapter is both to set out the reasons for establishing the Summary Trial Working Group, and outline the goals of this report.

2. Constitutional Challenges

(a) Court Decisions

The Summary Trial Working Group was established primarily to assess the ability of the summary trial system to withstand a Charter challenge. While no civilian court to date has ruled on the constitutionality of summary trials, there have been a number of successful Charter challenges to the military justice system. The following review of those challenges highlights the nature of the threat to the existing summary trial system.

Court decisions have been restricted to the court martial system, in particular the General Court Martial, and the Standing Court Martial. The challenges were primarily made

on the basis that military courts failed to meet the standards of independence and impartiality required under s. 11(d) of the Charter. Initially there was a series of civilian court decisions supporting the court martial system.[1] However, further review of the constitutionality of courts martial resulted in a decision of the Court Martial Appeal Court in R v.Ingebrigtson[2] that the Standing Court Martial was not sufficiently independent to survive Charter scrutiny. That decision was followed by decisions of the Supreme Court of Canada in R v. Genereux[3] and R v. Forester[4], which determined the General Court Martial was similarly unconstitutional.

The decision of the Supreme Court of Canada in Genereux is particularly instructive of the type of test to be applied in assessing the constitutionality of the military justice system since that court is the ultimate review court under military law.[5] There is much in the Genereux decision which supports the uniqueness of the military justice system. Chief Justice Lamer clearly stated that there was a need for a separate system of military tribunals:

> The purpose of a separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with

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[1] Genereux v. R (1990), 60 C.C.C. (3d) 536 (C.M.A.C.), Genereux v. General Court Martial, [1989] 2 F.C. 685 (T.D.), and Schick v. R (1987), 4 C.M.A.R. 540 (C.M.A.C.).

[2] (1990), 61 C.C.C. (3d) 541 (C.M.A.C.).

[3] (1992), 70 C.C.C. (3d) 1.

[4] (1992), 70 C.C.C. (3d) 59.

[5] National Defence Act, s. 245.

> speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[6]

The Supreme Court of Canada further concluded that members of the military could and should serve on service tribunals, and that "the Charter was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces and the R.C.M.P."[7] Therefore any constitutional review of service tribunals had to be interpreted in the context of the long-standing need for a parallel system of military tribunals.

These positive elements of the Genereux decision have to be balanced with the reasons for which the Supreme Court of Canada ultimately concluded the General Court Martial was unconstitutional. The Court found that the General Court Martial breached the independence requirements of tribunals under the Charter because it failed to meet the tests of "security of tenure", "financial independence" or "institutional independence". The corrective action which the court found to be acceptable included: fixed terms of appointment for military judges; no removal from judging duties, except for cause; and a prohibition on using an officer's performance on a service tribunal as a basis for determining promotion or a rate of

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[6] Genereux, at 25.

[7] Ibid. at 27.

pay (merit pay). Further, the Supreme Court of Canada found it unacceptable that a convening authority could both appoint the prosecutor, and select members of the tribunal.

The summary trial system runs a very real likelihood of running afoul of the Constitutional standards for "independence" as outlined in the Genereux decision. 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. The difficulties facing the summary trial system are highlighted in the following portion of the Genereux decision, which rejects the notion that could be a reasonable limit on the Charter standard under "normal circumstances":

> ...I am of the opinion that a trial before a tribunal which does not meet the requirements of s. 11(d) of the Charter will only pass...in the most extraordinary circumstances. A period of war or insurrection might constitute such circumstances. However, during periods of normality, the scheme of the General Court Martial, as it was as at the time of the appellant's trial, went far beyond what was necessary to accomplish the goals for which it was established.[8]

The Supreme Court of Canada appears to be suggesting that tribunals offering less protection than courts martial, such as summary trials, might only be acceptable during war or other emergencies. The fact that the summary trial system offers so few procedural protections in comparison to courts martials, means that any review of the summary trial system has to be directed in part to identifying if persuasive and cogent evidence exists which could convince a court to back away from the strong language used by the Supreme Court of Canada in rejecting a limitation on the application of the Charter to service tribunals.

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[8] Ibid. at 40.

In addition to the Genereux decision, reference must also be made to R v. Wigglesworth[9]. In that case the Supreme Court of Canada ruled that the Charter applied to R.C.M.P. disciplinary proceedings because those proceedings provided for the imposition of a penal sanction. The police officer involved could have, if convicted, received a punishment of up to one year in prison. Of particular concern in respect of military summary trials were the comments of the Court regarding the degree of procedural protection required when penal sanctions might be imposed. Madame Justice Wilson stated:

> If any individual is to be subject to penal consequences such as imprisonment---the most severe deprivation of liberty known to our law---then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.[10]

Since a summary trial can award a maximum punishment of 90 days detention, and detention is served in exactly the same manner as imprisonment, the requirement appears to exist in law that an accused be "entitled to the highest procedural protection known to our law". However, that high level of procedural protection, such as that applied at a court martial, is not contemplated in trial procedures presently applicable at summary trial.

Finally, while the summary system itself has not been challenged directly, there have been a number of cases in which convicted service personnel have successfully challenged the lack release pending review provisions following summary trial. In Glowczeski v. Canada (Minister of National Defence)[11], Fontaine v. Canada (Minister of National

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[9] (1987), 45 D.L.R. (4th) 234 (S.C.C.).

[10] Ibid. at 253. See also Dehghani v. Canada M.E.I. (1993), 101 D.L.R. (4th) 654 at 672.

[11] (1989), 27 F.T.R. 112.

Defence)[12], Veilleux v. Canada (Minister of Nation Defence) and Belizle v. R., Canadian Forces personnel have successfully avoided serving periods of imprisonment because post-trial procedures applicable to summary trials did not provide for release from custody pending a review of the constitutionality of the proceedings. In addition, the Veilleux and Belizle cases might still result in a ruling on the constitutionality of the summary trial system if the applicants in those cases proceed to trial. These cases provide clear evidence that CF members are willing to litigate the issue of whether the summary trial process is constitutionally valid.

(b) Effect on the Summary Trial System

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 with no 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.

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[12] (1991) 44 F.T.R. 266.

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 operational capability of the CF.

The unique structure and considerable flexibility of summary proceedings appears to be particularly well-suited to the disciplinary and operational needs of the CF. The summary trial emphasizes personal control by military commanders of their subordinates. It reinforces the trained habit of obedience which is essential to the maintenance of discipline. Summary proceedings, by virtue of their integration within the unit structure, offer an extremely "portable" trial process which can be readily employed anywhere that CF personnel are serving. It is not readily apparent that the inevitable reduced reliance on summary trials, and resulting increased reliance on court martial, which an adverse court ruling would bring, will result in an armed force which has the requisite level of discipline to meet the roles assigned to it. The procedurally complicated and administratively unwieldy courts martial are not designed to meet the "summary" disciplinary requirements of military forces. Indeed, there is considerable evidence which indicates that increased exposure to the procedural and administrative complexity associated with courts martial will drastically and unacceptably reduce the ability of military commanders to maintain the necessary "habit of obedience".[13] Therefore the inevitable challenge to the summary trial system cannot be ignored without the operational capability of the Canadian Forces being placed in considerable peril.

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[13] Henderson, "Military Law and Combat Effective Units", Annex C; Noone, "Summary Trial: Does the U.S. Experience Offer Any Lessons for Canada", Annex D; Watkin, "Role of Summary Proceedings: The Maintenance of Discipline", Annex F.

3. The Goal in Reviewing Summary Trials

(a) The Legal Perspective

If the summary trial system is worth saving, it is necessary to assess the threat presently posed to it in the nature of a constitutional challenge. Such an assessment not only will identify the weaknesses of the present summary trial system, but also provide an opportunity to confirm the requirement for continued reliance on those trials. This pre-trial assessment of the legal status of summary trials and the collection of evidence supporting the use of summary trials, also allows changes to be recommended in order to enhance the defensibility of the summary trial, while ensuring the military justice system as a whole continues to meet the operational requirements of the CF.

There is precedent for such a pre-trial review. Prior to the decision of the Court Martial Appeal Court in Ingebrigtson, a review of the Standing Court Martial system was undertaken in the Office of the Judge Advocate General to determine the changes which might be necessary should the Court Martial Appeal Court rule the court martial unconstitutional. Therefore, when the adverse decision was handed down, the CF was able to make timely changes to courts martial thereby resulting in limited disruption to the military justice system. The efforts of that working group had a further spin-off effect, since the Ingebrigtson amendments were held in Genereux to remedy most of the defects of the General Court Martial. Therefore this earlier proactive approach further limited the disruption the adverse ruling of the Supreme Court of Canada had on the court martial system.

Should a court rule that the summary trial is unconstitutional, then depending on the reasons for making such a ruling, military commanders could be barred from using summary trials at all until the defects are remedied. In light of the fact that 98% of disciplinary proceedings are conducted by summary trials, the potential exists that an adverse ruling by a review court could paralyse the military justice system due to a lack of court martial resources available to take up the "slack". A pre-challenge assessment of summary trials allows for the identification of possible changes to that trial system which can be implemented either before, or after, a challenge is made.

(b) Opportunity to Modernize the Summary Trial System

This review also provides an opportunity to ensure that the present summary trial system meets the needs of discipline in the CF in the 1990s. Again there is precedent for this type of review. The whole concept of summary trials was the result of a major review of the requirements of discipline in the British Army in 1881. The present summary trial system itself was created during a major post-World War II review of military law with the resulting decision to create a unified Code of Service Discipline in the National Defence Act. In addition, minor changes were made to the summary trial process in the 1950s. The enactment of the Charter in 1982 prompted further changes recommended by a Charter Working Group set up to assess required changes to the military justice system.

While significant changes were recommended to the summary trial system in 1983 and 1986 by the Charter Working Group, there has not been a large scale comprehensive review of the summary trial system since 1950. The threat of a constitutional challenge, and the

resulting requirement to explain and justify summary proceedings, provides an excellent opportunity to both streamline and rationalize the summary trial system. As will be indicated during this review, summary trials carry some historical "baggage" left over from the unification of the army, air force and navy summary proceedings in 1950. While it is unlikely an assessment of summary trials would have been undertaken independently of any potential legal challenge, the resulting review provides an opportunity to "modernize" the summary trial system. Therefore many of the recommendations in this review will not be based on legal requirements, but rather because it is hoped those recommendations enhance the usefulness of the summary trial process.

This report was prepared in consultation with the Commands and Canadian Forces Training System. The feedback from the "users" of the military justice system was universally positive. There were a number of minor points for which complete consensus was not reached. The areas where consensus was not complete are indicated in the report. The Working Group carefully considered the Command and Training System input and made the final recommendations as indicated.

In addition, as the Summary Trial Working Group was completing the report an updated version of CFAO 19-25 was brought into force. This CFAO (Annex L) was prepared without any 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. This report will highlight those areas where the Working Group disagrees with the new CFAO. Particular concerns will be noted in the areas of a requirement for a record

of trial or reasons for conviction and sentence, the process of pre-trial disclosure and the oath to be taken by trying officers.

(c) Summary of the Goals

In light of the reasons for undertaking a review of the summary trial system the goals of that review can be summarized as follows:

i) To 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) To ascertain what if any changes can or should be made to the summary trial system to allow it to survive a constitutional challenge;

iv) To identify what if any changes to the summary trial process not mandated by a constitutional challenge should be considered; and

v) To 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.

Chapter 3

Principles Applied

1. Principles

In assessing the summary trial system, it was considered essential that the principles of effectiveness, fairness and legality be applied throughout the review. The content of, and the reasons for, applying those principles are as follows:

(a) Effectiveness

The Supreme Court of Canada has recognized that effectiveness is an essential component of the military justice system. The unique requirements of the military for an effective justice system were identified by Chief Justice Lamer in Genereux when he stated:

> The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.[14]

That decision directly relates the operational readiness of the armed forces to the efficient and speedy enforcement of discipline. In addition, it was acknowledged in Genereux that discipline had to be enforced by members of the military.

In this report the concepts of speed, efficiency and responsibility have been expanded to include the requirement of "portability"; the need for service tribunals to enhance the

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[14] Genereux (1992), 70 C.C.C. (3d) 1 (S.C.C.) at 25.

"habit of obedience"; and the requirement that summary trials be conducted in the same manner in peace and at war. For example, could a particular service tribunal readily accompany members of the CF on the various deployments around the world and to remote parts of Canada? Does a particular service tribunal enhance the personal contact between the superior officer directly responsible for issuing orders and conducting military operations? These expanded criteria of portability, direct responsibility and universal application were not directly commented on in Genereux, but are included in this report because of the importance of those criteria as identified in the papers submitted to the Summary Trial Working Group.[15]

If a service tribunal, and its applicable procedures, do not enhance the speedy and efficient enforcement of discipline by the persons who are responsible for the discipline and morale then it is not meeting one of the primary requirements of military society. Simply put the service tribunal is not being effective.

(b) Fairness

It is important from both a legal and military perspective that any review of the summary trial system, and changes resulting therefrom, maintain fairness as one of its primary goals.

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15 Henderson, Annex C; Noone, Annex D; Watkin, Annex A.

(i) Legal Perspective

Fairness, and in particular procedural fairness, has taken on an especially important role under Canadian law during the past 20 years. Traditionally, procedural fairness was encompassed in the principle of "natural justice". Natural justice was contained in two common law rules: audi alteram partem (hear the other side; the parties are to be given a fair hearing) and nemo judex in causa sua (nobody is to be judge in his own cause). Nemo judex in causa sua is now referred to as "independence and impartiality", while the components of the eighty alteram partem principle are often expressed as notice, disclosure, oral or written submissions, submission of evidence, cross-examination, representation by counsel and reasons or a record of trial, etc.

The purpose of procedural fairness is to limit the arbitrary use of government authority by persons in power. It sets out a structure for the trial or hearing process in order to limit the opportunity for capricious or arbitrary action, and to ensure the meaningful participation of an accused in a trial.

At one time the rules of natural justice were only applied to judicial or quasi-judicial proceedings such as courts. Procedural fairness issues are often reviewed by means of seeking prerogative relief from courts (certiorari, mandamus, prohibition, etc.). Under British common law, and by incorporation under Canadian law, there was a traditional view of a "disciplinary exemption" that prevented the issuance of prerogative relief by a court for cases involving the armed forces, police and firemen. However, first in Schick v. Canada (Attorney General)[16] and then in a number of subsequent decisions (most notably for this

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[16] [1986] 5 F.T.R. 82.

review Glowczeski, Fontaine, Veilleux and Belzile) the issuance of prerogative relief opened the door for the review of service tribunals by civilian courts outside of the court martial appeal process.

This expansion of judicial review to service tribunals, and in particular to summary trials, mirrored a general enlargement of the traditional rules of natural justice beyond judicial and quasi-judicial proceedings. Instead of restricting the application of the rules of natural justice the fairness requirements are applied to all tribunals regardless of whether they are judicial, quasi-judicial or administrative. The content and scope of procedural fairness applicable in any case now depends upon the circumstances of the case, the statutory provisions and the nature of the matter to be decided. In effect the requirement to be procedurally fair is put on a sliding scale with tribunals performing the functions of courts being assessed against a high standard of fairness, while more administrative decision making bodies have to meet a lower threshold of fairness.

The importance which is placed on procedural fairness is reflected in the legal rights contained in the Charter. Many of the Charter provisions, and most notably for the purposes of this review ss. 7 and ll of the Charter, deal with components of procedural fairness. The inclusion of those components in the Charter represent the elevation of the requirements for procedural fairness to a constitutional status. The special status given to procedural fairness in the Charter does not, however, remove the obligation that exists at common law to be procedurally fair. While this review will be carried out in reference to the Charter many of the principles considered herein would have to be assessed in a similar fashion if the summary trial system was challenged under common law principles.

One of the most important features of procedural fairness from a legal perspective is that it is structural in nature. It involves a review of the trial process from an objective point of view. Ultimately, when applied to summary trials, it helps ensure a consistency of treatment for those members of the CF to whom that process applies.

(ii) Military Perspective

Every military commander knows the importance of not only treating subordinates fairly, but also of being perceived to be fair. A lack of fairness on the part of a superior can seriously undermine the cohesion and morale of subordinates. Therefore fairness is one of the characteristics an officer must display in disciplining subordinates. In military justice systems such as those found in Canada, the United Kingdom and the United States, which provide for the right to elect court martial, the person subject to summary proceedings can presently indicate their doubts in the fairness of the trying officer by choosing to elect court martial. As indicated by Peter Rowe in "Military Justice Within the British Army":

> The need for the maintenance of discipline in any army is axiomatic but it is not advanced by injustice. A soldier must have confidence in the fairness of his commanding officer and that any errors will be corrected. Discipline will inevitably suffer if this confidence is lacking and one might expect a larger number of soldiers to elect trial by court-martial and thus frustrate the beneficial effects (from the army's point of view) of summary disposal. For there are distinct advantages to the army in transferring powers from a court-martial to a commanding officer. This is so, however, only until the point is reached that the punishments "become so severe that the rights of individuals outweigh the needs of the services with respect to the maintenance of discipline." Individual cases are dealt with more expeditiously, and this avoids the disturbance to military

> routine that a court martial causes. Such evidence as there is suggests that this form of disposal is preferred by both soldiers and commanding officers.[17]

The "safety valve" provided by the right to elect court martial is a prime example of the premium which is placed on fairness from a military perspective.

Finally, from a practical perspective, fairness is an important factor to be considered in reviewing summary trials. Fairness not only forms the basis of the Charter and common law standards to be applied by the courts during any legal review, but also has the goal of limiting arbitrary or capricious actions by persons in authority, and ensuring a meaningful participation by an accused, thereby enhancing the overall effectiveness of the summary trial process. If the structure of the summary trial process helps ensure consistency in the manner in which an accused is treated, and provides that person a meaningful opportunity to participate in the proceedings than there is a greater likelihood that form of trial will enhance the trust between superior and subordinate which is so necessary for the maintenance of discipline.[18]

(c) Legality

(i) The Charter

The third essential principle to applied in this review is that the summary trial system must meet the standards of Canadian law. The Canadian military has always been, and must remain, subject to civilian control. That civilian control is not only exercised directly

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17 P. J. Rowe, "Military Justice Within the British Army" (1981) 94 Military Law Review 99. at 117-118.

18 Henderson, Annex C; Noone, Annex D, at 24-25; Watkin, Annex F, at 23-25.

through the political process, in the person of the Minister of National Defence, but also through the legal framework establishing military forces in Canada. The constitutional basis for the military is found in s. 91(7) of the Constitution Act, 1867 which provides as follows:

> 91(7)...the exclusive Legislative Authority of the Parliament of Canada extends to ... Militia, Military and Naval Service, and Defence

It is that authority which authorizes Parliament to enact the National Defence Act. That Act in turn establishes the CF, and provides for the trial system by military commanders to help maintain discipline.

In 1982, the Canadian government enacted the Charter, which as a constitutional document, applies to the CF. Section 32(1) of the Charter declares that the Charter applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament". Since the National Defence Act, with its provision for the trial of service offences by service tribunals, falls within the legislative authority of Parliament it is clear that the Charter applies to the disciplinary system of the CF. The application of the Charter is not only limited to the provisions of the National Defence Act, but must also extend to the subordinate legislation arising from that Act (QR&O), the procedures of the service tribunals, and the acts of those persons empowered to enforce discipline in the CF (trying officers, assisting officers, etc.). This broad application of the Charter is consistent with both the wording of s. 32(1) of the Charter, which states that it applies "in respect of all matters within the authority of Parliament" (emphasis added) and with the "purposive" approach to interpreting the Charter.

There is no exemption for the military from Charter scrutiny. The Charter itself contemplates the existence of a system of military tribunals. Section 11(f) of the Charter states:

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

The application of Charter rights to the military provides another avenue by which civilian institutions oversee the armed forces.

It is in reference to the Charter that the legality of the summary trial process will be reviewed. The analysis of legal rights under the Charter is a two step process. The Charter sets out specific individual rights which are first analyzed to determine if they are breached. As was evidenced in Genereux the legal rights primarily applicable to a review of service tribunals are ss. 7, 11 and 15 of the Charter. Once it is determined that an individual right has been breached, that right is balanced separately with "community interests". This balancing is done 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 subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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. This report will be directed primarily at identifying if the summary trial

system breaches Charter rights, and analyzing if reasonable limits on those rights presently exist, or can be established.

In this report, the following Charter rights are reviewed:

> 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 right to 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.

As has been indicated the legal rights under the Charter, and in particular ss. 7 and 11, are largely procedural in nature. Legally the term "fundamental justice" in s. 7 of the Charter means more than just procedural fairness, however, it is well established that procedural fairness is a minimum component of that section. It is in terms of procedural fairness that s. 7 will be studied in this report.[19] Section 11(d) itself refers to a "fair" hearing which brings in the element of procedural fairness.

With respect to ss. 7 and 11 it must be noted that both of these sections are interrelated. The Supreme Court of Canada has ruled that s. 7 of the Charter encompasses

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19 R v. Lyons (1987), 37 C.C.C. (3d) 1 (S.C.C.), Pearlman v. Manitoba Law Society Judicial Committee (1991) 6 C.R.R. (2d) 259 (S.C.C.), Idziak v. Canada (Minister of Justice), (S.C.C. November 19, 1992).

the rights contained in ss. 8 to 14 of the Charter (the legal rights). Those latter rights, including s. 11, "illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated...." Since there is this overlap it often happens, as was the case in Genereux, that a court will analyze the specific legal right (eg. under s. 11) and then decline to deal with s. 7 of the Charter. However, the overlap is not absolute as the Supreme Court of Canada has ruled the specific rights (ss. 8-14) in the Charter can be broader in scope than s. 7 of than enactment[20]. In addition, s. 11 only applies when someone has been "charged with an offence". It does not apply to pre-charge (eg. some pre-trial custody) procedures. In Wigglesworth, Madame Justice Wilson indicated that s. 11 should be applied to criminal and penal matters, and to leave other "offences" subject to the more flexible criteria of s. 7. This would indicate that even if summary trials were not criminal or penal proceedings under s. 11 of the Charter, they could still be subject to Charter scrutiny. As a result, this report will analyze the summary trial under both ss. 7 and 11 even though some overlap will occur.

(ii) The Degree to Which ss. 7 and 11 of the Charter Apply to Summary Trials

While Canadian military law is subject to Charter review there remains the question of the degree to which ss. 7 and 11 of that enactment apply to summary proceedings. Both s. 7 and s. 11 have pre-conditions which limit their application.

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20 R v. CIP Inc. (1992), 71 C.C.C. (3d) 129 (S.C.C.).

A. Section 11 and the Disciplinary Exception

The degree to which s.11 of the Charter applies to summary trials must be assessed in relation to the tests set out in R v. Wigglesworth[21], a case involving R.C.M.P. disciplinary proceedings. The Supreme Court of Canada ruled that certain disciplinary processes designed to regulate conduct within a limited sphere of activity were not subject to scrutiny under s. 11(d) of the Charter. The court established that a disciplinary proceeding was only subject to review under s. 11(d) if "by its nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence." Therefore if it is determined the summary trial system is neither criminal in nature, nor leads to penal consequences, then s. 11(d) would not apply.

In writing the majority decision of the court Madame Justice Wilson ruled that s. 11 of the Charter was available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. A matter falls within the nature of a criminal or quasi-criminal proceeding if it is "of a public nature, intended to promote public order and welfare within a public sphere of activity...."[22] As a way of contrasting the public aspect of criminal proceedings, private, domestic and disciplinary matters were outlined as:

> ...regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity.[23]

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21 (1987), 37 C.C.C. (3d) 385.

22 Ibid. at 400.

23 Ibid.

The "criminal" connotation of a proceeding could be derived from the use of terms such as "tried", "presumed innocent until proven guilty", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence".[24] It does not matter that public order offences carried relatively minor consequences. Even traffic offences with relatively small fines as possible punishments fall, by the nature of the offence, under the scope of s. 11(d) of the Charter.

With respect to the "true penal consequences" test Madame Justice Wilson acknowledged that, in general terms, disciplinary measures, such as fines, were indistinguishable from criminal punishments. There were, however, two caveats placed on this general rule. First, the imposition of a small fine could be consistent with the maintenance of discipline and order within a limited private sphere of activity. An indicium of the private purpose of the fine in that case was that payment went for the private use of a disciplining body rather than for public use. The second caveat was that Madame Justice Wilson had difficulty conceiving of a proceeding which would fail the "by nature" test (in other words non-public) but pass the "true penal consequences" test (allow penal sanctions). She concluded "I have grave doubts whether any body or official which exists in order to achieve some administrative purpose or private disciplinary purpose can ever imprison an individual".[25]

In Wigglesworth the Supreme Court of Canada decided that the R.C.M.P. disciplinary proceedings were "private" internal proceedings (not "by nature" criminal). The service

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[24] Ibid. at 397.

[25] Ibid. at 402.

offences under the R.C.M.P. existed separately from the civilian criminal law even though disciplinary action might be commenced in respect of an incident giving rise to criminal proceedings. However, due to the fact that the officer involved faced a punishment of one year imprisonment, if convicted, that tribunal passed the "true penal consequences test. Therefore s. 11(d) of the Charter applied to R.C.M.P. disciplinary proceedings as they were constituted at the time. Since Wigglesworth, the Royal Canadian Mounted Police Act has been amended to remove the punishment of imprisonment for one year. The punishments to be awarded by the R.C.M.P. service tribunal now include recommendation for dismissal for officers, or dismissal for other ranks; direction to resign; recommendation for demotion for officers, or demotion for other ranks; and forfeiture of pay for up to 10 working days.[26] In Landry v. Gaudet[27] the altered disciplinary proceedings were held to be outside the scope of s. 11 of the Charter.

Whatever the status of the R.C.M.P. disciplinary proceedings the summary trial is both by its nature, and as a result of the penal consequences it can impose, subject to scrutiny under s. 11 of the Charter. In Genereux the Supreme Court of Canada ruled that s. 11(d) applied in respect of a General Court Martial because:

> Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the National Defence Act, relate to matters which are of a public nature.

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26 The Royal Canadian Mounted Police Act, s. 45.12(3).

27 (1992), 95 D.L.R. (4th) 289 (F.C.T.D.).

> For example, any act or omission that is punishable under the Criminal Code or any other Act of Parliament is also an offence under the Code of Service Discipline. Indeed, three of the charges laid against the appellant in this case related to conduct proscribed by the Narcotic Control Act.[28]

As was indicated by Chief Justice Lamer, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court since, pursuant to s. 66 and 71 of the National Defence Act, an accused who is tried by a service tribunal (including a summary trial) cannot also be tried by an ordinary criminal court for the same offence, or any other substantially similar offence. Therefore the General Court Martial is "by nature" a criminal proceeding.

The summary trial has jurisdiction over the same offences as a court martial including Criminal Code and other federal criminal offences. A conviction at a summary trial precludes trial by a civilian court on the same or a similar offence. In addition, the terms used in summary proceedings such as "trial", "proof beyond a reasonable doubt", "punishment", "find the accused guilty", "find the accused not guilty", etc. are indicative of criminal proceedings. The summary trial is therefore "by nature" a criminal proceeding.

Once the "by nature" test is passed it is irrelevant if the summary trial awards penal sanctions. However, the sanctions awarded by summary trials such as detention and fines are true penal consequences. Potentially confinement to ship or barracks, stoppage of leave and extra work and drill could also be considered to be penal consequences. As a result, an assessment of this portion of the Wigglesworth test also leads to the conclusion that s. 11 of the Charter will generally apply to summary proceedings.

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[28] (1992) 70 C.C.C. (3d) 1 at 16-17.

B. The Application of s.7 to Summary Trials

The threshold to be passed in determining if s. 7 of the Charter applies to summary trials is whether an accused is threatened with the denial of a right to "life, liberty and security of the person".

The most obvious of the three rights affected by the summary trial process is that of "liberty". The right to liberty under s. 7 of the Charter has been interpreted to include the right to be free from imprisonment.[29] However, it is more than freedom from bodily restraint, and extends to the right of free movement.[30] It has even been interpreted to mean when physical liberty is restricted in any circumstances, when control over mental or physical integrity is exercised, or when the threat of punishment is invoked for non-compliance.[31] Section 7 has been held to apply in circumstances where a person would be confined to their home[32], a prisoner is to have parole revoked[33], and where an inmate is to have unescorted temporary absence from prison halted.[34]

In light of the foregoing it is clear that summary trials are subject to scrutiny under s.7 of the Charter by reason of the possible effect on liberty interests. The types of punishments

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29 S. 94(2) Motor Vehicle Act (1983), 23 C.C.C. (3d) 289 (S.C.C.).

30 R v. Neale (1987), 28 C.C.C. (3d) 345 (Alta. C.A.).

31 Reference re Criminal Code (Man), [1990] 1 S.C.R. 1123, Canadian Association of Regulated Importers v. A.G. Canada, [1992] 2 F.C. 130 (F.C.A.).

32 R v. Neale

33 Dumoulin v. R, (1983) 6 C.C.C. (3d) 190 (Ont. S.C.).

34 Cadieux v. Director of Mountain Institution et al. (1985) 13 C.C.C. (3d) 330 (F.C.T.D.).

which could involve a liberty interest include detention, confinement to ship or barracks, stoppage of leave and extra work and drill. This conclusion is supported by both British and American military law.[35] What remains to be determined in the course of this report is whether liberty in a military context has a different meaning than in civilian society.

In addition to the punishments available at summary trial, the ability of a trying officer to refer the matter to a court martial after the commencement of the summary trial and election of trial by the accused exposes an accused to punishment such as imprisonment, which clearly affect liberty interests.

The other two rights included in s. 7 of the Charter, "security of the person" and "life", have a more remote application to summary proceedings. The "life" interest is only invoked by an argument that the jurisdiction of a commanding officer or superior commander over offences attracting the death penalty, and the ability of that trying officer to refer the matter to court martial brings summary trials within s. 7 of the Charter. The remoteness of that argument negates any serious assessment in respect of this report. However, it does serve to highlight the issue of whether summary trials should have jurisdiction over offences for which the maximum penalty is death.

The right of "security of the person" has not as yet been fully defined by the courts. It does extend to "freedom from the threat of physical punishment or suffering as well as freedom from the threat of such punishment itself."[36] In addition it appears that serious

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35 Rowe, Annex E, at 28-30; D.A. Schlueter, Military Criminal Justice: Practice and Procedure (Charlottesville: The Michie Co., 1992) 3 ed. at 126.

36 Singh v. The Minister of Employment and Immigration, [1985] 1 S.C.R. 177 (S.C.C.) at 207.

state-imposed psychological stress, at least in a criminal context constitutes a breach of "security of the person".[37] However, due to the obvious affect of summary trials on an accused's liberty interests the application of the right to "security of the person" was not dealt with in this report.

Having determined an accused's right to liberty is potentially affected by a summary trial the analysis under s.7 of the Charter turns to the principles of fundamental justice. In this report that analysis will review whether a sufficient level of procedural fairness is provided at a summary trial to avoid a determination there is a breach of the Charter. The components of procedural fairness which are reviewed are: trial by an independent and impartial tribunal, right to counsel, pre-trial disclosure, notice, oral or written submissions, trial procedures, rules of evidence and requirement for reasons or a record.

(iii) Justifying Limits on Charter Rights

As has been noted once it is determined an individual right has been breached the analysis turns to s. 1 of the Charter to determine if there is a reasonable limit on that right. If a reasonable limit can be justified there is no breach of the Charter. Therefore even though portions of the summary trial process may breach an accused's right to a "fair" trial that breach may be allowed to stand if the reason for the breach can be justified under s. 1 of the Charter.

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37 Morgentaler v. R, [1988] 1 S.C.R. 30 (S.C.C.).

As was set out in R v. Oakes[38] the analysis of s. 1 of the Charter involves a two step test involving the identification of the legislative objective of any limitation, and then an assessment of whether the means chosen to attain that objective is proportional or appropriate to the ends.[39] The onus of proving the limit on a Charter right is reasonable and demonstrably justified in a free and democratic society rests on the government[40], in this case the CF. The limit can be prescribed by common law, statute, delegated legislation or by government policy.[41] There is now a clear body of law which recognizes that courts, in assessing whether Charter protected rights have been impaired as little as reasonably necessary, must defer to a certain extent to the decisions of legislatures which are better equipped to weigh the myriad of evidence and other information necessary to make an informed decision.[42] Finally any law which is either too vague or overly broad will not support a s. 1 analysis.[43]

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38 (1986), 24 C.C.C. (3d) 321 (S.C.C.).

39 Ibid. at 234.

40 Ibid. at 346.

41 McKinney v. University of Guelph (1990), 76 D.L.R. (4th) 545 (S.C.C.). Until the McKinney case, "prescribed by law" was given a much narrower interpretation. In Weatherall v. Can. (A.G.) (1988), 65 C.R. (3d) 27 (F.C.A.), penitentiary Commissioner's Directives were held not to be limitations "prescribed by law", because unlike statutes and regulations, they had not been enacted pursuant to a "recognized legislative process". The Weatherall decision would have meant that limits under s. 1 could only be justified under the National Defence Act or QR&O and not under CFAOs.

42 McKinney, at 665-666.

43 Osborne v. Canada (Treasury Board) (1991), 82 D.L.R. 321 (S.C.C.), Ref re ss. 193 and 195.1(1) of the Criminal Code, (1990) 56 C.C.C. (3d) 65, Irwin Toy v. Quebec (Attorney General), [1989] 1 S.C.R. 927, and R v. Zundel (1987), 56

The four criteria to be satisfied under s. 1 of the Charter have been summarized as follows:

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

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

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

iv) Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.[44]

While in practical terms it is the third step, the "least drastic means" which is usually at the centre of the inquiry into the s. 1 justification[45] the assessment of the government objective can be of particular importance when dealing with a question relating to national security, such as the military disciplinary system. The analysis in this report of limitations under the Charter is organized in the framework provided by these four criteria.

Finally, reasonable limits under the Charter are those which can be justified in a free and democratic society. One method of assessing whether a proposed limit is justifiable is to consider "the legislative approaches taken in similar fields by other acknowledged free and democratic societies."[46] The legislative approaches followed by other countries cannot be adopted as being definitive of the limits which should be justified under the Charter. As Mr.

C.R.(3d) 1 (Ont. C.A.).

44 P.W. Hogg, "Section 1 Revisited" (1991) 1 N.J.C.L. 1.

45 Ibid. at 4.

46 Re Southam Inc. and R (No.1) (1983), 3 C.C.C. (3d) 515 at 531 (Ont. C.A.).

Justice McDonald states in Legal Rights in the Canadian Charter of Rights and Freedoms[47]: "foreign legislation cannot be "determinative" because it has not been and never will be scrutinized as to whether it offends that Charter right".[48] However, an assessment of the use of summary proceedings by other free and democratic societies provides considerable insight into the necessity of those proceedings, and the extent to which they are used in the military forces of those countries. It also points to reform possibilities for the Canadian summary trial system.

The two countries which will be analyzed for comparative purposes are the United States of America and the United Kingdom. A general review of the military summary proceedings of those two countries are contained at Annex H. It is significant that the military justice system in the United States, like that of Canada, has its roots in British military law. The assessment of the military justice system in the United States will indicate whether constitutionally guaranteed rights in that country have mandated a restricted or altered use of summary proceedings.

(d) Summary

In applying the principles of effectiveness, fairness and legality it is clear that all three concepts are interwoven. An effective tribunal must have elements of fairness. Objective standards of fairness have been established as legal principles, and in certain circumstances

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47 D.C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms (Toronto: The Carswell Co. Ltd., 1989).

48 Ibid.

have been given constitutional status. However, the framework for analyzing whether broader societal interests justify limiting individual rights under s. 1 of the Charter provides an opportunity for effectiveness, an objective of the military justice system, to be weighed against an individual's right to be treated in accordance with established standards of fairness. It must be remembered, however, that the issue of primary importance is whether a service tribunal is effective. A service tribunal may have all the guarantees of procedural fairness, but if it is not effective in maintaining discipline then it is of no use to either the military or the country it serves.

2. Change, the Military and the Courts

(a) A Military Perspective

This report recommends changes to the summary trial system. For some members of the military the changes may be seen as being too great, or perhaps not necessary at all. Traditionally and perhaps somewhat unfairly, the military has been seen as an organization that is resistive to change. As B. H. Liddell Hart once commented "The only thing harder than getting a new idea into the military mind is to get an old one out." A reluctance to change can be the result of a number of factors: comfort with the status quo, fear of the unknown, or perhaps even resentment that "civilian" values are being forced on military society.[49]

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[49] For background to the tensions which can exist between military and civilian societies see C. Moskos & F. Wood, The Military: More Than A Job (London: Permagon-Brassey's International Defence Publishers Inc., 1988).

The reality is, however, that the summary trial system will be adjudicated upon by a civilian court. That court will apply the principles of fairness set out in the legal rights contained in the Charter. As this report will establish significant portions of the present system of summary trials may not survive that scrutiny and therefore will have to rely on a s. 1 Charter argument or a waiver of constitutional rights. If civilan criminal standards are stringently applied change will be imposed on the CF.

The options available to the military appear to be threefold. First, a decision can be made to be proactive; anticipate changes to the summary trial system which are necessary and defensible; and then make those changes. Secondly, the proactive approach can be taken; the anticipated changes can be prepared; and the changes can be instituted in respect of those parts of the summary trial process which are ruled by a court to be unconstitutional. Finally, a decision can be made to do nothing pending the review of the summary trial process by the courts. Of the three options only the first completely retains in the hands of the military the ability to control change. It is the ability to control change, rather than simply be resistive to it, which offers the most effective way for the CF to ensure the summary trial system meets the requirements of discipline.

There is precedent for making significant changes to the disciplinary system without being prodded by a court. The National Defence Act itself, and with it the present summary trial system, was a result of post-World War II pressures for change brought on by dissatisfaction with the military justice system of the day, caused largely by the influx of a large number of civilians into the armed forces during the war years. The changes which resulted from the Charter Working Group in the early 1980s were directly the result of a

proactive approach to assessing the impact on military law of evolving standards in Canadian society.

It was with the purpose of controlling change, and allowing the military to reconcile its disciplinary requirements with evolving standards of fairness, that this study was undertaken.

(b) Civilian Judicial Perspective

The task of assessing the constitutionality of the summary trial system should not only prompt a willingness to change on the part of the CF. Care will also have to be taken by civilian courts to put the military justice system in its proper context. In Genereux the Supreme Court of Canada acknowledged that very requirement. Chief Justice Lamer stated:

> The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above. An accused's right to be tried by an independent and impartial tribunal, guaranteed by s. 11(d) of the Charter, must be interpreted in that context.[50]

The "compelling principles" referred to by the court were the need for an expeditious and efficient system of military justice.

While the context described by the Supreme Court of Canada in respect of service tribunals is a correct one, care must be taken that civilian courts do not simply pay lip service to the concept. In reality the General Court Martial, the tribunal in question in Genereux, in a military context is neither a speedy nor efficient form of trial. It is the

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50 R v. Genereux (1992), 70 C.C.C. (3d) 1 at 27.

military equivalent of a civilian supreme court jury trial. Its procedures are complicated[51], and considerable time is required to prepare a case, assemble the court and conduct a trial.

Courts martial are designed to handle the most serious service offences and mete out the most serious punishments. They also serve as a "safety valve" in that an accused can, when given a right to elect court martial, opt for the procedurally more well defined, albeit more complicated, court martial. Courts martial have become increasingly more complicated ever since summary trials were established in the late 1800s to deal with disciplinary offences.[52] For example the post Ingebrigtson amendments to the National Defence Act made the presence of a military judge mandatory at a Disciplinary Court Martial. Courts martials, of all types, account for only approximately 2% of service tribunals held per year.

Summary trials, rather than courts martial, are the most important service tribunal in terms of maintaining discipline in the CF. Summary proceedings are not only the most frequently used tribunal (98% of tribunals), but also from a historical and practical perspective embody the speedy and efficient trial referred to in Genereux as an essential part of the disciplinary process. It is clear from the Genereux decision that the court was aware of the summary trial process. However, it is equally evident that the relative roles and importance of courts martial and summary trials was not in issue before the court. The Supreme Court of Canada was not being asked to adjudicate on the summary trial process. When a civilian court considers the constitutionality of the summary trial it must be asked to look behind the principles of speed and efficiency, and deliberate in some depth as to

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51 See QR&O Chap 112.

52 Watkin, Annex B, at 9-11.

whether that tribunal, or the procedurally complex court martial, best meets the disciplinary needs of the CF.

The United States Supreme Court has carried out that underlying analysis in determining legal counsel should not be allowed at summary courts martial, one part of American summary proceedings. In Middendorf v. Henry[53] Mr. Justice Rhenquist stated as follows:

> In short, presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.[54]

Mr. Justice Rehnquist also referred to Toth v. Quarles[55] where the United States Supreme Court had previously stated:

> [I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.... [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.[56]

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53 425 U.S. 25, 40 (1976).

54 Ibid. at 45-46.

55 350 U.S. 11, 17 (1955).

56 Middendorf, at 46.

Another issue courts will have to face is whether the procedures of civilian courts provide the best model upon which to assess service tribunals. An assessment of the constitutional challenges to the summary trial system cannot be undertaken without an understanding of the constitutional status of service tribunals. The civilian criminal justice system and the military justice system have an equal constitutional status. However, many of the courts and legal scholars who have dealt with military law issues have demonstrated (often subconsciously) a preference for the procedures and structure of the civilian justice system. This preference is a direct result of the supervisory role of civilian courts, such as the Court Martial Appeal Court, the Federal Court of Canada and the Supreme Court of Canada.

In carrying out this supervisory role civilian judges and lawyers, by virtue of their training and experience, are drawn to make comparisons between the less familiar military justice system and the more familiar civilian justice system. While such comparisons are useful for the purpose of ensuring that the basic principles of Canadian law are applied to the military justice systems, the trend has been for civilian legal authorities to elevate the civilian justice system to a higher constitutional status. This elevation of status is in effect a "doctrine of paramountcy". This trend has been particularly evident concerning questions of jurisdiction where preference has been given to civilian criminal courts in trying incidents which are both service offences and offences under criminal law.[57]

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[57] For example, while the judgement in MacKay v. R (1980), 54 C.C.C. (2d) 129 (S.C.C.) written by Mr. Justice Ritchie supporting the basis for military jurisdiction as being one of status attracted the largest support among court members, Canadian courts have consistently applied the more restrictive "military nexus" test. This approach has continued to be followed despite the fact that the

The problem with this de facto elevated status for the civilian justice system is that it has been developed without a detailed assessment of the effect which such a status has on the ability of military commanders to maintain discipline in the armed forces. The military justice system has as rich a history as its civilian counterpart, and has developed as it has for reasons unique to that society. Civilian courts will have to be urged to avoid the temptation to recreate the military justice system in its own image simply because that is the system with which those courts are most comfortable.

Finally there has also been a trend for civilian courts to group military, police and prison disciplinary systems together. The grouping together of these disciplinary systems should only be done with considerable caution. The purposes of the disciplinary systems are different particularly in relation to military and police forces on one hand, and the prison system on the other hand. The disciplinary systems of the military and police forces have a more positive goal of motivating and correcting its wayward members to perform a public duty, while prison disciplinary proceedings are targeted at keeping the "lid" on potential prison violence. Even between the military and police forces there are significant differences in the professional ethics of those forces which impact on the role of the proceedings which are used to maintain discipline. The uniqueness of the military ethic was described by Lieutenant-General R.J. Evraire in a paper entitled "General and Senior Officers and Professional Development in the Canadian Forces". After referring to "duty" as one of the

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American service connection test upon which it is based was rejected by the United States Supreme Court in Solorio v. The United States 483 U.S. 435 (1987).

basic tenets of the professional military ethic he stated:

> In most cases, these tenets do have equivalents in the codes of ethics of other professions. One notable exception exists, however, and it is this tenet that truly sets the military professional apart from all other professionals. I refer to the obligation of unlimited personal liability. The commissioned officer must accept the subordination of his personal interests and wellbeing to the efficient performance of his duty, even in the face of death.
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> Members of law enforcement bodies, fire brigades and certain other civil emergency organizations have every reason to claim they too often perform their professional duty under stressful and life-threatening circumstances. In my view, however, these conditions prevail for relatively short periods of time, involve few people, allow for a return to family on a daily basis, and do not entail duty the inadequate performance of which might place the security of the country at risk. I would therefore not characterize their obligation of personal liability as unlimited.

It is dangerous to group military, policy and penitentiary disciplinary systems together for the purposes of Charter analysis. The often divergent purposes of those disciplinary systems require a separate analysis.

Chapter 4

Approach to the Analysis and the Legislative Objective

1. Approach to the Analysis

The summary trial system consists of tribunals having jurisdiction over criminal offences; are presided over by trying officers serving within the chain of command; follow relatively limited procedures; and have the power to significantly affect the liberty interests of service members. In light of the decision of the Supreme Court of Canada in Genereux, it appears that the summary trial system, as it is presently constituted, cannot survive Charter scrutiny.

The weakness of the summary trial system from a constitutional perspective was recognized as early as 1959 when the timing of the right to elect court martial was transferred from the end of the summary trial to the commencement of those proceedings.[58] In effect the right to elect court martial became a form of waiver where an accused, by electing to turn down a court martial, waived the procedural guarantees available in that forum. Similarly, the changes to the summary trial process in 1983 were designed to increase the availability of the "waiver" to accused service members.

An assessment of the extent to which an accused service member can waive Charter rights in deciding to remain within a trying officer's 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

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58 Watkin, Annex B, at 22.

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. Finally, the identification of Charter breaches, and the extent of the breach will assist in determining what information needs to be passed to an accused to make the right to elect court martial an informed and valid waiver.

Therefore the analysis will be out carried as follows. First the question of whether military summary trials can or should be transformed into "private disciplinary" hearings will be considered. This "disciplinary exception" analysis will look at the service offences subject to, and punishments applied at, summary trials (Chapter 5).

The analysis will then be directed towards the "fairness" issue. This analysis will explore the issues of independence and impartiality, procedural fairness and the right to review/appeal (Chapters 6 and 7) in order to determine the extent of any Charter breach. The report will then deal with the right to elect court martial (Chapter 8), equality rights (Chapter 9) and miscellaneous provisions (Chapter 10). Each time it is determined that there is, or may be, a Charter breach, a s. 1 analysis will be carried out. That s. 1 analysis will determine the adequacy of existing procedures and trial structure, as well as assess proposed changes which will enhance the ability of the summary trial process to meet the s. 1 test.

Ultimately the defensibility of the summary trial system will depend upon a global assessment of 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; whether the right to elect court martial provides an acceptable waiver of constitutional rights; and whether an effective judicial review of summary proceedings can be instituted.

2. The Objective of Limits on Individual Rights

a) Disciplinary Proceedings and Their Objective

Before embarking on the analysis of the summary trial system it is important to understand the objective of any limits that trial process might place on individual rights. As was set out in Chapter 3, identifying the objective a limit on individual rights is designed to serve is the first step in a s. 1 Charter analysis.

As was set out by the Supreme Court of Canada in Oakes the objective which a limit is designed to serve must be sufficiently important to warrant overriding a constitutionally protected right. The standard for assessing the objective must be high, and at a minimum that objective must relate "to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important".

The Supreme Court of Canada, in Genereux, acknowledged that "the necessity of maintaining a high level of discipline in the special conditions of military life is a sufficiently substantial societal concern to satisfy the first arm of the proportionality test". The objective is the maintenance of discipline, and with it, the operational effectiveness of the military forces of Canada. However, that being said, the Supreme Court of Canada went on to rule that the deficiencies in the General Court Martial system went far beyond what was necessary to accomplish the goal of maintaining discipline in the CF.

As has already been noted in Chapter 3, the Supreme Court of Canada has acknowledged speed and efficiency are essential requirements of a military justice system. However, the General Court Martial, even when the minor changes recommended by the Supreme Court of Canada are made, will not meet those requirements. The General Court Martial, and the other types of courts martial, were never designed to be particularly speedy or efficient. They are designed to provide the procedural safeguards which cannot be made available at summary trials. Section 1 did not apply in the Genereux case, not because the court martial in question could be sufficiently "speedy" and efficient with minor changes, but rather because having gone to the effort of setting up a procedurally complicated trial process the minor changes recommended by the Supreme Court of Canada looked relatively inconsequential in respect of the overall trial process. In effect, the Genereux case was not about effective and efficient service tribunals, or the application of s. 1 to the military justice system.

The true "summary" proceedings under Canadian military law are the summary trials. In order to avoid a similar situation in respect of summary trials, in which a court acknowledges the principle of requiring a fast and efficient trial process, but fails to completely understand the effect of that acknowledgement, it is necessary to look beyond the words of the objective and assess the factors which mandate that form of trial.

In obtaining the objective of a disciplined and operationally effective armed force there is a requirement for a service tribunal which is sufficient flexible and responsive to be able to address the myriad of operational, societal, disciplinary and geographical factors which are unique to the deployment of the CF in its assigned roles. The objective of maintaining a

disciplined armed force is unique in Canadian society. The very existence of a disciplined armed force is a condition precedent to ensuring Canadian society is protected from both external and internal threats. It is difficult to see how the rights and freedoms enshrined in the Charter can be enjoyed unless the framework in which those rights exist is protected from such threats. A similar sentiment was expressed by Mr. Justice Dube of the Court Martial Appeal Court in Genereux[59] in discussing the importance of maintaining the court martial system as an objective under the Oakes criteria:

> ...as I mentioned earlier, the purpose is of capital importance since it is connected with discipline within the Armed Forces and, in the imperfect world in which we live, those forces are essential in keeping the peace and ensuring the survival of a democratic society.

Not all threats to free and democratic societies will be in a form which can be addressed by the use of military force. However, the ability to use force remains one essential method by which democracies can protect themselves from both external and internal threats. In addition, the need to maintain armed forces itself poses a potential threat to a free and democratic society. An undisciplined, and therefore uncontrolled, armed force can threaten the existence of the very society that it is designed to protect[60]. The requirement to create and control an armed force highlights the "pressing and substantial" nature of the objective of maintaining a disciplined armed force.

The connection between the protection of Canadian society, the maintenance of discipline and the need for a flexible response by the CF was directly recognized by the

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59 (1989), 59 D.L.R. (4th) 644 (F.C.T.D.)

60 Watkin, Annex F, at 8-9.

Court Martial Appeal Court in Rutherford v. R[61]. In writing for the majority Chief Justice Mahoney referred to MacKay v. R[62] where the Supreme Court of Canada had previously acknowledged the need for a separate Code of Service Discipline to administer military justice. Chief Justice Mahoney then continued:

> In summary then, the Canadian Armed Forces have the mission to defend Canada at home and abroad and to aid the civil authority in stipulated circumstances. They must be ready to execute their mission immediately they are called upon. Preparedness and morale depend on discipline. Military law comprises the rules of that discipline.

It is particularly important that service tribunals are able to be used by military commanders to maintain discipline regardless of when or where Canada's armed forces are deployed.[63]

A recognition that the circumstances under which the CF carries out its duties may result in the s. 1 justification of a breach of a Charter right can be found in S.94(2) Motor Vehicle Act[64] where Mr. Justice Lamer stated:

> Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in

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61 (1983), 4 C.M.A.R. 262 (C.M.A.C.).

62 (1980), 54 C.C.C. (2d) 129 (S.C.C.).

63 Watkin, Annex F, at 31-33.

64 (1988) 23 C.C.C. (3d) 289 (S.C.C.).

> cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.[65]
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> (emphasis added)

That exceptional circumstances, such as the outbreak of war, would justify the limit of a Charter right is particularly relevant to the objective of maintaining a disciplined armed force. At first glance, such a statement might be seen as somewhat exaggerated in light of the relatively peaceful existence Canadians appear to enjoy. However, Mr. Justice Lamer's judgment in S. 94(2) Motor Vehicle Act is, in effect, simply an acknowledgement that a free and democratic society may have to surrender some of its valued rights and freedoms when confronted with threats to the society, or members of that society.

The importance of administrative expediency to the maintenance of disciplined armed forces can be seen not only in the historical review of summary proceedings[66], but also more recently in the development of extended powers of punishment for commanding officers in the British Army.[67]

Often the difficulty in accepting that the objective of maintaining a disciplined armed force is so important that administrative expediency should be viewed as a justifiable limit

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65 Ibid. at 313. In Re Andrews and Law Society, B.C. (1986), 27 D.L.R. (4th) 600 at 610 (B.C.C.A.), Madame Justice McLachlin (now of the Supreme Court of Canada) indicated that discriminatory measures breaching an accused's Charter rights might be justified under s. 1 in "times of war". Mr. Justice McIntyre in the Supreme Court of Canada decision, Andrews v. Law Society of B.C. (1989), 56 D.L.R. (4th) 1 at 22 rejected Madame Justice McLachlin's narrow approach to s. 1, however, he did not comment on the use of the limit in time of war, emergency or other crisis.

66 Watkin, Annex B.

67 Watkin, Annex H, at 19-20.

under s. 1 at all times, arises primarily when the deployment of the armed forces in their assigned roles is linked solely to the concept of "war". In reality there is no longer any readily identifiable distinction between peace and war. Canada's armed forces are not maintained solely to repel, or deter, an aggressor in a large scale international conflict. The threat of international terrorism, internal security problems, and the requirement for United Nations and national sovereignty operations all involve threats to Canada as a free and democratic society. All of these threats exist in times of "peace". Military forces are maintained to counter those threats for the very same reasons that they are deployed in times of large scale armed conflict. Those forces provide a unique mix of discipline, training and equipment that enables them to be used as a force of "last resort" in protecting the country. Of these factors it is discipline which is of primary importance in setting the armed forces apart from civilian society, and the police and other agencies that protect that society under "normal" situations.[68]

Interestingly, in Genereux, the Supreme Court of Canada was prepared to accept that efficiency (ie. administrative expediency) was an acceptable requirement of the military justice system at all times, but held that only periods of war or insurrection might constitute circumstances extraordinary enough to limit a Charter right. It is the need to maintain discipline in preparation for conflict during periods of "normality" which makes efficiency an important part of the military justice system. In effect there can only be one standard of discipline. That same level of discipline must be maintained regardless of whether military forces are taking part in conflict, or located inside or outside of the country.

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[68] Noone, Annex D, at 22-23; Watkin, Annex F, at 33-35.

The control and use of armed force requires the development and maintenance of a "habit of obedience". As the word "habit" suggests, discipline is not something that can be turned on, or turned off, by order or decree. It may be that the intensity and level of the threat to a free and democratic society will affect the extent to which the civilian parts of that society will have to reassess whether factors such a administrative expediency should be given greater emphasis under a s. 1 analysis. Unlike the civilian segment of society, the armed forces exists solely to deal with the threats to that society. It is completely, and permanently, involved in the preparation for, and deployment in, armed conflict.

In effect, the armed forces are always immersed in the exceptional circumstances that may only periodically have to be considered in the civilian sphere of a free and democratic society. If they are not involved in the preparation for armed conflict (whatever its form), then those forces are of no use to the free and democratic society as an "armed" force. A strong argument can be made that the development, maintenance and deployment of armed forces itself constitutes an "exceptional condition" in a free and democratic society that requires increased emphasis to be placed on factors such as administrative expediency. It is the unique and essential roles for which the CF is maintained and deployed that makes the objective of maintaining discipline by means of service tribunals, such as summary trials, a pressing and substantial one.

Finally, discipline depends upon an interaction, both vertically and horizontally, with the personnel who serve together. The officers responsible for the conduct of operations are the ones to whom the "habit of obedience" must be most directly owed. It is the personal nature of leadership which is reflected in mutual trust between superior and subordinate.

That trust is developed in part through the knowledge and understanding that the military commander will deal personally and fairly with all of a soldier's problems including lapses of discipline.[69] The habit of obedience also has an effect on the horizontal relationship between members of a unit. Knowing that other members of the unit can be depended upon to obey commands enhances the mutual trust and effectiveness of the unit.[70]

b) The Objective

In light of the foregoing it can be said generally that the objective of service tribunals is to enforce discipline effectively and efficiently thereby maintaining an operationally ready armed force. However, in assessing whether a limit on individual rights is designed to meet that objective there are clarifying questions which must be answered in order 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 the summary trial system meets its objective.

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69 Henderson, Annex C, Annex G; Watkin, Annex F, at 23-25.

70 Henderson, Annex C, Annex G; Noone, Annex D, at 24-25.

Chapter 5

Disciplinary Exception

1. Introduction

The purpose of this Chapter is to determine the degree to which the summary trial system should maintain jurisdiction over "public order" offences, and award punishments which have "penal consequences". In effect, should summary proceedings be designed as "internal" disciplinary tribunals which are exempted from the application of the Charter.

2. Jurisdiction Over Offences

(a) Present Situation

Trying officers at summary trials have a broad jurisdiction to deal with service offences. Commanding officers and superior commanders can try all services offences listed in the National Defence Act (ss. 63-130 and s. 132). Included within their jurisdiction are all of the offences punishable under Part XII, the Criminal Code or any other Act of Parliament, and offences punishable under foreign law. A delegated officer has a less extensive, but still significant jurisdiction over service offences[71], however, has no jurisdiction over offences under other federal or foreign laws.

This extremely broad jurisdiction gives commanding officers and superior commanders the power to try offences for which the maximum power of punishment available at court martial or a civilian court would be death or life imprisonment. Theoretically a commanding

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[71] See Annex I, Aide-Memoire on Conduct of Summary Trials at C2.

officer or superior commander has the jurisdiction to try an offence for murder or manslaughter outside of Canada. By virtue of ss. 66 and 71 of the National Defence Act if the commanding officer or superior commander dismissed a murder charge prior to trial, or tried an accused and gave a minor punishment further trial on that charge would be precluded.

(b) Foreign Jurisdictions

Under British law, the offences over which summary proceedings have jurisdiction differ between the Army and Royal Air Force on one hand and the Royal Navy on the other. Summary proceedings conducted in the Army and the Royal Air Force are restricted primarily to offences for which the maximum power of punishment provided in the governing legislation is imprisonment for two years or less. Their jurisdiction over offences which are also offences under civil law is restricted to specifically listed less serious criminal offences.[72] The jurisdiction available to Royal Navy summary proceedings is somewhat broader. Under s. 49(3) of the Naval Discipline Act 1957 a summary trial can deal with all service offences which do not have a maximum awardable punishment of death or life imprisonment.

The American "summary" proceedings available to all armed services (Army, Air Force, Navy, Marines and Coast Guard) are Article 15 hearings (also called Non-judicial Punishment) and summary courts martial. This last proceeding is a "court martial" in name rather than in terms of procedural complexity. Article 15 punishment is only imposed for

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[72] Rowe, Annex E, at 4-5; Watkin, Annex H at 17.

"minor" offences. The is no exact definition of a minor offence, however, it has been held that an offence carrying a penalty of confinement for more than one year or which permits imposition of discharge would equate to a felony and therefore usually would not be considered to be a minor offence. The imposition of non-judicial punishment for any offence does not bar subsequent trial by court martial on that same offence.[73] A summary court martial has a broader jurisdiction, however, it is limited to non-capital offences.

A key distinction between American Article 15 hearings and Canadian summary trials is the lack of a bar from further prosecution by a court martial for the same offence. As a result of the United States Supreme Court decision in Solorio v. U.S.[74] the American military justice system applies to service members regardless to whether the offence which was committed was "connected" to the military. Members of the military remain subject to military law at all times. Therefore it would be unlikely there would be a civilian prosecution for the same offence. In terms of the Canadian military justice system the effect would be to remove the bar from prosecuting the same, or a substantially similar, offence by a court martial or civilian court found in ss. 66 and 71 of the National Defence Act.

In summary, both the British and American summary proceedings have a more limited jurisdiction than is available to summary trying officers under Canadian military law.

(c) Analysis

The effect of the Wigglesworth case (see Chapter 2) is that if summary trials were considered to be "internal" disciplinary matters then s. 11 of the Charter would not apply

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73 Watkin, Annex H, at 5-6.

74 583 U.S. 435 (1987).

even though the disciplinary action could involve the same incident which would give rise to criminal action. For example a summary trial could deal with an incident of assault as a disciplinary matter even though a charge of assault under s. 266 of the Criminal Code of Canada. The first test to be considered in determining if summary trials can be considered as internal disciplinary matters is to assess if they are by their nature a public proceeding, intended to promote public order and welfare within a public sphere of activity. It must be stressed that this is only the first stage of the test. The second stage, the "penal consequences" test is dealt with later in the review of punishments available to summary trials. The public nature of the proceeding is largely determined by the type of offence falling within the jurisdiction of the tribunal. For example, is a person being prosecuted by the state for public offences involving punitive sanctions?

In Genereux the Supreme Court of Canada ruled that General Courts Martial were public order tribunals because the Code of Service Discipline was not solely concerned with maintaining discipline and integrity in the Canadian Forces. The Code also served a public function as well by punishing specific conduct which threatens public order and welfare. The Court indicated that many of the offences under the Code of Service Discipline related to matters which are of a public nature. Examples of such offences were the Criminal Code offences and offences under other Acts of Parliament which were incorporated under s. 130 of the National Defence Act. Since summary trials, at least before a commanding officer and superior commander, have jurisdiction over the same offences as a General Court Martial then summary trials must be "by their nature" public order proceedings.

(d) Options

(i) Options for an "Internal" Disciplinary System"

While summary proceedings appear now to be public order proceedings the question remains as to whether the jurisdiction of summary trials can be altered so that those proceedings can be reclassified as private or internal disciplinary tribunals. The options considered by the Working Group to deal with this issue were as follows:

Option #1 - Removal of Civilian Criminal Offences

The first option considered by the Working Group was to remove the jurisdiction of summary trials over any offence which is the same, or substantially similar to, a civilian criminal offence. The rationale behind this option is that in Genereux the Supreme Court of Canada appears to have ruled that many, but not all of the offences found in the Code of Service Discipline were of a public nature. Specific examples of "public" offences included the civilian criminal offences incorporated in s. 130 of the National Defence Act. The s. 130 offences were, however, specific examples of public order offences, and from the wording of the Genereux decision it appears other offences in the National Defence Act would qualify as public order offences. For example, there are other offences in the Act such as stealing (s. 114) , driving a vehicle of the Canadian Forces while impaired (s. 111(b)) and causing fires (s. 113) which are virtually identical to civilian criminal offences. This interpretation is consistent with s. 66 of the National Defence Act which bars further trial for an offence, or a substantially similar offence once a person has had a charge dismissed, been found guilty or

convicted and punished. In effect, "criminal" offences would be dealt with by court martial, and "purely" military offences could be dealt with by either summary trial or court martial.

The Working Group rejected this option. The effect of removing civilian criminal, or substantially similar offences from the jurisdiction of summary trials would leave commanding officers and superior commanders the power to deal basically with the same offences presently tried by a delegated officer. This option would seriously undermine the summary role of service tribunals in the Canadian Forces. The required increase in the number of courts martial would be administratively burdensome, slow down the disciplinary process to an unacceptable level and undermine the authority of the officers responsible for the conduct of military operations. Further, it would be difficult to conduct the required courts martial when and where they are need in a timely fashion.

The determination that a service offence is criminal in nature because there is an equivalent or similar civilian criminal offence is an artificial distinction. All s. 130 of the National Defence Act does is incorporate offences under other Acts of Parliament as service offences. Offences under the Criminal Code, the Narcotic Control Act and other federal statutes do not have any status which is paramount to offences under the National Defence Act. This artificial distinction does not change the need for the commanding officer, or other trying officer to deal with some of those offences in order to maintain discipline.

Finally, the question of what constitutes a "purely" military offence is difficult to determine. That status is dependant upon a determination of what offences might be "substantially similar" to civilian criminal offences. The lack of precision in that term interjects an element of uncertainty that is not needed or desired. For example, the

jurisdiction of delegated officers was largely based on those officers dealing with "purely" military offences. However, a conviction under s. 117(f) (an act of a fraudulent nature) could raise the question of whether the tribunal was dealing with the same matter triable as fraud under the Criminal Code.

Option #2 - Separate Disciplinary Code

A second option considered was to either create a Code of Conduct regulated by summary trials which is separate from the Code of Service Discipline, or remove the bar from prosecuting an accused at a court martial or civilian criminal court for the same or substantially similar offence previously dealt with at summary trial.

As was indicated in Genereux disciplinary offences are separate and distinct from criminal offences. Therefore, as was determined in Wigglesworth an incident involving an assault could be dealt with as a disciplinary offence under The Royal Canadian Police Act and as a criminal offence under the Criminal Code. In the first instance the police officer was answering to his profession, while in the second case the officer was answering to the public at large.

The creation of a separate Code of Conduct could be carried out in a manner similar to that followed in The Royal Canadian Mounted Police Act. The Code of Conduct could outline "infractions" which if found to have been contravened by a summary trial would result in "sanctions" being awarded. While there is some attractiveness to creating a disciplinary system by a legislative "slight of hand" that has the potential to avoid Charter scrutiny there are a number of reasons why this option was rejected.

First, in light of the conclusions reached in the next section on punishments that trying officers must retain punishments which involve "penal consequences" there is little to be gained from creating an additional level of professional standards of conduct since scrutiny under ss. 7 and 11 of the Charter will not be adverted. Secondly, the creation of a truly internal disciplinary system again means that courts martials would have to be conducted in locations and under circumstances that will make it logistically and operationally difficult, if not impossible to do so[75]. A disciplinary Code of Conduct would not remove the need for the service offences presently found in the National Defence Act. Therefore, a member of the military would be subject to the ordinary criminal law, service "criminal" offences and service "infractions". Since the military is required to maintain discipline in areas where Canadian civil law may not exist (outside of Canada), or be conveniently applied (in remote areas of the country) service "criminal" offences would still require the involvement of courts martial. Certainly, even under the present system courts martial are held outside of Canada, or in remote locations, but due to the structure of the military justice system those courts are the exception rather than the rule (most serious offences, or as a result of an election for a court martial). That would not be the case if only courts martial could deal with public order service offences.

It is perhaps unfortunate that the Supreme Court of Canada in Genereux has taken the position that some service offences could be internal disciplinary offences, while others, due to their similarity to civilian criminal offences are public order offences. If Parliament, in enacting the National Defence Act had simply chosen to list all the Criminal Code offences

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[75] Henderson, Annex C, at 1-2; Watkin, Annex F, at 31-33.

as separate sections under the National Defence Act then the disciplinary system may cosmetically have appeared to be more like an "internal disciplinary system". However, even that approach would not have dealt with the fact that the Code of Service Discipline is the criminal code for Canadian Forces personnel serving outside of Canada. In addition, regardless of whether the National Defence Act applies to service members because of their status as members of the military, or due to the military nexus of an offence, it is also the "criminal code" for service members inside Canada as well. The difficulty in identifying service offences as criminal offences or internal disciplinary infractions highlights the unique nature of military law.

One of the most important reasons for not relegating the commanding officer, delegated officer and superior commander to deal with a third order of Code of Conduct infractions is that such action would seriously undermine the position of those officers in respect of maintaining discipline. The types of infractions set out in The Royal Canadian Mounted Police Act may be appropriate for a police agency, but a military force has a different level and type of discipline. Military forces have the potential to use more violence than civilian police agencies. They must be placed under tighter control, and that control must be exercised at the lowest possible level. Reducing the status and powers of the officers directly in the chain of command undermines both the personal control of those officers, and weakens one of the avenues through which the habit of obedience is developed and maintained[76].

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[76] Henderson, Annex C, at 14-21; Noone, Annex D, at 25-26; Watkin, Annex F, at 23-25.

Similarly, using the same service offences as presently set out in the National Defence Act, but removing the bar against subsequent prosecution for the same or a similar offence by either court martial or a civilian court is initially attractive. This approach would mirror that followed in the United States regarding Article 15 convictions. In effect the same service offences when dealt with by a summary trial would be "adopted" as a "Code of Conduct" having a different status than the same, or substantially similar, offences being dealt with by a court martial or civilian court.

The problem from a legal standpoint is that due to the penal consequences flowing from the denial of liberty associated with punishments such as detention, and potentially in respect of confinement to ship or barracks, stoppage of leave, etc. summary trials would still not likely escape scrutiny under ss. 7 or 11(d) of the Charter. Amending ss. 66 and 71 of the National Defence Act to provide for the subsequent prosecution of service members for service offences for which they have already been convicted at summary trial would leave those persons open to "double jeopardy". They very well could be deprived of their liberty by being given a punishment of imprisonment or detention by a court martial, when they had already been deprived of their liberty (detention) by a trying officer at summary trial. In addition, the same problems of speed and efficiency of the court martial system and the negative effect such a change could have on the authority of the trying officer led the Working Group to the conclusion that the American approach was not desirable under Canadian law.

(ii) Limiting the Present Jurisdiction

As has been noted the broad jurisdiction available to commanding officers and superior commanders leaves the summary trial system open to potential abuse. That potential for abuse could very likely prompt a court to either strike down the summary trial, or severely limit its jurisdiction. The question that needs to be asked is if that broad jurisdiction is appropriate or necessary.

While the jurisdiction of commanding officers and superior commanders is broad it is evident from the limited powers of punishment available to those trying officers that summary proceedings are intended to deal with less serious breaches of discipline. The summary trial is meant to be "corrective" with a goal of socializing members of the Canadian Forces to a habit of obedience. That service tribunal is not meant to try the more serious military offences[77].

This raises the question of how to determine the seriousness of an offence. In terms of summary proceedings, as they are presently constituted, the seriousness of a particular offence is determined in three ways. First, by whether the trying officer concludes, prior to trial, that the powers of punishment available to that officer would be insufficient having regard to the gravity of the offence. Secondly, if during the trial the trying officer determines that on conviction the available powers of punishment would prove inadequate. Finally, if the offence is one of a "criminal" or "quasi-criminal" nature the accused must be given the right to elect court martial.

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[77] Noone, Annex D, at 17-18; Watkin, Annex F, at 13-14.

This approach to determining the seriousness of a service offence completely ignores the method by which Parliament normally identifies the seriousness of an offence: by setting the maximum penalty. Under the civilian criminal law a further distinction on the seriousness of the offence is made in terms of whether the offence can be proceeded with by indictment or by summary conviction.

Under the National Defence Act the offence of Misconduct of any Person in Presence of Enemy (s. 74), which provides for the maximum penalty of death, is a much more serious offence than Absence Without Leave (s. 90), which has a maximum penalty of imprisonment for less than two years. For two offences charged under s. 130 of the National Defence Act the indictable offence of Kidnapping (s. 279 of the Criminal Code), which has a maximum penalty of life imprisonment, is a more serious offence than the summary conviction offence of Possession of a Weapon at a Public Meeting (s. 88 of the Criminal Code). The maximum penalty provided by statute provides an excellent starting point for determining the relative seriousness of the offence in question.

It is difficult to justify why summary jurisdiction needs to extend to all of the most serious service offences. Military commanders must maintain a broad control over the personnel under their command. However, offences which carry the penalties of death and life imprisonment are not the types of offences for which the "corrective" action of the summary trial is intended or designed. It is difficult to conceive of a situation where a commanding officer or superior commander, with their relatively low powers of punishment (90 days detention and a severe reprimand respectively) would try a charge alleging spying

(s. 78 of the National Defence Act). Offences which have a maximum penalty of death or life imprisonment should normally result in an "automatic" referral to court martial.

The restriction on jurisdiction over offences by reference to the maximum powers of punishment available pursuant to the statute is consistent with both the American and British approach to summary justice. It is that approach which was considered as the third option for dealing with summary trial jurisdiction.

Option #3 - Limiting Jurisdiction

The third option considered with respect to finding an acceptable limit to the jurisdiction of summary trials over service offences was to determine, as a general guideline, that summary trials should normally only have jurisdiction over the less serious service offences. Those offences would be the ones which are, under the National Defence Act, provided a maximum allowable punishment of imprisonment for less than two years. An exception to this general rule would be those offences which are considered crucial to the maintenance of order and discipline at the unit level, and offences which are uniquely operationally oriented. In addition it was determined that there should be retained a difference in jurisdiction between Commanding Officers and Delegated Officers, although the extent of the difference is considerably lessened. The jurisdiction of commanding officers and superior commanders will be dealt with first.

The offences listed in the National Defence Act attracting a maximum punishment by statute of imprisonment for less than two years which should fall within the jurisdiction of summary trials (commanding officers and superior commanders) are:

SECTION	OFFENCE
86	Quarrels and Disturbances
87	Resisting or Escaping from Lawful Custody
89	Connivance At Desertion
90	Absence Without Leave
91	False Statement in Respect of Leave
95	Abuse of Subordinates
96	Making False Statements
97	Drunkenness
99	Detaining Unnecessarily
100	Setting Free from Custody (when not acting wilfully)
101	Escape from Custody
102	Hindering Arrest
103	Withholding Delivery of Member to Civil Power
107	Offences in Relation to Aircraft
108	Signing Inaccurate Certificate
109	Low Flying
112	Improper Use of Vehicles
113	Causing Fires (when not wilful)
116	Destruction/Damage/Loss of Property
117	Miscellaneous Offences
118(2)	Offences in Relation to Service Tribunals

120	Offences in Relation to Billeting
126	Refusing Immunization
127	Injurious or Destructive Handling of Dangerous Substances (where not wilful)

There were also a number of National Defence Act offences over which it was considered essential that commanding officers and superior commanders retain jurisdiction, even though the maximum punishment that could be awarded by statute was greater than a term of two years. These offences were included within the jurisdiction of trying officers because the nature of the offence was such that it was considered to be an integral part of maintaining discipline at the unit level. Those offences were:

SECTION	OFFENCE	MAXIMUM PUNISHMENT
83	Disobedience of a Lawful Command	Imprisonment for Life
84	Striking or Offering Violence to a Superior Officer	Imprisonment for Life
85	Insubordinate Behaviour	Dismissal with Disgrace
93	Cruel or Disgraceful Conduct	Imprisonment not Exceeding 5 Years
98	Malingering	Imprisonment for Life
106	Disobedience of Captain's Orders	Imprisonment for Life
110	Disobedience of Captain's Orders in Aircraft	Imprisonment for Life
111(1)	Offences in Relation to Vehicles	Imprisonment for 5 Years
114	Stealing	Imprisonment for 14 Years
115	Receiving	Imprisonment for 7 Years

124	Negligent Performance of a Military Duty	Dismissal with Disgrace
125	Offences in Relation to Documents	Imprisonment not Exceeding 3 Years
129	Conduct to the Prejudice of Good Order and Discipline	Dismissal with Disgrace

There were also a number of offences under the National Defence Act of an operational nature which were included in the jurisdiction of the summary trial even though they could attract a maximum penalty that exceeded the threshold of imprisonment for less than two years. Those offences were:

SECTION	OFFENCE	MAXIMUM PUNISHMENT
74(a)(c) (f)(h)	Misconduct in the Presence of the Enemy	Death
75(c)(d) (e)(f) (h)(i)	Security Offences	Death
77	Miscellaneous Operational Offences	Imprisonment for Life

While these serious offences could attract the death penalty the nature of the offences was also seen to be potentially sufficiently minor to warrant summary punishment.

The offences which would no longer fall within the jurisdiction of summary trials and which would have to proceed to court martial are:

SECTION	OFFENCE	MAXIMUM PUNISHMENT
73	Misconduct of Commanders in Presence of Enemy	Death

74(b)(d) (e)(i) (j)	Misconduct in the Presence of the Enemy	Death
75(a)(b) (g)(j)	Security Offences	Death
76	Prisoners of War	Death
78	Spies for the Enemy	Death
79	Mutiny	Death
80	Mutiny Without Violence	Death
81	Offences Related to Mutiny	Death
82	Seditious Offences	Imprisonment for Life
88	Desertion	Imprisonment not exceeding 5 Years
92	Disgraceful Conduct	Dismissal with Disgrace
94	Traitorous or Disloyal Utterances	Imprisonment not Exceeding 7 Years
104	Losing, Stranding or Hazarding A Vessel	Dismissal with Disgrace
105	Offences in Relation to Convoys	Death
113	Wilfully Causing Fires	Imprisonment for Life
119	False Evidence	Imprisonment Not Exceeding 7 Years
127	Wilfully Injurious or Destructive Handling of Dangerous Substance	Imprisonment for Life
128	Conspiracy	Imprisonment Not Exceeding 7 Years

In addition to the offences specifically listed above, it was considered necessary to retain a limited jurisdiction over offences incorporated as service offences pursuant to s. 130 of the National Defence Act. It was evident that the area where the greatest criticism could be made of the jurisdiction of summary trials (commanding officers and superior commanders) was the wholesale incorporation of civilian criminal statutes under s. 130. The Working Group considered that a primary consideration of the officers maintaining discipline was to be able to control subordinates in respect of violence related offences, misuse of alcohol and drugs, misuse of weapons and breaching the public peace. Therefore modelled on the British Army and Royal Air Force example of specifying criminal offences, the following offences were included within the jurisdiction of the commanding officer:

INCORPORATED FEDERAL STATUTES

CRIMINAL CODE

SECTION	OFFENCE	PUNISHMENT
82	Possession of explosives without lawful excuse	Hybrid
86	Pointing a firearm	Hybrid
87	Possession of a weapon	Indictable/10 years
89	Carrying a concealed weapon	Hybrid
90	Possession of a prohibited weapon	Hybrid
91	Possession of an unregistered restricted weapon	Hybrid
104	Finding a weapon	Hybrid
129	Obstruction of peace officer	Hybrid

253	Impaired driving	Hybrid
254	Driving with alcohol-.08	Hybrid
266	Assault	Hybrid
270	Assaulting a peace officer	Hybrid
267	Assault with a weapon	Indictable/10 years
334	Theft (less than $1,000)	Hybrid
335	Taking of a motor vehicle	Summary Conviction
430	Mischief	Hybrid
437	False alarm of fire	Hybrid
420	Military stores	Hybrid

NARCOTIC CONTROL ACT

SECTION	OFFENCE	PUNISHMENT
3	Possession	Hybrid

FOOD AND DRUGS ACT

SECTION	OFFENCE	PUNISHMENT
39(2)	Possession	Hybrid
48(2)	Possession	Hybrid

* The term "hybrid" means the offence can be dealt with as either an indictable or summary conviction offence.

The effect of limiting the jurisdiction of the summary trial to the offences listed above is that it retains the commanding officer's ability to maintain discipline while limiting the potential for any abuse. In addition, it helps ensure that the most serious service offences are

dealt with by court martial, the service tribunal designed to perform that function. All other offences incorporated pursuant to s. 130 of the National Defence Act would be tried by court martial. It was the need to have the more serious offences dealt with by court martial which prompted the decision to place trafficking in a narcotic or drug solely within the jurisdiction of a court martial. It is anticipated that there could be a marginal increase in courts martial as a result of restricting the jurisdiction of summary trying officers in this fashion. However, the increase will not have any significant effect on the maintenance of discipline.

Due to the very technical nature of s. 132 of the National Defence Act it was determined that offences under foreign law which are charged under s. 132 should be tried by court martial.

Finally, in respect of delegated officers it was determined that, due their more junior status in relation to commanding officers, their jurisdiction should not extend to the specific listed offences under s. 130 of the National Defence Act or s. 132 of that Act. In addition, they should not be provided jurisdiction over ss. 74, 75 or 77 of that Act (the operational offences).

(e) 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, 124, 126, 127, 129.**

Criminal Code/
National Defence Acts. 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.

3. Punishments

(a) General

Having determined that summary jurisdiction should be retained over offences which, by their nature, are public order offences the determination of whether trying officers should be able to award "penal consequences" is a moot point regarding whether s. 11 of the Charter will be applied to those proceedings. However, the following review still serves two important goals. First, it will confirm the need for trying officers to retain the power to deprive a service member of their "liberty". That issue is of course important in respect of whether s. 7 of the Charter is applied to the analysis of summary trials. Secondly, this

review will assess the rationale for awarding a punishment that results in a deprivation of liberty, and further will look at the degree to which such liberty should be restricted. The question of the degree of the liberty interest involved is particularly relevant both in the standards of procedural fairness required at the summary trial, and whether a justification is available under s. 1 of the Charter. For example, a punishment involving confinement to cells will likely result in a higher standard of procedural fairness being required by a court than a sentence involving a remedial training program or extra work and drill, where the loss of liberty is incidental to the goals of the punishment. The question will also be addressed as to whether certain losses of liberty should be justified in a military context.

The scale of punishments that may be imposed in respect of service offences is set out in s. 139(1) as follows:

> 139(1) The following punishments may be imposed in respect of service offences:
>
> (a) death
> (b) imprisonment for two years or more,
> (c) dismissal with disgrace from Her Majesty's service,
> (d) imprisonment for less than two years,
> (e) dismissal from Her Majesty's service,
> (f) detention,
> (g) reduction in rank,
> (h) forfeiture of seniority,
> (i) severe reprimand,
> (j) reprimand,
> (k) fine, and
> (l) minor punishments,
>
> and each of the punishments set out in paragraphs (b) to (l) shall be deemed to be a punishment less than every punishment preceding it.

The minor punishments under s. 139(1)(l) are defined in the regulations as confinement to ship or barracks, extra work and drill, stoppage of leave, forfeiture of seniority, extra work and drill not exceeding two hours per day and a caution.

The powers of punishment available to a commanding officer are detention (90 days), reduction in rank, forfeiture of seniority (3 months), severe reprimand, reprimand, fine (60% of monthly basic pay), confinement to ship or barracks (21 days), extra work and drill (14 days), stoppage of leave (30 days), extra work and drill not exceeding two hours per day (7 days) and a caution. The applicability of each punishment depends on the rank of the accused. For example, only a private can receive the punishment of confinement to ship or barracks.

The powers of punishment available to a delegated officer are severe reprimand, reprimand, fine ($200), confinement to ship or barracks (14 days), extra work and drill (7 days), stoppage of leave (30 days), extra work and drill not exceeding two hours a day (7 days) and a caution.

The National Defence Act provides that a superior commander may impose a punishment of forfeiture of seniority, severe reprimand, reprimand and a fine. However, QR&O limits the powers of punishment to a severe reprimand, reprimand and a fine.[78]

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[78] Watkin, Annex A.

(i) Detention

A. Analysis

From a legal perspective the ability of a commanding officer to award up to 90 days detention is one of the factors which places the summary trial system most at risk. This view is based on the following two factors:

(i) Although detention is a separate punishment from imprisonment on the scale of punishments set out in s. 139 of the National Defence Act the Regulations for Service Prison and Detention Barracks make no distinction between the two punishments. In effect by awarding detention the Commanding Officer is awarding the punishment of imprisonment.

(ii) The Supreme Court of Canada has ruled (in Wigglesworth) that imprisonment is the most severe deprivation of liberty known to our law and that an accused liable to such punishment is entitled to the highest procedural protection known to Canadian law.[79]

It is obvious that a summary trial while capable of awarding what is in effect the most severe deprivation of liberty known to Canadian law does not provide the highest level of procedural protection.

It seems unnecessary and undesirable to have two punishments under the National Defence Act be carried out in exactly the same fashion. The integration of the two punishments appears to have occurred in 1959 with the passage of the Regulations for Service Prisons and Detention Barracks.[80] It is not clear why that happened, and the

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[79] R v. Wigglesworth (1987), 45 D.L.R. (4th) 234 at 253.

[80] Watkin, Annex B, at 21.

principle of having detention served in an identical manner runs counter to the purpose for which detention was created.

Detention was developed under British military law in 1906 to offer a punishment which was less penal in nature than imprisonment. Imprisonment was served in a civilian prison and detention was created to allow for a military programme that was rehabilitative in nature. It was meant to be awarded to personnel who were to be retained in the armed forces[81].

Both British and American military law provide for a punishment other than imprisonment, which deprives liberty but which also has as its primary goal the rehabilitation of the service member. A commanding officer in the British Army normally can award a punishment of detention for up to 28 days. Under certain circumstances the power to award that punishment can be increased to 60 days. In the Royal Navy a commanding officer can award up to 90 days detention. That commanding officer also has summary jurisdiction to award 90 days imprisonment.

In the British Army detention for a period of 28 days is normally served in the unit guard (detention) room. Detention for longer periods is served at the Military Corrective Training Centre at Colchester (MCTC). At MCTC detainees are kept in separate wings depending upon whether they are scheduled to be returned to military service, or are under sentence of dismissal. Accommodations are largely dormitory style with rooms containing six or eight beds. Single cells are available, however, they are usually reserved for persons

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[81] Watkin, Annex B, at 12.

convicted by court martial who have received imprisonment and are awaiting confirmation of finding and sentence.

The period of detention is divided into stages with the soldier being locked in during stage I, confined, but not locked in the room during stage II, and under no restrictions during stage III. During the final stage the "detainee" is allowed free and unescorted movement within an area defined by the commandant and can visit the nearest town for a restricted number of hours (cannot visit public houses).[82] Detainees who are being returned to their units after the expiration of their sentence primarily receive training related to their recruit training: drill, PT, weapon handling, live firing, map reading, first aid and NBC. Those detainees who are being released from the army receive training in brickwork, woodwork, painting, animal husbandry etc.[83] The ability of the unit guardroom to provide such training is extremely limited. The Royal Navy also maintains a detention facility with personnel receiving imprisonment serving their sentence in civilian prisons.[84] They also send personnel to the MCTC in cases where civilian training is appropriate.

For the Army, Royal Navy and Royal Air Force the purpose of the training and treatment of personnel under sentence in detention quarters is to improve their service efficiency, discipline and morale.

American military law provides that Article 15 hearings can award "correctional custody" (in certain circumstances up to a period of 30 days), while a summary court martial

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[82] Rowe, Annex E, at 17-20.

[83] Rowe, Annex E, note 75 at 30-31.

[84] Rowe, Annex E, at 14.

can award confinement for a period of one month. Confinement is the American equivalent of imprisonment, while "correctional custody" is more remedial in nature.[85] The power of a summary trial to award confinement must be considered in the context that this form of service tribunal is falling into disuse.

Correctional custody appears to be similar to the British punishment of detention, although it was originally developed from the Canadian punishment of confinement to ship or barracks. Interestingly the Army, for funding and manpower reasons, no longer operates correctional custody facilities. However, the other American armed services do operate such facilities. Correctional custody programs place emphasis on PT, military training and constructive military work programmes. There are specific facilities set aside as correctional custody facilities. However, they do not appear to be set up in cells. The United States Navy instruction governing correctional custody facilities states "Cells, or locked rooms, or other types of isolation spaces are not authorized. Correctional custody shall not be served in brig spaces."[86] A proposed United States Air Force policy contemplates the use of existing quarters and dormitories as correctional custody facilities with such facilities being set up according to need. Personnel undergoing correctional custody must be segregated from offenders undergoing confinement.

With the exception of the United States Army, a military punishment which is primarily remedial in nature; designed largely as a return to basic training; and served

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[85] The American punishment of confinement does have a remedial component, however, the use of cells to restrain prisoners gives it more of a penal than a remedial flavour.

[86] OPNAVINST 1640.1, I-2.

completely separately from service prisoners is used extensively in the armed forces of the United States of America and the United Kingdom. This return to a basic training remedial style of punishment is entirely consistent with the remedial/correctional goal of summary trials. The basics of the "habit of obedience" are first instilled in members of the Canadian Forces at recruit training. This stage of formal or "collective" discipline is then followed by the development of a more individualistic "self-discipline". The commission of a service offence, particularly when the incident is not a serious one, is an indication of a failure of discipline on the part of the service member. Therefore, the return of the ill-disciplined member to an "enhanced" recruit training environment to relearn the basics of discipline is a logical punishment in military society.[87]

Detention, as presently served at the Canadian Forces Service Prison and Detention Barracks (CFSPDB) does contain elements of remedial training. There is General Military Training which is "inserted into the inmate training program" as well as lifestyle enhancement programs (alcoholics anonymous, etc.).[88] However, in effect, the CFSPDB is being asked to serve two masters: run a prison and a detention facility. The result is a compromise with the same program being run for service detainees and service prisoners. The use of locked cells and other features of a prison are not consistent with the goals of a "corrective" program. As is evidenced in the American and British approaches a separate program specifically designed to be "corrective", rather than penal, can be operated.

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[87] Watkin, Annex F, at 7-11.

[88] Canadian Forces Service Prison and Detention Barracks 1991 Commandant's Annual Report at 8/12.

It is the determination of the Working Group that the Canadian Forces should once again create a distinction between imprisonment and detention. Present day detention should be run as a "correctional custody" program and termed as such. The change in terminology is not meant to be cosmetic. It is designed to divorce the new retraining program from the old "detention", and remove the excess baggage which that term now carries with it under Canadian law.

Service of a term of correctional custody still results in a loss of liberty, however, the key element of the program should be the remedial aspect of the training. Persons undergoing correctional custody should have no contact with service prisoners. Cells should not be used at a correctional custody facility. The use of existing barracks and dormitories should be considered. The location of correctional custody facilities should be based on need. Consideration could be given to having base, regional, command or national facilities, depending on need.

The training at those facilities should be full time, intensive and directed towards instilling collective discipline. The military training provided should develop useful military skills. Due to the retraining, as opposed to penal, nature of correctional custody reconsideration should be given to whether such a sentence should be served under the direction of the military police. Regardless of who provides the supervision of corrective custody the program should be well defined and closely monitored by trained personnel in order to avoid training abuses.

Considerable discussion was carried out by the Working Group concerning the length of time any sentence of correctional custody should run. Presently, the power of a

commanding officer to award a punishment of detention for a period of up to 90 days is fairly unique. Only the Royal Navy can award detention for a similar length of time. Indeed the period of 90 days detention under Canadian law appears to be a hold over from the pre-1950 powers available to the Royal Canadian Navy. A reviewing court may have trouble with accepting someone other than a judge can restrict a person's liberty for that length of time. It was determined, however, that the length of a correctional custody sentence should be tied to the time required to "re-train" an offender. The maximum power of a commanding officer to award "correctional custody" should be considered in terms of the length of time required for effective training. The determination of the length of time required for "re-training" was a matter which was outside the areas of expertise of the Working Group. This is a matter which should be the subject of further study. However, consistent with the "re-training" goal of correctional custody, the maximum period of the punishment should not exceed the present period of recruit training (8 weeks). It is important to stress the importance of setting a maximum period of correctional custody based on the require- ments of an effective training program rather than selecting a period of 30, 45 or 90 days because of "optics". However, once having determined the maximum amount of correctional custody sentence is required to re-train an offender that award should be the maximum awardable punishment by a court martial as well. If any service member was not salvageable after a retraining then they should not be considered for retention in the Canadian Forces, and a punishment of imprisonment would be more appropriate. The salvageability of the service member should be a primary consideration in respect of whether they are awarded corrective custody or imprisonment.

In order to make training more meaningful one of the principles of sentencing should be that the offender be given a sufficiently long enough sentence to allow for a meaningful training program to be conducted.

The power to award corrective custody should, in the same manner as detention, be retained solely in the hands of the commanding officer. Correctional custody should apply to all non-commissioned members below the rank of warrant officer. The offender should serve the sentence with the deemed rank of private. Upon successful completion of the sentence, the original rank should automatically be re-instated. The offender would be paid at the rank of private while undergoing the sentence.

The question of the rate of pay while undergoing the sentence of correctional custody was one area where consensus was difficult to receive. Maritime Command and Canadian Forces Communication Command presented a number of strong arguments for allowing the offender to receive the full rate of pay at the offender's sentence, or actual rank. Those arguments included the desire to avoid punishing family members; avoid financial hardship; ensure Commanding Officers where not deterred from awarding the punishment. In addition, it was felt Commanding Officers could award a fine in addition to correctional custody if it were considered necessary.

The other Commands and Training Systems supported the rate of pay for someone undergoing "correctional custody" as that consistent with the deemed rank of private. It was suggested by Air Command that the rate of pay could be that of a private (trained). That rate of pay reflected the actual worth of the service the offender was providing while undergoing sentence.

Ultimately the Working Group accepted the majority view on this issue.

B. Recommendations

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 "retraining" 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.

(ii) Reduction in Rank

A. Analysis

Commanding officers have the power to award the punishment of reduction in rank to any non-commissioned member above the rank of private. The service tribunal specifies the rank to which the non-commissioned member is being reduced. In the case of a corporal who holds an appointment of "Master Corporal", the punishment of reduction in rank results in reversion to the rank of private.

While reduction in rank carries with it a considerable penalty in terms of lost income it is not a punishment which appears to be a "penal consequence" according to the Wigglesworth criteria. It is more in the nature of a "job" related disciplinary action designed to maintain professional standards and integrity. In Landry v. Gaudet[89] the Federal Court Trial Division held that sanctions available under The Royal Canadian Mounted Police Act, such as dismissal, demotion and forfeiture of pay, were not penal consequences. Therefore there appears to be no reason to alter this punishment.

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[89] (1992) 95 D.L.R. (4th) 289.

B. Recommendations

RECOMMENDATION 9

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

(iii) Confinement to Ship or Barracks

A. Analysis

Like detention, confinement to ship or barracks involves a deprivation of liberty. QR&O 108.50 provides that a person undergoing that punishment shall not "be permitted during the term of that punishment during the hours he is not on duty to go beyond the limits prescribed by the commanding officer in standing orders". Since the commanding officer has discretion in defining the area to which an offender is restricted the sentence is not necessarily carried out within the confines of a ship or barracks. However, when the service member lives outside of barracks (often married personnel although there are an increasing number of single personnel living "off base") then they are required to move back into quarters for the duration of the sentence.

The punishment includes the sentence of extra work and drill, and the offender is subject to the rules for "defaulters" applicable at the base or other unit or element. QR&O 104.13 provides that a commanding officer "shall ensure that a set of rules for defaulters is drawn up for his base or other unit, that such rules are made known to all defaulters, and that they are rigidly enforced." The term "defaulters" is not defined in QR&O, however, it traditionally has been a periodic personnel dress and kit inspection usually carried out after normal working hours by the Duty NCO and/or Duty Officer.

Commanding Officers may award a maximum of 21 days "CB", while delegated officers are restricted to a maximum of 14 days. The punishment can only be awarded to privates. Due to the limitation on delegated officers to fines in the amount of $200 the awarding of "CB" is generally seen as a more effective punishment than a fine. The inclusion of extra work and drill, and the requirement to attend "defaulters" indicates that the punishment of confinement to ship or barracks has the element of "re-training" which fulfils the corrective requirement of summary punishment.

It is the determination of the Working Group that confinement to ship or barracks should be retained as presently constituted. It is an extremely effective punishment. Although the punishment involves a loss of liberty in the broadest sense of the word the program associated with it provides for the retraining ~~of the offender while~~ allowing the service member to remain as a productive member of the unit. The retention of the service member within the unit during normal working hours with re-training taking place during off-duty hours sets this punishment apart from "correctional custody". Correctional custody involves full time re-training with the service member being removed from normal duties. In addition, it is a very flexible punishment which can be awarded and carried out easily while in the field or at sea. As with "correctional custody" there should be an emphasis placed on the "re-training" requirement of "CB". The punishment should be renamed as "unit corrective training" and a standardized re-training programme should be established.

While the ability of units to provide re-training will be dependant upon the facilities available, at a minimum, the training should continue to include drill and kit inspections. Any military training provided could be directed towards the operational environment in

which the offender serves (land, sea, air). Finally, the term "defaulters" should be defined in the regulations.

There was a particular concern addressed during Working Group deliberations that corporals in addition to privates should be subject to the punishment of "unit corrective training". There is considerable controversy as to whether the corporal rank is supervisory. Presently the corporal rank appears to be indicative of an "experienced" private. That was not the case prior to integration when Corporals and Lance Corporals were positions carrying considerable status and responsibility. Since confinement to barracks has traditionally only been applied to non-supervisory personnel, corporals who were not filling a supervisory position post-integration were escaping this form of remedial training. It was the determination of the Working Group that the power to award "unit corrective training" should be extended to include corporals. Individual commanding officers and delegated officers could then use their discretion to determine if it was appropriate to award that punishment to a corporal. Among the factors to be taken into consideration in awarding the punishment to a corporal would be whether the offender was filling a supervisory position. Land Forces Command observed that the status of Corporals/Master Corporals was not resolved, and recommended no extension of jurisdiction to award "unit corrective training" to Corporals be undertaken until the Corporal/Master Corporal question is finally determined. The Working Group determined the extension of the punishment of detention to "Corporals" should be delayed until a final decision is made on the Master Corporal/Corporal issue.

B. Recommendations

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.

(iv) Fines

A. Analysis

The commanding officer, superior commander and the delegated officer can all award fines to service offenders. The delegated officer can award a maximum fine of $200. The commanding officer and the superior commander can both award a fine up to 60% of an offender's monthly basic pay, however, an accused must be given the right to elect court martial before any fine above $200 can be awarded.

As a result of Wigglesworth the legal status of fines as a penal consequence is presently uncertain. In that case the Supreme Court of Canada held that a restricted power

to fine might not be considered to be a "penal consequence". In addition, if the fine went to the benefit of the disciplinary body as opposed to the Consolidated Revenue Fund then it could be seen as being awarded for a "private purpose". A further indication of the confusing state of the law in this area was that the Federal Court Trial Division in Landry found that the sanction under The Royal Canadian Mounted Police Act of "forfeiture of pay for a period not exceeding ten working days" was not a penal consequence.

Although pre-dating Wigglesworth it was this rationale of minor fines being indicative of internal disciplinary matters, as opposed to a penal sanction, which was the basis for the $200 limit being placed on delegated officers and as a threshold for offering the right to elect court martial. The theory was that if a trying officer gave a $200 fine or less the Charter either would not apply to a disciplinary matter, or the more stringent procedural steps associated with public order tribunals (ie. courts martial) would not be necessary.

Whatever the validity of the theory at the time there is no longer any reason to maintain the $200 limit at law. The whole rational of keeping the limit on fines to $200 was to avoid or limit Charter scrutiny (ie. operation of s. 11 because no penal consequences are involved). It is also clear that as courts have interpreted the Charter the liberty interests affected by detention, confinement to ship or barracks, extra work and drill and stoppage of leave will likely invoke s. 7 of that enactment. Those liberty interests also make those punishments "penal" as well. In light of the decision by the Working Group that it is essential punishments affecting liberty interests such as "corrective custody" and "corrective unit training" continue to be awarded by commanding officers and delegated officers there appears to be no reason to place an artificial limit on fines. The level of fine for

commanding officers and delegated officers should remain at 60% of the monthly basic pay, while a delegated officer should be allowed to award a fine of up to 25% of an offenders monthly basic pay.

B. Recommendation

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.

(v) Extra Work and Drill

A. Analysis

The are two punishments of extra work and drill. One is limited to extra work and drill not exceeding two hours per day while the other punishment contains no such time limit. A commanding officer may award extra work and drill for a period not exceeding 14 days, and extra work and drill not exceeding two hours a day for a period not exceeding 7 days. Delegated officers may award either punishment for a period not exceeding 7 days. An offender receiving the punishment of extra work and drill may be required to perform normal duties for a longer period of time, other useful work and extra drill. This punishment is similar to "restriction of privileges" under British military law, and "extra duties" under American military law.

Of all the punishments which potentially involve a loss of liberty this punishment appears to come closest to a purely internal disciplinary sanction because the sentence is so closely related to military duties. It also provides a graduated process of retraining which complements "unit corrective training" and "corrective custody". Extra work and drill requires the performance of duties and training in addition to normal duties. "Unit corrective training" includes extra work and drill, adds defaulters parade and provides some restrictions on where an offender can go. However, the offender still performs normal duties. "Correctional custody" removes the offender from normal duties and is designed to provide an intensive military re-training program.

The Working Group determined that extra work and drill should be retained as a punishment available to commanding officers and delegated officers. However, in order to streamline the number of offences involving re-training it was decided that extra work and drill not exceeding two hours per day should be removed. The commanding officer should be able to award a maximum of 14 days punishment, while the delegated officer should be limited to 7 days.

B. Recommendation

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.

(vi) Stoppage of Leave

A. Analysis

The punishment of stoppage of leave can be awarded by a commanding officer or delegated officer to non-commissioned members below the rank of warrant officer. The sentence in either case can be for a period of 30 days. QR&O article 108.49(3) provides that a person undergoing a punishment of stoppage of leave shall not without the specific permission of the commanding officer be permitted, when not on duty, "to go beyond the limits prescribed by the commanding officer in standing orders". The American punishment of "restriction" is similar in effect.[90]

The Working Group determined that stoppage of leave is a valid and effective punishment in a military environment, however, the broad wording of QR&O 108.49(3) does leave open an opportunity for abuse. A commanding officer could restrict a person receiving stoppage of leave to their quarters. In the case of personnel living "off base" those personnel could be directed to stay within quarters on the base or within unit lines. In effect stoppage of leave could be used to confine personnel to quarters without the benefit of the extra training provided by "unit corrective training". It is a method by which personnel above the rank of private can be confined to barracks. The discretion presently available to the commanding officer should be restricted so that a person cannot, upon receiving stoppage of leave, be de facto confined to a ship or barracks.

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[90] Watkin, Annex H, at 7.

(b) Recommendation

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.

(vii) Reprimand/Severe Reprimand

A. Analysis

The punishments of reprimand and severe reprimand, which can be awarded by all trying officers are designed to maintain professional integrity and professional standards, and is more of an internal disciplinary sanction than a penal consequence. The punishments should be retained as presently provided for in the National Defence Act and QR&O.

B. Recommendation

RECOMMENDATION 16

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

(viii) Forfeiture of Seniority

A. Analysis

The punishment of forfeiture of seniority can only be awarded to subordinate officers (officer cadets) by a commanding officer. The maximum forfeiture is 30 days. This punishment is related to the maintenance of professional standards and integrity and therefore is more in the nature of an internal disciplinary sanction than a penal consequence.

However, it is limited in its application to subordinate officers. In operation it appears to have little useful or practical effect on the promotion opportunities of those officers and therefore the punishment should not be retained.

B. Recommendation

RECOMMENDATION 17

The punishment of forfeiture of seniority should be removed.

(ix) Caution

A. Analysis

A caution may be awarded by commanding officer or delegated officer to all personnel who they may try by summary trial. The punishment is in the nature of an internal disciplinary sanction and should be retained. However, QR&O art 108.53 Note A, which indicates a commanding officer does not need to record the punishment of a caution on the offender's conduct sheet, should be removed. If an accused is found guilty the punishment should be recorded. If it does not merit a recorded punishment then reconsideration should be given to whether a finding of guilty is appropriate.

B. Recommendation

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.

(b) Penal Consequences/Liberty in a Military Context

The law, as it presently stands in Canada, appears to set up a somewhat artificial distinction between penal and non-penal consequences. According to the analysis set out in Wigglesworth, and followed in Landry v. Gaudet, punishments such as corrective custody, unit corrective training, stoppage of leave and extra work and drill would, prima facie at least, appear to be penal consequences since they involve a loss of liberty resulting from a trial process. Similarly, a significant fine would also be a penal consequence. However, punishments such as reduction in rank, reprimands, cautions would not appear to be penal in nature. This conclusion appears to be inconsistent particularly in respect of the punishment of reduction in rank which carries with it a significant financial penalty. That penalty usually far outweighs any fine which can be awarded at a summary trial. The seriousness of the punishment of reduction in rank is recognized under military law as is evidenced by its inclusion in the list of punishments for which a right to elect court martial must be given if the punishment is to be awarded. In Landry, however, the Federal Court Trial Division indicated that the sanction of demotion under R.C.M.P. disciplinary procedures did not invoke the protection of the Charter.

In assessing liberty in a military context it must be noted that not all "corrections" would deprive an individual of his or her liberty so as to invoke s. 7 of the Charter. It is an essential part of maintaining discipline that faults be corrected swiftly. The idea is to catch faults when they are relatively minor thereby ensuring a service member does not embark on more serious breaches of discipline. The corrective action is often based on the individual involved repeating the process which was improperly completed until it is done correctly.

Therefore if someone shows up on parade with a substandard uniform the answer to the problem for the superior officer often is to have that individual appear at a later time with the deficiency corrected. There is no formal offence charged or trial conducted. It is an informal correction of the deficiency which takes up the service member's time and may very well restrict that individual's liberty since they will have to stay at their place of duty to correct the fault. This re-training is not a penal consequence largely because it is not part of a charging/trial process. It is related much more to a requirement to maintain professional standards. The individual is not being prosecuted by the "state" and does not receive a "record". What about punishments which, while awarded by a trial process are also corrective in nature?

Traditionally, punishments such as confinement to ship or barracks, stoppage of leave and extra work and drill have been viewed as minor punishments which could be awarded without providing the right to elect court martial. The punishment has been viewed as non-penal even though it resulted from a trial process. The question arises as to whether there is something unique about military society which makes the loss of liberty in respect of these punishments different in a military context.

Liberty in a military context has been dealt with by both American and a European courts. While American military punishments such as correctional custody, extra duties, restrictions, arrest in quarters and confinement on diminished rations have been recognized as deprivations of liberty[91] reviewing courts have not made that factor determinative of whether procedural guarantees must be made available to an accused. A distinction has been

[91] Schlueter, Military Criminal Justice: Practice and Procedure, at 126

made on the nature of the "substance" of the punishment. A definite dividing line has been drawn between confinement (similar to Canadian detention as it is presently served) and punishments and such as correctional custody, restriction, etc. The substance of correctional custody has been held to be similar to that of "detention" after school. It is corrective and promotes discipline.[92]

In Engel and others[93] the European Court of Human Rights dealt with the interpretation of "deprivation of liberty" in Article 5 of European Convention on Human Rights 1950. The case involved five soldiers of the Dutch armed forces who had been convicted by their commanding officers of service offences and sentenced to various forms of punishment. The penalties imposed were light arrest, aggravated arrest, strict arrest and committal to a disciplinary unit. The applicants appealed to a "complaints" officer and then to the Supreme Military Court. Further challenges were then made to the European Commission of Human Rights and then ultimately to the European Court of Human Rights.

Light arrest involved remaining in the camp while off duty; aggravated arrest required the soldier to remain in camp and in an unlocked punishment room while off duty. Strict arrest involved being placed in a cell in solitary confinement. The European Court of Human Rights found that liberty had to analyzed in the context of military service. Light and aggravated arrest were not deprivations of liberty when imposed on a member of the armed forces even though a similar punishment might be a deprivation of liberty when

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[92] United States v. Shamel 22 C.M.A. 361 (1973).

[93] Eur Court HR, Series A, Vol 22, Judgment of 8 June 1976, (1979-80) 1 E.H.R.R.

imposed on a civilian. Strict arrest and committal to a disciplinary unit were held to be deprivations of liberty.[94]

In reaching its decision the European Court of Human Rights determined that in assessing the liberty interest involved it was necessary to assess a whole range of factors such as the nature, effects and manner of execution of the penalty or measure in question. A primary distinction between light arrest and aggravated arrest on the one hand and strict arrest and confinement on the other hand was that the offender was not locked up and was able to perform ordinary military duties. In effect the offender was within the "ordinary framework of military life". The Engel principles were followed by the Human Rights Committee in 1989 in Communication No. 265/1987, Antti Vuolanne v. Finland[95] where a soldier locked in a cell 2 X 3 meters was held to be deprived of his liberty.

An important distinction to be made in determining if liberty is lost is whether an individual is locked in cells, and if they are able to continue with normal military duties.[96]

In terms of punishments under Canadian military law it appears that punishments such as imprisonment and "corrective custody" would involve liberty interests. The American case law notwithstanding "corrective custody" would involve removing the CF member from both ordinary duties and living conditions. However, "unit corrective training", stoppage of leave and extra work and drill would not, under the European and American legal standards,

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[94] Watkin, Annex H at 27-31, Rowe, Annex E at 31-45.

[95] Rowe, Annex E at 40.

[96] While Professor Rowe is critical of these criteria (Annex E at 43-45) he also acknowledges there is no British equivalent to the Dutch aggravated arrest. The punishment of aggravated arrest is similar to the present confinement to ship or barracks ("unit corrective training").

appear to be deprivations of liberty in the context of military life. The argument that unit corrective custody is not a deprivation of liberty, and therefore not a penal consequence, would be enhanced if there was no requirement that the CF member living off base move into quarters.

This more restrictive view of liberty in a military context does appear to run counter to the broad and liberal interpretation given to "liberty" in s. 7 of the Charter to date. It is not clear that if a court accepted the view liberty was different in a military context it would have to rule the liberty interest itself would be narrower, or the limitations on liberty in the form of the punishments awarded would be seen as justifiable s. 1 limits on the s. 7 Charter right. Due to the structure of the European Convention on Human Rights and the American Constitution, the European Court of Human Rights and the US courts respectively, were forced to read the "community standards" into the final determination of whether liberty interests were ultimately breached. Even if Canadian courts follow the approach that the punishments themselves are limits on a broad liberty right the factors considered by the other courts, such as the goal of the punishment, the manner in which it is carried out and the degree to which ordinary life is affected should provide significant evidence upon which to reach a conclusion similar in effect to that reached by the European court and its American counterpart.

It could then be said that punishments such as "unit corrective training", stoppage of leave and extra work and drill are not penal consequences. The practical effect of such a determination is that ss. 7 and 11 of the Charter would not apply by virtue of the awarding of the punishments of "unit corrective training", extra work and drill or stoppage of leave

alone, although s. 11 of the Charter would apply to "public order" offences which awarded those punishments.

4. Summary

This chapter has dealt with the issue of whether trying officers at summary trials need to maintain jurisdiction over public order offences. In effect, whether there is some way to change the focus of those trials to an internal disciplinary proceedings. In addition, a review of the punishments available to summary trying officers was undertaken in order to evaluate whether these punishments awarded at summary trial should deprive a service members of their liberty, and if so, to reassess the purpose for which that deprivation takes place. Finally, an assessment has been undertaken of liberty in a military context in order to determine which punishments are "penal consequences".

The Working Group has concluded that trying officers at summary trials need to maintain a broad jurisdiction over service offences, including those service offences incorporated under s. 130 of the National Defence Act. However, the present extremely broad jurisdiction should be limited to a jurisdiction more in keeping with the purpose of the summary trial. The summary trial is designed to allow commanders at the lower levels of command (primarily the unit level) to deal with relatively minor breaches of discipline and award punishments that are remedial in nature in order to "correct" the offender. The summary trial was never intended to deal with the most serious service offences (ie. offences attracting the death penalty or imprisonment for life). The Working Group recommends restrictions be placed on the jurisdiction of trying officers so that summary trials generally

deal with service offences identified by the seriousness of the offences in terms of punishment; the operational nature of the offences; and the degree to which those offences assist in maintaining order, dealing with alcohol and drug problems, and controlling violence.

The review of the punishments awarded at summary trial indicate that most of the present punishments meet the needs of the military. However, a requirement was identified to alter the punishments of detention and confinement to ship and barracks to ensure the focus of those punishments is consistent with the corrective/retraining purpose of summary trials. The suggested new punishments of "correctional custody" and "unit corrective training", when combined with extra work and drill, are designed to provide an increasingly more corrective system of punishments designed to escalate the degree of re-training offered to the service offender.

Finally, the punishment of "correctional custody" continues to affect liberty interests in a military context. However, a strong argument can be made that the punishments of "unit corrective training", stoppage of leave and extra work and drill are not deprivations of liberty in a military context and therefore are not penal consequences.

The effect of the conclusions drawn by the Working Group with respect to the jurisdiction of summary trials and the punishments available to those service tribunals is that Charter scrutiny under s. 7 and 11 likely cannot be avoided. Therefore there can be no disciplinary exception from Charter scrutiny. Public order offences and the punishment of "correctional custody" will mandate Charter scrutiny. Once such scrutiny is undertaken its effect will be felt on the whole summary trial process regardless of the nature of the offence

consequences involved. The analysis in the next Chapter turns to the degree to which the summary trial system does or can meet the constitutional requirements of fairness.