Chapter 6

Fairness

1. Independence and Impartiality

(a) Present Situation

All three trying officers, the delegated officer, the commanding officer and the superior commander have that status as a result of the positions they hold within the chain of command. By its very nature summary trials are designed to involve the officers responsible for conducting operations in the disciplining of subordinates[97]. The trial process does not provide for a separate prosecutor and judicial officer. The trial itself is conducted more in the nature of an inquiry with the trying officer hearing the evidence against an accused, and then allowing the accused to present a defence if the accused so wishes. Trying officers are paid and evaluated in the same manner as officers who do not fill positions involving that responsibility. There is limited provision for a commanding officer to disqualify himself or herself where that officer directly supervised or carried out the investigation of a charge, or issued a search warrant in relation to the offence charged.[98]

(b) The Law

The Supreme Court of Canada in R v. Genereux[99], in dealing with General Courts Martial, provides the criteria upon which a court will assess whether summary trials are

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97 Henderson, Annex C, at 14-15; Noone, Annex D, at 26; Watkin, Annex F, at 20-27.

98 QR&O 108.25 (1.1).

99 (1992), 70 C.C.C. (3d) 1.

"independent and impartial" tribunals for the purposes of s. 11(d) of the Charter. Section 11(d) of the Charter attempts to achieve a two fold purpose. First, it is designed to ensure the decision maker is not biased and is not influenced by "outside" parties. Secondly, irrespective of any actual bias s. 11(d) attempts to maintain the integrity of the judicial system by preventing any reasonable apprehension of bias. In terms of trial structure the issue is primarily one of "independence" as impartiality involves a reference to the state of mind of the decision-maker. This analysis will deal solely with the independence since this report is focused on trial structure.

The three criteria for judicial independence are security of tenure, financial independence and institutional independence. A review of those criteria and how they were applied in Genereux is helpful in assessing their impact on summary proceedings. The requirement of security of tenure is aimed at protecting a decision maker from interference by the executive branch of government in an arbitrary or discretionary manner. For instance a commanding officer being removed from command because a superior officer is unhappy with the result of a summary trial.

Security of tenure can be until an age of retirement, for a fixed term or for a specific adjudicative task. In Genereux it was held that members of a General Court Martial were independent in the sense that they served for a specific adjudicative task. However, the judge advocate was not independent because that officer repeatedly presided at courts martial, and was appointed by the Judge Advocate General who, due to the responsibility of also providing the prosecutor, was part of the executive arm of the military hierarchy. Changes have been made to military law (actually before the Genereux case was decided but after the

initial trial) so that military judges are now appointed to fixed terms and are only removable "for cause". In addition, military judges are assigned to cases by the Chief Military Trial Judge rather than the Judge Advocate General.

The criteria of financial security requires that the salary and pension of decision makers be established by law. Financial compensation cannot be subject to arbitrary interference by the executive in a manner which could affect judicial independence. In Genereux it was held that since there were no formal prohibitions against evaluating a member of a court martial on the basis of his or her performance at the trial, and the annual evaluation could affect both advancement and pay, there was no financial independence. A change to QR&O which was commented on favourably by the Supreme Court of Canada was to amend the regulations in order to prohibit an officer's performance as a member of a court martial, or as a military judge, from being used to determine qualification for promotion or pay (ie. merit pay).[100]

Finally, institutional independence requires that a tribunal be as free as possible from external interference with respect to matters that relate directly to the tribunal's judicial function. In the case of the military as free as possible from "the persons who are responsible for maintaining the discipline, efficiency and morale of the armed forces." In Genereux it was held that it was not acceptable to have the convening authority who appointed the prosecutor also select the members who were to serve on the court martial. In addition the appointment of the judge advocate by the Judge Advocate General was contrary to the principles of institutional independence. As a result the judge advocate is now

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100 QR&O, art. 26.10, 26.11.

appointed by the Chief Military Trial Judge, and members of courts martials are appointed by a "court martial appointment officer".[101]

In the opinion of the Working Group summary trials as presently structured do not meet the requirements of independence set out in s. 11(d) of the Charter. Commanding officers, delegated officers and superior commanders are an integral part of the military hierarchy and may be removed at any time from their positions of command. Their pay and pensions are provided in the same fashion as members of General Courts Martial. There are no regulations barring comments on their performance as trying officers at summary trials. Finally the inquisitorial nature of summary proceedings results in no separation between the prosecutorial and judicial functions. Both are carried out by the trying officer. Therefore, the present system of summary trials can only be constitutionally valid if they are justified as a reasonable limit on individual rights under s. 1 of the Charter.

The concern over independence is not only limited to s. 11(d). Procedural fairness under the common law requires that tribunals which are "primarily adjudicative in their functions will be expected to comply with the standard applicable to courts."[102] Since liberty interests are affected by a number of punishments available at summary trial s. 7 of the Charter, with its requirement of only depriving a person of liberty in accordance with the "principles of fundamental justice", would likely require an adjudicative body such as a summary trial to comply with the independence standards of a court.

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101 QR&O, art. 111.051.

102 Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities) (1992), 89 D.L.R. (4th) 289 (S.C.C.) at 299.

(c) Justifiable Limit?

(i) Other Free and Democratic Societies

Prior to embarking on the s. 1 analysis it is helpful to review the summary proceedings provided for by American and British military law in order to assess them in terms of judicial independence.

British summary proceedings have changed little since they constituted the disciplinary system applicable to the armed forces of Canada (prior to 1950). The British system of summary proceedings provides the foundation upon which the present summary trial system is based. For example, in the army and air force, there are three types of summary investigations: investigation by subordinate commander, by commanding officer and by an appropriate superior authority. All those officers serve within the military hierarchy and closely mirror the roles of the Canadian delegated officer, commanding officer and superior commander.[103]

The American summary proceedings consist of the Article 15 hearing and the summary court martial. All Article 15 hearings can be conducted by a commissioned officer or warrant officer who by virtue of that officer's grade (rank) and assignment exercises command over a military organization or prescribed territorial area. For example in the United States Army such command authority can include companies, troops, batteries, detachments, service schools, etc.. The commander's discretion to impose an Article 15 punishment is personal and cannot be hampered by command influence. However, a

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103 Watkin, Annex G, at 15.

superior commander can totally withhold or restrict the grant of authority to impose such punishments.

The Summary Court Martial is lowest level of trial court and is designed to dispose of less serious offences. The summary court martial may be convened by any person who has authority to convene a general or special court martial, the commanding officer of a detached company, squadron or any other detachment of the army or air force or any commanding officer or other officer empowered by the Secretary of the service concerned.[104] The officer designated to sit as a summary court martial need not be a lawyer. The officer should be in the same service as the accused, but does not have to be in the same unit. The presiding officer also acts as the prosecutor and is not disqualified if he or she is also the "accuser".[105]

In terms of reliance on summary proceedings the percentage of use for summary proceedings in relation to all service tribunals held in the American armed services in 1991 were[106]:

Armed Service	Summary Court Martial	Article 15
Army	1.5	95.5
Navy	5.8	84.6
Air Force	.1	90.5
Coast Guard	1.4	95.0

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104 Watkin, Annex H, at 8-9.

105 D.A. Schlueter, Military Criminal Justice, 3 ed. (Charlottesville: The Michie Co., 1992) at 600.

106 Information provided in Noone, Annex D, at 19.

The heavy reliance on summary proceedings (90-97%) in the American military is consistent with the overwhelming use in the of summary trials for maintaining discipline in the CF. The statistics also indicate that discipline is most often meted out by means of Article 15 hearings where the presiding officer is part of the military chain of command.

(ii) Rational Connection

Is the use of officers from directly within the military chain of command to sit as trying officers at summary trial rationally connected to the objective of enforcing discipline effectively and efficiently thereby maintaining an operationally ready armed force? Clearly it is. The trying officers as presently selected result in an efficient and speedy trial process; which is also portable, can be applied at all times (in armed conflict or in times of normality), and enhances the habit of obedience and personal contact between those responsible for conducting operations and the subordinates responsible for carrying out those orders. Due to the nature of existing summary procedures and the objective of military justice, it will not be difficult to establish a rational connection between the limit and the objective.

(iii) Least Drastic Means

Does the use of officers within the chain of command as trying officers at summary trials impair the right to trial by an independent and impartial tribunal as little as is reasonably necessary in order to accomplish the objective? In order to answer this question a review will be undertaken of the options which might be considered.

<u>Option #1</u> - Trial by Court Martial

The transfer of all, or even a significant portion of disciplinary matters to court martial will have a drastic effect on discipline in the CF. The summary trial was developed in 1881 under British military law because trial by court martial was a less effective means of maintaining discipline. As trials became more procedurally complicated there was a greater need to find a way to maintain discipline in a more informal approach. The approach was the development of summary trials.[107] Summary proceedings under American military law were developed at roughly the same time, and for basically the same reasons.[108]

While courts martial provide the full compliment of "fair" procedures provided by law, they are not designed to produce the speedy resolution, portability, administrative simplicity, universal application or personal contact between the commander and the subordinate essential to maintaining discipline[109]. Courts martial do enhance the "habit of obedience" in the sense that it is military officers, albeit from outside a unit, trying a military accused. However, the detachment of those officers from the accused in terms of personal responsibility for maintaining discipline is only acceptable in the sense it is presently carried out in such a small number of cases. This option does not adequately meet the requirements of maintaining discipline on a broad scale in the CF.

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107 Watkin, Annex B at 8-11.

108 Noone, Annex D, at 8-10.

109 For a review of the importance of having officers responsible for operations meting out discipline, see Henderson, Annex C, at 14-21; Watkin, Annex B, at 20-27.

<u>Option #2</u> - Summary Courts Martial

A second option is to pattern the summary proceedings somewhat along the lines of the American Summary Court Martial. In other words have a summary proceeding where the trying officer is not directly within the chain of command. The trying officer could be an officer from another unit, or a legally trained officer. There would be no complicated procedures, and the independence of the trying officer would be enhanced by a provision in regulations similar to QR&O art. 26.10 and 26.11.

The problem with this option is that it has been tried under both British and American military law and has not been a success. Under British military law it was known as the Regimental Court Martial and it was abolished in 1921 because there was particular dissatisfaction with the time and effort consumed with conducting those proceedings at the unit level.[110] Similarly, there has been a steady decline in the use of Summary Courts Martial. They dropped from 43,542 trials in 1962 to 931 Summary Courts Martial in 1991.[111] At the time of an increase in the powers of punishment at Article 15 hearings in 1963 there was a proposal to eliminate Summary Courts Martial, however, no action has been taken on that proposal to date.

While a Canadian version of a summary court martial would increase the portability, speed, universality, etc. in comparison to any of the courts martial presently available under the National Defence Act that form of trial still will not meet the needs of the armed forces for maintaining discipline. The increase in independence is incremental. On many

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110 Watkin, Annex B, at 11.

111 Noone, Annex D, at 14, note 44.

deployments the summary court martial officer would have to come from within the unit, or from a unit closely involved with the accused's unit. The trying officer would still come from within the chain of command. If the trying officer was a lawyer the problems of "portability" would be the same as if an existing court martial were used. The problem of getting the lawyer to the scene of the trial in a timely fashion and with minimum disruption to operations would still exist. In addition, historically the involvement of lawyers has resulted in increased procedural complexity.[112] Finally, the personal nature of discipline between the commander and the commanded would be eroded. In light of all these problems the second option is rejected.

<u>Option #3</u> - Summary Trials

The final option would be to maintain the status quo with minor changes to QR&O in order to provide some protection from interference to the trying officer and provide additional "independence" for those officers. Those changes would be to expand QR&O art. 26.11 to include trying officers at summary trial and requiring an oath be taken by all trying officers at summary trial. The expansion of QR&O art. 26.11 provides a means of protecting those officer's from interference in the conduct of a summary trial.

The requirement to take an oath is not different than the obligation placed on military officers serving at courts martial. However, it does serve as a reminder to the trying officer, and provides a message to the accused, that justice will be "administered according to law, without partiality, favour or affection." Neither the protection offered from interference, nor

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112 Watkin, Annex B, at 10-11.

the requirement to take an oath will allow the summary trial to meet the judicial standard of independence. However, it will provide some protection which can be factored into the assessment on proportionality when weighing the accused's right against the legislative objective of summary proceedings.

The timing of any oath was carefully considered. Initially, the view of the Working Group was that the oath should be taken by the trying officer in front of each accused at the commencement of the summary trial. The representatives of the Commands at an early briefing on this report indicated a preference for the oath to be taken once when the officer takes up a position where it would be necessary to preside at summary proceedings. Ultimately the Working Group adopted the Command position on this issue. It should be noted the position adopted by the Working Group differs with that initally set out in the new CFAO 19-25. The CFAO provisions regarding the oath appear to now be under review.

As has been demonstrated in the history of Canadian, American and the British justice systems summary proceedings conducted by officers within the chain of command is the only way that disciplinary proceedings can be kept sufficiently speedy, portable, universal in application, reinforce the habit of obedience, etc. to meet the objective of maintaining of a disciplined and effective armed force. As a result, the Working Group is strongly of the opinion that summary proceedings should continue to be the responsibility of officers in the chain of command.

(iv) Proportionality

Does the maintenance of summary proceedings in the control of trying officers from within the chain of command have a disproportionately severe effect on the right of a service member to trial by an independent tribunal? The answer to that question depends ultimately on two factors. First, there is the degree of importance a court places on the legislative objective of enforcing discipline effectively and efficiently thereby maintaining an operationally ready armed force. Secondly, a court must be asked to look behind the words "effectiveness" and "efficiency" to understand, in a military context, the criteria which must be applied to fulfil the objective. The tribunal must be speedy, portable, capable of being applied universally, administratively simple, and enhance the habit of obedience and personal contact between those responsible for issuing orders and those responsible for obeying them. History has shown that only a service tribunal conducted by officers within the chain of command can meet those criteria. In addition, the assessment of the requirement for an "independent" trying officer at summary proceedings must be assessed in the context of the overall trial, including the proposed changes to punishments designed to make the sentences more corrective in nature. The remedial nature of the proposed punishments of "corrective custody" and "unit corrective training" should make trial by a non-independent officer less objectionable than if the offender is, in effect, imprisoned.

On its face, the decision in Genereux does not provide much support to the notion that summary trials conducted by trying officers serving within the chain of command will be saved by s. 1 of the Charter. However, the Supreme Court of Canada was not dealing with summary trials in Genereux, and was not presented the arguments or the evidence relating to

that form of trial. A reviewing court must either be willing to probe deeper behind the elements of efficiency and effectiveness, or be ready to force change on a society which is radically different from civilian society in Canada. The results of such change will be difficult to measure, perhaps until it is too late. Ultimately the question must be answered as to why an officer in the CF can be entrusted to exercise judgement that literally can result in the death of personnel under that officer's command, but cannot be entrusted with enforcing discipline at a summary trial. This question may seem foreign to a civilian court, but the reality of military service in Yugoslavia, Cambodia, Somalia and at Oka, Quebec is that the lives of service members were directly in the hands of the very military officers who preside at summary trial.

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. If this results in a breach of an accused's charter rights then reliance must be made on the right to elect court martial as a waiver on the part of the accused of those Charter rights.

(d) Recommendations

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.

2. Procedural Fairness

(a) Right to Counsel

(i) Present Situation

The accused does not have a right to representation by legal counsel at a summary trial. The participation of counsel rests solely in the discretion of the trying officer. The accused does have a right to be represented by an assisting officer. The assisting officer is an officer, or in exceptional circumstances a non-commissioned member above the rank of sergeant, who is appointed by or under the authority of the commanding officer. An accused may request a particular assisting officer. That request must be complied with if the exigencies of the service permit and the person requested is willing to serve in that capacity. The appointment of the assisting officer must be made as soon as possible after the charge is laid.

In practice the assisting officer is usually an officer holding the rank of lieutenant or captain, and most often is the officer immediately in command of the accused. The assisting officer is also usually, but not always, under the command of the trying officer.

The assisting officer assists the accused prior to, during and after the trial. The assistance provided is to the extent requested by the accused. Such assistance can include preparing the case, advising the accused regarding witnesses and other evidence, questioning

witnesses and making representations on behalf of the accused.[113] The present responsibilities of the assisting officer are outlined at Annex I, Part IV.

(ii) The Law

The main case dealing with the right to counsel is Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution[114]. In that case the Federal Court of Appeal held that s. 7 of the Charter did not create a right to counsel in all prison disciplinary proceedings. Although it was important when a person's liberty was at stake to allow an accused to present a case as fully as possible, what was required was to present the case adequately. The court found that the presence of counsel was not a requirement for an adequate presentation of a case.

However, while the decision to be provided counsel was to be left in the hands of the trying officer, it was not a discretion but rather a qualified right. There was a right to counsel "where the circumstances are such that the opportunity to present the case adequately calls for representation by counsel". Among the factors which were to be considered in deciding if counsel could participate were "the circumstances of the particular case, its nature, its gravity, its complexity, the capacity of the inmate to understand the case and present his defence". The inmate's right to liberty was potentially at risk (267 days of earned remission) and that alone "suggests a need for counsel". In his judgment Chief Justice Thurlow also considered that the type of charges (including three charges of an act to

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113 Watkin, Annex A, at 14-15.

114 (1985), 19 C.C.C (3d) 195 (F.C.A.).

the prejudice of good order and discipline) were notoriously difficult to defend and that the accused, while capable of conducting a defence, obviously felt the need for counsel because he had contacted legal aid. The accused's right to counsel as guaranteed under s. 7 of the Charter had been denied. Mr. Justice MacGuigan wrote a stronger judgement indicating there was a presumption in favour of being represented by counsel.

Although there is no absolute right to counsel, the threat to liberty; the jurisdiction over public order offences and complicated service offences; and the likelihood that many military accused will either be incapable or too intimidated when appearing in front of the trying officer lead to the conclusion that summary proceedings will likely result in a denial of a right to counsel under s. 7 of the Charter.

(iii) Justifiable Limit

A. Other Free and Democratic Societies

Under British military law there is no right to representation by counsel at summary proceedings. In fact there is no right to representation by counsel at the lowest level of court martial, the District Court Martial. Statistics show that legal counsel participated in only about one third of those proceedings in 1985. Legally trained personnel are only involved in the most serious cases with the participation of civilian lawyers being controlled to a large extent by the power of the Director of Army Legal Services to authorize legal aid certificates.[115] Navy regulations provide for an assisting officer, the "accused's friend",

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[115] Watkin, Annex H, at 21.

while the army allows for the presence of an Advising Officer. However, the Advising Officer is not permitted to cross-examine witnesses.[116]

Under American military law there is no right to counsel at either Article 15 hearings, or a Summary Court Martial. The presence and participation of counsel appears to be within the discretion of the presiding officer. As was noted in Chapter 3, the United States Supreme Court ruled in Middendorf v. Henry[117] that under the United States Constitution there was no right to counsel at a summary court martial. This was modified somewhat in a later case to the extent that if there was no opportunity to consult with counsel prior to consenting to the proceeding (the Canadian right to elect court martial) there may be a limit on the use of a conviction at a summary court martial for impeachment at a later trial. An American court has also ruled there is no right to counsel at an Article 15 hearing because the most serious punishment, corrective custody, does not deprive an accused of a sufficiently serious liberty interest.[118] There are, however, varying rights under the service regulations to consult counsel prior to trial, prior to election of court martial and prior to commencing an appeal.

B. Rational Connection

The decision to not provide a right to counsel at a summary trial is rationally connected to the objective of enforcing discipline effectively and efficiently thereby maintaining an

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116 Rowe, Annex E, at 9-10.

117 425 U.S. 25 (1976).

118 United States v. Shamel, 22 C.M.A. 361 (1973).

operationally ready armed force. The lack of counsel helps in keeping the proceedings uncomplicated, avoids delays in proceeding with the hearing and assists in ensuring the trials can be conducted world wide and in remote areas of Canada.

C. Least Drastic Means

There appear to be four options available to military authorities to protect the rights of an accused to be represented by counsel while attempting meet the objective of summary trials.

Option #1 - Provide Legal Counsel

This option is not realistic if the objective of the summary trial is to be met. The judgment of the United States Supreme Court in Middendorf was correct when it indicated the presence of counsel would turn a brief, informal hearing into an attenuated proceeding which consumes the resources of the military to a degree which would be an unacceptable burden to the armed forces.

Option #2 - Assisting Officers

The provision of a right to an assisting officer provides an accused with a "friend" who has the education, rank, and to the extent it is an superior officer, the obligation to assist the accused. Since the officer is a service member, and can be a member of the unit there should be no delay in providing advice to the accused. The use of assisting officer provides a reasonable means of providing assistance to an accused at summary proceedings while still

maintaining the goals of maintaining discipline. While the assisting officer will not normally have any legal training that officer can help the accused "adequately" present the accused's case. That officer can also assist the accused even when there would not be a legal right to counsel.

<u>Option #3</u> - Increased Availability of Legal Counsel

Like at American Article 15 hearings an accused could be provided an opportunity to consult counsel prior to trial. In times of enhanced electronic communication the opportunity to consult with legal counsel, if desired by an accused, could be arranged on a fairly consistent basis. It would, however, be extremely difficult to make it a right. If QR&O were amended to provide an opportunity to consult counsel, where feasible, the accused could be provided an enhanced opportunity to be advised of his or her rights prior to trial. This would likely require an expansion of the existing duty legal aid program provided in the Office of the Judge Advocate General. While by itself it would not likely justify limiting the right to counsel this option would be of some assistance in balancing the right to counsel with service requirements. There was a concern noted by Land Forces Command and Air Command over the access by an accused to CF legal counsel prior to a summary trial because of resource implications and the feasibility problems associated with units being deployed outside Canada. While Land Forces Command merely observed on the problem Air Command was opposed to providing access to a military lawyer. These concerns about the expansion of access to legal advice were not commented on by the other Commands.

The Working Group decided that an incremental increase in JAG resources was justified in terms of the overall defensibility of the summary trial system.

Option #4 - Send Accused to Court Martial Who Requests Counsel

An option is to automatically send the case to higher authority for disposal by way of court martial in any case where the accused requests to be represented by counsel. Under Howard there is no obligation to do so. There is presently guidance provided in QR&O that a trying officer should consider the nature and complexity of the offence, the interests of justice, the interest of the accused, and the exigencies of the service in determining if representation by counsel should be permitted at summary trial, if matter should proceed without counsel or whether the matter should be sent to court martial.[119] The limited number of cases in which civilian counsel have been permitted to appear at a summary trial have resulted in a proceeding which is anything but summary. However, it is the view of the Working Group that the discretion as to whether counsel should be allowed to participate in the summary trial should remain in the hands of the trying officer.

D. Proportionality

In weighing the importance of the qualified right to counsel against the objective of maintaining an efficient and effective disciplinary system it appears that the present regulations allowing only for the right to an assisting officer should support a s. 1 defence.

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[119] QR&O, art. 108.03, Notes C and D.

In order to enhance the likelihood that a court will determine a lack of a right to legal counsel is defensible under the Charter a number of changes to the present system should be instituted. For example, to aid the assisting officer in helping the accused QR&O Chap 103, in which the service offences are described to the "lay person", should be amended so that the notes to each article outlining service offences include the essential elements of each offence.

At the present time there is also no specific training provided to junior officers on their responsibilities as an assisting officer. Such training should be an integral part of officer training. In addition, in order to provide guidance to assisting officers, Annex I, Part IV, should be expanded and made part of a CF publication. Assisting officers could also be given a privilege from having to testify at any subsequent service tribunal concerning information received from the accused relating to any charges. Such a privilege would enhance communication between the assisting officer and an accused and reinforce the notion that the assisting officer is performing approved military duties by assisting the accused.

Finally, it is recommended Option #3 also be instituted in order to provide additional support for the position that the provision of an assisting officer as a right, rather than a lawyer, is proportional to the objective of maintaining an effective armed force.

(iv) Recommendations

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.

(b) Pre-trial Disclosure

(i) Present Situation

At a summary trial the accused receives a list of witnesses with the charge report[120] and the assisting officer is "informed of the evidence relating to the charge".[121] There is

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120 QR&O, art. 106.09.

121 QR&O, art. 108.03(6).

no guidance provided as to the manner in which the assisting officer is to be informed of the evidence (eg. orally, summaries of the evidence, written statements etc.). In a case proceeding to court martial the accused receives a synopsis of the evidence prior to the referral of the charge to higher authority.[122] When a prosecutor determines prior to the commencement of the court martial that additional witnesses will be called the accused must be informed of those witnesses and be provided with a written summary of the evidence.[123] In addition to these regulatory requirements to disclose the general practice at a court martial is to make all information in the hands of the prosecution available to the defence.

(ii) The Law

In Stinchcombe[124] the Supreme Court of Canada ruled that subject to some exceptions there was a duty under s. 7 of the Charter to disclose all material evidence whether favourable to the accused or not. There was a requirement to disclose all statements obtained from personas who have provided relevant information to the authorities notwithstanding they are not proposed as witnesses. Where statements are not in existence, other information such as notes should be produced. If there are no notes then the names, addresses and occupations of witnesses as well as all information in the possession of the prosecution relating to any relevant information should be supplied.

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122 QR&O, art. 109.02, 109.03

123 QR&O, art. 111.64.

124 (1991), 68 C.C.C. (3d) 1

The Crown did not have to disclose privileged (informers, etc.) or clearly irrelevant information. There was, some discretion in the timing of disclosure if, for instance, early disclosure would impede an investigation. However, at a minimum disclosure had to occur before an accused is called upon to elect the mode of trial or to plead.

The Stinchcombe case dealt with indictable offences. The Supreme Court of Canada did indicate that while the duty to disclose did extend to all offences, the extent of disclosure may be less for summary conviction offences. However, the court did not provide any further guidance on what the lesser standard of disclosure might be.

(iii) Justifiable Limit

A. Other Free and Democratic Societies

In Britain, in the army and air force, the accused can get disclosure of the evidence against him by means of a "summary of evidence". As part of the pre-trial procedure a commanding officer has the power to order that the evidence be reduced in writing as a summary of evidence or an abstract of evidence. The summary of evidence is prepared during a separate hearing where a written record of the evidence is prepared. A summary of evidence is ordered where the maximum punishment for the offence is death, the commanding officer considers it necessary in the interests of justice or where the accused requires in writing that a summary of evidence be taken. In complicated cases the summary of evidence is prepared by a legal officer. The involvement of the legal officer usually occurs when it is considered that the matter may ultimately be dealt with by court martial.

During the hearing the evidence against the accused is presented and the accused is given an opportunity to cross-examine any prosecution witness. The accused may call any witness in defence to testify in their own behalf. An accused or a defence witness cannot be cross-examined. The record of the evidence may be in narrative form, however, any question put to a witness by the accused in cross-examination must be recorded verbatim.

An abstract of evidence consists of a signed statement, or a precis of the evidence of each witness necessary to prove the charge. The statements are provided to the accused who is then given an opportunity to make a statement and provide an abstract of the statements of defence witnesses.

A summary or abstract of the evidence must be provided on any charge against an officer or warrant officer (for an investigation of the case by an appropriate superior authority) or in any other case remanded for trial by court martial. If after the receipt of the summary or abstract of evidence the commanding officer decides to deal with the case summarily those documents can be used at the trial. The summary of evidence appears to be rarely requested by an accused or used as the basis of a trial by a commanding officer or subordinate commander.[125]

Under American military law it appears that required disclosure at an Article 15 hearing consists largely of advising an accused of the charges that are pending, the right to elect, the right to remain silent, assistance of a spokesperson. etc. At Summary Courts Martial, however, the summary court officer holds a pre-trial conference with the accused

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125 Watkin, Annex H, at 17-19.

and counsel, if any, at which time the accused is apprised of the nature of the charges, the name of the accuser, the names of adverse witnesses and the accused's legal rights.[126]

B. Rational Connection

The present regulations governing disclosure at summary trial do pass the rational connection test. They are designed to provide the information relevant to the charge on the accused, or to the accused's representative in a speedy and efficient manner.

C. Least Drastic Means

While the present regulations appear to be rationally connected to the objective of maintaining an effective armed force by means of an efficient and effective disciplinary system the provision of the names of witnesses on the charge report, and informing the assisting officer of the evidence does not appear to provide for disclosure in the general sense required by Stinchcombe. Presently, the briefing of the assisting officer could be solely oral in nature even though the trying officer might be in possession of a written investigation conducted pursuant to QR&O, art. 107.03, a military police report, a summary investigation and statements of witnesses. Stinchcombe, subject to some specific exceptions, requires the release of all information in the hands of the "accuser" regardless of whether that information is against or in favour of the accused. The only question which is not answered in Stinchcombe is the degree of disclosure required for "summary" proceedings. There appears to be two options available to CF authorities:

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126 Schlueter, Military Criminal Justice, at 601.

Option #1 - Complete Disclosure

This option would require complete disclosure in line with the direction provided in Stinchcombe in respect of civilian indictable offences. Such a requirement would be too onerous, particularly in light of the limited administrative facilities available when deployed outside of Canada or in remote locations. Many summary investigations, a common and effective means of investigating incidents are ordered for reasons ancillary to any proposed disciplinary actions. It may be difficult to sever irrelevant information from the summary investigation. A similar problem of severance could occur in respect of military police reports. In addition the requirements for a detailed disclosure of all information will likely be administratively complicated. A complicated release procedure particularly where severance of information, or knowledge of privileges available at law is required, would run counter to the objective of the summary trial system. As has been noted CFAO 19-25 was amended in January, 1994 just as this report was being finalized. The CFAO requires the disclosure of all information including military police reports. The disclosure of such reports is one area which would likely be administratively complicated since there are often concerns over confidential sources, the identify of third parties unrelated to a particular accused's case and possible security implications.

Option #2 - Reduced Disclosure

A second option would involve reduced disclosure in line with the reference in Stinchcombe to a less onerous test for summary conviction offences. For example QR&O could be amended to require disclosure of any written investigation produced pursuant to

QR&O, art 107.03, written statements of the accused and other witnesses and all documentary evidence to be relied on at the trial. Where the investigation includes a military police report careful consideration will have to be given as to whether the trying officer or security officers (military police officers) will control what information is released. Clear direction would be necessary to allow the release of information with a minimum of disruption at the unit level. The easiest approach to such a release could be to require military police reports to be written in such a way that the whole report can be released at the unit level without reference to security authorities. For example a form of "Crown Brief" could be considered. The lack of direction is this regard is a deficiency in the new CFAO 19-25.

In addition, in situations where there is no written investigation the British practice of having a summary of the evidence prepared could be set up. However, rather than have a hearing as contemplated under British military law, a brief synopsis of the evidence, similar to that set out in QR&O, art. 109.02 could be prepared at the accused's request. The reason for requiring the accused to request the synopsis is that many minor charges will not be based on a written investigation. It would be administratively onerous to require a synopsis to be prepared when an accused may not want it.

D. <u>Proportionality</u>

The effect of following option #2 could be that there may not be any breach of s. 7 under the Charter since the minimum disclosure requirements might be met. However, assuming s. 7 is breached, the proposed option of limited disclosure should provide an

acceptable balance between the accused's right to disclosure and the military's need for a speedy and efficient system of justice.

(iv) Recommendations

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.

(c) Notice

(i) Present Situation

Every charge under the Code of Service Discipline must initially be recorded on a charge report.[127] That charge report contains the number, name, rank and unit of the person charged.[128] The charge report is served on the accused and the assisting officer as soon as practical after a charge has been laid.[129] The charge itself shall allege only one offence and must contain a statement of the offence with which the accused is charged and a

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127 QR&O, art. 106.02

128 QR&O, art. 106.05.

129 QR&O, art. 106.04(7).

statement of the particulars of the act, omission, conduct, disorder or neglect constituting the offence.[130]

(ii) The Law

The test for adequate notice set out by the courts has not been a particularly onerous one. In R v. Lucas[131] the Nova Scotia Supreme Court Appeal Division held that s. 11(a) of the Charter enshrined the rights contained in (then) s. 510(3) (now s. 581) of the Criminal Code requiring that the charge contain sufficient detail of the circumstances to identify the transaction and provide reasonable information concerning the alleged offence. In R v. Goreham[132] that court held that an abbreviated form of a charge provided sufficient information concerning the offence charged. Similarly, in Re Warren and the Queen[133] it was held that an accused only had the right to be informed "of the substantive offence and the acts or conduct which allegedly form the basis of the charge".[134]

Based on these criteria, it appears that the information provided on the charge report (particulars of the accused, section number, statement of the offence, particulars of the

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130 QR&O, art. 106.06.

131 (1983), 6 C.C.C. (3d) 147 (N.S.C.A.).

132 (1984), 12 C.C.C. (3d) 348 (N.S.C.A.).

133 (1983), 35 C.R. (3d) 173 (H.C.J.).

134 Ibid. at 177.

offence and the list of witnesses to be called) is sufficient to avoid a determination of a Charter breach for a lack of adequate notice.

(d) Oral or Written Submissions

The purpose of providing for an oral hearing is to allow the accused to directly confront the witnesses providing adverse evidence. In addition, an oral hearing allows the credibility of the evidence to be more accurately assessed than is provided by written submissions. In Singh v. The Minister of Employment and Immigration[135], the Supreme Court of Canada determined that an oral hearing was not required in all cases. However, after indicating that written submissions might be an adequate substitute in appropriate cases where the life, liberty and security of the person was at stake, the court went on to indicate it would be difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

Since QR&O require that all summary trials be conducted "in the presence of the accused"[136] the present procedures, which in effect require an oral hearing, provide a "fair" hearing for that accused.

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135 [1985] 1 S.C.R. 177.

136 QR&O, art. 108.13(1), 108.29(1) and 110.05(1).

(e) Rules of Evidence

(i) Present Situation

Rules of evidence provide a method of enhancing the fairness of a trial. "Admissibility of evidence should be based on relevancy and conversely on an avoidance of irrelevant and collateral issues which are likely to distract"[137] the person trying the accused. Included in the law of evidence are rules governing the examination, cross-examination and re-examination of witnesses; the competence and compellability of witnesses; the admissibility of evidence (eg. the hearsay rules); and the classification of evidence.[138]

Unlike courts martial there are no rules of evidence applied at summary trials. The evidence may be viva voce or documentary. All forms of hearsay evidence may be admitted. In situations where the witness is not present at the trial the testimony can be admitted in documentary form (not necessarily by means of an affidavit if the evidence is not under oath) or even by a conference telephone call.

Regarding the right to cross-examination the regulations provide the trying officer "shall permit the accused to put or have put to any witness such questions as are relevant to the charge...."[139] However, the present legislation provides no guidance on what might be "relevant to the charge".

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137 P. McWilliams, Canadian Criminal Evidence (Aurora: Canada Law Book Company Inc., 1989) at 1-4.

138 Ibid. at 1-10 - 1-13.

139 QR&O, art. 108.29 (2)(d).

Except in the case of a trial before a superior commander, where the synopsis of the evidence can be used at the trial, the only record of the summary trial is found on the face of the charge report. In contrast the admissibility of evidence at a court martial is regulated by the Military Rules of Evidence.[140]

(ii) The Law

In R v. Seaboyer[141] the Supreme Court of Canada has ruled that rules of evidence are part of a basic notion of fairness and are at the heart of our trial process. The court stated:

> These principles and procedures are familiar to all who practice in our criminal courts. They are common sense rules based on basic notions of fairness, and as such properly lie at the heart of our trial process. In short, they form part of the principles of fundamental justice enshrined in s. 7 of the Charter.[142]

Similarly in R v. Potvin[143], the Supreme Court of Canada indicated that the right to cross-examine a witness when the accused's liberty and security of the person was at stake was a principle of fundamental justice. Madame Justice Wilson stated:

> When evidence is sought to be introduced in order to obtain a criminal conviction which could result in imprisonment, the accused is threatened with a deprivation of his or her liberty and security of the person and this can only be done in accordance with the principles of fundamental justice. It is as I have said, a principle of fundamental justice that the accused have had a full opportunity to cross-examine the adverse witness.[144]

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140 QR&O, Appendix XVII, Rule 3.

141 (1991), 7 C.R. (4th) 117.

142 Ibid. at 140.

143 (1989), 47 C.C.C. (3d) 289 (S.C.C.).

144 Ibid. at 301-302.

As a result of these decisions it is clear that rules of evidence are part of the fundamental principles of justice in s. 7 of the Charter. Using the Military Rules of Evidence as an example of evidentiary rules providing a complete standard of "fairness" the limited procedures applicable at summary trials will not survive scrutiny under s. 7 of the Charter.

(iii) Justifiable Limits

A. Other Free and Democratic Societies

The American Military Rules of Evidence are applied at courts martial, and, other than rules governing privilege, are not at applied at Article 15 hearings. This does mean, however, that they are applied at Summary Courts Martial.[145] There is no provision for the application of rules of evidence at British summary proceedings, although procedures governing the preparation of summaries of evidence are fairly extensive in nature.

B. Rational Connection and Least Drastic Means

Because of the limited provisions regarding evidence it is clear the present system is rationally connected to the objective of the summary justice system. The question of whether the least drastic means has been selected as a limit on an accused's constitutional right to have rules of evidence applied pursuant to s. 7 of the Charter is not as easily answered.

There are three options which could be considered to limit the Charter right in question.

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145 Schlueter, Military Criminal Justice, at 114, 601, note 5.

Option #1 - Apply the Military Rules of Evidence

The MRE are a codified set of rules which were specifically developed for use at court martial by lay persons. Prior to the post-Ingebrigtson amendments the involvement of a judge advocate at a Disciplinary Court Martial was discretionary and court martial members were expected to apply the MRE without the advice of lawyers. A problem with applying the MRE at summary trials is that they were not designed for summary proceedings. Many aspects of the MRE, particularly regarding the admissibility of documents are complicated. The mandated use of the MRE in their present form runs counter to the effective and efficient requirements of summary justice. Although the American Summary Court Martial applies their MRE the limited use of that court martial indicates that evidentiary rules are not applied at the vast majority of American summary proceedings

Option #2 - Present System

While the present system clearly provides a speedy and efficient means of trial it provides little in the way of procedural safeguards. The weakness in the present system is not only the lack of rules of evidence, but also a lack of training or guidance for trying officers.

At present the ability of trying officers to ensure that an accused gets a "fair" trial in terms of the evidentiary basis upon which an adjudication is made is severely limited. Trying officers are not provided with the training necessary to rule on evidentiary matters and the regulations do not provide sufficient procedural guidance to help make up for that lack of training. The lack of training in the conduct of summary trials is particularly

surprising in light of the importance which is placed on maintaining discipline in the armed forces.

There are also no aide-memoires or training manuals dealing with the conduct of summary trials beyond what has been produced on an ad hoc basis at the base or unit level. The general disinterest in providing guidance to trying officers is reflected in CFAO 19-25 which was only recently amended in January, 1994. As has been noted the utility of some portions of the amended CFAO has been called into question. That administration order contains checklists for the conduct of summary trials, however, those lists are presently seriously outdated. They have not been changed since 1978, and therefore do not include the post-Charter amendments made to summary trial procedures.

As a result of this lack of training on evidentiary matters, an accused at a summary trial can be convicted on virtually any evidence which the trying officer is willing to admit. The admissibility of evidence and the weight given to that evidence is dependent upon the attitude of each individual trying officer. Under the present procedures outlined in the regulations an accused can be convicted on the basis of an unsigned and unsworn document without being given the opportunity to cross-examine the maker of that document. A conviction at a summary trial can be made on the basis of evidence which would not be admissible (because of the Military Rules of Evidence) had the same offence been dealt with by a court martial. The regulations provide little or no guidance on what evidence is relevant, which witnesses are competent or compellable (although an accused testifies only "if he desires to be heard"[146]), the sequence of examination or cross-examination, or the

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[146] QR&O, art. 108.13(1)(f), 108.29(1)(g), 110.05(1)(g).

standards of admissibility. While the resulting broad discretion enhances the "portability" of the summary trial it inevitably means that there is no standard procedure applicable to all summary trials.[147]

The weaknesses of the present system must be weighed against the requirements for "portability", speed, efficiency, etc. It is no coincidence that the American and British systems of summary justice do not require rules of evidence. It is not clear, however, that some additional guidelines could not be provided. For example, the regulations provide the trying officer "shall permit the accused to put or have put to any witness such questions as are relevant to the charge...."[148] In light of the limited training for all summary trial participants this general right to frame questions only offers limited protection to the accused. The present legislation provides no guidance on what might be "relevant to the charge". Summary trial participants should be informed that the right to cross-examine extends to questions concerning the opportunity and powers of observation, memory, accuracy and powers of expression, or to matters showing bias, bad character, reputation, previous convictions or prior contradictory statements. The ability to question witnesses may also ring hollow when a trial can be conducted with few exclusionary rules concerning documentary evidence.

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147 For an example of unusual summary trial procedure see Andrew v. R (27 February, 1986) C.M.A.C. 241 (C.M.A.C.) at 3, where Mr. Justice Hall commented on the manner in which the commanding officer conducted a summary trial.

148 QR&O, art. 108.29 (2)(d).

Option #3 - The Middle Ground

The third option provides a middle ground between options 1 and 2. CFAOs could be amended to provide greater guidance to trying officers. The factors to be taken into consideration during cross-examination could be set out as a reference for all parties. The present provisions for cross-examination allow an accused, or other participant to ask any question. The key issue, however, is not whether any question can be asked, but whether the right question is being asked. Since there is a lack of training for trying officers and participants greater effort can and should be made to provide guidance in the regulations. Other factors which should be considered are requiring all oral evidence to be taken under oath, and banning the use of military police reports as evidence at summary trials. By leaving the taking of evidence on oath optional, it is easier to admit evidence. However, the safeguard of having an oath or solemn affirmation should outweigh administrative convenience in this instance. Similarly there should be some safeguards on the admissibility of documentary evidence. It will be difficult to argue that the present system of summary trials cannot accommodate a tightening of evidentiary rules.

C. Proportionality

In light of the importance which the Supreme Court of Canada has placed on rules of evidence it is unlikely the objective of maintaining an disciplined and operationally effective armed force will outweigh the right to fair procedures under s. 7 of the Charter when more could be done within the existing trial procedure to allow for some basic rules governing the admissibility of evidence. Option #3, however, would appear to provide a compromise which might be defensible under s. 1 of the Charter.

(iv) Recommendations

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.

(f) Procedures

(i) Present Situation

The question to be asked in respect of procedures is ultimately whether the existing procedures allow an accused to fully participate in the trial process. Does an accused have an opportunity to know the case against the accused, confront the accusers and fully and adequately present a defence? This right has also been termed the right to make a full answer and defence.

The aspects of procedure that will be considered are the sequence of procedures, guilty pleas, and the definition of guilty beyond a reasonable doubt. This portion of the report will also provide an opportunity to address procedural issues which are not necessarily Charter driven.

An outline of the procedures followed at a summary trial is provided at Annex A.[149] However, for ease of reference the general procedures set out in QR&O, art. 108.29 are set out below:

> 108.29 - General Rules for Trial by Commanding Officer
>
> (1) When a commanding officer tries an accused summarily, he shall conduct the trial in the presence of the accused, the assisting officer and, subject to paragraph (4) of this article, those members of the public who wish to attend. The commanding officer shall:
>
> (a) cause Part I of the charge report to be read to the accused;
> (b) when required, comply with the procedure prescribed in article 108.31 (Election to be Tried by Court Martial);
> (c) ask the accused whether he requires more time to prepare his case and grant any reasonable adjournment requested for that purpose;
> (d) ask the accused if he wishes to admit any of the particulars of the charge or charges and advise the accused that he is not required to make any admissions, but if he does so his admission may be accepted as proof of any particular so admitted without further evidence being presented;
> (e) either direct that the evidence be taken on oath or inform the accused that he has the right to require that the evidence be taken on oath;
> (f) receive such evidence as he considers will assist him in determining whether to:
>
> (i) dismiss the charge,
> (ii) find the accused not guilty,
> (iii) find the accused guilty, or
> (iv) remand the accused to a higher authority;
>
> (g) in such order as the accused may request, hear the accused, if he desires to be heard, and call such witnesses as the accused may request to be called and whose attendance can, having regard to the exigencies of the service, reasonably be procured, but nothing in this subparagraph shall require the procurement of the attendance of any witnesses, the request of whose attendance is determined by the commanding officer to be frivolous or vexatious;
> (h) receive any further facts that should be brought out in the interests of the accused and any relevant submission by or on behalf of the accused;
> (j) unless he has dismissed the charge or referred the case to higher authority for disposal, make and pronounce a finding in accordance with articles 108.32

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149 At 18-23.

(Determination of Finding and Sentence By Commanding Officer) and 108.33 (Pronouncement of Finding and Sentence By Commanding Officer); and

(k) if he finds the accused guilty, determine and pronounce the sentence in accordance with articles 108.32 and 108.33.

These general rules are substantially the same for all types of summary trials, with the exception that a delegated officer does not have the power to offer the accused the right to elect court martial.

(ii) Analysis

The present procedures as illustrated in QR&O 108.29 do meet the minimum requirements of procedural fairness. They provide an opportunity for the accused to know the case that has to be met, provide time to prepare, permit the accused to participate to the extent desired and allow for cross-examination. The concern expressed by the Working Group over the existing provisions of QR&O was whether the procedures could be simplified. In particular, two issues which caused concern were the admission of particulars and the sequencing of the trial process.

A. Particulars

The admission of particulars (see QR&O, art. 108.29) is a way to simplify a trial in terms of limiting the number of essential elements which have to be established in order to prove guilt. However, in terms of its ease of application for non-legally trained personnel it is a part of the process which if often either ignored, or used to indirectly plead guilty. It is in effect too "legalistic". It is interesting that a plea of guilty or not guilty is not part of the trial process. Certainly one way in which a trial can be shortened is to have a guilty plea. Having no provision for a guilty plea serves two purposes. First, it keeps the trial process

more in the nature of an inquiry. That idea may have been useful when the courts were willing to apply a "disciplinary exception" to virtually all types of military, police and prison tribunals, but law has now rejected that notion.

The second reason for not having a guilty plea is that the trying officer is forced to hear all of the evidence in order to be convinced of guilt. If that was a valid consideration then there should be no provision to admit the particulars of a charge. If a requirement to plead guilty or not guilty were instituted a trying officer could still be required to ensure there is enough evidence upon which a finding of guilt could be made. It is the determination of the Working Group that the provision for admission of the particulars be removed and replaced with a requirement for an accused to plead to the offences charged. If an accused pleads guilty a trying officer could be required to satisfy himself or herself if guilt is proven based on documentary evidence, or if necessary by hearing some of the evidence. A provision to plead to the offence would offer an opportunity to shorten the trial, and allow for the removal of a presently confusing procedure.

B. Trial Sequence

The present trial sequence set out in QR&O is adequate, however, there is room for confusion since the procedures as set out do not outline in sufficient detail the process which should be followed in hearing evidence. For example, present regulations do not set out that witnesses against an accused are called first, evidence against the accused is elicited, the accused can then ask questions, etc. An example where a commanding officer became confused by the present regulations is found in Andrews v. R[150]. The commanding officer

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150 (1986) 4 C.M.A.R. 486.

called witnesses both for the prosecution and the defence, before subjecting any witnesses to cross-examination. In looking at the present procedures there is nothing to stop that sequence of calling witnesses from occurring. It cannot be assumed that untrained trial officers will automatically know and understand the process for calling witnesses normally followed at a trial.

The following suggested changes to outline of the trial process indicates that the existing regulations do not need to undergo significant changes. The suggested sequencing is:

i) Read Part 1 of Charge Report
ii) Election to be tried by Court Martial
iii) Time to Prepare Case
iv) Plea of Guilty or Not Guilty
v) Direct Evidence to be taken on Oath
vi) Hear Witnesses Against Accused
For each witness trying officer asks questions and accused given an opportunity to ask questions
vii) Hear Witnesses Supporting Accused/Hear Accused if Requested; Allow the accused to ask questions and then trying officer to ask questions.
viii) Allow Accused/Assisting Officer Summarize Defence
ix) Adjourn to Make a Finding if Necessary
x) Available Findings
- Dismiss the Charge
- Find the Accused Not Guilty
- Find the Accused Guilty
xi) Hear any Evidence Concerning Sentencing
xii) Pass Sentence.

This outline is now substantially reflected in the recent amendments to CFAO 19-25. However, in the opinion of the Working Group the amendments should also be made in QR&O. While the foregoing is only an outline, in general, the procedural guidelines set out in QR&O should be simplified and made more "user friendly".

C. Proof Beyond a Reasonable Doubt

The trial process would also be assisted by providing a definition of proof of guilt beyond a reasonable doubt. At the present time there is no publication, or regulation which informs the trying officer what that standard means. The definition could be linked to the earlier recommendation that all elements of the offences be outlined in QR&O Chap 103.

(iii) Recommendations

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.

(g) Reasons or Record of Trial

(i) Present Situation

In respect of summary trials neither the National Defence Act nor QR&O impose a direct obligation on trying officers at summary trial to give reasons for their decisions. Although such an obligation might possibly be implied in the requirement that a commanding officer explain the circumstances surrounding the commission of an offence on those limited occasions for which approval of a punishment warrant provides must be obtained.[151]

A "record" of the trial is provided by the charge report for trials commanding officers and delegated officer. The charge report does not outline the substance of what occurred at a summary trial. It serves as a record of the main procedural steps which were followed. When the accused is tried by superior commander the "record" of the charges is a charge sheet and synopsis. However, for the purposes of this section, "record" means a transcript of the testimony presented at a trial.

(ii) The Law

At common law there is no requirement to give reasons. The leading case in relation to criminal law is MacDonald v. R[152]. In that case the Supreme Court of Canada rejected an appeal that the failure of a President of a Special General Court Martial to give reasons supported an argument that the judge had not adequately considered the issue of intent. In

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151 QR&O, art. 108.39 and 108.40.

152 [1977] 2 S.C.R. 665 (S.C.C.).

addressing the requirement to give reasons Chief Justice Laskin stated:

> There is no such statutory obligation under the National Defence Act nor under the Criminal Code, nor can I find, or be justified in fashioning, a common law rule applicable to all criminal trials. The desirability of giving reasons is unquestionable. As was said in a Note in (1970), 48 Can. Bar Rev. 584 by Professor Hooper, "The arguments in favour of reasoned judgments are obvious. The process of publicly formulating his reasons may lead the judge to a conclusion other than that reached upon the basis of 'intuition'. The parties to the case, both the Crown and defence, will want to assure themselves that the judge properly understood the issues before him and will want to know whether he reached any conclusions of law or fact that could be challenged at the appellate level. The general public, or at least the victim if there was one, may have an interest in knowing why a certain verdict was reached".
>
> These considerations and others that could be mustered go to show what is the preferable practice, but the volume of criminal work makes an indiscriminate requirement of reasons impractical, especially in provincial criminal courts, and the risk of ending up with a ritual formula makes it undesirable to fetter the discretion of trial judges.[153]

While there may be no common law requirement for reasons the question remains as to whether such a requirement exists under the Charter. The provision of reasons appears to fulfil a two fold purpose. First, reasons inform the accused and the general public why a particular decision was reached. Such information can be essential in resolving any conflict which may have led up to the offence. In terms of the "corrective" aspect of disciplinary proceedings reasons can help explain to an offender where they went wrong. Secondly, the reasons can provide the basis upon which the accused may challenge the decision of the trying officer.

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153 Ibid. at 672.

In terms of the requirement for reasons it is the first component, the need for proof beyond a reasonable doubt, which has particular relevance. Insight into that requirement was provided in R v. Vaillancourt[154] where the Supreme Court of Canada confirmed that the trier of fact must be convinced beyond a reasonable doubt of all the essential elements of the offence. The provision of reasons provides a major, albeit not the sole, method of confirming that the accused was convicted on each essential element of the charge. The existence of a record of the proceedings provides another avenue with which to confirm that the presumption of innocence has been maintained.

During both criminal courts and military courts martial there is an obligation to maintain a record of the proceedings.[155] There is no similar requirement in respect of summary trials, although in the limited number of cases where an accused being tried by a superior commander has agreed to have the synopsis read at the trial there is a record of the evidence relied on by the trying officer. The importance of having a record to rely on when the reasons of the presiding officer are not available was addressed by the Supreme Court of Canada in MacDonald:

> It does not follow, however, that failure of a trial judge to give reasons, not challengeable per se as an error of law, will be equally unchallengeable if having regard to the record, there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue or in appreciation of evidence that would affect the propriety of his verdict.

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154 (1988), 60 C.R. (3d) 289 (S.C.C.).

155 Under military law see QR&O, art. 112.66, 113.16, 112.54(1)(c) and 112.55(4). The requirement for a record proceedings in the civilian justice system can be found in sections 540-542, 557, 646 and 801(3) of the Criminal Code.

When there are neither reasons for judgment, nor a record of the proceedings, there can be no adequate assurance that the presiding officer has addressed all the essential elements of the offence in determining guilt.

As was indicated in MacDonald a general requirement for reasons could put considerable stress on provincial court judges. However, the comments of the court must be viewed in the light of the statutory requirement for a record of the proceedings. The record of the proceedings still provided a basis to review the decisions of those provincial court judges even if there were no reasons. In addition, the question of the work load of the presiding officers appears to be a factor which should be addressed under s. 1 of the Charter and not in respect of whether an accused can receive a "fair" trial.

In any event the courts do not appear to have ruled that reasons, or a record of trial, is a constitutionally guaranteed right.

(iii) Justifiable Limit

The uncertainty over whether there has been a breach of the Charter, combined with the administrative burden the creation of a record and reasons would place on summary proceedings, caused the Working Group to conclude that there should be no record of trial or written reasons required as part of the trial process. In any event the creation of a verbatim record, whether by tape recorder, video tape, or in handwritten form, could not be carried out in many locations and under the conditions that many summary trials have to be conducted. The problems associated with storing a record also indicated that the requirement to prepare a record would be inconsistent with the "summary" nature of summary trials. The

Working Group was particularly concerned over the additional complexity which the requirement to create a record would cause in the summary trial process. Such a record is counter to the efficient and effective requirements of the summary trial process.

Indeed, CFAO 19-25, as amended, included in paragraph 23 an obligation for the trying officer to prepare "in synopsis form, a record of procedures and evidence of the trial, which shall include the reasons for conviction and sentence." This provision resulted in swift and strong condemnation from Air Command, Maritime Command and the Summary Trial Working Group. At the time of the completion of this report it appears that paragraphs 23 and 25 of the CFAO will be suspended pending further analysis, and the review of this report.

The strong negative feeling the Working Group had towards creating a record is again reflected in the analysis of the appeal/review procedures with a preference stated for an appeal by trial de novo where no record would be required. Therefore, even if there were a constitutional right to have a record or reasons prepared, there is also a strong argument that s. 1 of the Charter could be invoked to limit that right.

Separate from the constitutional issue there is presently under QR&O no requirement for the trying officer to advise the accused orally the reasons for which the accused is being found guilty. It may appear self-evident that the corrective nature of summary proceedings should cause a trying officer to advise an accused of the reasons for being convicted so that the same conduct will not be repeated. However, the fact that there is no requirement to do so could result in an inexperienced trying officer not providing reasons. Therefore, the

regulations should be amended to require reasons for conviction to be given orally to an accused.

(iv) Recommendation

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.

(h) Pre-Trial Custody

(i) The Present Situation

Military law provides for powers of arrest[156] and release from custody prior to trial. Sections 158 and 159 of the National Defence Act and QR&O Chap 105 provide several points at which a person committed to service custody must be considered for release. The release "points" at the unit level include release by the person making the arrest[157]; when an account in writing has not been delivered to the officer or non-commissioned member into whose custody the person is delivered[158]; when a commanding officer, or other designated officer having authority to release a person receives a report of the arrest[159]; when those officers are advised no charge has been laid within 48 hours of the arrest[160]; and as part of

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156 National Defence Act, s. 154.

157 s. 158(1).

158 QR&O, art. 105.19.

159 s. 158(4).

160 QR&O, art. 105.22.

a continuing review of custody by a commanding officer or designated officer.[161] When a commanding officer or designated officer consider whether continued detention is necessary they are required to have regard to any representations made by the person committed to custody. There is, however, no obligation to seek out those representations.

There is a requirement to report to a convening authority within 8 days of a person being placed in custody if no summary trial has been held or court martial has been ordered to assemble. In addition, if by the 8 day point no charges have been laid the person in custody shall be informed of the reasons why no charge has been laid, and the person's continuation in custody is required.[162] If the convening authority does not order continued custody within 15 days of the arrest then the person must be released from custody. In deciding to retain the person in custody the convening authority shall have regard to any representations made by the person committed to custody.[163] After 28 days without a court martial being ordered to assemble, or summary trial being held the person in custody may petition the Minister of National Defence for release. After 90 days the person must be released unless the Minister otherwise directs, or a summary trial has been held or court martial has been ordered to assemble.[164]

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161 QR&O, art. 105.23.

162 s. 159(1), QR&O, art. 105.27.

163 s. 159(1.1), (1.2).

164 s. 159(2),(3).

Where there is a discretion required to be exercised by an arresting officer or non-commissioned member, commanding officer, a designated officer or a convening authority as to whether a person will be retained in custody it is based upon the following criteria:

> ...it is necessary in the interest of the public or the Canadian Forces that the person under arrest be retained in custody having regard to all the circumstances, including
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> (a) the seriousness of the offence alleged to have been committed;
> (b) the need to establish the identity of the accused;
> (c) the need to secure or preserve evidence of or relating to the offence alleged to have been committed;
> (d) the need to prevent the continuation or repetition of the offence alleged to have been committed or the commission of any other offence; and
> (e) the necessity to ensure the safety of the person under arrest or any other person.[165]

(ii) The Law

Under s. 11(e) of the Charter a person charged with an offence has the right not to be denied reasonable bail without just cause. In addition, since the military pre-custody provisions contemplate keeping someone in custody without a charge being laid s. 7 of the Charter also applies. Pre-trial confinement clearly affects a person's right to liberty.

The Supreme Court of Canada has ruled that there are two parts to s. 11(e): the right to reasonable bail and the right not to be denied bail without just cause.[166] The term "bail" has been interpreted to mean all forms of judicial interim release. Pre-trial detention is seen as being extra-ordinary in the Canadian justice system and a right to be free from such

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165 s. 158(1).

166 R v. Pearson (S.C.C., November, 1992).

custody is stringently protected by the courts. The importance of regulating pre-trial detention can been seen in R v. Morales[167] where it was held that criteria such as in the "public interest" were too broad in scope to use in retaining someone in custody. However, the term "public safety" was not too vague a criteria upon which to deny bail.

(iii) Justifiable Limit

The existing pre-trial custody provisions under military law potentially breach the Charter in three ways. First, the persons making the decision are not independent and impartial. The denial of liberty is seen as being even more serious than imprisonment because the person being detained has not been convicted of any offence related to the detention. Secondly, there is no requirement to seek representations from the person being detained. At the most the commanding officer, designated officer or convening authority must have regard to the detainee's representations. This procedure requires the detainee to make the effort on their own to get representations to the deciding authority. In one of the early court actions in Genereux v. R[168] the Quebec Superior Court ruled that there was a positive obligation on the part of the deciding authority to seek the representations of the accused. Finally, the wording in QR&O, art. 105.16 includes broad wording such as the "interest of the pubic or the Canadian Forces". This broad wording appears to be similar to the wording found objectionable by the Supreme Court of Canada in Morales.

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167 (S.C.C., November, 1992).

168 (4 October, 1988) 200-36-00269-882 (Que S.C.).

A. Rational Connection

Again due to the "summary" nature of the existing provisions they appear to be rationally connected to the objective of an efficient and effective disciplinary system.

B. Least Drastic Means

The most important question to be considered is if the least drastic means have been chosen to limit a person's right to reasonable bail. It appears there are two main options.

Option #1 - Release Determined by a Military Judge

Having pre-trial custody determined by a military judge runs afoul of the same obstacles which are presented in having all disciplinary proceedings carried out by court martial. The requirement for a portable, universally applicable, speedy and efficient review process precludes the large scale use of judges. An argument could be made that pre-trial detention when considered in a base setting should be dealt with by a judicial officer. The problem with that option is that the number of judges required to sit at bases would result in an inefficient use of resources. There would not be enough other "judicial" work involving pre-trial confinement or otherwise to keep the military judges gainfully employed.

Option #2 - Maintain the Status Quo

This option provides the most economical and efficient use of resources. It does, however, mean that pre-trial custody, whether considered by a commanding officer, designated officer or convening authority is not being considered by someone who is independent and impartial. However, realistically it is the means by which pre-trial custody

can be determined in a fashion which meets the objective of the military justice system. It provides an efficient, effective and speedy process to have pre-trial confinement adjudicated upon. Existing regulations could be amended, however, to provide for a requirement that representations be sought from a person in custody. In addition, the broad criteria in QR&O, art. 107.16 relating to the public and CF interest could be removed. In their place, reliance could be placed on the specific criteria listed in that regulation.

C. Proportionality

Option #2 provides the most realistic option in terms of having pre-trial custody considered in a manner consistent with the objective of the military justice system. In many cases in which pre-trial custody is considered the commanding officer, designated officer and convening authority will be the only "law" available. The ability of the present system to pass the proportionality test will depend upon a court accepting the same arguments presented in respect of trying officers within the chain of command presiding at summary trials. Maintaining discipline and with it running the military justice system is an integral part of an officer's responsibilities.

iv) Recommendations

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.

3. Summary

This review of procedural fairness indicates that parts of the summary trial process already do, or can, readily be altered to meet the Charter standards of procedural fairness. These constitutionally valid procedures include the right to notice, oral or written submission, pre-trial disclosure and general procedures. The extent there is a right to reasons or a record of trial, the lack of either reasons or a record would likely be justified under s. 1 of the Charter.

Regarding the legal counsel, it appears that the provision of a right to assisting officer and an expanded opportunity to consult counsel prior to trial, would allow for the justification of a limit on a right to counsel. The lack of rules of evidence is more problematic and it will be difficult to present the limited rules which can realistically be applied at a summary trial as a justifiable limit on an accused's Charter right.

However, it is the question of trial by a non-independent trying officer which raises the greatest difficulty in arguing that the summary trial system meets the constitutionally mandated standards of fairness. On the other hand, having officers from within the chain of command try disciplinary matters lies at the heart of the objective of maintaining discipline in a military force. Every effort must be made to educate civilian reviewing courts of the unique requirements of military society.

If courts are not willing to accept that non-independent officers can try public order offences and award penal consequences, then reliance will also have to be placed on the right to elect court martial as a constitutional waiver, and the effectiveness of the post trial review process. It is anticipated that the constitutionality will ultimately depend upon the strength of the right to elect court martial as a constitutional waiver; the lowering of the "penal" nature of military punishments the enhancement of procedural fairness of the trial process, and the effectiveness of the post trial review process. The summary trial must be assessed globally and not simply on the weakness of any one component of the trial.

Chapter 7

Right of Appeal/Review

1. Review/Appeal

(a) Present Situation

Unlike the court martial system there is no right to appeal from a summary trial to a judicial body. The supervision of summary proceedings is carried out entirely by means of non-judicial review. Such review includes the approval of punishment warrants, a redress of grievance system, a mandatory review by officers in the chain of command and an ad hoc review by legal officers.

(i) Approval of Punishments

A commanding officer must under certain circumstances seek approval from higher authority prior to awarding the punishments of detention or reduction in rank. While this "review" occurs prior to the passing of a sentence, it is included in this section because it is a review of the commanding officer's discretion in awarding punishments. The "higher authority" from whom authority must be sought is an officer not below the rank of brigadier general or an officer of the rank of colonel who has been designated as an approving authority by the Minister.

In the case of a private who a commanding officer considers should be sentenced to a period of detention greater than 30 days, the trying officer commits the accused for that

term. However, service of the portion in excess of 30 days detention is subject to the approval of the approving authority. If the offender is a non-commissioned member above the rank of private then the commanding officer must seek approval from higher authority of any proposed punishment of detention or reduction in rank. Unlike the case of a private, approval of the punishment awarded to an offender above the rank of private must be sought prior to the sentence being passed.

The approval is sought by means of a punishment warrant which sets out the date of trial, the charges, a summary of the evidence, circumstances affecting the severity of sentence, particulars of the offender and recommendations of the commanding officer. There is no provision for any input by, or on behalf, of the accused regarding the approval of the sentence. When the commanding officer considers it appropriate the approval can be sought by more expeditious means, such as by telephone or message. A punishment warrant is then prepared and forwarded for written confirmation of the approving authority.

Punishment warrants are an example of the historical "baggage" which has been retained in the present summary trial system. Historically the Canadian army followed the British army tradition of using the right to elect court martial instead of punishment warrants. The Royal Canadian Navy has followed the Royal Navy tradition of using punishment warrants, but had no right to elect court martial. When the military justice system was unified in 1950 both procedures were retained rather than accepting one over the other.

(ii) Redress of Grievance

A service member dealt with by summary trial has the right to grieve the results of the trial by means of a "redress of grievance". A redress of grievance is a general grievance procedure provided for in s. 29 of the National Defence Act. Any officer or non-commission member may submit a grievance when it is considered "that he has suffered any personal oppression, injustice or other ill-treatment or that he has any cause for grievance". The grievor may "as a matter of right seek redress" from superior authorities as prescribed in regulations. The complaint must be submitted in writing to the commanding officer. If the complainant requests, the commanding officer must detail an officer to assist in preparing the complaint. The grievance proceeds through each level of the chain of command with the final level of redress being the Governor in Council.

(iii) Mandatory Review

All charge reports and charge sheets from summary trials are forwarded for review purposes to the "next superior officer" of the trying officer. However, since the only record of trial that usually exists of a trial by delegated officer or commanding officer is the charge report this review is limited to errors on the face of the record (jurisdiction, wording of the charges, incorrect punishments and procedural errors).

(iv) Review by Legal Officers

While not mandated by the National Defence Act, QR&O or CFAO a practice has developed where charge reports reviewed by superior officers and commanders of commands are referred to the legal officers who advise the applicable headquarters. However, this ad hoc system of review is limited to errors on the face of the charge report or charge sheet.

(v) Alteration of Punishments

Should a redress of grievance be granted or a review of the summary trial indicate an error in the proceedings there are a number of authorities who have the power to quash or substitute findings, and substitute, mitigate, commute, remit or suspend punishments. Those authorities include the Minister, the Chief of Defence Staff, the officer commanding a command and the commanding officer.

(vi) Judicial Review

Even though there is no right of appeal a person convicted by a summary trial can apply to court to have the constitutionality of the summary trial system reviewed. Pursuant to s. 18 of the Federal Court Act, apply for prerogative relief (certiorari, mandamus, prohibition, quo warranto or declaratory relief) in relation to service tribunals. In addition, prerogative relief (including release from custody by means of a Writ of Habeas Corpus) can be sought from provincial courts of superior record. It was the use of such prerogative relief which resulted in the release from custody of Glowczeski, Fontaine, Viellieux and Belzile

after their conviction by a summary trial. If the Vielleux and Belzile cases continue the whole summary trial system could be made subject to judicial review.[169]

(b) The Law

To date the Supreme Court of Canada has not ruled on whether there is a right to appeal from the decision of a tribunal where no statutory appeal process exists. At common law there was no right to appeal. If a statute did not provide for an appeal from the decision of a court or service tribunal then no right of appeal exists.

The Supreme Court of Canada has ruled that no right of appeal exists from an interlocutory proceeding (ie before the trial has been completed).[170] However, the court also felt it was essential an appeal procedure exist since pursuant to s. 24(1) the Charter there is a right to seek a remedy from a court of competent jurisdiction concerning the infringement or denial of a Charter right. Section 24(1) of the Charter states:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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169 Watkin, Annex A, at 23-29.

170 R v. Meltzer (1989), 49 C.C.C. (3d) 453, and R v. Mills (1986), 26 C.C.C. (3d) 481 (S.C.C.).

As was stated in Mills v. R:

> Since the Charter has conferred a right to seek a remedy under the provisions of s. 24(1) and since claims for remedy will involve claims alleging the infringement of basic rights and fundamental freedoms, it is essential that an appellate procedure exist.[171]
>
> (emphasis added)

The fact that the Supreme Court of Canada has not ruled out a Charter driven right of appeal was relied on in R v. Daniels[172] where the Saskatchewan Court of Appeal ruled that the idea of an appeal from a final order is too well-founded to be denied, particularly in a fundamental rights context.

While there has not been a definitive ruling on this issue from the Supreme Court of Canada there is no doubt that s. 24(1) of the Charter contemplates a review by a court of competent jurisdiction. What is not clear is whether the review of summary proceedings only by means of prerogative writs as is presently the case will meet the requirements of the Charter.

As was clearly set out in Ingebrigtson the presence of an independent and impartial appellate procedure will not save a tribunal from Charter scrutiny under s. 11(d). Therefore, if an appeal was provided from a summary trial to a an independent and impartial tribunal

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171 Ibid. at 496. However, see R v. Robinson (1989), 73 C.R. (3d) 81 at 102 (Alta C.A.) where it is ruled there is no right of appeal provided by the Charter.

172 (1991), 65 C.C.C. (3d) 366.

such as a court martial, that appellate procedure would not protect the summary trial process itself from being declared unconstitutional.[173]

This Canadian position can be contrasted with the decision of the European Court of Human Rights in Engel and others. In the Engel case non-commissioned members were convicted by their respective commanding officers and received punishments of light arrest, aggravated arrest, strict arrest and committal to a disciplinary unit. The offenders appealed to a "complaints" officer and then to the Supreme Military Court which confirmed the decisions. The European Court held Article 5(1)(a) of the European Convention of Human Rights permits detention if it results from a conviction by a competent court. Not all of the awarded punishments constituted a loss of liberty in a military context. Only strict arrest and committal to a disciplinary unit were deprivations of liberty. In the case of the punishment of committal to a disciplinary unit confirmation of the punishments by the Supreme Military Court was considered to be the imposition of the punishment de novo. Therefore there was no breach of the Convention with respect to that punishment.

The punishment of strict arrest was not saved by the appeal to the Supreme Military Court because, unlike committal to a disciplinary unit, there was no suspension of the operation of strict arrest on appeal. Therefore, the Supreme Military Court did not impose a "new" punishment with respect to strict arrest.

Under the European Convention the reconsideration of the conviction by a competent (independent) tribunal saves the trial process. This appellate "safeguard" is reflected in the British Army and Royal Air Force placement of the right to elect court martial at the end of

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173 R v. Ingebrigtson (1990) 61 C.C.C. (3d) 541 (C.M.A.C.) at 549.

the summary trial. The Canadian military abandoned that approach in 1959 in favour of the "waiver" of rights, by offering an accused the right to elect court martial at the commencement of the trial. The right to elect court martial as a form of waiver is relied on in American military law.

The rejection in Ingebrigtson by the Court Martial Appeal Court of the appeal to an independent tribunal as a safeguard of an accused's rights under s. 11(d) of the Charter does not necessarily mean the presence of an independent review process will not affect the overall assessment of the constitutionality of the summary trial process. The ability to appeal to an independent review tribunal should carry considerable weight in making a s. 1 Charter argument that a breach of accused's right under s. 11(d) is justifiable.

Although the law in this area has not been definitively decided there is a sufficient indication that some form of appellate "review" should be provided to an offender convicted at summary trial to warrant assessing the existing system as if such a right existed. In any event the military justice system itself has long felt a review of the decisions of summary trying officers is warranted as is evidenced by the punishment warrant process and the right to submit a redress of grievance. A Charter review of the right to an appeal will aid in assessing the appropriateness of those review forums.

(c) Justifiable Limit

(i) Other Free and Democratic Societies

Both Article 15 proceedings and summary courts martial are only subject to non-judicial review. Although the review of an Article 15 proceeding is called an "appeal" it is

made to an officer within the chain of command. The person punished by an Article 15 hearing is advised the right to appeal to the presiding officer's next superior officer. Unlike a grievance under s. 29 of the National Defence Act this "appeal" does not go any higher up the chain of command. The person making the appeal can submit documents in support of the appeal. In certain cases the superior commander must forward the appeal for review by a legal officer. The superior authority may suspend, remit, mitigate or set aside the punishment in whole or in part.

The findings and sentence of a summary court martial must be "reported" to the convening authority. The accused may also submit matters for consideration to that authority. The convening authority (or someone acting on behalf of the convening authority) can approve, disapprove, commute or suspend the sentence in whole or in part. In addition, that authority can dismiss any charge or specification or substitute a finding of guilty for a lesser offence. The record of the court martial must also be reviewed by a judge advocate (legal officer). It can also be reviewed, under limited circumstances, by the Judge Advocate General.[174]

As has been noted under British military law there is also no appeal from summary proceedings. However, in the British Army and Royal Air Force the placement of the right to elect court martial at the end of the summary trial proceedings operates as a limited form of "appeal". The route of appeal post trial is by way of redress of grievance. Section 155 of The Army Act 1955 provides for the review of summary proceedings. That review can be done as a result of a grievance, a periodic administrative review of unit records or

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174 Watkin, Annex H, at 10-11.

automatically in the case of the use of the extended punishment powers of commanding officers.[175] In the Royal Navy there is provision for the approval of some punishments by means of a punishment warrant. In addition, the accused can get a review of summary proceedings by submitting a "complaint".

(ii) Rational Connection

The present use of punishment warrants and the redress of grievance system is rationally connected to the objective of maintaining an operationally ready armed force by means of an efficient and effective disciplinary system. The review system is portable, efficient, can be used under all circumstances in which military units are employed and enhances the personal nature of military discipline.

(iii) Least Drastic Means

In assessing whether the least drastic means has been chosen to protect any right to appellate review there are four options which were considered.

Option #1 - Appeal to a Review Court Martial

One option considered by the Working Group was the creation of a separate Review Court Martial (RCM) which would consist of one military judge. In all cases, other than a small number of specifically outlined offences (see Chapter 8- right to elect/summary offences), an offender would be able, at the end of the summary trial, to indicate if he or she

175 Watkin, Annex H, at 23.

wishes to appeal (likely by "ticking" a box on the charge report form). The right to appeal would arise regardless of whether the punishment awarded was a penal consequence (ie. someone who receives a caution, reprimand, etc. could appeal). Once the offender indicates an appeal is desired the trying officer, or a designated officer, would prepare an appeal form, or "record", summarizing the evidence which was submitted at the trial. That evidence would have to disclose facts related to each of the essential elements of the charge(s) before the trying officer. The mitigation evidence relating to sentence would also have to be included.

The trying officer then provides the convict with a copy of the record, who, with the assistance of the assisting officer, prepares written representations. The whole package is then sent by fax or message to the RCM located in Ottawa. The RCM reviews the record and decides whether to uphold the conviction and sentence, dismiss the appeal, or quash the proceedings and direct a new trial. When the RCM does not agree with the sentence awarded it would have the power to remit the matter to the trying officer with a direction not to exceed a level of sentence determined by the RCM.

The Working Group was strongly of the view that the RCM process was incompatible with the "summary" nature of summary trials. Of particular concern was the requirement to create a record, albeit post-trial. Such a record would potentially have to be created for every trial. The creation of a record is the antithesis of summary proceedings. The spin off effect would be that the trying officer, or a designated officer would start to create a record during the summary trial itself. Some trying officers might even attempt to tape record

summary proceedings. In short the proceedings would no longer be summary. They would start to take on the trappings of a court martial.

An additional problem is created by the use of a fax or message to transmit the reasons for conviction or sentence to Ottawa. If the material faxed to the RCM did not contain sufficient facts relating to the essential elements of the offence than the RCM would have to ask for more information or dismiss/quash the charges. Inevitably, the trying officers would need to include more and more information in order to ensure a sufficient record got to the RCM to justify the conviction. In the end the process would be slowed down and would be less summary.

While understanding the principle behind the need for an independent review tribunal the Working Group was strongly of the view the Review Court Martial is not the method by which to attain that goal.

Option #2 - Appeal by Trial de Novo to a Court Martial

Provision could be made for an appeal in the form of an appeal de novo to a court martial similar to the appeal from a summary conviction court found in s. 822 of the Criminal Code. In effect, the court martial would re-try the case. The involvement of the court martial as the appellate tribunal would help limit any adverse effect on operational readiness by ensuring the appeal is heard by a service tribunal which is more "portable" and more integrated into the military justice system than a civilian court (eg. the Court Martial Appeal Court). The use of a trial de novo is mandated by the lack of any record or reasons at a summary trial. In comparison with the Review Court Martial outlined in Option #1

having no requirement to create a record would ensure the summary trial remained "summary". This factor alone makes the appeal by trial de novo a more preferable option than the Review Court Martial.

The problem with using a court martial as an appellate court lies primarily in deciding when to provide the right of appeal. If it were provided for all summary trials, as contemplated with the Review Court Martial, the administrative, efficiency, speed burdens associated with courts martial would again pose a significant and unacceptable problem. However, if the court martial was only used as an appellate court when a potential penal consequence was involved then there would be a less burdensome number of courts martial which would have to be held. The requirement for an independent appellate proceeding is particularly important in relation to the loss of liberty. As has been noted, in respect of military society, a strong argument can be made the loss of liberty arises in respect of "correctional custody". It would not arise regarding "unit corrective training", stoppage of leave or extra work and drill. Taking into account the traditional view that reduction in rank is seen as a serious military punishment the right to appeal by trial de novo could be provided for punishments involving that punishment as well as "correctional custody" and significant fines.

Air Command was alone in the view that the right to appeal by trial de novo as suggested in this report is too broad. In the view of the that Command it should not extend to reduction in rank. This view was based on the Landry v. Gaudet decision which indicated reduction in rank was not a penal consequence. In addition it was thought that the fines which could be awarded by a trying officer where not "significant fines" as contemplated by

the Wigglesworth decision. Air Command therefore indicated an appeal by trial de novo should only be made available when the punishment of correctional custody is awarded. The Summary Trial Working Group was of the opinion its review was not limited to purely legal matters. Reduction in rank may not be a penal consequence, but it has significant career and financial impact on the offender. In addition, the Working Group does not necessarily agree that the fines which can be awared by a trying officer (up to 60% of monthly pay) would not attract scrutiny as a penal consequence under the Wigglesworth criteria. Therefore the recommendation remains as stated.

The use of a trial de novo on its face does not look as summary as the idea of a Review Court Martial. Obviously, there is the need to conduct a court martial. However, since the trial de novo does not require the maintenance of a record the adoption of that process will have less of an overall negative effect on the summary trial system than Review Courts Martial. It is not anticipated that a significant number of offenders will choose to appeal. A form of trial de novo has been applied in the British forces by placing the right to elect court martial at the end of the trial and it has not been unduly complicated to administer.

Option #3 - Prerogative Relief

The third option is to simply continue to rely on courts granting prerogative relief as the "courts of competent jurisdiction" to provide Charter relief. The problem with this approach is that the lack of a record at a summary trial makes it extremely difficult to review a summary trial in terms of whether there were any Charter breaches relating to the

substance of what occurred at the trial. The review of summary trials by prerogative relief granting courts is, due to the lack of a record, primarily restricted to questions of the structure and procedures associated with summary proceedings. These review courts do provide some protection to an offender, however, it terms of the military justice system it might be more appropriate to provide the granting of prerogative relief to the military justice system. Presently it must be sought from the Federal Court of Canada, or a provincial superior court. There would appear to be no reason why the Court Martial Appeal Court (which consists of judges from the federal court and superior courts of the provinces) could not exercise that power. Courts martial could even be considered as a forum for providing prerogative relief when the Canadian Forces is deployed outside of Canada, however, careful analysis would have to be undertaken as to whether military trial court judges should be provided the power of a superior court of record. The advantage of using the Court Martial Appeal Court is that it would allow courts which are familiar with the military justice system rule on its constitutionality. The use of a court martial would provide the most portable means of allowing prerogative relief to be sought by an offender.

<u>Option #4</u> - Non-Judicial Review

The third option is to maintain the status quo of relying primarily on non-judicial review. This approach is consistent with that followed under both the American and British military justice systems. It appears to be driven primarily by the same factors which lead to the conclusion that summary proceedings should be in the hands of trying officers within the

chain of command. It provides a military justice system which is designed to meet the unique objectives of ensuring a disciplined and operationally ready armed force.

The present system is not without its faults. The punishment approval process is designed as a method of supervision of the actions of the commanding officer. While the creation of a supervisory body to oversee commanding officers can be seen as a positive step to protect the rights of an offender, the carrying out of that supervision prior to the final decision being made should raise some concern. It could be argued that a system requiring the approval of the trying officer's decision prior to the taking of effect of that decision does not indicate complete confidence in the abilities of that officer. It is a legitimate question to ask if commanding officers should be given broad powers to award punishments of detention or reduction in rank if those officers cannot be trusted to make the decision on their own. The summary trial would be better protected from criticism if the approval system was developed into a true post-trial review of the summary proceedings. Commanding officers should be left to make the decision of what punishment should be awarded without prior input from higher authority.

The faults with the present punishment approval process could be addressed by having a confirmation of sentence after it is awarded by the Commanding Officer. The Commanding Officer would award the sentence, receive input from the offender and forward the information to the confirming authority. The sentence would not be served until confirmation is given.

Land Forces Command expressed a preference to retain punishment warrants in their present form since the delay in commencing sentence until the confirmation could still be

seen as an expression of a lack of confidence in the commanding officer. The Working Group was of the view, however, that the enhanced participation of the offender (procedural fairness) in the confirmation process made the confirmation process a legally more sound procedure.

The other method available to review summary proceedings is through the redress of grievance system. A potential problem with arguing that the redress system offers an effective review process is that it does not appear the offender presently has adequate notice of the review process itself. There is nothing in either the National Defence Act or QR&O which ties the redress of grievance procedures to the summary trial process. Its application must be read into the legislation since a grievance is only prohibited "in respect of a matter that would properly be the subject of an appeal or petition under Part IX or an application under Part IX.I"[176] of the National Defence Act. Since a grievance from a summary trial is not excluded it must therefore be included, as a method of reviewing summary proceedings. However, it is not clear that either the accused or the assisting officer will necessarily make that deduction. If an offender does not know of the review process then that person cannot exercise the right to be heard.

The relatively low number of grievances which annually make it beyond the level of the commander of a command could be interpreted in two ways. On the one hand it could be seen as an indication of a general satisfaction with the summary trial process. It could also indicate that grievances are adequately resolved at the unit, formation or command level.

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176 National Defence Act, s. 29.

On the other hand, the paucity of grievances in relation to the actual number of summary trials might be viewed as evidence that offenders are unaware of their right to grieve.

The failure to directly link the grievance procedure to the summary trial process provides considerable support for the view that service personnel do not know of the right to submit a redress of grievance in relation to summary proceedings. It might be argued that the lack of notice of this avenue of review is itself a denial of an offender's right to be heard. That in turn could be seen as a failure to comply with the principles of fundamental justice since the purpose of providing the review process would be negated by the lack of notice.

It appears that there is nothing to lose by specifically referring in both the National Defence Act and QR&O to the redress of grievance procedures as a method of review for summary trials. Such a step would enhance the procedural fairness of the post-conviction summary trial review process by removing any doubt about whether the offender is advised of that process.

The other forms of mandatory review and the practice of reviewing the record of the trial (charge report) provide limited safeguards. This review process would be made more effective by making the review of charge sheets by a legal officer mandatory.

(iv) Proportionality

Would the present system of non-judicial review justify a denial of a right to an appeal? In light of the existing flaw in the punishment warrant process and the lack of a link between the grievance system and summary trials it is unlikely a review court would accept a s. 1 Charter defence. However, the adoption of an appeal to a court martial for a trial de novo in

appropriate cases, combined with the moving of the punishment warrant process to a post-trial review and a direct link to redress of grievance would appear to provide a balance between the need for operational effectiveness and the right to have the proceedings of summary trials reviewed.

While this section has "assumed" there is a Charter right to an appeal, the concerns over the existing review process remain even if no such Charter right exists. The military has a long standing commitment to the review of summary proceedings. That review process must allow the accused to know about the process and take a meaningful part in the review.

(d) Recommendations

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 the 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.

2. Release Pending Review

(a) Present Situation

There is no provision under Canadian military law for an offender to be released from detention pending the outcome of a redress of grievance or review of a summary trial. As a general rule, a punishment commences from the time at which it is awarded by the trying officer. As the redress of grievance and other grievance procedures are usually time consuming it is not uncommon for an offender to finish serving the punishment of detention prior to the completion of the review process.

(b) The Law

The law is clear that a member of the armed forces has the same right to release pending appeal as any other citizen of Canada. This right is enshrined in s. 11(e) of the Charter. However, in light of the attitude of review courts to the loss of liberty in a military context such a right would likely only arise in respect of "correctional custody".

Release pending appeal from the conviction by a court martial was being effected by means of Habeas Corpus prior to the enactment of the Charter.[177] The Charter was relied on a number of times in the early 1980s to effect the release of a service member from detention pending the resolution of that member's appeal to the Court Martial Appeal Court.[178] It was the line of cases involving civilian courts granting release pending appeal that caused the release pending appeal provisions involving appeals from courts martial to be enacted (Part IX.I of the National Defence Act). The general proposition that service members have the right to release pending appeal to the same extent as all citizens was confirmed by the Court Martial Appeal Court in Graham v. R[179].

As has been noted this trend towards granting release pending a review of the proceedings of service tribunals has been extended to summary trials. In Glowczeski, Fontaine and Vielleux prerogative relief was granted to offenders convicted at summary trial ordering that they be released from service detention pending a review of the constitutionality of summary trials. More recently an order in the nature of habeas corpus was granted by the Nova Scotia Supreme Court ordering the release of Able Seaman Belzile pending the "final determination of his appeal by way of redress of grievance".[180]

It is concluded therefore that there is a constitutionally protected right to release pending appeal for a person convicted by a summary trial.

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177 Hicks v. R, [1982] 1 W.W.R. 71 (Alta C.A.).

178 see Re Muise and The Queen (1984) 16 C.C.C. (3d) 285 (Ont. Ct. H. J.) and Re Hinds and The Queen (1983) 4 C.C.C. (3d) 322 (B.C.S.C.).

179 (1987) 4 C.M.A.R. 383.

180 Belzile v. R (N.S.S.C., 6 January, 1993)

(c) Justifiable Limit

(i) Other Free and Democratic Societies

The British military justice system does not provide for release pending appeal from conviction at a summary trial. The practice with respect to American Article 15 hearings is that an appeal will normally "toll or interrupt the imposition of punishments other than reduction or deprivation of pay punishments."[181] There is, however, provision for the punishment to be carried out prior to the completion of the appeal. Those assigned to a vessel may have the punishment deferred until the arrival of the vessel in port, and the imposition of a similar punishment may result in the deferment of the imposition of the punishment.[182] The delay in the imposition of the punishment depends upon the rules in effect for each service. However, the effect of the deferment of punishments other than those involving a loss of rank or money is a release pending appeal.

(ii) Rational Connection and Least Drastic Means

Again it does appear that the lack of provisions for release pending appeal from a summary trial conviction is rationally connected to the objective of maintaining an efficient and effective military justice system. A more difficult issue to resolve is whether the least

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181 Schlueter, Military Criminal Justice, at 130.

182 Ibid.

drastic means to obtain that objective has been chosen. There are four options which could be considered.

Option #1 - Release by a Court Martial/Military Judge

This option contemplates setting up a release pending appeal process similar to that followed post court martial. The present provisions of the National Defence Act contemplate release pending appeal being determined by the convicting court martial, the Court Martial Appeal Court as well as a Standing Court Martial[183]. The drawbacks to expanding judicial review of release pending appeal are those which have been discussed in a number of other sections in this report. The involvement of an elaborate judicial system in the maintenance of discipline is contrary to the principles of speed and efficiency which set that justice system apart from its civilian counterpart.

Option #2 - Automatic Release Pending Appeal

While this process, which goes farther than the system applied at American Article 15 hearings, would virtually guarantee the right to release pending appeal it does not take into consideration the need of the military to have some military offenders be retained in custody for reasons such as ensuring the person will not flee, or to protect the public.

Option #3 - Maintain the Status Quo

This option would meet the "summary" needs of the military by avoiding a hearing and by ensuring all service members are aware conviction for a service offence will result in

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183 ss. 248.1, 248.2.

punishment being swiftly carried out. However, this option does not allow for the proposition that the trying officer may have made a mistake. Although money can be returned to a wrongly convicted offender, that person's liberty cannot be replaced. By allowing for a review of the summary trial the military justice system is already acknowledging that there could be errors made at a summary trial. Release pending appeal/review, where appropriate, would avoid a service member's liberty being wrongly removed.

Option #4 - Release by Trying Officer

The fourth option would allow for the release of offenders pending an appeal, however, that release would be granted by the trying officer. The criteria which the trying officer would use in exercising that discretion could the same as those set out in s. 248.3 of the National Defence Act. There would have to be an intention to appeal, the person would surrender himself or herself into custody when directed to do so, etc. In addition, the person would agree to other reasonable conditions such as staying within a geographical location, not associating with certain persons or frequenting places where alcohol is served. This option would allow for interim release pending the convening of a court martial for a trial de novo.

(iii) Proportionality

In weighing the right to release pending appeal with the objective of the military justice system it is option #4 which appears to provide a balance between a complete denial of the

right and the need to have a effective and efficient military justice system. Again the ability to establish a s. 1 defence to the breach of the right to release pending appeal will depend upon a court accepting the need for the military justice system to be centred in the hands of the trying officer.

If a civilian court does not accept that trying officers should be allowed to grant pre-trial release, or if option #3 is maintained then heavy reliance will have to be placed on the right to elect court martial as a form of constitutional waiver of the right to release pending appeal.

In addition to having the release determined by the trying officer there should also be a review of that decision. As with pre-trial custody that review should be maintained within the chain of command. When the appeal by trial de novo is actually commenced then the court martial would be able to re-assess any need for continued custody at the time the court is convened.

(d) Recommendations

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.

Chapter 8

Right to Elect Court Martial

1. Background

The right to elect court martial was created with the establishment of summary proceedings in British Army Act of 1881. That Act provided for the right of a soldier to request to be tried by district court martial in any case where the punishment to be awarded would involve imprisonment, a fine or deduction from pay.[184] While the time for exercising the right to elect was not clearly set out in the original legislation the Army Act later provided that the election was to be given "after the hearing of the evidence".[185] The placing of the right to elect court martial after the hearing of the evidence in effect created a form of appeal. The accused would know that the trying officer had decided a finding of guilt was warranted and a punishment greater than a minor punishment was appropriate.

The Canadian army and the Royal Canadian Air Force by incorporation of British law also used the right to elect court martial. The Royal Canadian Navy followed the Royal Navy practice of using punishment warrants, and Canadian naval law up to 1950 did not provide for the right to elect court martial. From 1950 to 1959, the right to elect court martial provided for in the National Defence Act continued the British tradition of being offered at the end of the trial.

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184 Army Discipline and Regulation Act, 1879, s. 46.

185 Army Act of 1881, s. 46.

In 1959, in anticipation of the enactment of the Canadian Bill of Rights the regulations were amended to expand the right to elect court martial to include any service member charged with a service offence that was also a criminal offence under civilian criminal law. Previously, the right to elect court martial under the National Defence Act (but not under the Army Act) had only been available to non-commissioned officers (eg. not privates). It was also moved to the end of the trial. In effect, the right to elect court martial was changed from a type of appeal to a form of waiver. It was made into a form of waiver specifically because of concerns over the enactment of a "quasi-constitutional" document, the Canadian Bill of Rights.[186]

2. Present Situation

Presently the right to elect court martial is only provided if the accused is being tried by a commanding officer or superior commander. The manner in which the right to elect court martial arises depends upon whether the accused is charged with a "minor" offence (Annex I at B2) or a "major" offence (Annex I at C2). The right to elect court martial is given primarily at the start of the summary trial. If the accused is charged with a "minor" service offence then the trying officer must give the accused the right to elect court martial if the officer concludes, that if the accused should be found guilty, a punishment of detention, reduction in rank or a fine in the amount of $200 would be appropriate. If the accused is charged with a "major" offence then the accused must be given the right to elect court martial regardless of the punishment the trying officer might consider appropriate should the

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186 Watkin, Annex B, at 22.

accused be found guilty.[187] The accused is given at least 24 hours to decide whether the option will be exercised to be tried by court martial. If the election is made then the trial is adjourned and the case is forwarded to higher authority.

The right to elect court martial may also be extended to accused at any time prior to a finding, if the trying officer determines that as a result of having heard the evidence the available powers of punishment may not be sufficient.[188] It is the responsibility of the assisting officer to advise the accused of the differences between remaining with the summary trial or electing court martial.

3. Other Jurisdictions

The British Army and Royal Air Force have retained the right to elect court martial as a form of "appeal". The right to elect is provided after the evidence has been heard. The opportunity to elect court martial is provided when a commanding officer intends to award a punishment of a detention or fine. In the Royal Navy, like the CF, the right to elect court martial is given before any formal evidence is given. The right to elect court martial is offered where the possible punishment is one of disrating (reduction in rank), detention or stoppages (of pay).[189]

American Article 15 procedures provide for the right to demand trial by court martial. Article 15 punishment is seen as "consensual" with the right to turn down such proceedings

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187 QR&O, art. 108.31, 110.055.

188 QR&O, art. 108.29(2)(b)(i), 110.05(2)(b)(i).

189 Rowe, Annex E, at 14.

being available to all accused, unless it is specifically limited. The limitation on the right to demand court martial is found in Article 15(a) of the Uniform Code of Military Justice which provides that an accused cannot demand court martial when "attached to or embarked in a vessel". A person is attached to or embarked in a vessel if:

> ...at the time the nonjudicial punishment is imposed, that person is assigned or attached to the vessel, is on board for passage, or assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regulatory organized body.

A person is "attached" to a vessel even if they are not actually on the vessel.[190]

American courts have held that an accused is not denied constitutionally protected rights in turning down a court martial. In Dumas v. U.S.[191] the U.S. Claims Court held Article 15 proceedings were not criminal in nature, and did not attract the same constitutional protection as judicial proceedings. Therefore where, upon advice of counsel, the accused elected Article 15 nonjudicial punishment to avoid risk of greater court-martial penalties there was no breach of constitutionally protected rights to remain silent, or to call witnesses (trial conducted based on written reports). In addition, in U.S. v. Pun[192] the limitation on the right to elect court martial if attached to or embarked on a vessel was constitutionally acceptable because of the unique responsibilities of the ship's captain and in the interest of maintaining morale and discipline aboard ship.

The American courts have relied heavily on the United States Supreme Court decision in Middendorf in determining that despite the fact that summary proceedings deal with a

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190 Schlueter, Military Criminal Justice, at 110-111.

191 620 F.2d 247 (1980).

192 4 M.J. 879 (NCMR 1978), COMA.

broad range of service offences summary proceedings are not criminal in nature. Under American law, conviction by a Summary Court Martial, or at a Article 15 hearing does not constitute a criminal conviction. It appears therefore that American courts consider that the nature of the proceeding truly governs the determination of whether the process is criminal or disciplinary in nature, even though both courts martial and summary proceedings deal with the same offence.

A distinction, between the American and Canadian systems of summary proceedings is the use that can be made of a conviction. Under American military law the fact of a conviction before by a Summary Court Martial[193], or an Article 15 hearing[194] can only be used to affect sentence at a subsequent court martial proceeding if the accused has been told of their right to confer with independent legal counsel (military or civilian). No such bar on the use of a conviction at a summary trial exists under Canadian law.

The lower status of a Summary Court Martial is reflected in the fact that an accused facing trial in that forum can elect to be tried by another court martial. The charges would be referred to either a Special or General Court Martial.

4. The Law

The requirement for a valid waiver of a Charter right was first dealt with by the Supreme Court of Canada in Clarkson v. R[195]. One of the issues in that case was whether an intoxicated accused could waive the right to counsel. The court stated:

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193 U.S. v. Booker, 5 M.J. 238 (CMA 1977).

194 Dumas v. U.S.

195 [1986] 1 S.C.R. 383 (S.C.C.).

> Given the concern for fair treatment of an accused person which underlies such constitutional civil liberties as the right to counsel in s. 10(b) of the Charter, it is evident that any alleged waiver of this right by an accused's awareness of the consequences of what he or she is saying is crucial. Indeed, this court stated with respect to the waiver of statutory procedural guarantees in Korponay v. A.G. Can., (1982) 26 C.R.(3d) 343 ... that any waiver:
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> "... is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process."[196]

A waiver of Charter rights can be express or implied.[197] The responsibility for ensuring that a waiver is made on the basis of an informed decision lies with the judge. As Mr. Justice Lamer stated in Korponay v A. G. Canada[198]:

> The judge's duties concerning any waiver are not different than those on a plea of guilty. The factors he will take into account in determining whether the accused has clearly and unequivocally made an informed decision to waive his rights will vary depending on the nature of the procedural requirement being waived and the importance of the right it was enacted to protect. However, always relevant will be the fact that the accused is or is not represented by counsel, counsel's experience, and in my view of great importance in a country so varied as ours, the particular practice that is developed in the jurisdiction where the events are taking place.[199]

In terms of a summary trial that responsibility rests with the trying officer.

Generally courts have taken a strict interpretation of what constitutes a valid waiver. The giving up of constitutionally guaranteed legal rights can only be done with complete knowledge of the extent of the rights being waived and the effect of waiving those rights. If

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196 Ibid. at 394-395.

197 See R v Manninen (1987), 58 C.R. (3d) 97 (S.C.C.).

198 [1982] 1 S.C.R. 41 (S.C.C.).

199 Ibid. at 50.

the right to elect court martial is to be a valid waiver of constitutional rights the election process must provide full information to the accused of the differences between courts martial and summary trials, the effect those differences have on the accused's rights and the consequences of electing summary trial.

5. Analysis

There are two main questions which have to be answered in assessing the validity of the right to elect court martial as a form of constitutional waiver. First, to what extent is it being relied upon as a waiver of constitutional rights? Secondly, what must an accused be told before the waiver can be considered to be valid?

(a) Scope of the Waiver

Presently, the right to elect court martial is provided in a manner which is consistent with the nature of the offence/penal consequences distinction 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 if the accused were found guilty of the offence(s) charged. In particular, if it is anticipated an accused would receive detention, reduction in rank or a fine greater than $200 if convicted of a less serious service offence then the right to elect court martial must be provided prior to any of those punishments being awarded. The right to elect court martial would not have to be provided if the accused was convicted

and was to receive a fine of $200 or less, confinement to ship or barracks, forfeiture of seniority, severe reprimand, reprimand, extra work and drill, stoppage of leave or a caution.

Presuming for the moment that the present right to elect court martial is a valid waiver of constitutional rights then an accused is able to waive those rights in respect of the more serious service offences (Annex I, at B2). With respect to the less serious offences the waiver, based on the punishments of detention (correctional custody), reduction in rank and a significant fine would appear to be a valid threshold for invoking the right to elect court martial. Since courts in both Europe and the United States have ruled that liberty in a military context is different than in civilian society, punishments such as "unit corrective training", stoppage of leave and extra work and drill would not appear to invoke a need for a waiver, where such waiver is based on the threat of penal consequences being imposed.

However, the problem with the present "consequences" approach is that it is based upon the notion that the service offences, for which there is no mandatory right to elect court martial, are not by their nature public order offences. However, a number of the less serious offences have a "public order" aspect to them. For example:

Service Offence	Public Order Offence
s. 84-Violence to a Superior Officer (except striking or using violence)	s. 266- Assault - Criminal Code
s. 117(f)-Act of a Fraudulent Nature	s. 380(1)-Fraud - Criminal Code
s. 129-Conduct to the Prejudice of Good Order and Discipline (ie. use of a narcotic)	s. 3(1) Narcotic Control Act

Not only are a number of the service offences the same as, or substantially similar, to civilian public order offences, but an offence such as s. 129 of the National Defence Act is so broadly worded it is open to abuse. For example, it is a common practice to charge drug use under s. 129 of the Act. If an accused is to be given a punishment which is not detention, reduction in rank or a fine in excess of $200 then there is no requirement to give the right to elect court martial. The accused can be tried, and as is often the case, released administratively from the CF based upon conviction without being given the right to elect court martial. However, it is not possible to use a narcotic without being in possession of it. If the accused was charged under s. 130 of the National Defence Act for being in possession of a narcotic contrary to s. 3(1) of the Narcotic Control Act then the accused would receive the right to elect court martial. Further examples of service offences, which at first glance might be considered to be "purely" military offences, but which are the same or similar to civilian criminal offences are s. 85 (Insubordinate Behaviour/Assault), s. 86 (Quarrels and Disturbances/Assault), s. 95 (Abuse of Subordinates/Assault). Therefore, although at first glance the offence looks "purely" military in nature it often turns out to be "by nature" a public order offence.

The only way to ensure that an accused facing summary trial has an opportunity to waive constitutionally protected rights is to broaden the right to elect court martial. Except for a small number of offences relating to training, drill, deportment and absence from duty, etc., the Working Group was of the view that the right to elect court martial should be extended to all service offences. This broader right to elect court martial would also have the advantage of ensuring an accused could seek trial by court martial even when the

punishment awarded is not technically a penal consequence ("unit corrective training", stoppage of leave and extra work and drill).

The need to maintain an exception to providing a generally broader right to elect court martial arose out of a recognition of the serious problem in terms of maintaining discipline which would be created by having courts martial try extremely minor service offences. These offences could be termed "dirty boot and haircut" offences. Such offences arise most often in the training environment, however, they continue to be relevant to everyday military service as well. Such offences would include minor insubordination, alcohol related problems, etc. Not only would the delay in holding court martials cause particular problems for training establishments, which usually has a fixed period in which to process trainees, but the holding of courts martial for extremely minor service offences runs the risk of trivializing the court martial process.

Therefore, the Working Group determined that it should remain discretionary to provide an accused the right to elect court martial for the following offences, when a punishment other than "correctional custody", reduction in rank or a fine in excess of 25% of the offenders monthly pay was being considered:

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.

If a trying officer considered a penal consequence might be awarded then the accused would have to be provided the right to elect court martial either at the commencement or during the trial.

Consideration was given to calling these offences "summary" offences when the right to elect court martial was not provided to an accused. While this would have the effect of reinforcing the "disciplinary" nature of the offences it was felt the confusion brought on by creating another order of offence (service offences, summary offences) would be counter productive. The Working Group was particularly concerned that the wrong impression would be left with a reviewing court that providing jurisdiction over minor summary offences would mean trying officers have less of a need to maintain jurisdiction over the much more numerous service offences.

The threshold for a fine of 25% of an offenders monthly salary was chosen for two reasons. First, it is well within the level of financial consequence found acceptable in Landry v. Gaudet (forfeiture of pay for a period not exceeding ten working days). By setting the level of fine as a percentage rather than a set amount (as is done with the present $200 limit) the scope of the fine keeps up with increases in salaries so that the impact on the offender remains proportional.

The extension of the right to elect court martial to nearly all summary trials could create a number of potential problems. First, it will likely increase the number of courts martials, particularly if some accused see the exercise of the right as a method of avoiding or delaying the imposition of discipline. An increase in the number of courts martial also carries with it the problem of creating an undue administrative burden. However, it is anticipated that any initial increase in courts martials will be short lived. In addition it is an increase which can likely be absorbed by the military justice system. For example, in 1983 there were 169 courts martial conducted in the CF. In 1992 the number of courts martial

had dropped to 60. It would appear that the CF could absorb a doubling of the number of courts martial with out putting an undue strain on either the units or legal resources.

The problem of having an accused delay the imposition of justice is a harder issue to deal with. For example, when a ship is at sea, at isolated locations such as C.F.S. Alert or on U.N. peacekeeping duties the election of a court martial means the determination as to whether the accused should be disciplined will be delayed. An accused who continues to flaunt rules, regulations and orders pending the convening of a court martial can be dealt with by means of pre-trial confinement. In addition, steps should be taken to make the convening and conduct of courts martial more streamlined and speedy process.

Ultimately, a determination has to be made as to whether the utility of the right to elect court martial as a form of waiver outweighs 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 fair proceeding. Those accused who elect court martial to avoid justice will learn that ultimately they will have their day in court and the delay will not be worth the wait.

This expansion of the right to elect court martial is consistent with both the British and American military justice systems. Particularly under American military law there is a very broad right to elect court martial which applies to the majority of the American armed forces. Having this broad right to elect court martial does not appear to have had a harmful effect on operational effectiveness. Interestingly, even with the broader right to elect court martial the percentage of disciplinary proceedings which are conducted by Article 15 or Summary Court Martial runs in the 90-98% range, depending on the service involved.

Those percentages are consistent with the CF statistics of 98% of disciplinary proceedings being conducted as summary trials.

The American Navy does have the exception of there being no right to elect court martial when the accused is "attached to or embarked on a vessel". Consideration was given to adopting a similar exception, however, it was ultimately rejected for two reasons. First, while the navy does deploy for long periods of time away from shore installations, it is not clear that they are any worse off in terms of providing court martial support than isolated army or air force units. For example, getting courts martials to C.F.S. Alert or to U.N. deployments involve similar logistical problems. Therefore the navy problem was not seen as being so unique as to warrant a special exception. In addition, to adopt such an exception would run counter to the "unified" disciplinary approach which has appeared to work well since 1950.

Secondly, the navy has been operating with a mandatory right to elect court martial for certain offences since 1959, and any problems associated with delays in holding courts martial do not appear to have been insurmountable.

That does not mean that an "embarked in a vessel" or similar exception should not be considered if it turns out that the expanded right to elect court martial creates problems. For example, the exception could be made available when the accused is serving "at sea", or in a "special duty area". However, such provisions would have to be considered closely since devising separate rules for an operational theatre opens up the "peace" versus "war" issue. It was considered by the Working Group to be better to simply expand the right to elect court martial, and make any necessary adjustments based on concrete examples of problems during

an annual review of the summary trial system, than to create different types of rights based on perceived problems.

That is not to say that an expanded right to elect court martial will not create difficulties. However, it was determined that it would be better to deal with the problems once they are identified rather than abandon the traditional universal application of the National Defence Act based on anticipated problems, which may never materialize.

(b) A Valid Waiver

The question of the validity of the waiver concerns the issue of whether the accused "has clearly and unequivocally made an informed decision to waive his rights". Presently the only requirement to explain the consequences of the right to elect court martial is found in the duties of the assisting officer set out in QR&O art. 108.03(8). At a minimum, the assisting officer must inform the accused of the matters relating to the court martial. Those matters are the greater powers of punishment at a court martial, the right to legal representation, the application of the Military Rules of Evidence and the right of appeal. The regulation is drafted in such a way as to impose additional obligations to inform the accused of the differences between the two tribunals, however, in light of the limited training for assisting officers it is difficult to see how that can be done with any consistency.

There is no requirement in the regulations to inform the accused of other important considerations such as the independence and impartiality of the court martial, the greater pre-trial disclosure, the ability to challenge the members of the court martial, the provision of a transcript of the proceedings, the more detailed review procedures and the right to release

pending appeal. In addition it is unlikely that the assisting officer, due to a lack of training, will presently be in a position to explain the effect of many of the differences between the two tribunals (eg. the effect of applying Military Rules of Evidence).

One way of ensuring that an accused is fully informed of the consequences of not exercising the right to elect court martial is to ensure the accused has the opportunity, where possible, to consult legal counsel. That proposal has already been discussed in Chapter 6.

However, it should not be necessary that an accused consult legal counsel prior to exercising their right to elect court martial. CF may be deployed in areas and under conditions that it is not possible to contact a lawyer. In order to rely on the right to elect court martial as a waiver there does appear to be a requirement that more information be made available to an accused on the effect of that decision. That information could be passed on by means of more comprehensive regulations, the use of aide-memoires and by increasing the training for assisting officers and trying officers.

Means of achieving art. 108.03

The limitations on the information which is provided to an accused is compounded by the lack of an obligation on the part of the trying officer to confirm that the accused has made a fully informed decision. For example, there is no requirement on the part of the trying officer to confirm that the assisting officer has complied with the limited requirements of QR&O, art. 108.03(8). One way to ensure that the accused is fully aware of the consequences of the decision to elect court martial is for the trying officer to advise the accused of the effect of that decision. Such repetition will help ensure that the accused receives the necessary information and will confirm in the mind of the accused that the trying officer is neutral on whether the accused turns down the summary trial. The provision of

that information could be recorded on the charge report. If the accused has had an opportunity to talk to counsel that information could also be recorded.

Finally, an argument could be presented that the exercise of the right to elect court martial is unfair because the accused is exposed to a greater penalty at a court martial. In effect, greater access to procedural protection should not be accompanied with the potential for a greater punishment. While prima facie that argument has some attractiveness it is evident that in criminal proceedings decisions such as pleading guilty also carry with them an assessment of potential procedural protection verses the opportunity for a lower punishment. While the question of plea bargaining is often a controversial one the concern of the courts has been centred on ensuring that the accused has made an informed decision.[200] In that respect the issue of entering a plea is similar to waiver. In Middendorf v. Henry[201] the United States Supreme Court specifically rejected an argument that the higher level of punishment available to general and district courts martial nullified a waiver of an accused's right to counsel when deciding to remain subject to summary court martial jurisdiction.[202] The link between guilty pleas and waivers was made by the Supreme Court of Canada in Korponay.

It is this connection between waiver and guilty pleas which also counters any argument that an accused either cannot waive the type of Charter rights involved (trial by an independent tribunal) or waive the number of rights affected by summary proceedings. In

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200 Adgey v. R (1973), 13 C.C.C. (3d) 177 (S.C.C.).

201 425 U.S. 25 (1976).

202 Ibid. at 40.

pleading guilty an accused can choose to forego virtually all the guarantees (right to counsel, rules of evidence, full answer and defence, etc.) available at a court martial or civilian criminal trial. Often that choice is made for practical considerations such as a guarantee the prosecution will seek a lower sentence. Certainly considerations such as a preference to be tried by a commanding officer, or the opportunity to be confronted with lower maximum punishments should permit a service member to choose to be tried by summary trial.

In conclusion, it does not appear that the right to elect court martial, as it is presently constituted, provides an adequate waiver of the accused's rights under the Charter. Like the changes to the legislation which could be made to enhance the compliance with the requirements of s. 1 of the Charter, the alterations to the right to elect procedures are neither extensive nor difficult to undertake. An expanded right to elect court martial would neither unduly complicate the trial process, nor adversely affect the "readiness" of the CF. While the changes to the election provisions of the summary trial system are easy to make they should not be done at the expense of enacting the enhanced procedural protection discussed in relation to s. 1.

The right to elect court martial provisions should be used as a "safety valve" to enhance the protection of an accused's rights, rather than as a means to avoid changing the procedures employed at summary proceedings.

6. Recommendations

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.

Chapter 9

Equality

1. Present Situation

There are two ways in which an accused might claim that the summary trial is discriminatory and breaches the equality rights enshrined in s. 15(1) of the Charter. First, since the summary trial system applies primarily to lower ranking personnel an accused might claim discrimination on the basis of rank. Secondly, since civilians are not subject to summary proceedings, and therefore enjoy the protection of the full procedures of the civilian court system, a service member might allege discrimination due to membership in the military.

The rank of an accused plays an important part in determining both the type of service tribunal by which an accused can be tried, and the type of punishment which can be awarded. For example a delegated officer has the jurisdiction to try non-commissioned members below the rank of warrant officer. A commanding officer's jurisdiction extends to subordinate officers as well as non-commissioned officers below the rank of warrant officer. Finally a superior commander has the jurisdiction to try an officer below the rank of lieutenant-colonel or a non-commissioned member above the rank of sergeant. However, the jurisdiction of a superior officer is limited by CFAO 110-2 which recommends that majors only be tried by summary trial in cases involving minor traffic offences occurring outside of Canada. As is set out in the Tables to QR&O art. 108.11 and 108.27 the applicability of each punishment depends on the rank of the accused. For example, only a private can

presently receive the punishment of confinement to ship or barracks. Finally in terms of status a civilian cannot be tried by summary trial.[203]

2. The Law

The lead case on equality rights under s. 15(1) of the Charter is Andrews v. The Law Society of British Columbia[204]. In that case the Supreme Court of Canada held discrimination requires the fulfilment of two criteria. First, it has to be based on "grounds relating to the personal characteristics of the individual or group". Secondly, the distinction has to either impose "burdens, obligations or disadvantages", or withhold or limit "access to opportunities benefits and advantages". The grounds upon which claims to discrimination could be based are either the specific enumerated grounds in s. 15(1) of the Charter, or grounds which are "analogous" to the enumerated grounds. The enumerated grounds are race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. Since military status and rank are not enumerated grounds a successful claim to discrimination would have to be based on those two criteria as being analogous grounds.

In determining what constitutes an "analogous" ground the Supreme Court of Canada indicated that s. 15(1) was intended to protect discrete and insular minorities. Those minorities could be further identified as persons lacking in political power. In order to determine whether a group falls within the analogous category it is necessary to look at "the

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203 QR&O, art. 102.19

204 (1989), 48 C.C.C. (3d) 8 (S.C.C.).

context of the place of the group in the entire social, political and legal fabric of the society."

To date there have been no cases assessing if rank qualifies as an analogous ground under the Charter. However, the question of membership in the military as a ground of discrimination has been raised in both Genereux v. R[205] and Glowczeski v. R. In Genereux the Supreme Court of Canada ruled that in the context of that appeal the accused, as a member of the armed forces, could not claim to be a member of a discrete and insular minority so as to fall within s. 15(1) of the Charter. However, the Court went on to indicate:

> I do not wish to suggest that military personnel can never be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the Charter. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status....[206]

Therefore Genereux left open the door that membership in the military could be the basis of discrimination under the Charter.

In Glowczeski, after commenting on the lack of training of CF personnel in the principles of fundamental justice, and the lack of any provision for interim release from custody pending the review by an independent and impartial tribunal, the Federal Court Trial Division ruled that the applicant's rights under s. 15(1) of the Charter were breached. The

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205 (1992), 70 C.C.C. (3d) 1.

206 Ibid. at 70.

useful of both of these judgments are limited because of the lack of analysis setting out why membership in the military constituted a "discrete and insular minority".

3. Analysis

(a) Discrimination on the Basis of Rank

It is considered unlikely that discrimination on the basis of rank will ever support an argument that an accused's s. 15(1) equality rights are breached. Rank is not a personal characteristic. Rank is not immutable as is indicated by the inclusion of reduction in rank as a punishment under the National Defence Act. Rather rank is simply a sign of the professional status attained within the military organization. Similarly, while commissioned officer status historically was largely based on a class distinction, the attainment of that status is now educationally or experience based. Therefore, there appears to be no breach of an accused's equality rights to make lower ranking personnel subject to summary proceedings, as well as courts martial.

Providing trying officers with jurisdiction over more junior personnel is consistent with the goal of summary trials in correcting disciplinary faults at the unit level. Generally, it is the junior non-commissioned members and officers who need the greatest corrective action in terms of encouraging identification with the vocational requirements of military service.[207]

(b) Discrimination on the Basis of Status

In order for an accused to claim discrimination on the basis of military status that accused must be able to demonstrate adverse treatment in relation to civilians, and

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207 Watkin, Annex F, at 18-19.

membership in the military constitutes a "discrete and insular minority". Due to the lack of procedural safeguards found at summary trials an accused should have little problem in demonstrating adverse treatment in comparison to the civilian justice system.

In order to make an argument that membership in the military is a "discrete and insular minority" the accused would have to demonstrate that being in the military is a an analogous ground under s. 15(1) of the Charter. That could be done by demonstrating be "military" is a personal characteristic (immutable or deeply ingrained part of the person's character). Membership in the military could also be linked to an enumerated ground such as citizenship. In making an argument supporting membership in the military as an analogous ground reliance might be placed on the following factors: ability to resign, isolation of military society, restricted political involvement and the connection between military service and citizenship. Looking at the example given in Genereux it was indicated s. 15(1) of the Charter might apply during demobilization. For example at the end of a period of conscription. In such a case the ability to resign, restricted political involvement and connection between citizenship and conscription could all apply to make military membership a "discrete and insular minority".

However, even if it was determined that present day membership in a voluntary armed force resulted in a determination that s. 15(1) of the Charter was breached the constitutionality of that service tribunal from an equality perspective will hinge on whether the process is "fair". If there is a sufficiently strong s. 1 argument that the lack of independence and procedural fairness at summary trials a justifiable limit on s. 7 or s. 11 Charter rights then it should also be justified under s. 15 of that enactment. Similarly, the

right to elect court martial should also provide a valid waiver of equality rights. Therefore the separate system of summary trials for service members should be maintained.

4. Recommendation

RECOMMENDATION 50

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

Chapter 10

Miscellaneous

1. Dismissal

(a) Dismissal Power

The authority to dismiss a charge was reviewed in two circumstances: the lack of dismissal power for a delegated officer; and limiting the dismissal power of all trying officers in light of the recommended reduction in the number of offences over which they have jurisdiction.

The power to dismiss charges is presently provided to the commanding officer and the superior commander. A delegated officer cannot dismiss a charge.[208] This lack of dismissal power is inconsistent with the power provided to a delegated officer to try and convict or acquit an accused on that charge. Instead of dismissing a charge a delegated officer could simply try the accused and find that service member not guilty. Requiring the delegated officer to refer a charge to a commanding officer for dismissal shows an institutional lack of confidence in the judgment of delegated officers which calls into question the provision of trying authority to those officers in the first place. In addition, the intervention of a higher authority, the commanding officer, into decision making responsibility of the delegated officer raises the legal issue of improper "command influence"

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208 QR&O, art. 108.12, Note A.

(Nye v. R[209]). It is the determination of the Working Group that the delegated officer should be given the authority to dismiss charges over which that officer has jurisdiction.

Regarding commanding officers and superior commanders the recommendation of this working group (Recommendation 1) is to restrict the number offences over which those officers have jurisdiction. The effect of that recommendation will be that some offences will automatically be tried by court martial. If the commanding officers and superior commanders were able to retain their general dismissal power then abuses could occur where the trying officer could dismiss a charge over which that officer has no authority to try. Such a dismiss would preclude subsequent trial by either court martial or civilian court. Therefore the power to dismiss a charge should be limited to those offences over which the officer has jurisdiction for trial. Dismissal authority over offences which now will automatically be tried by court martial could be exercised by the convening authority.

(b) Recommendations

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 powers of a convening authority.

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209 (1972), 3 C.M.A.R. 85.

2. Supervision of Summary Trial System

(a) Responsibility

While the summary trial system is the most important and most used service tribunal in the CF it was not possible to determine which part of the armed forces is either tasked with, or actually oversees summary trials. It would appear that summary trials presently fall under the authority of DPLS, since that Directorate collects trial statistics and has been tasked with amending CFAO 19-25. However, there is no clear mandate to oversee summary proceedings.

The summary trial system, as the most important component of the military justice system, should not be an "orphan". The responsibility for overseeing summary trials should be clearly defined. Consistent with the role of the Judge Advocate General in supervising the military justice system, the responsibility of overseeing summary trials should fall directly under the authority of the legal branch. This would allow the legal status of the summary trial system to be reviewed on a regular basis. 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.

As was noted by Land Forces Command and supported by the Working Group, the supervision of the summary trial system by the JAG will require continued consultation with the chain of command. In addition, as was reflected in the problems associated with the recent amendments to CFAO 19-25 in January, 1994 no amendment should be made to the

summary trial system without appropriate consultation with the users of that system (the Commands).

b) Recommendations

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.**

3. Training and Publications

(a) Training

The lack of training for all participants in the summary trial system is a serious deficiency. While there is a rudimentary introduction to the National Defence Act and QR&O in basic training and many officers follow a self study professional development program which includes a segment on military law, there is no organized training provided in the CF on the roles and responsibilities of trying officers, assisting officers, summary trial

procedures, evidentiary matters (meaning of proof beyond a reasonable doubt, etc.), pre-trial and post-trial administration or the general purpose and conduct of summary trials. Learning about how summary trials are conducted is largely done on an ad hoc basis at the unit level. This process can obviously lead to incomplete training, and hampers the establishment of standardized procedures.

Maintaining discipline is the prime responsibility of the professional officer and senior non-commissioned member. Without a disciplined armed force tactics and weapons systems are of no use. An essential component of maintaining discipline is the summary trial system. Learning about the purpose of the summary trial system, and how to conduct summary trials should not be left to ad hoc training and self study. Training on summary trials should be integrated into all levels of officer and senior non-commissioned officer development. For example, the duties of the assisting officer should be stressed at Basic Officer Training, in the Officer Professional Development Program and at CF Staff School. The role of the trying officer should be incorporated into CF Staff College and other senior officer training. Such training should include participation in mock trials.

(b) Publications

As well as the increase in training there is also a requirement for the production of a CF publication which covers all aspects of the summary trial. At present there is QR&O, an a CFAO and ad hoc aide-memoires such as those found at Annex I. While the need for comprehensive regulations and a regularly updated CFAO are obvious there is also a requirement for a comprehensive manual outlining pre-trial and post-trial administration, the

roles and responsibilities of trying officers and assisting officers, trial procedure and trial checklists. That manual could then be used as the basis for training courses, as well as providing a reference publication at the unit level. The manual needs to be a CF publication in order to provide an updated resource tool. The need for this type of manual is obvious from the existence of aide-memoires such as the one found at Annex I. That aide-memoire has been updated three times since it was first produced in 1983. However, because it is not a CF publication there is no way of controlling whether trying officers are presently using one of the outdated aide-memoires, or a similarly deficient locally produced reference publication. Similar to the practice followed in the British Army consideration should also be given to producing a publication outlining the rights of service members subject to summary trial. That publication should be issued to all service members.

(c) Recommendations

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.

4. Charge Report

(a) Recording of Rights

The present charge report provides a useful record of the main procedural steps followed at a summary trial. However, as has been identified in this report there are deficiencies in the present summary trial process, particularly in ensuring that an accused is making an informed "waiver" of Charter rights in electing summary trial. The American "Record of Nonjudicial Punishment Proceedings" (see Annex K) provides a very useful example of how the charge report form can be used to record information indicating the accused has been informed of constitutional rights. That form outlines the rights available to an accused including the differences between a court martial and summary proceedings. It also provides a record of the accused having been advised of those rights. Provision is also made to indicate that the accused has consulted counsel. Finally the Record of Nonjudicial Punishment Proceedings operates as the appeal form. Amendments should be made to the CF charge report to allow it to provid similar instruction on rights, and as a means of recording those rights have been provided to the accused.

(b) Recommendation

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 11

Conclusion

As was recognized in Genereux, the objective of the military justice system is to enforce discipline effectively and efficiently thereby maintaining an operationally ready armed force. This objective is unique in Canadian society. In order to attain that objective service tribunals must be portable, capable of being applied universally regardless of the level of conflict, provide a speedy resolution, enhance the habit of obedience and reinforce the personal contact between commanders and their subordinates. In choosing between courts martial and summary trials only the latter service tribunal provides the flexible, fast and uncomplicated form of trial necessary to maintain discipline in an armed force.

It is, however, the "summary" nature of the summary trial which leads to a conflict with Charter protected rights. The Charter emphasizes procedural fairness as a means of protecting individuals from the danger of arbitrary or abusive government action. A premium is placed on developing procedural safeguards embodied in a well defined trial structure. Detailed trial procedures, right to legal counsel, rules of evidence, records and reasons of trials, trial by independent and impartial tribunals, etc., run counter to the need of the military to have disciplinary problems resolved quickly at the unit level by the officers who are responsible for the conduct of military operations. The more complicated the procedures, and the greater the number of procedural safeguards, the slower and more administratively awkward the trial process.

The conflict between the need to ensure fair procedures, and the requirement to have a "summary" form of justice is a classic example of the weighing of interests which is embodied in s. 1 of the Charter. In assessing the constitutionality of the summary trial process it is evident the ability of that trial process to withstand Charter scrutiny depends to a large degree on the extent to which reasonable choices have been made in weighing the right to procedural fairness against the need for a swift and efficient trial process. A civilian court will ultimately be reviewing where military leaders have "drawn the line" in order to ensure a reasonable level of procedural protection has been provided to a military accused. It will be up to the military to justify any level of procedural protection which does not meet the "norm" in Canadian society.

The unique role of the summary trial in maintaining discipline, the long history of the use of summary proceedings and the recognized need for those proceedings in other free and democratic societies all point to a justification for the continued use of summary trials. In reviewing the summary trial process, however, it is evident that a number of new options are available to increase the procedural fairness available to an accused without creating an unacceptably negative impact on operational effectiveness. In other words the present level of procedural fairness can be enhanced. The enhancement of procedural fairness not only helps the summary trial meet the requirements of the Charter, but also makes that trial process better from a military perspective. The more fair the summary trial process is seen to be by service members the more likely it will continue to be chosen as the form of trial when the right to elect court martial is provided to an accused.

There are parts of the summary trial structure which may be very difficult for a civilian court to understand as being necessary to maintain discipline. In particular, the trial by an non-independent trying officer is directly opposed to civilian judicial practice. If a court is unwilling to accept there is a s. 1 justification for a non-independent trying officer, or feels other procedures are too far removed from Charter standards of fairness, then reliance will have to be placed on the right to elect court martial as a constitutional waiver of an accused's rights as well as the right to have a re-trial of any offence for which a penal consequence is awarded.

It is the conclusion of the Working Group 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, while at the same time increasing the level of procedural fairness provided in the trial process itself. In addition, the jurisdiction of summary trying officers over offences should be reduced and punishments should be more corrective in nature, reflecting the purpose of the summary trial. The enhancement of the right to elect court martial; the provision for an appeal by means of a trial de novo; the increase in the level of procedural protection; the reduced jurisdiction; and the alteration of punishments require changes to the present trial process. However, those changes are not radical in nature and do not impede the objective of summary proceedings.

The question which is left to be resolved is whether the inevitable change to the summary trial system will be imposed by a civilian court, or instituted under the control of the military. Changes can be put in place now in anticipation of the inevitable constitutional

challenge, or they can be instituted after a court, which is not fully aware of military society, has ruled the present system does not meet constitutional standards. That question really is one of the degree to which the military wants to chance relinquishing its control over the future of the military justice system.