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Canada's Military Lawyers

McDonald



Canada's Military Lawyers



Colonel (Retired) R. Arthur McDonald

Office of the Judge Advocate General

Cabinet du Juge-avocat général



In this history of the lawyers who have served Canada in uniform during peace and armed conflict, Colonel (Retired) Art McDonald provides a captivating look at the personalities who have made up the Office of the Judge Advocate General from 1911 to 2000. *Canada's Military Lawyers* also chronicles many of the landmarks in military law and the wide-ranging activities of the military lawyers during the period.

Starting with the early legal traditions inherited from the British Army and the Royal Navy brought to Canada during the colonial period, the book describes Canada's maturing into a valuable independent contributor in the field of military law. It concentrates to a considerable extent on the military justice system and its development through the decades from a relatively arbitrary forum for trying disciplinary and criminal offences into a modern system of justice with few equals in the armed forces of the world.

Besides the military justice developments, this book depicts the broad scope of roles demanded of military lawyers in virtually every area of the law. It ranges from the salons of London during the First World War to the tragedy of Somalia and portrays the events and personalities that formed Canada's history. The book also deals with legal milestones, such as the passage of the *Canadian Charter of Rights and Freedoms* and the *Canadian Human Rights Act*. While these had an impact on all Canadians, they had particularly dramatic consequences for the Canadian Forces.

This story of the Canadian Forces Legal Branch would not be complete without a description of some of the individuals who have served—from the twelve Judge Advocate Generals themselves to some of the more junior military lawyers thrust into this unique area of legal practice. Starting with the appointment of the first Canadian Judge Advocate General (JAG) in 1911, the military lawyers and support staff making up the Office of the JAG have seen times of growth, retraction and reorganization that reflected the legal services needs of National Defence. The individual anecdotes included in the book provide the human element to the story of this remarkable organization.

Anyone interested in the history of law, and particularly how the law is applied in Canada's fighting forces, should enjoy this recounting of Canada's military law, lawyers and traditions.

Colonel (Retired) R. Arthur (Art) McDonald, C.D., served in the Royal Canadian Air Force and Canadian Forces for 30 years, first seven as an Electronic Systems Officer on the antisubmarine "Argus" aircraft and then as a Legal Officer. A 1977 graduate of Dalhousie Law School, Colonel McDonald also obtained his Masters of Law degree in constitutional law from the Queen's University Law School in 1986. He is a member of the Nova Scotia Barristers' Society. His military legal career saw him serve first as a unit-level legal advisor in Halifax, Nova Scotia, and Trenton, Ontario, and then in the specialized legal directorates at National Defence Headquarters in Ottawa, Ontario. His main areas of expertise in the Canadian Forces were human rights law and information law. Prior to his retirement in 1995, Colonel McDonald headed the Legislation division and later the Litigation division at JAG Headquarters. He is also the author of several published articles, including two on Canadian military legal history, and is a frequent contributor of book reviews to *Maritime Patrol Aviation* magazine. Since retiring from the Canadian Forces to Nova Scotia's Annapolis Valley, Colonel McDonald has been involved in mediation, including serving a term as President of the Valley Community Mediation Society, headed a study on the provision of defence counsel services in the Canadian Forces, and acted as a consultant on regulatory changes. He is married with one daughter.

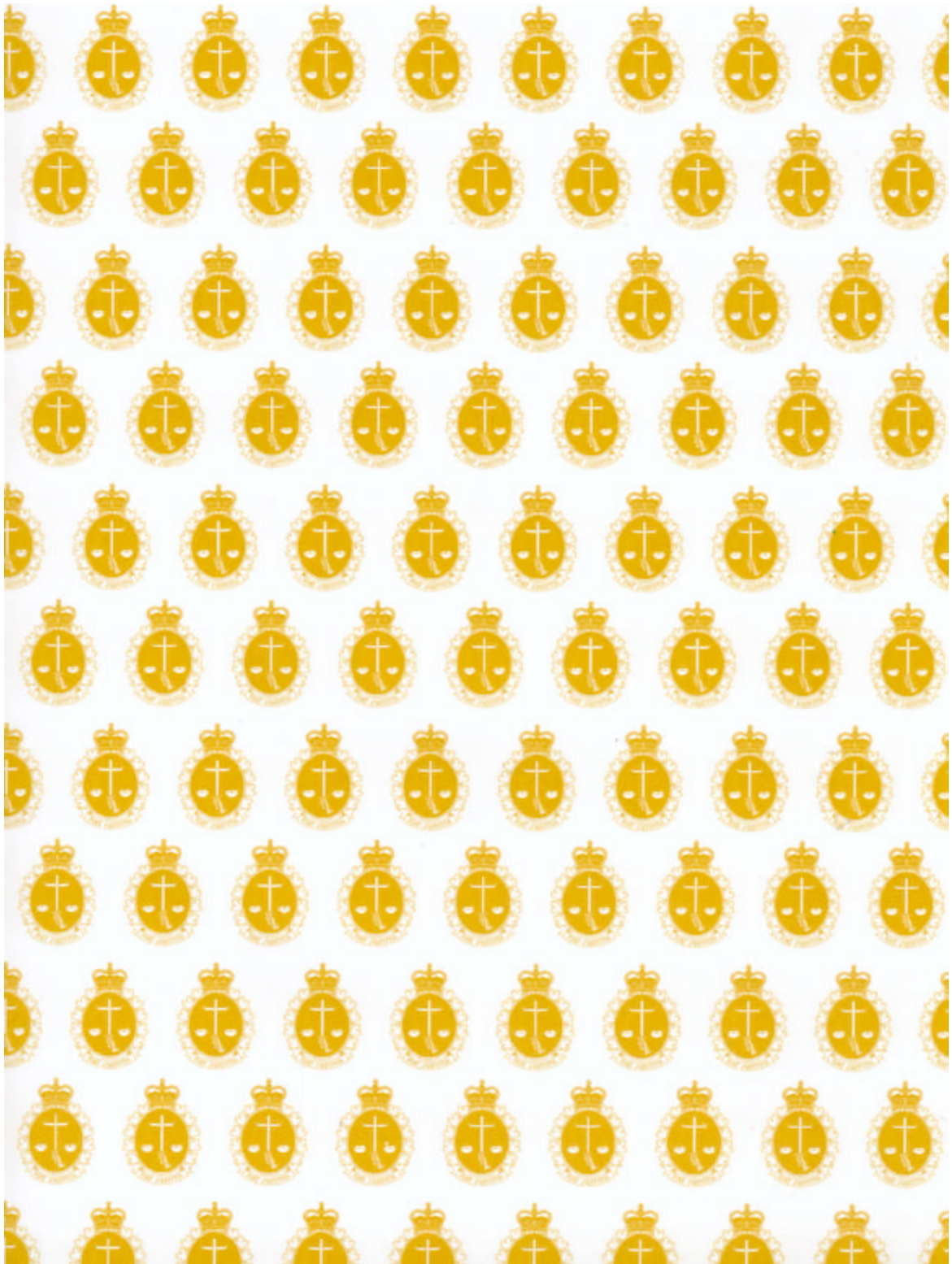
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Table of Contents

Foreword	vii
Preface	viii
Acknowledgements	x
Chapter 1. Foundations	1
Development of British Military Law	1
The British Judge Advocate General	9
Development of Canadian Military Law	12
Chapter 2. Beginnings	15
The Canadian Judge Advocate General	15
The Great War	17
Overseas Discipline	18
Lawyers and the War	21
Formation of the Legal Branch	26
The Successor	28
Developments in Canada	30
Siberia	32
Demobilization and a Change of JAG	34
Military Justice Activity	36
Coping	37
Aid of the Civil Power	40
Trying Times	41
Chapter 3. World War II and Its Aftermath	45
Mobilization	45
The European Legal Team	47
Discipline Overseas	51
A Separate Overseas JAG	53
Activity at Home	54
Court Martial Centre	55
Trials of Interest	56
The RCAF Overseas JAG	58
The RCN Goes Its Own Way	60
Winding Down the War	61
War Crimes Trials	62
Adapting to Peace	66
Chapter 4. Hot and Cold War	71
A New JAG	71
The National Defence Act	73
Court Martial Appeal Board	76
The Korean War	77
Expanding Duties	83
Courts Martial	87
Traditional and Unusual	89
A New Decade	90
Discipline Developments	91
UN Duty	93

TABLE OF CONTENTS

DPLS	95
Outside Canada	96
Change	99
Transfer of Responsibility	99
Chapter 5. Revolution and Evolution	103
The October Crisis	103
New Blood	105
Change at the Top	109
Court Reporters	110
Military Justice	112
The Creation of the JAG Reserve.....	114
A Veteran Takes Over.....	115
Branch Routine.....	117
The Human Rights Era	119
Human Rights Tribunals.....	122
Access to Information Challenges	125
New Leader.....	126
Charter Developments	128
The JAG Identity.....	129
Continuing Trials.....	130
Changing of the Guard	132
Updated Reserves	134
Decade's End	135
Chapter 6. Pride, Shame and Change	137
Summer of Unrest.....	137
Persian Gulf War	138
Change at the Helm	143
The Charter and Courts Martial.....	146
New Roles	150
From Military Judge to JAG.....	152
Somalia	154
Military Justice Changes	163
Human Rights	166
Balkans Conflict	167
Other Operations	173
Fish Fight	179
Last JAG of the Millennium	179
The New JAG Organization	182
Conclusion.....	187
Notes.....	189
Appendix A. Canadian Judge Advocates General	199
Appendix B. JAG Organization Charts	201
Appendix C. Faces Over the Years.....	207
Bibliography	225
Index	231

Foreword

It is with great pride and pleasure that I write this foreword. This excellent book is well worth reading for a number of reasons.

At the outset it reviews the origins of military law and justice. It refers particularly to the time of the war between the Parliamentary and royalist forces over 350 years ago. It is fascinating to learn that both sides in that conflict set forth a code of conduct for their armies.

Equally important is the careful review of the evolution and development of military justice in Canada. There is no attempt made to downplay the tragedy of Somalia. However, the improvements made to the system thereafter are also thoroughly documented.

More than anything else the book demonstrates the great talent and skill of those who have held the office of Judge Advocate General and indeed all the personnel of this branch of the armed forces. All members of the branch have diligently applied their considerable talents to the great benefit of the Armed Forces and to Canada. Their dedication is exemplary. The book makes it very clear that the Judge Advocate General's branch will provide a magnificent opportunity to skilled and dedicated young men and women to serve their country in a very responsible role.

The Honourable Peter Cory, Q.C.

Preface

The role of professional legal officers in providing advice to military commanders has a long and eventful history in armed forces around the world, particularly those that trace their roots back to British military traditions. Canada is no exception. The Court of Chivalry, the Lord High Constable, the appointment of the first Judge Advocate General in 1666 and the appointment of the first Canadian Judge Advocate General in 1911 are integral parts of our nation's military and legal history.

This history provides the underpinnings for today's Canadian Forces Legal Branch, a diverse and dynamic group of legal professionals with expertise in the full range of legal disciplines that fall within the scope of what is commonly referred to as military law. Today's legal officers carry on the traditions of their predecessors, traditions that have seen Canadian legal officers support military commanders through two world conflicts, international policing and peacekeeping operations and in the daily operations of a multi-purpose combat capable military force both at home and abroad.

This book creates a record where none has previously existed, telling the story of Canadian legal officers and our nation's deep-rooted military justice traditions. It provides an overview of the Office of the Judge Advocate General and the significant events that have involved the Office from its creation in 1911 to the end of the millennium on December 31, 1999. It does not purport to be the definitive history of Canadian military law or even an exhaustive review of the functions of military lawyers over the years; rather, it provides a sense of the times and recognizes the valuable work of all those who served the cause of military law during the twentieth century.

The reader of this story will see how the role of the legal officer has evolved from that of a military justice specialist throughout most of the first half of the last century to today's reality where the military lawyer is essential to combat capability. The reader will be exposed to many of the personalities that in their own unique ways have shaped the legal branch of today. Finally, it is hoped that the reader will come away with a real sense of the fascinating and challenging work performed by lawyers in uniform and their commitment to the values and traditions of our society and the Canadian Forces.

While of necessity, much has been omitted from this history it does recognize the officers, and those who supported them, who have selflessly served their nation in promoting fairness, justice and integrity in the conduct of Canada's military affairs over the last century. The commissioning of this history reflects the deep respect and admiration that is held for those who have gone before us—this is only just.

Fiat Justitia (Let Justice Prevail)

Major-General Jerry S.T. Pitzul, C.M.M., C.D.
Judge Advocate General
Ottawa, Ontario
2002

Acknowledgements

Work such as this is not the effort of a single individual. It has taken the cooperation of many to bring it to fruition. In particular, Major-General Jerry Pitzul, the Judge Advocate General, was the driving force behind the project and provided guidance and review during its development. Brian Grier, the researcher in the JAG library, has put up with many a request for just one more bit of information. Also deserving of special mention is Lieutenant(N) M.L. Geiger-Wolf. She eagerly delved into the Manitoba archives for the diary material on Colonel Dennistoun. Lieutenant-Colonel Mario Léveillé kindly provided a considerable amount of research material he had already accumulated. Francis Yergeau of the Directorate of Law/Training was a great help in scanning pictures and providing the graphics design for the cover. Despite their heavy workloads, Ms. Liz Lundy, Ms. Sharon Dujay, Ms. Madeleine Warden, Ms. Carole Renaud and the rest of the staff at JAG headquarters responded magnificently on the frequent occasions when I requested help. Numerous members and former members of the Legal Branch who took the time to provide interviews or to send information and pictures from their time in the Branch deserve a tip of the hat as well.

The very professional staffs in the National Archives of Canada, the National Defence Directorate of History and Heritage and the JAG Library were a major source of assistance in digging out the myriad details needed for the book. Furthermore, special mention must be given to those who reviewed the original draft and provided comments that, hopefully, have resulted in a much-improved final version. These included Dr. Chris Madsen, a military historian currently with the Canadian Forces College and author of *Another Kind of Justice*, Dr. J.L. Granatstein, noted historian, author and former Director and CEO of the National War Museum, Dr. Stephen Harris, Chief Historian of the National Defence Directorate of History and Heritage, Commander (Retired) William Fenrick, C.D., military author and a senior legal adviser to the International Criminal Tribunal for the Former Yugoslavia, Captain(N) William Reed, O.M.M., C.D., of the Office of the Judge Advocate General and Colonel Kenneth Watkin, C.D., of that Office. I would also like to acknowledge the editorial work done by the team in the Directorate of Law/Training: Lieutenant-Commander Guy Phillips, Major Martin Côté, Lieutenant(N) Alexandra Johnson and Véronique Piché-Lebuis. Last, but not least, my wife, Sharon, deserves thanks for the hours she spent proofreading the drafts and making sure they were reasonably readable by those who are not historians or in the legal profession or the military.

R. Arthur McDonald, C.D.
Canning, Nova-Scotia
April 2002

Canada's Military Lawyers

Chapter 1. Foundations

The mosaic of cultures, languages and traditions that was Canada at the end of the twentieth century was founded on a much simpler triad of nations: First Nations, France and Great Britain. However, since Wolfe defeated Montcalm on the Plains of Abraham, British military structures and traditions have dominated the Canadian martial culture. To understand why Canadian military structures, including those concerning military law, exist in their current forms one must revert not only in time but also in place—to England in the eras of Chaucer, Shakespeare, Cromwell, and Victoria. There lie the foundations of the Canadian military institutions and traditions.

Development of British Military Law

If you are a romantic and dream of bygone days of glory, the realities would soon change those dreams to nightmares. Feudal times were not just kings and knights charging into battle on majestic warhorses under the adoring eyes of fair maidens. For the majority of the population they were dreary days of toil from dawn to dusk in order to eke out a marginal living. Most of what was produced ended up being paid in taxes to those knights and kings. Poverty and disease were constants. Sanitation was a lengthy and unknown word. However, there was an occasional break from the mundane when the trumpets of war blared their calls to arms. Then it would be off, on foot for the most part, to whatever battlefield your lord desired and to fight on whichever side he chose. The result might be death, maiming or glory.

When a group of armed men were called together to fight for a cause, there was always the problem of ensuring they would fight the enemy and not each other, if they would fight at all. For a military force to be successful, it also had to fight as a unit under the direction of a leader who understood the campaign's objectives. In other words, the force had to have discipline. The means of enforcing that discipline among soldiers and sailors, and later airmen and airwomen, is the central focus in the story of military law.

In the centuries immediately following William the Conqueror's conquest of England in 1066 there was neither a Royal Navy nor a standing army. The main function of ships was to transport troops to the locations where they were to fight. When the King needed a navy he would requisition commercial vessels or fishing boats, as needed, to provide the transport. The troops on board would constitute the ship's fighting force. For heinous offences, discipline onboard was maintained by means of Articles of War issued by the King. The ships' Captains would deal with the minor problems according to the laws established by the maritime courts located at the major seaports or else in accordance with the "customs of the sea." These customs, which were generally accepted in the "civi-

lized" world, had been developed over the centuries by the major seafaring nations. The punishments would make today's concepts of cruelty appear kind.¹

In the days when drawing and quartering, branding and public flogging were common for the most serious civilian offences on English soil, naval punishments had their own unique aspects. For instance, a shipboard murderer might be tied to the corpse and thrown into the sea. A lesser offender might be hauled underwater from one side of the ship under the keel and up the other side. While this latter punishment might sound unpleasant, it was even more dangerous than it sounds due to the razor-sharp barnacles that infested the hulls of the ships. More minor offences might make the miscreant subject to a flogging, a loss of grog (rum), or other punishments appropriate to a nautical setting.

As centuries passed and the concept of an all-powerful monarch in England evolved into a monarchy subject to the will of the people as expressed by Parliament, the means of prescribing naval discipline also changed. When Charles I insisted on his "Divine Right of Kings" and eventually lost his head in 1649 as a consequence of the Civil War that started in 1642, Parliament took over the task of specifying the process for trying wayward sailors. It first codified the rules for naval discipline in 1645 and amended them twice afterwards.² In 1661, after the restoration of Charles II, Parliament again passed a statute governing naval discipline to replace the abrogated statutes of the earlier Parliament.³ For matters beyond the scope of the Captain's disciplinary powers it modified an earlier system of trial known as Councils of War and created instead "courts martial."

These hearings were not the criminal trial by one's peers that could be expected in a civilian setting. A tribunal composed of naval officers would hear the evidence and act as both judge and jury. The number of officers required to be on the panel depended on the type of trial. The consequences could be severe, depending on the nature of the offence. Even members of the elite were not exempt. The Captain of a ship involved in a grounding or a failure in combat was likely to find himself hauled up before such a tribunal. Over the next two centuries the naval law was expanded and modernized until the last major codification in 1866,⁴ the year before the birth of Canada. This 1866 version and its amendments regulated British and Canadian naval discipline well into the mid-twentieth century.

While the navy was safely off on the bounding waves defending the country's shores or increasing its wealth by seizing the ships of hostile nations, any army stationed in England was always more problematic. It might be used against the existing power structure and would almost invariably inconvenience the local citizenry. Some of the most fundamental declarations of rights in English law resulted from the difficulties with forcefully billeting soldiers with the civilian population.⁵ As a result, the average citizen, as well as the average lord, was most anxious to make sure that the soldiers would be subject to the jurisdiction of the civil

courts so that they could be charged with criminal offences or sued for civil liability in peacetime.

Up until the 17th century, the discipline in the armies of England was maintained through a combination of civil law and Articles of War. Although there were local militia, no standing armies existed. An army would only be assembled at the call of the King (or someone challenging the King) for a specific campaign. The army would then be dispersed at the end of the campaign. Therefore, the local and civil laws would deal with problems when no war was being fought. In times of conflict the King or his Commander-in-Chief, the Lord High Constable, would issue Articles of War to maintain the discipline of the army during the campaign.

In this early period of approximately the 11th to 15th centuries there existed a court called the Court of Chivalry (also known as the Court of the Constable and Marshal) to try matters of honour, civil matters such as contracts made outside the country and military offences committed outside the country that were beyond the jurisdiction of the common law courts. The Lord High Constable and his second-in-command, the Earl Marshal, were members of this court. The Court of Chivalry fell into decline over the years as its jurisdiction was restricted. Its principal officer, the Lord High Constable, permanently disappeared when Henry VIII beheaded the incumbent, the Duke of Buckingham, in 1521. The Earl Marshal took over responsibility for the trial of military offences. The system of trial, the court martial (Marshal's Court), took its name from his office.

During the civil war in England that began in 1642, both the parliamentary army and the royal forces were governed by Articles of War issued by their respective authorities. When Charles II took the throne in 1660 after the interregnum, he created the first standing army in England. This innovation caused considerable concern in Parliament. When the Catholic James II succeeded to the throne these concerns were magnified. Parliament feared James would use the army to re-impose Catholicism on the country. Therefore, as a condition of offering the throne to William of Orange and his wife Mary upon the abdication of James II in 1688, Parliament insisted on their approval of the *Bill of Rights*⁶ that, among other things, outlawed standing armies in England in times of peace without the approval of Parliament. In other words, soon after standing armies came into existence, Parliament ensured that it was in ultimate control of those forces.

There is nothing like a good mutiny to stir the indignation of politicians. It was only after the first standing army was created that Parliament became painfully aware that you have to maintain discipline in the forces in peacetime as well as during a war. The civil law was no longer adequate. Soon after William and Mary took the throne there was a mutiny in a regiment bound for Ireland to fight the invading James II, as well as several other challenges to military authority. Parliament responded with the passage of the first *Mutiny Act*⁷ in 1689. Once Par-

liament got the bit in its teeth, there was no turning back. Over the next two centuries Parliament expanded its jurisdiction to include control over Articles of War that had been the King's prerogative. It also increased the number of offences and the territorial locations to which the *Mutiny Act* applied. These complementary authorities were finally combined in one Act in the late 19th century. After some fine tuning,⁸ the *Army Act* of 1881⁹ was the finished product. It formed the basis for the discipline of the British Army well into the twentieth century. When the Royal Air Force came into being in 1917, its discipline provisions¹⁰ were basically a re-wording of those in the *Army Act*.

The military justice system in the 19th and early 20th centuries was designed to impress on the offender the seriousness of failing to maintain proper discipline. There were swords clattering, accused without hats, and marching escorts. Only the swords have disappeared. The system was more properly one of military discipline rather than military justice at that time, although the hope was that the two would coincide in most cases.

The Commanding Officer (CO) of the army unit or the Captain of the ship was the central figure to whom all looked for guidance. Officers were expected to lead their men and to make sure they were ready to fight. This meant looking out for their welfare, developing loyalty to the unit and instant obedience to orders, rewarding those who performed well, and ensuring anyone who got out of line would regret it. The discipline system was the tool designed specifically for this last duty. The hand at the control was that of the CO or Captain.

Logically, the first requirement when determining whether the discipline system should be applied was determining whether anyone had committed an offence. The *Army Act, 1881*, and *Naval Discipline Act, 1866*, set out a list of offences that covered just about anything a soldier or sailor could do wrong. There was even a catchall article (often referred to as the Devil's Article) that made it an offence to do anything prejudicial to good order and discipline.¹¹ This included breaking any of the myriad regulations and orders that govern the military lifestyle.

Just doing the proscribed deed did not automatically mean you had committed a military offence. You also had to be subject to military law when you did it. This meant that the alleged offender had to have committed the act or omission within the territorial jurisdiction of the service and under circumstances that made the military law applicable. The territorial jurisdiction of the navy and army disciplinary codes changed over the years from the limited application of the first *Mutiny Act* to the point where they could be applied anywhere in the world. While determining when members of the permanent military forces were subject to military law was relatively straightforward, it could be much more difficult where part time soldiers, such as members of the militia, were involved.

The military tribunals were not the first option in developing disciplined and effective fighting forces—they were the last. The best way to bring the unit into fighting trim was through good training and leadership. Soldiers or sailors who had confidence in their ability and wanted to carry out their duty were much more likely to succeed than those who merely did so because they were forced. A verbal blistering from the Sergeant or a weekend assigned to kitchen detail would resolve most minor lapses. Only when things got a little more serious or the offender did not learn from his mistakes would there be a resort to the more formal system of trial and punishment.

The heaviest weapons in the military justice arsenal were, and remain, the courts martial. But, just as you would not use artillery to combat a single soldier, you would not use a court martial to try someone for not saluting. The type and complexity of the tribunal had to fit the seriousness of the offence—hence the summary trial.

By the beginning of WWI, when a soldier was alleged to have committed a minor breach of discipline a superior would charge him with an offence under the *Army Act*. The commanding officer would then have to conduct an “investigation.” This involved the accused being marched before him, usually in the morning and only if the accused was completely sober.¹² The witnesses against him then stated their evidence. The accused could ask for the evidence to be given under oath if he wished. The accused would be allowed to cross-examine the witnesses, give his own side of the story and call his own witnesses.

After all the evidence was in, the CO would have to decide whether to dismiss the charge, deal with the matter summarily under his own powers of punishment, or have the evidence written up so that the case could be forwarded for trial by a superior commander or a court martial. If the CO decided he could deal with the case summarily but would award something more than a minor punishment (e.g. detention or a deduction from pay rather than confinement to barracks or extra guard duty), he would have to give the accused the option of a trial by District Court Martial. The CO could also delegate some of his powers to his subordinate commanders for the lowest levels of offences not involving non-commissioned officers.¹³ If the matter was too serious for the CO or if the accused had elected trial by court martial, the written summary of evidence, along with a request that a court martial be convened, would be sent through the chain of command to an officer with the power to convene such a court.

Although the CO could deal with most matters, he did not have the power to award a summary punishment to those in the non-commissioned officer (NCO) ranks or to officers holding a commission.¹⁴ These would be sent to a superior commander for summary trial or else recommended for court martial. Even a superior commander was limited by the rank of the member. For anyone above the

rank of Major there was no choice. The case had to go to a court martial if it was to proceed.

In the army, the most powerful court was the General Court Martial. No offence or punishment under the *Army Act* could escape its all-encompassing jurisdiction. However, General Courts Martial were a major drain on time and high-ranking officers. A General Court Martial held in the UK, India, Malta, or Gibraltar had to have a minimum of nine officers on the panel and they all had to have held their commissions for at least three years. Outside these areas, there had to be at least five officers on the panel. There were also rank requirements. Five or more of the members had to be Captains or higher rank. If an officer was being tried, all the members had to be of an equal or higher rank to the accused (presumably to avoid a conviction based on personal chances of promotion). A number of officers were also disqualified from sitting on a court martial. These included the officer who convened the court, the prosecutor, witnesses for the prosecution (but not apparently a witness for the defence), officers involved with the investigation of the case, etc.¹⁵ Considering the limited number of officers that would normally be available for duty on a court martial panel, this type of court was reserved for trial of the most serious offences or for officers.

Despite the occasional flagrant lapse in judgement, armies do tend toward practicality whenever possible. The trial of alleged offenders is no exception. To avoid the serious drain on senior officers necessitated by a General Court Martial, and the impossibility of obtaining sufficient numbers in some cases, the army developed the Field General Court Martial. As the title suggests, it was designed to deal with serious offences that needed to be tried in areas where it would be impractical to hold a full-blown General Court Martial. In the British military mind of the early twentieth century, it would always be practical to hold a General Court Martial in Britain, India, Malta, or Gibraltar. Outside those territories, the practicality was more open to question. If a convening officer was of the opinion that a General Court Martial was not practicable, he could authorize a Field General Court Martial instead. While this truncated court could exercise all the powers of a General Court Martial, it normally only required three officers on the panel. This could go as low as two if the convening authority was of the opinion that three officers were not available. The court's sentencing powers would be restricted to less than two years imprisonment or three months field punishment in such a case.¹⁶

The next level down from the General (or Field General) Court Martial was the District Court Martial. It could not try an officer nor could it award penal servitude. Five officers normally sat on its panel except outside the four geographical areas mentioned above. Then only three officers were required.

The lowest level, the Regimental Court Martial, could be initiated by a Commanding Officer. It was composed of three officers, usually from the accused's

unit, and could not try an officer or award punishments of death, penal servitude, imprisonment for more than 42 days, or discharge with ignominy. This type of court martial was abolished in 1920 because the powers of this court were not sufficiently different from those of a commanding officer at a summary trial to warrant the added complexity.

The navy had a less complicated system. The Captain or a delegated officer, usually the Executive Officer, would hold the summary trial. There was only the "Court Martial" to deal with the most serious offences and, later, the "Disciplinary Court" to handle the remainder of the cases that were beyond the powers of the Captain. The latter court was first created in 1915 and used during wartime only to try naval officers for purely disciplinary offences not considered sufficiently serious to justify a full court martial.¹⁷

Until 1829, the prosecutor at an army court martial was the Judge Advocate. This is the same person who was required to provide legal advice to the court. In the early nineteenth century there developed an understandable concern that this dual role might lead to an appearance of conflict of interest when the Judge Advocate was giving his legal advice. Even if the Judge Advocate was of the highest character and always fair in his advice, there would be the appearance, particularly from the accused's perspective, that the advice would be to the benefit of the prosecution. As a result, the 1829 Articles of War relieved the Judge Advocate from this burden to a limited extent. He was no longer required to act as the prosecutor, although there was no law preventing him from doing so. It was not until 1860 that the law was changed to require the Judge Advocate to act impartially and to prohibit him from prosecuting.

While desirable, it was not even essential that a Judge Advocate be a qualified lawyer. He merely had to be a "fit person" and "should possess some acquaintance with military law and the rules of evidence."¹⁸ For that matter, it was not even obligatory to appoint a Judge Advocate for District Courts Martial or Field General Courts Martial, only for General Courts Martial. The authority to appoint a Judge Advocate rested either with the officer who convened the court or, in some cases in Britain, the Judge Advocate General. The Judge Advocate was required to be free of any bias and certain people, such as witnesses for the prosecution, were excluded from acting as the Judge Advocate at a court martial. However, the relationship between the Judge Advocate and the rest of the military justice system was much closer than was the case at the end of the twentieth century.

Part of the distinction between a Judge Advocate and a civilian judge concerned the control and authority that each had over a trial. In a civilian court, the judge presides over the case and has complete control over the proceedings. However, in the past it was the military officer appointed as President of a court martial who controlled its proceedings and it was the panel itself that decided both inno-

cence or guilt and any sentence that might be awarded. The Judge Advocates were advisers to the court in matters of law and procedure. Even then, the Judge Advocate's legal advice could be ignored if the court had sufficient reasons for doing so and was willing to put those reasons in writing. Fortunately, few courts were so daring. In reality, the President would allow the Judge Advocate to control the court martial in most cases as he was usually the only one, other than the counsel, with trial experience.

From 1860 until 1881 the prosecutions at courts martial were presented by line officers assigned by the authority that convened the court martial, as there was no authority to have legally qualified counsel do so. After the 1881 changes in rules under the *Army Act*, legally trained counsel could be used as prosecutors under certain circumstances. They could only do so at General or District Courts Martial, but not at Regimental Courts Martial. The convening authority decided whether counsel was needed in a particular case. Normally, he would only appoint a lawyer as prosecutor for a particularly complex trial. To be fair, if the convening authority was going to have the case prosecuted by legally trained counsel, he had to notify the accused at least seven days in advance so that the accused could hire his own legal counsel.

Before the late nineteenth century, an accused had better be quick witted and well spoken if he hoped to have an effective defence at a court martial. Although the Judge Advocate was expected to look out for the interests of the accused and to ensure that he received a fair trial, this could not have generated much satisfaction for the accused during the period when the Judge Advocate was also the prosecutor. An accused could always hire a civilian lawyer on those rare occasions when the trial was in a location where civilian lawyers were available and the accused could afford one. However, the defence counsel would only be able to prepare the defence in writing and suggest questions for the accused to ask. One British author put the rationale as follows:

For Lawyers being in general as utterly ignorant of Military Law and practice as the members of courts martial are of civil jurisprudence and the forms of ordinary courts; so nothing could result from the collision of such warring and contradictory judgements, but the inextricable embarrassment or rash, ill founded and illegal decisions.¹⁹

In one American case in 1809, the Commanding General refused to approve the proceedings due to the involvement of defence counsel. He stated, in part:

Shall Counsel be admitted on behalf of a Prisoner to appear before a general Court Martial, to interrogate, to except, to plead, to teaze, perplex & embarrass by legal subtilities & abstract sophistical Distinctions?

Were Courts Martial thrown open to the Bar, the officers of the Army would be compelled to direct their attention from the Military service & Art of War, to the study of law.

No one will deny a prisoner, the aid of counsel who may suggest Questions or objections to him, to prepare his defence in writing—but he is not to open his mouth in Court.²⁰

As the nineteenth century progressed and concerns grew in Britain about the fairness of the court martial system, the attitudes toward help for the accused relaxed somewhat. The accused at a court martial had the right to have a “friend” assist him. Sometimes this would be an officer or an expert of some sort. When the rules on counsel were relaxed, lawyers were included. The advantage of having a lawyer after 1881 was his ability to speak on behalf of the accused. He could question witnesses and make representations to the court on behalf of the accused. Except for officers subject to military law, any “friend” of the accused who was not a lawyer was restricted to providing advice and giving suggestions. The accused would still have to do all the talking. As the Canadian Militia used the British laws and practices, it also had the same rights and limitations with respect to counsel.

Between the summary powers of the Royal Navy’s Captains and British Army’s commanding officers and the broader jurisdiction of the courts martial, the British forces had a full range of options to enforce discipline among their occasionally wayward members. As children inherit from their parents, the colonies were heir to these centuries of growth in British military law.

The British Judge Advocate General

Military courts historically have depended on military officers to administer them and to sit in judgement. Not surprisingly, the competence and levels of knowledge of these officers concerning military law has tended to vary widely. Therefore, to ensure that his military officers were properly dispensing the King’s justice, an official was appointed to oversee these trials. This official became the “Advocate of the Army” with the development of courts martial and later, in 1666, the first “Judge Advocate General” (JAG) to be known by that title was appointed—Dr. Samuel Barrow.

The JAG needs to be distinguished from the Judge Advocates mentioned earlier. Judge Advocates were the individual legal advisers to courts martial at the trial itself. As far back as the Court of Chivalry, a Judge-Martial, the predecessor to the Judge Advocate, would attend to provide advice on the civil law applicable to the case and to superintend the proceedings. He had the responsibility of arranging for the summoning of courts martial and administering the oaths to witnesses.

The JAG, on the other hand, was a more senior appointment. He was responsible for assigning Judge Advocates to courts martial, as well as for the legal review of General Courts Martial once they were completed. If the review raised concerns about the legality of the proceedings, the JAG would make submissions to the Sovereign as to the action that should be taken to resolve the matter. Until 1806, the JAG would make his submissions to the Sovereign through the Secretary of State for War. That year the JAG was made a member of the Privy Council. While this gave the JAG direct access to the Sovereign instead of having to go through an intermediary, it also made the office a political one. As a result, a Member of Parliament was selected to hold this office and the office-holder changed with each change of administration.

Operational commanders in the British Army were like any other authority—they did not like to have their decisions questioned. This was especially true where the person doing the questioning was not himself a military officer. Therefore, there was frequent friction between those at Army headquarters (known as the Horse Guards) and the JAG over the jurisdiction of the latter. One of the principal irritants in the latter part of the nineteenth century was the JAG's role in overturning court martial decisions based on points of law. The Army administrators (especially the Commander in Chief, the Duke of Cambridge) were of the view that the JAG was only an adviser on legal matters. Consequently, he had to give advice such as a recommendation for quashing a court martial decision to the Commander in Chief. It was then discretionary on the part of the Commander to accept or reject this advice in presenting the case to the Sovereign. The alternate view was that the JAG was acting on behalf of the Sovereign in such cases and could directly order a commander to quash a decision. The Letters Patent appointing the JAG were capable of interpretation either way.

There was also considerable controversy over the political status of the JAG during this period. Holding a political office as well as a judicial one at the same time in relation to the same subject matter was seen as being of questionable propriety. To meet this growing concern, the Office was once again made non-political in 1892. From then until 1905 the President of the Probate, Divorce and Admiralty Division, Sir Francis Jeune, held the position. In 1905, the chain of authority was clarified in the Letters Patent by making the JAG a permanent official subject to the orders of the Secretary of State for War. The issue had come full circle back to its 1806 position.

Changes to the JAG's responsibilities and organization were far from over. As usual, money played a large role. At the end of the First World War the JAG organization had only a civil side responsible for providing Judge Advocates for courts martial and reviewing court martial proceedings. However, there was a proposal to create a separate legal service for the army and the air force. These organizations would take over the responsibility for pre-trial advice and preparations for courts martial, while the JAG would retain responsibility for the judicial

aspects during trial and for post-trial review. Treasury Board turned down this proposal for financial reasons. The result was the creation of a Military and Air Force Department within the Office of the JAG. Although this organization was nominally under the control of the JAG, the incumbent gave it virtual autonomy in order to ensure that its activities remained separate from his more-judicial ones.

The JAG organization was devoted almost entirely to military discipline. The Military and Air Force Department provided advice to commanders in the field and prepared and prosecuted courts martial. They also provided a legal member for significant Courts of Inquiry. Although a legal opinion might be sought on a rare occasion on a purely military question, the JAG was not the generalist lawyer for the armed forces that he had become in other countries such as Canada. Contracts and other civil issues were referred to the Treasury Solicitors instead.

In the mid-1930's the JAG's Office came in for intense public scrutiny as a result of some court martial cases that attracted the attention of the press and, therefore, Members of Parliament. The government of the day set up a committee (the Oliver Committee) to examine any injustices that might have resulted from the way in which the Office of the JAG was organized. While it did not find any, it did acknowledge a problem with public perception and recommended changes to separate the JAG's role from those concerning the preparation and prosecution of courts martial. Among the recommended changes was the separation of the Military and Air Force Department from the Office of the JAG. In addition, to enhance the perception of that office as being of a judicial nature, it was recommended that the JAG be made responsible to the chief judicial authority, the Lord Chancellor.²¹ Although general agreement was soon reached at the political level as to the changes that should be made, implementation was to be delayed for years as a result of the outbreak of the Second World War.

In 1946 the issue of the JAG's status and organization rose again. A new Parliamentary committee was struck (the Lewis Committee). While it did make a number of recommendations that differed from the earlier Oliver report, it agreed with transferring the Military and Legal Services from the Office of the JAG and having the JAG made responsible to the Lord Chancellor.²² These recommendations were eventually implemented. The Directorate of Army Legal Services and the Directorate of Air Force Legal Services were created to provide legal advice to their respective ministries. The JAG now reported to the Lord Chancellor. His opinions on matters affecting his Office, while not binding on the Secretary of State for Defence, were required to be accorded the same respect as an opinion of a judge of the High Court when considered by a fellow judge of the same standing.

All of this discussion of the British JAG would not be complete without reference to his naval counterpart, the Judge Advocate of the Fleet (JAF). The earliest days

of this office are somewhat obscured in the fog of history. From 1661 the records of courts martial were required to be forwarded to the Judge Advocate of the Fleet for registration. These records included the depositions against and the defences made by the accused, as well as a narrative of the circumstances surrounding the incident. It appears that prior to 1661 each Admiral in command of a fleet may have had the power to appoint his own judge advocate who would perform the necessary duties while the fleet was on detached service.²³

In May 1661, John Fowler was issued a warrant "to repair on board ye said Fleet and from time to time attend all courts martial that shall be called on board the ship Admiral or any other in the Fleet, where you shall be present for trial of offenders trespassing against the laws of war and customs of the sea."²⁴ From then until 1884, the principal function of the JAF and his deputies was to act as legal adviser to courts martial although, like the army Judge Advocates, they also acted as prosecutors until the mid-nineteenth century. In 1884 the Royal Navy set up a review procedure to provide some assurance that the courts martial were being conducted lawfully. The Judge Advocate of the Fleet was given the responsibility for this review. In order to avoid any appearance that the JAF was reviewing his own advice, the Deputy Judge Advocate and his assistants took over the duties of providing the legal advice to courts martial and the JAF carried on his review duties separately. This system was formally recognized in 1960 when the Deputy Judge Advocate was renamed the Chief Naval Judge Advocate.

Like the JAG, the JAF was appointed by the Queen on the recommendation of the Lord Chancellor. He acted as the legal adviser to the Admiralty Board that was responsible for the functioning of the Royal Navy. As was the norm for most officials in the modern era, the duties of the JAF had also expanded over the years from just the review of court martial proceedings to cover a much broader range of legal issues, such as advice on matters arising from summary trials and advice on the criminal and quasi-criminal aspects of the law of armed conflict.²⁵

Development of Canadian Military Law

Prior to the creation of the Dominion of Canada in 1867, the colonies that eventually formed the country were protected by a combination of British regular troops and home-grown militia. The disciplinary law applicable to the British troops has already been discussed above. Colonial statutes that incorporated the British legislation and regulations controlled the colonial militia. After Confederation in 1867, the British were anxious to rid themselves of the responsibility for the defence of Canada as they had no intention of becoming involved in any future conflict against the United States on the North American continent. Besides which, stationing troops in Canada cost too much money.

The potential for conflict with the Americans was still very real. Westward expansion, the American concept of "manifest destiny" and the potential for inva-

sion by Fenians from American bases all pointed to the need for a strong military force to defend the new nation. Indeed, these factors played a large role in the creation of the nation itself. As Canada had no navy at this time and airplanes had not yet been invented, Parliament only had to concern itself with the organization and discipline of ground forces. The new Canadian Parliament's initial response was the passage of the *Militia Act*²⁶ in 1868. Once again, British military laws, and in particular the provisions of the *Army Act*, were incorporated into the *Militia Act* to control the discipline of the militia.²⁷ The *Militia Act* went through a considerable number of modifications over the years. However, until the passage of the *National Defence Act*²⁸ in 1950, the British *Army Act*, with appropriate modifications to reflect Canadian differences, was to hold sway over the discipline of Canada's ground forces.

The concept of a military defence grounded, for the most part, on part-time soldiers was to dominate the governmental thinking in Canada from Confederation until the early part of the twentieth century. A small "permanent force" was created for such things as operating schools of instruction and manning forts. But it was much more attractive to the prominent citizens of the day to have the prestige of a military commission and only perform such duties on a part-time basis than it was to have a large professional military force. Like the British when deciding to leave Canada to its own military resources, the Canadian taxpayers were not enamoured with the cost of maintaining a professional force. Although these attitudes may seem short sighted, the emphasis on local militia did have the advantages of spreading out the military funds to a large number of smaller communities and getting those communities conscious of military matters to a greater degree than might otherwise have been the case. However, it also had the disadvantage of slowing the evolution of distinctly Canadian military institutions and authorities and maintaining a high level of political patronage in military appointments.

As Canada developed its own military forces, it still relied for the most part on British leadership of those forces as well as on British military laws. Until 1904, the Chief of the General Staff was always a British General. Amendments to the *Militia Act*²⁹ that year made Canadians eligible for the position and the first Canadian was appointed. The 1904 amendments also established the Militia Council to act as the advisory body to the Minister of Militia and Defence, similar to the function of the British Army Council.

Despite these small steps toward uniquely Canadian institutions, the country still relied on British legal wisdom in military matters. Legal questions concerning military discipline were referred back to the JAG in London for an opinion. The Imperial Lion still controlled its colonial cubs. This situation existed from 1867 until the appointment of the first Canadian JAG in 1911.

The militia was not unique in its dependence on British institutions and laws. For the nation as a whole, the Judicial Committee of the Privy Council remained the supreme judicial authority for the country until 1949. Prior to the *Statute of Westminster*³⁰ in 1931, laws passed by the Canadian Parliament were still subject to being overridden if they were inconsistent with Imperial statutes.

During the nineteenth century, no distinctly Canadian navy existed. The Royal Navy was the protector of Canada's coastlines. However, in the first decade of the twentieth century there was a surge of reform with respect to Canadian military forces. In addition, Britain was in a shipbuilding race with Germany and was feeling the financial pinch in providing the naval defence of the colonies and dominions at the same time. Britain diplomatically urged the colonies to help defer these enormous costs. Rather than making a financial contribution to the building of Royal Navy capital ships, as did New Zealand, Canada opted to take over responsibility for its own naval defence. In 1910 the Laurier government introduced, and Parliament passed, *The Naval Service Act*.³¹ The Royal Canadian Navy was born. Two older British cruisers were purchased. H.M.C.S. *Rainbow* was used for the west coast defence and H.M.C.S. *Niobe* for the east coast. However, both of these were intended as training ships rather than front line defence. Like the Militia, discipline in the new navy was to be enforced by incorporating the disciplinary laws of the U.K.

Questions arose about the legal authority for enforcement of *The Naval Service Act* and its disciplinary provisions outside Canadian home waters due to restrictions contained in British legislation. Self-governing colonies like Canada were still limited by Imperial statute to legislating only within their own territorial limits. To ensure that Canadian, Australian and New Zealand authorities could maintain discipline on their naval vessels at sea, Britain had to pass specific legislation on the subject in 1911.³² However, Canada waited until the end of the First World War before adopting the British legislation. This was due to the embarrassing fact that, until that time, there were not enough senior officers holding a Royal Canadian Navy commission to hold a court martial.³³ The military situation in Canada just prior to the outbreak of World War I was therefore one of limited capabilities. A small permanent force and a part time militia governed mostly by British laws were the basis for land defence while a tiny newborn navy, also operating mostly under British laws, protected the coastlines.

Chapter 2. Beginnings

Not all lawyers are satisfied working with corporations or wish to endure the daily grind of magistrate's court or divorce applications. For those seeking a more novel career, the Office of the Judge Advocate General offered an alternative during the last half of the twentieth century. In its early years, though, that organization was too small to provide a career for more than one or two lawyers on a permanent basis. There was a large bulge in the number of military lawyers during the First World War, but these were only temporary appointments that did not survive the following peace. It was these early years, however, that set the tone for the operation of the Legal Branch almost to the end of the century.

The Canadian Judge Advocate General

The administration of Canadian military law took a distinct turn at the beginning of the twentieth century. In 1896 Laurier and the Liberals came to power. He appointed as his Minister of Militia and Defence a reformist Nova Scotia doctor, who was also a militia surgeon, Frederick (later Sir Frederick) Borden. Unlike the modern trend of frequent changes in the Defence portfolio, Borden would retain the post until the defeat of the Laurier government in 1911. His tenure was largely one of innovation and change. To begin with, Canada had a limited involvement in the Boer War in South Africa. The Canadian government, which was not keen to take on the cost or responsibility of a foreign campaign, agreed to transport Canadian volunteer units who wished to fight. However, the British were expected to pay them once there. This was a first for Canada—sending troops outside the country to battle in Canadian formations under Canadian commanders. Due to a number of perceived Canadian successes during that war, and perceived British failings, Canada developed a certain self-confidence that encouraged it to let go of Mother England's apron strings—but only with one hand.

Along with Canada's growing desire for more independence in military affairs at the beginning of the twentieth century came a corresponding increase in the complexity of the legal relationship with Great Britain with respect to the control of military forces. For instance, when *The Naval Service Act*¹ was passed in 1910 to establish a Canadian navy, the law officers of the United Kingdom questioned the authority of the Canadian Parliament to legislate discipline on the high seas. A British statute, the *Colonial Laws Validity Act*, 1865,² limited the authority of colonial governments to legislation applying within the territorial limits of the colony. Problems like this gave Borden concern that the only official source he could turn to for military legal advice was the British Judge Advocate General (JAG). To remedy this situation, and in keeping with the Canadianization of military institutions and authorities, he decided in 1911 to have a purely Cana-

dian JAG appointed. Doing so was to be one of the last actions he took as Minister due to the defeat of the Laurier government in the election that fall.

The dawning of a distinctly Canadian force of military legal advisers came on October 1, 1911. To call it a force might be somewhat of an overstatement as the only adviser was the new JAG appointed that day, Colonel Henry Smith.³ The first Judge Advocate General for Canada did not lack military experience. Born in Montreal on August 1, 1837, he joined the Militia as a Lieutenant in 1862.⁴ As with all of the Militia members, his military duties were only on a part time basis unless he was called out on active service. In his civilian capacity he had been studying law. In 1865 he completed his studies and articles and was called to the Bar of Upper Canada.⁵ The year 1866 saw him promoted to Captain and he was made the Adjutant of the 40th Regiment. These were still turbulent times just after the end of the American Civil War. That year Irish nationalists known as Fenians took advantage of the turmoil by launching raids into Canada from bases in the United States.⁶ They hoped to use any gains they made as bargaining chips to force the British from Ireland. Captain Smith was among those who helped drive them back. Smith was promoted to Major in 1871 and acted as the Brigade Major for the 6th Division in Ontario until 1876. Louis Riel and the other major players in the Northwest Rebellion of 1885 also had Major Smith as one of their foes. He was the Assistant Adjutant General under General Middleton during the campaign. Smith saw action at Fish Creek, Batoche and against the Indian Chief Big Bear. For his actions during these conflicts he was Mentioned in Dispatches.⁷

Promoted to Lieutenant-Colonel in July 1887, Smith was made the Commandant of the Royal School of Artillery and the following year became the District Officer Commanding No. 1 Militia District in Ontario. Lieutenant-Colonel Smith then held the influential post of Military Secretary at Militia Headquarters during the 1903-04 period. From then until his appointment as JAG in 1911 he was "specially employed" at the headquarters. During the course of this special employment he was promoted to Colonel in 1908. Smith was multi-talented and energetic. Not satisfied with just performing military duties, he initiated a course on military history, tactics, law and administration at McGill in 1907.

Colonel Smith had already been providing legal advice to the Minister of Militia and Defence as Military Secretary and later on special employment at Militia Headquarters. The fact that he was also a respected friend of the Minister probably did not hurt his chances when being considered for the new position of Judge Advocate General.

Organizations, or countries, born of a foreign mother inevitably diverge in their development once umbilical separation has been achieved. The Canadian JAG organization started off with a major distinction at birth—the senior official was a military officer. In this respect, the Canadian Office of the JAG more closely

resembled its American counterpart than its British ancestor. Despite the title, the first Judge Advocate General was not a General when appointed to the position, although he did attain Major-General rank later.⁸

The responsibilities of the JAG were first set out in a 1912 amendment to the *King's Regulations and Orders for the Canadian Militia, 1910*. Those orders read:

22(b). The duties of the Judge Advocate General are:

1. To review the Proceedings of General and District Courts-Martial, and, where irregularities appear therein, to report on the same for the information of the Honourable Minister in Militia Council.
2. To keep a record of the Proceedings of General and District Courts-Martial and of their final dispositions;
3. To advise convening and confirming officers on all questions relating to Military law, courts-martial and the rules of procedure, when the advice is sought through proper channels;
4. To perform such services as may be assigned to him in connection with the revision of Militia Law and the Regulations;
5. To advise the Department on questions of a purely legal nature when required to do so.

Any hope Colonel Smith might have had of a tranquil sinecure until retirement under these terms of reference was short lived. Two and a half years after his appointment Canada's military was marching to war.

The Great War

With the advent of the First World War in August of 1914, the country began to recognize its own worth. Canada went into the war as a semi-dependent dominion but developed a sense of its own identity through the teamwork needed to fight the war and the shared agony of lost sons and daughters. It finished the war confident in its ability to take a full role in the world as a mature democracy.

At the commencement of the war, all of the participants were sure of a short and victorious campaign.⁹ The common wisdom predicted that the troops would be home by Christmas. Canadians flocked to the recruiting stations in patriotic fervour, whether for Canada or the British Empire. Canada offered to send a contingent of 25,000 troops and the offer was quickly accepted. After much confusion and limited training, the first Canadians headed for Europe on the 3rd of October.

The troops were largely the part-time soldiers of the Militia as Canada's Permanent Force was still only the small core of the military apple. When called up, the Militia members were placed on "active service," thereby increasing their obliga-

tions to serve and also increasing the potential penalties for violating the disciplinary provisions of the *Army Act*. These few trailblazers were to be only the first instalment of Canadian youth to be sent to the battlefield.

Inevitably, Canada's involvement in the First World War began in legal confusion. A new organization was formed called the Canadian Expeditionary Force (C.E.F.) into which soldiers would be recruited for the duration of the war. Canada was still a loyal part of the British Empire and the Canadian Government, including the military authorities at Militia Headquarters, wanted to make this clear. When the C.E.F. was being organized in August of 1914, Militia Headquarters issued an order stating that the force would "be Imperial and form part of H[is] M[ajesty's] regular forces."¹⁰ Militia Headquarters failed to realize that "regular forces" under the British *Army Act* meant officers and soldiers who were liable for continuous service anywhere in the world. Effectively they were members of the permanent British Army. If the C.E.F. was part of the British Army, Great Britain and its Army Council had total control. However, colonial forces raised by the colony itself were only subject to the *Army Act* to the extent authorized by the colony. In other words, the colony retained control over the forces. It took over two years for Canadian authorities, including the Canadian Deputy Judge Advocate General who had been sent to Britain, to convince the British that the Canadian troops were specially formed units of the Canadian Militia and that the well intentioned Militia Headquarters' order defining them as Imperial regular forces was a mistake.

Overseas Discipline

Until the appointment of Colonel Smith as the Canadian JAG, the responsibility of overseeing the Canadian military justice system rested with the British JAG. The First World War provided an opportunity for Canada to exert full control over its disciplinary process by having courts martial reviewed by the Canadian JAG and requiring the approval of punishments to follow the Canadian chain of command. The opportunity was ignored. There was fear among the Canadian leadership of confusion in disciplinary matters when Canadian troops were serving so closely with British forces and members of both might well be involved in the same offence. To avoid this complication, Canada ceded disciplinary jurisdiction to the British authorities. The chain of command for approval of punishments awarded to Canadian soldiers ended with Sir Douglas Haig, the British Commander-in-Chief.

The deliberate intent of the Canadian Government to cede this control to the British is demonstrated by the way in which courts martial were convened. There were two possible ways of doing so. The first involved a warrant being issued by the King to his Generals authorizing them to convene courts martial. Any courts they convened would be held under the British *Army Act* and go through the British channels for review and approval. This avenue was open for the trial of Ca-

nadians because of a provision of the *Militia Act*¹¹ that made the British disciplinary legislation applicable to the Canadian Militia. The alternative was to have the Canadian Governor-in-Council issue warrants authorizing the Generals to convene courts martial. This would have made the process subject to the limitations of the *Militia Act*, which included a review of the sentence of all General Courts Martial by the Governor-in-Council. The Government chose the former method as being the most practical and least disruptive. This attitude would not survive into the Second World War.

The ultimate punishment for quite a number of military offences during the war was death. The theory was that men who were facing almost certain death on the battlefield would need the encouragement of the death penalty to ensure they would fight when ordered to do so. Twenty-five Canadians were executed during the war; twenty-two for desertion, one for cowardice and two for murder. Unfortunately, the standards of military justice were not the highest during this conflict. Although over 1,500 British barristers, solicitors and articled clerks were in the military during the war, there is little indication that their talents were used much in court martial defences. The prosecutor was most often the battalion or unit adjutant. The accused would be offered an officer to assist in the defence, but whether the officer was competent or had any legal qualifications to defend the soldier was frequently a matter of chance.

In cases where the death penalty might be awarded, apparently more care was taken to ensure appropriate representation for the accused. In a commentary by the Chief of the General Staff in 1922, he states:

In a case where the offence was one which might involve the infliction of the death penalty special provision was made to ensure that the accused was afforded the utmost assistance in his defence and every possible latitude was allowed him at his trial. In such cases it was the duty of the convening officer (i.e. the officer who directed the assembly of the Court Martial) to see that the accused had the best legal assistance available – a professional barrister or solicitor wherever possible – unless the accused himself elected to have as a “next friend” a person of his own choosing.¹²

The purpose of the death penalty had more to do with ensuring that others would not follow the member's example, particularly with respect to desertion, than the facts of an individual case. Therefore, the circumstances of discipline in the units was often more important than the particular situation of the accused in determining whether the death penalty would be carried out or commuted. This resulted in a number of cases where soldiers were executed when others with almost identical circumstances had their sentences modified.¹³

Although there was a considerable amount of Canadian involvement in the court martial process in Great Britain, the same could not be said with respect to such courts martial held in France. The British authorities were firm in their attitude

that the military law was to be carried out "solely by the Imperial Authorities acting through the [British] Army Council and the General Officers commanding the different Imperial Commands."¹⁴ However, the British JAG did assure the Canadian authorities that their interests were being well looked after and that Canadian officers were used.

During the war the majority of Canadians tried by court martial in England were tried by a District Court Martial while those in France were tried by Field General Courts Martial. In a memorandum to the Minister of Overseas Military Forces of Canada in 1918, the Canadian Deputy Judge Advocate General passed on the following information from the British Judge Advocate General:

1. Field General Courts-Martial for the trial in France of Canadian soldiers are in practice exclusively composed of Canadian Officers when the soldier is serving with the Canadian Corps, with the exception that the Court-Martial Officer attached to the Corps who is a legal expert but not necessarily a Canadian Officer is detailed to sit in cases of difficulty. When a soldier in France is serving away from the Canadian Corps with an isolated unit or detachment, the Court is not necessarily composed of Canadian Officers but endeavours are made to ensure that so far as is practicable, under the circumstances, Canadian Officers, or at least, one Canadian Officer, shall serve.¹⁵

Although this might look like Canadians had a fair amount of control over the discipline of Canadian troops, in fact the British had the last say. The reviews went through the British chain of command. If Canadian soldiers were sentenced to long terms of imprisonment by a court martial they would be committed to British prisons and would not be subject to Canadian control during their incarceration.¹⁶

The system for assigning prosecutors during the war is described in a 1916 circular memorandum from the British Deputy Adjutant General for Eastern Command:

It has come to the notice of the General Officer Commanding-in-Chief, that in many instances the case for the prosecution is very badly prepared and presented to the Court, with the result in some cases that there has been a failure to obtain a conviction and a miscarriage of justice has occurred.

It is the duty of the Commanding Officer of the accused to see that the case is properly got up, and that a duly qualified officer is appointed as prosecutor.

It is the custom of the Service for the Adjutant (or in exceptional cases some specially selected officer) to take the Summary of Evidence ... and as a rule this officer should be appointed as Prosecutor at the trial.

In cases where a Commanding Officer has no officer qualified to prosecute, he should report the fact in order that the Convening Authority may carry out the instructions laid down in King's Regulations, paragraph 573.¹⁷

Over 16,000 Canadian troops were tried under this system of military justice during the war.

Lawyers and the War

Where the Office of the JAG was concerned, you would never know there was a war on by looking at the Militia Lists of the time. For the most part this was due to the fact that the lawyers hauled into service during the war were not included under the Branch of the Judge Advocate General in those lists. Only the JAG and another officer, Colonel J.C. MacDougall, C.M.G., made it into this august category. Colonel MacDougall had joined Colonel Smith in the Branch of the Judge Advocate General, as it was then known, on November 1, 1912, on special employment.¹⁸ However, additional legal services were needed in the Militia and were provided. For one thing, each of the thirteen Military (i.e., Army) Districts in Canada had a legal adviser appointed. They went under the title of Assistant Judge Advocate General.

Patriotic fervour had not only gripped the general population in the early days of the war, it had also struck the Bar. In 1915, the *Canada Law Journal* exhorted lawyers to do their duty. It quoted an article dealing with the Napoleonic wars that stated: "Any able-bodied man, of whatever rank, who was not a volunteer, or a local militiaman, had to explain or apologize for his singularity." The *Journal* added: "We commend this last sentence to any student or any young barrister whom the cap would fit. We would again remind them that Canada is at war with Germany."¹⁹ To do its part, each edition of the *Journal* listed by province the names of those barristers and law students who had joined up. This did not last. Soon there was only room for a list of those barristers and students who were casualties.

One of the amazing statistics to come out of the war was the number of Calgary lawyers that joined. Out of a total Bar of 126 lawyers, 30 went to the front along with another 30 law students.²⁰ There cannot be many professions that can say that almost a quarter of their members had joined to fight rather than practice their profession as civilians or in the military.

In December 1914, the General Officer Commanding the 1st Contingent, C.E.F. made an application to the Army Council in London for a Canadian officer experienced in military law to be attached as a Deputy Judge Advocate General. He was to act as an advisor on the Rules of Procedure for courts martial. Although the British had overall control of discipline among the Canadians, the Army Council pointed out that the Divisional Headquarters was a Canadian unit and if Canada agreed to send an officer they would have to pay for him.²¹ In response, Canadian military authorities arranged with the head of the Canadian troops in England, General Alderson, to have Colonel MacDougall appointed to the position. This may have exceeded the expectations of the Contingent as they

had only asked for a Captain. Colonel MacDougall himself was no neophyte in war. He had seen action in the Boer War in South Africa in 1899-1900 with the 2nd Battalion of the Royal Canadian Regiment and had been the Regimental Adjutant from October to December of 1899.²²

Even though military lawyers provided advice on courts martial matters and other military discipline issues, they were not in charge of the discipline system. This was, and traditionally had been, the province of the Adjutant General and his organization. Overseas, an Assistant Adjutant General was in charge of both the discipline and financial areas. These included military law, discipline, courts martial, the Military Police, the detention of prisoners, absentees and deserters, appeals and complaints, "the Discharge of Bad Characters, [and] Resignations referred for opinion of disciplinary action."²³

As the overseas discipline cases themselves were being dealt with through the British chain of command and as other areas such as estates had their own establishments, there was no call for a significant presence of Canadian military lawyers. There was only one position with the Overseas Military Forces of Canada for a legal officer, and only three lawyers filled it over the course of the war.²⁴ The Branch of the Deputy Judge Advocate General that was established in February of 1918 at the overseas headquarters in London consisted of two people, the Deputy Judge Advocate General and a clerk.²⁵

By 1916 the Canadian Government was trying to get a grip on the organization and use of its troops overseas. Too many Canadians had died in France for the Canadian Government to continue being a mere bystander in the way its troops were used. The Minister of Militia and Defence, Sir Sam Hughes, was very much an individualist and preferred to control things with his own people and organizations. In 1916 he went too far. He paid a personal, and extended, visit to England in the late summer and, while there, established an Acting Sub-Militia Council to oversee the Canadian troops in Europe. The Council still reported to him as Minister of Militia and Defence. By setting up this Council he stepped on the toes of the Prime Minister, Sir Robert Borden, and the rest of the Cabinet. At that time a plan was being developed for an overseas ministry that would perform the same function. When Hughes finally got back to Canada, he found that many of his ministerial functions had devolved to others and the plans for an overseas ministry were well along the way. When the Canadian High Commissioner in London, Sir George Perley, was named the new Minister rather than Hughes' own preference, Sir Max Aitken, Hughes sent a very intemperate letter to the Prime Minister criticising his actions in setting up the ministry. After chastizing Hughes for the way in which he ran his department "as if it were a distinct and separate Government in itself," Sir Robert demanded, and got, Hughes' resignation. On 31 October an Order in Council made Sir George Perley the "Minister of Overseas Forces from Canada in the United Kingdom."²⁶

The Assistant Judge Advocate General at the Canadian General Staff Headquarters in London at the time that all this was going on was Major (later Lieutenant-Colonel) Maurice Alexander, C.M.G. Part of his job was to attend all courts martial of Canadian soldiers held in England in order to ensure Canadian legal involvement in the process. He also provided legal advice on problems he saw occurring within the court martial system. An exchange of correspondence in May of that year showed, however, that his guidance was not always appreciated.

In order to help keep accurate records of courts martial, Major Alexander requested the Headquarters, Canadian Training Division, in Shorncliffe, to forward to him a copy of each application for court martial along with a summary of the evidence. Somebody got the wind under his tail and sent the letter to the General Officer Commanding (GOC) the Canadian Training Division. The testy reply from the GOC came back challenging Alexander's authority to make such a request, chastising the "curt and peremptory, not to say objectionable tone," of the "order," and questioning the motivation for the request. It took a letter from Major-General Carson, the Canadian Special Representative in Britain, to quell the matter by telling Training Headquarters to get on with it.²⁷ Interestingly, the GOC of the Canadian Training Division was none other than Brigadier J.C. MacDougall, C.M.G., who had earlier been the Deputy Judge Advocate General in Britain and who was himself still listed as Assistant Judge Advocate General in the Branch of the Judge Advocate General.²⁸ It may have been because of these legal credentials that he took exception to a Major trying to instruct him in courts martial.

A noted Winnipeg lawyer, Lieutenant-Colonel Robert M. Dennistoun, took over the Deputy Judge Advocate General's job at the Overseas Military Headquarters on February 10, 1917. He was promoted the following year and continued to hold the position until September of 1919. Colonel Dennistoun had originally joined the Militia in 1883. In 1914 both he and his two sons had joined to do their bit for the war. One of those sons, Jack, would be killed in an aerial dog-fight behind enemy lines in May, 1916. Dennistoun originally signed up with the Fort Garry Horse and later became the commanding officer of the 53rd Battalion. However, problems due to his age (over 50) precluded him from leading the battalion into combat in France. With numerous courts martial under his belt and having authored two small works on military law, he was a natural for the Deputy Judge Advocate General's position.

Besides the serious matter of authority for the execution of Canadian soldiers overseas, the difficulties of Imperial control over Canadian troops was exemplified in a case mentioned by Colonel Dennistoun in an article in the *Canada Law Journal*:

In 1917 a number of Canadian soldiers refused to submit to re-inoculation against typhoid fever. One of them was court-martialed for "refusing to obey a lawful command" and his conviction was quashed by direction of the [British] Judge Advocate General—Mr. Felix Cassel, K.C., a very able lawyer, who gave the Canadian legal staff every consideration and assistance at all times.

On enquiry as to the reason for this decision he stated that the British authorities have always refused to compel a soldier to submit to a surgical operation ... and that inoculation, involving a puncture of the skin by a needle, was regarded as such an operation.

It was pointed out in reply that no soldier could be sent to France without a certificate that he had been inoculated against typhoid and that such a decision would enable a considerable number of men to escape service at the front. He was obdurate. It was the law, and he had no power to change it. But we had the power to change it, and in a very brief space of time obtained an Order-in-Council from Ottawa ... making it a Military offence for a Canadian soldier to refuse to submit to inoculation. The Judge Advocate General at once admitted the validity of the enactment, and undertook to quash no more convictions on the ground previously taken ...²⁹

Colonel Dennistoun's tour as Deputy Judge Advocate General had numerous highlights besides the legal issues he had to address. At different times he dined with the likes of Rudyard Kipling, Winston Churchill, Prime Minister Borden, Sir George Perley, and Lord Beaverbrook. He also travelled to the front in France in both 1917 and 1918. Dennistoun attended a General Court Martial at the Canadian Corps during his 1917 visit and watched the shells bursting over the lines from Vimy Ridge. During the 1918 visit he endured strafing by airplanes, artillery attacks and a three mile round trip hike through the front lines when their vehicle broke a spring in a shell hole. The Canadian troops also started their advance in the Battle of Arras on August 26, while he was there, and he watched from behind the lines. To Dennistoun, this was a dose of the real world of warfare. He commented in his diary: "One must see war as it really is at the front to form any idea what it is. Written or spoken words are of little value. It is the sight and hearing which alone can create in the mind the true impression." He was devastated when, after a week in France, he was ordered to return to London.

There can be little doubt that Colonel Dennistoun appreciated that his duties were important. In June of 1918 he was informed that he had been appointed to the Manitoba Court of Appeal. However, Sir Edward Kemp, the new Minister of Overseas Military Forces, wrote to him saying: "Your services are needed here, I can assure you, and we rely upon you, as you know, to deal with a great many most-important problems which come before you constantly in connection with the war."³⁰ Although a month before receiving word of his appointment Colonel Dennistoun had requested permission to resign, he agreed to stay on if he could

be given a leave of absence from the court. This was not the only plea he would receive before his tenure finally finished. In the middle of March 1919, he finally sailed for home for two months to arrange his affairs. On March 29, he was sworn in as a Justice of the Manitoba Court of Appeal. Within two weeks he was receiving cables from Kemp and the Minister of Militia and Defence, General Newburn, pleading for him to return to England. He did so in May and two days after his arrival was having dinner with the Prince of Wales and "all the great Generals of the war."³¹ He returned to Canada for the last time in September. Undoubtedly to his great relief, he was demobilized the following month.

Back in Canada, the JAG's organization in Ottawa had its ups and downs. Before the war Colonel Smith and Colonel MacDougall held the fort. In September 1915, Captain the Hon. H.M. Daly added his name to the roster of the Branch of the Judge Advocate General. By July of 1917 he was gone and it was back to the original two, although MacDougall was performing any legal duties on a part time basis if at all.³² However, the field offices were carrying on with the daily responsibilities of advising the District Commanders and their subordinates on the legal implications of their activities.

In Canada the demon rum caused many of the disciplinary problems with those being trained for overseas service. Twenty-four hour leave passes had to be cancelled at the Valcartier Camp because of drunken misconduct by the troops and the Military Police spent most of their time trying to intercept illicit liquor shipments into the camp.³³ Overseas in Britain it was absence without leave that bedevilled the training establishment at Shorncliffe. The official history of the war describes the reasons as follows:

Absence without leave usually meant overstaying pass: a Military crime classified in the circumstances as a minor offence, for determination was needed to forsake the bright lights of London or the kindly warmth of home and friends, when the alternative was a tent on a wind-swept waste where darkness lasted fourteen hours a day and all was wetness, mud, and misery.³⁴

Although Canadian legal officers were at a premium overseas, they were much more involved with military affairs in Canada during the war. Lawyers serving with other branches of the forces were detailed to act as Assistant Judge Advocates General at the various Military District headquarters. In other cases, civilian lawyers were recruited directly from their civilian practices, given a military rank ranging from Captain to Lieutenant-Colonel appropriate to their perceived status, and put into the headquarters' position.³⁵

Desertion was a major problem in Canada as well as overseas. In large part this resulted from the provisions of the *Military Service Act* that considered failure to report for duty when called up to be desertion. Setting up the numerous General Courts Martial that were required to try these offences was extremely wasteful of both manpower and time. Therefore, in 1918 the Adjutant General instituted

Standing General Courts Martial in the districts.³⁶ The members of these courts, including the President, members, and waiting members (alternates) were appointed on a permanent basis as were the prosecutor and Judge Advocate. The Assistant Judge Advocate General for the district normally received the Judge Advocate appointment, but not in all cases.

By the beginning of 1918 the responsibilities of the JAG had increased to include revising proposed minutes for submission to the Privy Council, maintaining a record of Orders in Council, advising on and drafting amendments to regulations and orders, keeping a record of courts martial, recommending the appointment of Assistant Judge Advocates General to Military District Headquarters, advising those headquarters on questions of military law and procedure, directing the distribution of deceased soldiers' estates, and negotiating and keeping records of the acquisition and disposition of lands by the Department.

Formation of the Legal Branch

On January 30, 1918, Major-General Smith retired from his position as he felt his age precluded him from continuing to deal with the numerous matters involved. Despite his advancing years, Major-General Smith was kept on at Militia Headquarters as an Administrative Staff Officer, 1st Grade. He handed over responsibility as JAG to a relatively new officer, Major Oliver Mowat Biggar, who was made an acting Lieutenant-Colonel when appointed.³⁷ Although the first JAG was appointed in 1911 and the responsibilities of his position were formally set out by an Order in Council in 1912, no support organization, as such, was created at that time. While there were a number of legal officers reporting to the JAG and acting as his deputies and assistants, they were not listed as part of the Branch of the Judge Advocate General. The Legal Branch itself only came into being with an Order in Council of February 28, 1918, which provided for a separate establishment to support the new JAG.³⁸

Before the Legal Branch was created there had been no controversy about the creation of the position of the JAG or the nature of his responsibilities. However, the Order in Council that provided a special establishment for the JAG also specified that his duties "are to be such as defined in routine orders from time to time." A Routine Order of March 16, 1918, stated, among other duties, that:

It shall be the duty of the Judge Advocate General:

- (1) To advise the Militia Council, or any branch or officer of the Department of Militia and Defence, upon such questions of law and procedure as may be submitted to him.
-
- (5) To conduct investigations into alleged breaches of discipline; to prepare orders appointing Courts of Enquiry and conven-

ing general courts-martial and (when these are directed from Militia Headquarters) District courts-martial; to recommend, when necessary, the persons to be appointed to act as prosecutors and Judge Advocates at courts-martial; to review the proceedings of all courts-martial and to recommend such action thereon as may seem advisable, and generally to be responsible for the proceedings taken to enforce Military law.³⁹

When these provisions came to the attention of the Deputy Minister (DM) of Justice, he immediately protested to the DM of Militia and Defence. On April 17, that year, the DM Justice wrote:

My attention has been directed to an Order-in-Council of 28th February last reciting that it is desirable to create a legal branch of the Department of Militia and Defence for the purpose of dealing with the volume of special matters arising in connection with the Canadian Expeditionary Force, and providing a special establishment for the Judge Advocate General, whose duties are to be such as may be defined in routine orders from time to time. Following upon this there are routine orders of 16th March by the Acting Adjutant General which define the duties of the Judge Advocate General under nine separate heads, the first of which professes to constitute the Judge Advocate General the legal adviser of the Department and of the Militia Council, a provision for which I am afraid there is no authority, either in the Acting Adjutant General or in the Governor in Council, since this duty of advising is constitutionally charged upon the Minister of Justice.

Moreover by the 5th and 6th heads the Judge Advocate General is to recommend the persons to be appointed as prosecutors and judge advocates at courts-martial, and generally to be responsible for proceedings taken to enforce Military law: but certainly the Government cannot escape responsibility by putting it upon an officer; and further I do not perceive how the Judge Advocate General can be authorized or made responsible in these broad terms compatibly with the statutory direction that the Attorney General shall have the regulation and conduct of all litigation for or against the Crown or any public department in respect of any subject within the authority or jurisdiction of Canada.

On the advice of the JAG, the DM responded that, while the *Department of Justice Act* placed a duty on the Minister of Justice to provide such legal advice, it did not exclude other possible sources of advice. In addition, the proceedings to enforce military law did not fall within the "litigation for or against the Crown or any public Department" category. It appears that the DM Militia and Defence attempted to postpone this issue until after the war by proposing that the Governor in Council pass an order under the *War Measures Act* that would resolve the matter "in favour of the continuation of the [current] practice during the present emergency." The DM Justice was not amused. This difference in point of view continued to the end of the century.

The Successor

Colonel Biggar was to have a short term in the Office but a significant impact on the nation. Born in Toronto on October 11, 1876, he had a distinguished lineage. His grandfather was Sir Oliver Mowat, the Postmaster-General in 1854 and later the Premier of Ontario. To quote the *Montreal Standard* of August 31, 1940: "Biggar is solid Scot right through..."⁴⁰ After attending the prestigious Upper Canada College for his early schooling, "Moe" (to his father) obtained a degree from the University of Toronto followed by the study of law at Osgoode Hall. Although called to the Bar of Ontario in 1899, he only practiced there until 1903. Colonel Biggar was then lured to the west and set up a practice in Alberta. The family tradition of public service had been ingrained in his younger days and he carried on the legacy by, among other things, serving on the Board of Governors of the University of Alberta from 1911 to 1918 and the Board of the Edmonton Hospital.

With this background, Biggar could not ignore the needs of the country when the First World War broke out. He enrolled as a Lieutenant in the 101st Regiment, Edmonton Fusiliers. Soon afterward he was appointed as an Assistant Judge Advocate General at the Headquarters of the 13th Military District. Ottawa did not leave him in the field for long. He was appointed a member of the Military Service Council that was responsible for the administration of the *Military Service Act* (conscription) until his appointment as Judge Advocate General on February 28, 1918.

The increasing importance of legal input into the defence issues of the day was demonstrated in Lieutenant-Colonel Biggar's further appointment as a member of the Militia Council in June of that year.⁴¹ The Government recognized his abilities, first by a promotion to Colonel on April 23, 1919,⁴² and then by selecting him as a member of Sir Robert Borden's team for the negotiations on the Versailles Treaty that same year. Colonel Biggar acted as the British Secretary to the Commission on the Authors of War and Penalties at the conference. Obviously a family man, he wrote voluminous letters to his wife, first from the ship on the way over to France and then from Paris during the negotiations. The letters can be found in the National Archives.

On his return from France, Colonel Biggar was given the additional responsibility of Vice-Chairman of the Air Board, a newly created body that was to shepherd the growth of aviation in Canada. This included jurisdiction over the infant Canadian Air Force. One of his proudest accomplishments on the Air Board was ensuring that everybody who got a flying certificate was automatically made an officer in the Air Force. This created a cadre of trained pilots who were liable to be called out by the Air Force for training and duty and who could act as the core of an air defence system should Canadians be called to war again.

In 1920 Colonel Biggar gave up the mantle of JAG when asked by the Government, with the support of all political parties, to become Canada's first Chief Electoral Officer. Although he was no longer JAG, he retained his position with the Air Board, acted as Chairman of the Interdepartmental Committee on the St. Lawrence Waterway, and occasionally was called upon for legal advice to the Department of External Affairs. Biggar saw public service as a duty, but he was not the type for a full career in government.



Colonel O.M. Biggar, K.C.

In 1927 he resigned as Chief Electoral Officer and joined with Russell S. Smart to start the Ottawa law firm of Smart & Biggar, specializing in intellectual property matters. Colonel Biggar soon demonstrated his broad knowledge and expertise, authoring the reference work *Canadian Patent Law and Practice*⁴³ that same year. He carried on an active practice, arguing a number of major industrial and constitutional cases before the courts. However, war seemed to follow in his footsteps. He and his family had taken to vacationing in Europe during the late 1930s and in 1939 they had to beat a hasty retreat from Switzerland when it appeared that war was about to break out on the continent.⁴⁴

With Canada again at war, the nation called Colonel Biggar to public service once more. In 1940 he was appointed Co-Chairman and Canadian Secretary of the Permanent Joint Board on Defence. The American Co-Chairman was the former Mayor of New York, Fiorello LaGuardia. This Board was responsible for coordinating the joint Canadian-American defence plans for North America throughout the war. He held the post until 1945, despite a severe heart attack in 1943. In recognition of his service, Colonel Biggar was awarded the US Legion of Merit, Degree of Commander, in 1945. This was not the only post held by this distinguished former JAG during the war. He was also given the unenviable duty of Director of Censorship by the Canadian Government in 1942 and continued with his legal practice throughout the war. Colonel Biggar passed away in September of 1948 after a lifetime of service and accomplishment.

Developments in Canada

After the Legal Branch was formed in 1918, there was an augmentation of personnel and new duties were thrust on the organization with respect to military estates.⁴⁵ Major Gregor Barclay became an Assistant Judge Advocate General and Major H.S. Ralph of the 101st Regiment came in as the Director of Military Estates. He was given another Major as an assistant and five junior officers were also attached to the Branch for duty.⁴⁶ The estates for which the directorate was responsible were only the military estates of the members, not their civilian ones. These included such things as pay and benefits owed to the member and any personal belongings the member had with him at the time of death.

As might be expected from the slaughter of WWI, the grim business of administering military estates thrived. The new JAG directorate had a legal department, an accounting branch, a personal effects branch and a wills branch to deal with the influx of estates-related activity. The legal department prepared the estates of deceased soldiers for distribution and then distributed them under the laws of the country where the soldier was domiciled, which was not always Canada. The Wills Branch was responsible for the safekeeping of almost 200,000 wills at the end of the war, not including those held by the Estates and Legal Services Branch at the Headquarters of the Overseas Military Forces of Canada in London. In keeping with the close ties with Britain and the frequent use of British nationals with the overseas forces, a British barrister headed this latter organization.⁴⁷ When its records were repatriated to Canada in November 1919, with the demobilization of the Overseas Headquarters, another 220,000 wills, 21,000 files and 30,000 collections of personal effects were added to the total. In March 1920, the responsibility for the Estates Directorate was transferred to the Director of Records.

One of the more contentious issues in both the First and Second World Wars was the question of conscription. With the slaughter on the battlefields of France in 1916 and 1917, Canada was having a difficult time in meeting its commitment for troops. As a result, conscription was brought in with the passage of the *Military Service Act*⁴⁸ in 1917. Those who were duly registered under the Act and failed to report for service were considered deserters and could be court-martialed. One of the reasons for the creation of a separate Legal Branch was to help deal with the numerous deemed desertions that resulted from this law. The problem was particularly prevalent in Quebec where the war was not at all popular.

In 1918, the JAG, Lieutenant-Colonel Biggar, arranged with the Dominion Police to set up a Special Service Section in Montreal reporting to the JAG. This unit, along with personnel of the Canadian Provost Marshal's Office, was responsible for apprehending men who had failed to report for duty under the *Military Service Act*. However, the wholesale arrests that resulted raised concerns about the legality of what was taking place. In part this may have been a result of the ten dollar reward that any civil police or peace officer could collect for any

deserter or member who was absent without leave.⁴⁹ The JAG decided to send a representative to Montreal to ensure that any arrests were proper. Captain Reginald Orde, a new legal officer at the time, was selected for the task.

Those trying to enforce the *Military Service Act* were not exactly heroes in Quebec. Orde was frequently called out in the middle of the night and never went out without a revolver and a black jack in his inner pocket. In one case, an informer used by the Special Service Section had been reported killed. However, Captain Orde saw him on the street two days later and took him in to the Police Barracks for "safekeeping." Two days after he was let out, the informer was murdered. It got so bad that Orde could not go out at night without a personal bodyguard. In September Orde was able to return to Ottawa, still in one piece. He was promoted to brevet Major and made an Assistant Judge Advocate General.

After the Armistice in November, 1918, Lieutenant-Colonel Biggar was ordered to accompany the Prime Minister, Sir Robert Borden, as one of his advisers to the Peace Conference in Paris on the Versailles Treaty. The size of the JAG Headquarters in Ottawa at the time was not large. Besides the JAG, there were only four legal officers. Lieutenant-Colonel W.B. Kingsmill was the Deputy Judge Advocate General. (Lieutenant-Colonel G.F. MacFarland later succeeded him.) The rest of the establishment included Major R.J. Orde, Major H.C. Hanington, and Captain H.A.L. Conn. Despite the small size of the office, there was no lack of innovation. The demands of discipline had been heavy in the latter part of the war and during demobilization. On March 31, 1918, the JAG opened the first court martial register for the Canadian Forces. Between then and March 31, 1919, the Branch registered and reviewed the proceedings of 1,579 courts martial.⁵⁰ However, the apex had been passed and the activities of the military tribunals were about to nose dive dramatically.

When the JAG headed for Europe, Lieutenant-Colonel MacFarland and the remaining three legal officers continued to hold the fort in Ottawa until his return. One of the most pressing issues was the fate of those serving prison terms in Canada for military offences, particularly desertion. In December 1918, the Deputy Judge Advocate General pointed out to the Minister of Militia and Defence:

There are, at the present time, in the penitentiaries and gaols serving sentences 225 persons. Of this number about 120 are conscientious objectors. These prisoners are serving terms anywhere up to 10 years penal servitude, and, in some cases, 20 years. They have been convicted on the same crimes that men are now being tried for and punished by terms not exceeding two years imprisonment.⁵¹

He then raised the possibility of remitting the sentences to two years imprisonment for consistency or achieving the same result with an amnesty within a reasonable time after the return of the overseas forces. To the relief of many, and the dismay of some, a General Amnesty was proclaimed on December 20, 1919,

which pardoned the majority of offenders tried under the *Army Act*. As a result, 76 soldiers who were then still undergoing sentences awarded by courts martial were released from custody.

There can be no doubt that the services provided by the JAG organization were still considered essential at the end of the war. On November 30, 1918, the General Officer Commanding the 2nd Military District strongly recommended that the Assistant Judge Advocate General position for his district be made permanent. That position had been created in June of 1916. The General reported that, since that time, the Assistant Judge Advocate General had acted as Judge Advocate in 202 trials by court martial, advised on the prosecution of 730 deserters and absentees in civil courts, been involved in 203 trials by civil courts for civil offences and 292 District Courts Martial for desertion and fraudulent enrolment, and provided advice on numerous issues. The General also reported that the legal officer, Lieutenant-Colonel J.A. Macdonald, had provided services that "have been entirely satisfactory to me in every way."⁵²

Military District Number Six echoed these sentiments in March of 1919. The Commanding Officer wrote to the Secretary of the Militia Council concerning his Assistant Judge Advocate General, stating: "... I beg to say that the services of such an officer are deemed indispensable [sic] at this time. It may be said that at no time since the establishment of that Branch has the necessity for an Assistant Judge Advocate been greater than it is at present."⁵³ He goes on to describe the legal and disciplinary problems the district had before the appointment of a legal officer and the tremendous improvement since. He recommended that the Assistant Judge Advocate General be retained after demobilization because of the considerable number of troops that would continue to be stationed in the district. Alas, like the others desiring to retain their legal officers, he was to be disappointed.

Siberia

The end of the First World War was not the end of operations for the Canadian Militia. In March, 1917, the last Russian Czar abdicated in favour of a provisional government after mutiny in the armed forces in Petrograd. The provisional government was then overthrown by the Bolsheviks, lead by Lenin, in the "October Revolution" later that same year. The Russian military forces collapsed from internal dissension and Lenin was forced to sue for peace with the Germans. The country lost approximately a quarter of its population and arable land and a third of its industry in the resulting Soviet German Treaty of Brest-Litovsk signed in March 1918. However, the Bolsheviks did not have an easy time when trying to consolidate their power during this period. Counter-revolutionaries, commonly referred to as White Russians, formed their own governments and armies and fought a five-year civil war for control of the nation.

The Allies were not neutral in this civil war. Where they had lauded the first revolutionary government for its introduction of democratic rights, they were violently opposed to the Bolshevik regime and its policies. In addition, some of the Allies wanted to make sure that Russian arms did not end up in the hands of the Germans while the war was still ongoing. The Japanese also appeared to have territorial designs on eastern Siberia. As a result, fourteen countries sent troops and supplies to support the counter-revolutionaries. The Japanese sent 60,000 troops into Siberia, Great Britain sent about 40,000 into northern Russia, and even the U.S sent over 10,000 men.⁵⁴ Not to be left out, beginning in October, 1918, Canada sent more than 4,000 of its own troops under the command of Brigadier-General J.H. Elmsley to Siberia and a much smaller contingent to Murmansk.⁵⁵ Included in the Siberian deployment was a military lawyer. On October 26, 1918, Lieutenant-Colonel Gregor Barclay disembarked in Vladivostok to begin his tenure as Deputy Judge Advocate General, Canadian Expeditionary Force (Siberia).

Lieutenant-Colonel Barclay's tour was much like that of the expeditionary force itself—in an interesting locale but without much action. His first month in theatre included setting up his office, meeting the American JAG officer, dealing with an American complaint about the conduct of a Canadian ordinance officer, approving contracts, and handling the occasional claim. The highlight of the month was attending a Russian court with the American and Czech JAG representatives where a Bolshevik was being tried for the attempted murder of the Postmaster at Vladivostok.

Once December rolled around the disciplinary problems started picking up. Perhaps this is not surprising considering the conditions in Siberia in the winter and the lack of entertaining things to do to keep the troops out of mischief. Barclay's next five months were taken up mainly with courts martial and reviewing Courts of Inquiry, although his war diary's most frequent entry is "nothing of interest to report."⁵⁶ The courts martial were generally of a minor nature on charges such as absence without leave, drunkenness and disobeying an order. There were, however, a few more-serious ones in January, 1919, involving charges of mutiny. The Courts of Inquiry covered a full spectrum of incidents. Cars were damaged, there was a fire in a barracks, a ship had shortages, someone's revolver exploded, a typewriter was stolen from the dentist and a number of deaths had to be investigated. However, the Canadian excursion into the wilds of Siberia was to be relatively non-violent and short lived.

Beginning at the end of April 1919, the Canadians who had been sent to Siberia started to sail back for Canada. They had virtually nothing to show for their efforts. While some of the troops sent to northern Russia had become involved in combat, the Canadians in Siberia had not gone into battle. The civil war continued without further Canadian involvement until the ultimate Bolshevik victory in 1922.

Demobilization and a Change of JAG

With demobilization at the end of “the war to end all wars,” the Canadian military was decimated. Politicians and the Canadian public were keen to get back to the normalcy of peacetime and not to think of matters military. However, Canada was a young country with a vast amount of territory. Most of this territory had never been accurately charted in detail and there had been no reasonably effective way of conducting such surveys until after the war. The development of the airplane and improvements in photographic techniques provided just such a capability. There was also a recognized need for Canada to have some kind of an air force for defence purposes. The Government’s solution to these problems was the creation of the Canadian Air Force under the *Air Board Act*⁵⁷ of 1919. This new fledged organization would carry out both the training needed for a military air force and the civil aviation functions desired by the Government. The Vice Chairman of this new body was none other than the JAG at the time, Lieutenant-Colonel Biggar.

The Office of the JAG was to be hit as hard as any other in the Canadian Militia when the post-war reductions hit. In fact, on February 1, 1920, it ceased to exist as a separate Branch. Instead, it became a directorate reporting to the Adjutant General. That is also the date that Captain and brevet Major Reginald J. (Reg) Orde was appointed to replace Colonel Biggar as JAG.⁵⁸ The appointment came as a considerable surprise to Major Orde who was twenty-six years old at the time. When informed of his appointment by the Minister of Militia and Defence, General Newburn, he exclaimed: “How about it. I’m only a kid!”⁵⁹ The kid was to hold the position for the next thirty years.

Major Orde’s father, the Honourable John Orde, was a prominent lawyer in Ontario and later a judge. During the interview Orde told General Newburn that he had thought of going into his father’s extensive, and lucrative, law practice. General Newburn replied undiplomatically: “Oh Reg, John is damned glad to get rid of you.”⁶⁰

Major (later Brigadier) Orde was to have the longest term as JAG and, although two others preceded him in the position, he had the greatest impact in the formative years of the Legal Branch. He was born with the proverbial silver spoon in his mouth in Ottawa on May 15, 1893. Nothing but the best was suitable for young Reg Orde. After attending the exclusive Ashbury College in Ottawa, he went to the University of Toronto where he obtained his Bachelor of Arts in 1913. This was followed by a start at legal studies at Osgoode Hall. However, this was not a good time for trying to complete an education. The First World War was about to begin and young Canadians were answering the call to arms. Reg Orde was not one to resist. Why did he join? In his own words:

Because I was a goddamned fool. I could ride a horse. Everyone else was doing it.

Did you feel any kind of patriotic ...

Naw, hell, I don't feel patriotic, it was just a lark.⁶¹

Of such noble motives are careers made.

In any case, Orde enlisted in August of 1914 in the Canadian Field Artillery. He trained in Valcartier and was awarded the rank of Bombadier. In October he shipped off for Europe with three other well-to-do sons. Each had 100 gold sovereigns sewn in the back seam of his pants. They put this to good use on the crossing by fixing it with the Chief Steward of the ship to buy a generous supply of whiskey—which they then re-sold to the officers of their brigade. John McCrae, the author of “In Flanders Fields,” was their doctor for the voyage.

Soon after arriving in England, Orde was ordered to report to a selection board as he had been recommended for a commission as an officer in the Royal Field Artillery. The Board process did not seem to be going all that well until he was asked what his father did. Once they were told his father was a barrister and a King's Counsel, he passed the Board with flying colours. Such were the standards of the time.

After “learning how to fall off a horse decently,” Orde was transferred to the Eighth Battery, 13th Brigade of the Royal Field Artillery, in France. They formed a part of the British India Corps. Over the course of the next months he was to take part in the Battle of Neuve Chapelle, catch the tail end of the gas attack at Ypres, and participate in the Battle of Festubert and the Battle of Loos.

While serving in Mesopotamia in 1916 he became a casualty. Because the Royal Field Artillery was part of a British India Corps, he ended up in the Taj Mahal Hotel Hospital in Bombay. One of his friends in the Battery who had also become a casualty happened to be the son of the Viceroy of India. Upon hearing that Orde was in the country, he had his father order Orde to be transported to join them and that he be provided with suitable medical care for the trip.

Lieutenant Orde was on extended sick leave in the summer of 1917 and the early part of 1918 due to his war related disabilities. In late September 1917, he transferred back from the Royal Field Artillery to the Canadian Militia and received a commission in the Canadian Field Artillery. His sick leave was extended long enough for him to finish his studies at Osgoode Hall and get called to the Bar in Ontario. On being promoted to Captain, Orde was given command of the Toronto Depot Battery, but this did not last long. He was soon placed on active service again and ordered to report for duties with the Judge Advocate General in Ottawa in May, 1918.



Brigadier R. J. Orde, C.B.E.

As the war wound down and steps were taken toward setting up peacetime establishments, Captain Orde was made a brevet Major and took on the position of Assistant Judge Advocate General, followed by the appointment as JAG in 1920.

On the social side, he was an ardent, and excellent, golfer. He belonged to the exclusive Royal Ottawa Golf Club and was the club champion at one time. Many of his more important discussions with senior members of the Forces and the Government took place when chasing par. He was also a man of firm opinions and was not afraid to voice them in plain language. Brigadier Orde retired in 1950.

By the time of Orde's appointment in 1920, he and his assistant, Major Hannington were the only legal officers remaining, and Hannington would not remain long. The total personnel in the Office of the JAG consisted of the JAG himself, an executive officer, one assistant, two stenographers and two orderlies. The organization, like the Forces generally, was to remain in this sorry state for much of the next two decades.

Military Justice Activity

The inter-war period was, for the most part, a quiet nap as far as the Canadian military justice system was concerned. Not surprisingly, the number of courts martial started to decline drastically soon after the war ended. For the five months from the beginning of November, 1919, until the end of March, 1920, only 99 courts martial were registered and reviewed by the Legal Branch.⁶² The number of courts martial in Canada decreased by over fifty percent from 168 in the 1920-21 fiscal year to 74 in the 1921-22 period. The level of court changed as well. While there were thirteen General Courts Martial in the first period, with the rest being District Courts, there were no General Courts in the latter time-frame at all. However, as a result of a number of amendments to the Rules of Procedure and the *Army Act* in 1920 there were frequent errors in the 1921-22 courts that required them to be sent back or quashed. Over the eighteen years from 1921 to 1939 the Militia averaged only a little over 32 courts a year.⁶³ The

majority of these were desertion and absence without leave (AWOL) offences during the first few years after the war.

The actual number of courts per year in the late thirties was down to single digits. While this statistic is extremely low in light of the wartime figures, it should be remembered that the size of the Permanent Militia was negligible in comparison to its wartime strength. To put the figures into further perspective, the Royal Canadian Air Force only had nineteen courts martial in total for the whole period and the Royal Canadian Navy had only five.

Although the number of new courts plummeted immediately after the war, the court martial records held by the JAG had a one-time explosion in 1921. That is the year an Order in Council⁶⁴ authorized the JAG to transfer to his custody the records of proceedings of the 16,000 courts martial held overseas for members of the Canadian Expeditionary Force. Despite this considerable number, the records were not complete. The British retained additional records of Canadians who had been court martialled where other nationalities were also involved.

The military justice system was not totally moribund while awaiting the Second World War. In the 1923-24 period the JAG was busily drafting the new *King's Regulations and Orders* that were to govern the Royal Canadian Air Force once it officially came into existence on April 1, 1924. These included disciplinary provisions incorporating the British *Air Force Act* procedures and offences. The following year he started a yearlong drafting exercise to completely revise the regulations and orders applicable to the Canadian Militia.

One of the concerns about the disciplinary system during the inter-war years was the lack of knowledge on the part of the military officers who were supposed to apply military law. Many had joined during the war when there was only time for the most rudimentary training on the subject. After the war ended and the Militia demobilized, there were few knowledgeable enough to teach and little time to do so with the restructuring work that was needed. The JAG noted this in his annual report for 1922.⁶⁵ The Adjutant General, who was responsible for discipline in the Militia, was also aware of this failing. Gradually the training and knowledge levels improved and the number of observations the JAG had to make on the propriety of the courts martial declined.

Coping

During the early 1920s, Major Orde was able to cope largely due to his extensive network of contacts with others in positions of authority. The Deputy Minister of Militia and Defence was Sir Eugene Fiset, who was a good friend of Orde's father. They got along very well and Fiset provided Orde with help whenever he could. For those few legal matters that arose that were too difficult for Orde to

handle by himself, he consulted his mentor, Mr. E.L. Newcombe, Q.C., who held the position of Deputy Minister of Justice.

The JAG was also appointed as junior counsel to a Royal Commission looking into alleged frauds on the public relating to the redemption of sterling currency at the end of the war. For three months he supervised the investigations carried out by the Royal Canadian Mounted Police in Ottawa and Montreal in addition to attending all the hearings. He also produced a large volume of opinions and correspondence on pensions and claims as he was a member of the Pensions & Claims Board that administered the *Militia Pension Act*.

The armed forces of Canada at the beginning of the 1920s were organized in the Department of Militia and Defence, the Department of the Naval Service and the Canadian Air Force (under the control of the Air Board). The position of JAG had been exclusively an army one since its inception. As indicated earlier, the JAG's initial duties were prescribed in militia orders that had been issued by the Acting Adjutant General of the Canadian Militia. The Royal Canadian Navy was so small that it had no legal adviser dedicated specifically to that service. The initial attempts at an air force at the tail end of the war met with limited success and there was no need for dedicated legal resources for the minuscule numbers involved nor did the Canadian Air Force require such services. This changed in 1922. In an economy drive that was to be echoed forty years later, the Government wanted to reduce the amount of duplication in the three services. Therefore, Parliament passed the *National Defence Act, 1922*, which brought these three organizations under one civil Department of National Defence with one Minister and one Chief of Staff to oversee the three services.

On November 24, 1922, the Governor in Council approved a number of changes to the Headquarters Staff as a result of the creation of the new organization. Among them was the transfer of the JAG from the Branch of the Adjutant General to the Department effective January 1, 1923, when the new Act came into force. The JAG was made responsible to the Deputy Minister. With respect to the Canadian Militia, the JAG was to:

retain the same status and perform and exercise all the powers, duties and functions which, prior to the coming into force of The *National Defence Act, 1922*, were had or possessed, exercised or performed by the ... Judge Advocate General ...

However, the duties of the JAG were also expanded considerably with the creation of the Department. Besides his role in relation to the Militia, he also took on similar duties with respect to the Royal Canadian Navy and the Canadian Air Force. His was one of the first truly unified functions in the Canadian Forces.

As is all too frequently the case, increased responsibilities did not mean increased support in providing the necessary services. The JAG was often pleading for

some assistance in carrying out his duties. For instance, in 1923, after receiving a negative reply to a request for an assistant, he stated:

Paucity of funds necessitates the practice of economy and, unless unforeseen circumstances arise, I am prepared to carry on without an assistant.

While the employment of an assistant might be, to a certain extent, an extravagance, yet there is no one in the Department to carry on with the work of this office on occasions when I am absent on duty or leave.⁶⁶

He then asked for a part time assistant, with better success. Over the years he was occasionally provided with extra staff or the loan of an officer when a special project arose such as drafting regulations for the Royal Canadian Air Force. However, in general, he was a one-man show.

Despite the fact that Orde was the only legal officer at the time, it would be overstating the case to say that he could not get the job done. Times were somewhat simpler and less legalistic than they are now. Orde himself acknowledged this in an interview where he stated:

There was not a hell of a lot of work to do, you see. I mean, I could leave my office there and go down to Montreal to negotiate a deal with Vickers for the Ventura aircraft. I might be away for four days, nobody would seem to mind that. I was not holding anybody up in the Headquarters here, you see. My superintending clerk could probably handle it all, find the files or something. There was no even flow to it, and when there was a feast, it was a bad feast. It was a nightmare.⁶⁷

The workload of the JAG in the 1920s involved mostly routine matters. There was a steady flow of leases and agreements to draft. Every year he perused the minutes of the numerous courts of inquiry dealing with the multitude of accidents and cases of malfeasance that are the bane of military forces. There were regular meetings of the Pensions and Claims Board on which he was a member and Colonel Orde was never short of an opinion on the frequent occasions that his advice was solicited. He was also noted for his legislative drafting skills that were kept finely honed by the abundant changes to legislation and regulations affecting the Department and the three services each year.

One of his most challenging tasks was the drafting of the *National Defence Act, 1922*, mentioned earlier, but it was not only due to the complexity of the drafting exercise. The Minister of Militia and Defence at the time wanted Orde to draft the Bill. However, as a result of Orde's influence in the process of creating the new organization he ended up as the meat in the sandwich in a power struggle between the Chief of the General Staff and the Chief of the Naval Staff over who would be the military chief of the new entity. Although uncomfortable with the situation, he managed to avoid any fatal damage from the squeeze.

There would always be unusual situations to keep one's interest. For instance, turf wars between the federal and provincial governments often involved the military. In one case in 1924, a matter came up concerning civilian jurisdiction over military personnel in Canada. Lieutenant-Colonel Orde was assigned to attend the civilian trial of seven troopers charged with assault. A soldier with the Royal Canadian Dragoons had made a statement at a Baptist meeting that "it is hard to become a good Christian in the Army, as the man on one side may be gambling, and the man on the other side may be drinking."⁶⁸ This became known to the troops in the barracks. They held a "barracks-room court martial" and sentenced the soldier to ten cuts from a whip. He was taken to the riding school and given a number of lashes, after which he was taken to the Station Hospital and put in a bed. When the matter was investigated, seven men confessed. They were charged under the *Army Act* and the commanding officer gave one a reduction in rank while the others received 28 days detention.

The story got to the press and the Ontario Attorney General personally ordered an investigation. The local Crown Attorney had not thought it worthy of an investigation after the military had already taken care of it. However, the Attorney General told the Colonel Commandant of the Military District that he proposed to show soldiers and civilians alike that civil law was supreme. As far as he was concerned, the military authorities did not enter into the matter at all. The seven soldiers were charged with assault, tried and convicted.⁶⁹

Aid of the Civil Power

The above incident was hardly the first federal-provincial difficulty. The Canadian Forces are normally thought of as a military force to be sent against foreign troops in wartime situations or as peacekeepers to countries recovering from conflict. Occasionally, however, Canadian troops have been used in Canada in confrontations with Canadians. While such occasions were fortunately rare during the latter half of the century, they tended to be both dramatic and traumatic when they did occur. When a provincial government requested the use of the Forces in such situations it was called "aid of the civil power."⁷⁰

While less frequently used in the modern era, aid of the civil power was once a major part of the military functions. During the nineteenth and early twentieth centuries, the militia was often called to deal with riots and, later, with strikes. The interesting aspect of aid of the civil power is the ability of provincial authorities to call out the Forces. The military forces of the Crown were, in all other respects, a federal responsibility. However, the *Militia Act* gave municipalities and the provinces limited authority to demand the assistance of military forces in situations beyond their ability to control. Before Confederation the colonial militia would have been available for these purposes, but the provincial authority over militia forces ended when the *Constitution Act, 1867*, gave the federal government authority over "Militia, Military and Naval Service, and Defence."⁷¹

In the first six or seven decades of Canadian nationhood, there was frequent resort to aid of the civil power. Two major reasons were the rise of unions in Canada and the understandable preference of local officials to spend federal funds rather than municipal ones to maintain the peace. The original provisions of the *Militia Act* authorized municipal officials, such as the mayor of a town or a Justice of the Peace, to requisition military forces. There was no provision for anyone other than the federal government to pay the costs of this call out. As a result, the municipal officials would call out the military on the flimsiest of pretexts effectively to act as a police force. The most common occasion for making such a requisition was a labour strike. The municipal officials feared violence either from the strikers or from strike-breakers hired by the employers and would call out the Militia even if nothing had actually happened that would warrant this action.

Finally, the federal government had had enough of this misuse. After a strike in Cape Breton in 1923 where the Militia was requisitioned under dubious circumstances, the federal government entered into negotiations with the provincial governments to modify the system for providing aid of the civil power. It was agreed that the Attorney General of each province would be the authority to requisition the military. It was also agreed that the province would be responsible for the costs of calling out the troops and would provide a report on the reasons for the requisition later on. The JAG was often consulted on the legal issues when the troops were called out and was deeply involved in the drafting of these changes as well. The *Militia Act* was amended in 1924 to reflect the new system and the incidence of call outs dropped drastically.

Colonel Orde came close to being arrested as a spy by the Americans as a result of an aid of the civil power situation in 1923. He was vacationing in Maine. The rule at the time required that official communications by cable be sent in code and Orde was carrying the book containing the code with him. When problems arose with the use of the Militia during the general strike that was going on in Cape Breton, the Chief of Staff sent Orde a cable in code. The result was a visit by the FBI wanting to know who this "Colonel Orde" was and what was going on with coded messages over the telegraph system. After explaining who he was, Orde defused the situation by inviting the agents to help him decode the message.

Trying Times

A considerable number of Canadians had served with distinction in the Royal Flying Corps and the Royal Naval Air Service in the war and air power was increasingly recognized as essential to any effective military force. On April 1, 1924, the Royal Canadian Air Force was officially born through an Order in Council under the *Air Board Act*. The Order in Council specified that the disci-

pline of the new service was governed by the British *Air Force Act* except where its provisions were inconsistent with any Canadian Orders in Council.

At that time, only military officers enforced military law relating to discipline. There were no military lawyers as prosecutors or defending officers, as Colonel Orde was the only legal officer. One would think that this would make training in military law a prime function for the JAG. However, due to the number of claims on his limited time such training was haphazard. From 1921 to 1926 the JAG did not provide any formal instruction in military law. The instruction immediately preceding this hiatus had only been given to five of the thirteen Military Districts. In September of 1926, the Deputy Chief of the General Staff requested that the JAG furnish instruction in military law by means of a comprehensive series of lectures and court martial demonstrations. As the decade proceeded, further instructional packets were prepared and issued which resulted in an observable improvement in the quality of courts martial.

In 1926 Colonel Orde was dispatched on loan to the War Office in England for six months and a Deputy Judge Advocate General, Major McDougall was appointed for the period. Major McDougall later went on to become a County Court Judge in Ontario.

In June of 1929, the JAG received some additional help. Colonel J.S. Rankin was appointed as an Assistant Departmental Solicitor under a temporary certificate from the Civil Service Commission.⁷² The Commission may have had a problem with tracking time as in August of that year its Secretary demanded a complete itemized account of the work performed by Colonel Rankin for the JAG. This request wanted the information for the two-year period ending June 30, 1929. As Colonel Rankin had only been appointed on the 29th of that month, Colonel Orde made a suitable reply.

Having a deputy provided Colonel Orde with considerably more flexibility than had been the case earlier. For instance, he was able to attend the Imperial Defence College in England in 1931-32. Unfortunately, in 1933 the depression was in full swing and the JAG was told to get rid of his deputy. From then until the start of World War II, Colonel Orde was again the only legal officer.

With the coming into force of the *Statute of Westminster* on December 11, 1931, Canada lost almost the last vestige of its colonial status.⁷³ It could now pass its own legislation regardless of any inconsistency with legislation applicable in Britain. In addition, it could pass laws having extraterritorial application, including laws governing its armed forces, without requiring British enabling legislation. Despite this expanded national authority, Canada was not in a rush to modify all of its laws as it did not exercise its jurisdiction to make a completely Canadian code governing service discipline for years to come.

The constitutional landmark created by the *Statute of Westminster* also created a monumental amount of work for the JAG. Canada was now able to legislate independently of Great Britain, with minor exceptions relating to the Constitution itself. This power included full control over the application of its defence legislation. It also meant that British legislation governing the relationships between the various Commonwealth members and limiting the authority of the Dominions' legislation to their territorial boundaries was no longer valid. As a result, the countries involved negotiated an agreement, called the *Commonwealth Status of Forces Agreement*, that regulated those relationships. Each country then had to pass national legislation to implement the agreement. While Brigadier Orde was a member of the committee involved in drafting the Canadian legislation, he was the first to admit his role was secondary to that of Mr. John Read of the Department of External affairs. The result was the *Visiting Forces (British Commonwealth) Act, 1933*.⁷⁴

On first reading of the Act upon introduction to Parliament, the Prime Minister, R.B. Bennett, summarized its purpose as follows:

In consequence of the passing of the Statute of Westminster it becomes essential that questions arising out of the visiting of forces from one of His Majesty's dominions to another, or questions of command, discipline and attachments of Commonwealth forces when serving together, should be dealt with by separate legislation, that is legislation passed by the Parliaments of each of the dominions and of the United Kingdom.⁷⁵

As a result of this Act and reciprocal ones passed by the other Commonwealth countries, forces operating in another Commonwealth country still retained their own jurisdiction to deal with internal administration and discipline. When they were operating with other Commonwealth forces, things got a little more complicated. However, the Act and its implementing regulations provided the map as to which authority controlled discipline in any given circumstance. During World War II it was this legislation that enabled Canada to exercise effectively the disciplinary jurisdiction that it lacked during World War I.

The early thirties also brought on the economic cruelty of the depression. The massive unemployment strained the resources of the country to their limits. Despite the generally conservative policies of the Bennett government at the time, steps were taken to alleviate some of the worst suffering. These included government relief projects to provide jobs. As National Defence was tasked with running many of these projects, Colonel Orde was swamped with new work involving agreements, contracts and expropriation proceedings. The latter part of the decade also saw him in his Sherlock Holmes persona conducting investigations into the inevitable problems arising from the administration of the relief programs. The heavy workload was further increased when he assumed the position of President of the Pensions and Claims Board in 1933.

The latter half of the thirties continued in much the same vein as the first half. The one major difference involved the purchase of armaments. The Government was awakening to the threat of renewed conflict and the need for updated materiel for the three services. In 1938 the JAG drafted all of the larger contracts for these armaments and was actively involved in the discussions and negotiations. A sense of urgency permeated these activities as the European drama of appeasement and conquest was played out.

Just before the outbreak of World War II, the responsibilities of the JAG had not changed much from when they were originally promulgated. The 1939 *King's Regulations and Orders* specified:

II. The Judge Advocate General is charged with:-

Superintendence of the administration of Naval, Military, and Air Force law; advising on matters leading up to the convening of courts-martial, and review of proceedings with a view to seeing whether they have been regular and legal. In the event of it being necessary to quash proceedings to recommend accordingly to the proper Naval, Military or Air Force authority.

Recording the proceedings of courts-martial and their final disposition.

Assisting the Minister in the formation of any advice it may be necessary to give the Governor in Council regarding the proceedings of general courts-martial.

Such services as may be assigned to him in connection with the revision of Naval, Military, and Air Force law and regulations relating thereto.

Advising on and performing duties in relation to, matters of a legal nature within the Department when and as required so to do.

Advising on such matters of a disciplinary nature as may be referred to him.⁷⁶

It was with this mandate and on his own that Colonel Orde brought the Office of the JAG into the Second World War.

Chapter 3. World War II and Its Aftermath

Despite the fervent hopes of most, the tides of war could be seen flooding up the borders of Europe in the summer of 1939. Hitler's leisurely digestion of neighbouring countries could not persist forever and appeasement merely prolonged the day when bullets were the only response left. That day arrived on the 1st of September. The invasion of Poland made it clear that the only effective response to Germany's territorial ambitions would be a military one. Britain and France declared war.

This was the first major opportunity for Canada to demonstrate its full emergence as an independent nation since the *Statute of Westminster* of 1931 had permanently buried its colonial status. Instead of automatically joining in the declaration of war as part of the British Empire, the Canadian Government waited until September 10th to do so. With the commitment to war, however, Canada was determined to do its share.

The mobilization and expansion of the Canadian Forces to meet the demands of the Second World War forever changed the Office of the JAG. As the Legal Branch shrank and disappeared at the end of the First World War, so it had a phoenix-like rebirth with war again calling Canadians to arms. From a one-man show it exploded into a law firm of global proportions. The years that immediately followed the war saw the Legal Branch contract once again, but nowhere near the extent to which it had done so after the First World War.

Mobilization

At the start of World War II, the Canadian Forces had to rebuild almost from scratch. Like the Canadian Expeditionary Force that had been created to fight the First World War, the Canadian Active Service Force was established at the start of WWII. This body of troops and the Non-Permanent Active Militia formed the Military (land) forces of Canada. In November 1940, an Order in Council under the *War Measures Act* redesignated all of the Military forces as "The Canadian Army" and the Canadian Militia disappeared.¹ Those formations, units and personnel on active service were designated as "Active" while the rest were designated "Reserve."

Due to the neglect of the armed forces between the wars, there were no experienced military lawyers on whom an expansion could be based. The re-creation of the Legal Branch had to start with recruiting civilian lawyers and placing them in positions of responsibility to learn by trial and error. One could not complain of this situation and hope for any sympathy. Despite the existence of some reserve forces, all of the services faced the same dilemma. Canada was not ready with the needed military forces when the balloon went up in the fall of 1939. Fortu-

nately, the protection provided by two oceans prevented the country from suffering excessively from this lack.

In the fall of 1939 Colonel Orde was still on his own within the JAG's organization. After the war started, he managed to procure another lawyer for the office, Captain Clayton, who had been a Police Magistrate in Ottawa and an officer in the Militia. Over the first few months of 1940, fifteen green legal officers were recruited from the Canadian legal establishment. The need for offices was constantly expanding as the number of legal officers and staff multiplied. Field legal offices were set up across the country with the senior lawyer being given the rank of Major or Lieutenant-Colonel depending on the size of the district involved. They once again held the title of Assistant Judge Advocate General. Colonel Orde encountered no difficulty in acquiring suitable lawyers as the volunteers outnumbered the available positions. There was some political interference in the selection process, though. The three services each had a Minister at that time and the Ministers liked to warn the JAG when lawyers who were in their disfavour showed an interest in joining the Legal Branch.

The war quickly showed up areas of weakness in the legal procedures used during peacetime. One of them was the way in which claims against the Crown involving the military were handled. Prior to the war, every time there was a claim against the Department of National Defence or the Forces, the JAG would have to go to the Department of Justice to have it resolved. After six months of war, matters got so busy that a Claims Section consisting of two officers had to be set up just to write letters to the Department of Justice asking for counsel to defend the cases. As the Justice Department official responsible for assigning counsel was having difficulty keeping up with the volume, that Department agreed to transfer authority to deal with claims to the Office of the JAG. While this made administration of the claims easier, it also added to the Branch's already heavy workload.

Education, and particularly legal education, can be a curse as well as a blessing. It seems whenever legal officers have been co-located with administrative personnel, those personnel think the legal officers know all of the proper procedures, policies, rules and regulations that govern administration. Therefore, requests frequently came in for the drafting or review of documents that have nothing to do with a legal officer's sphere of duties (and probably knowledge). This got so bad in 1940 with respect to demands on the time of the Assistant Judge Advocates General that the Adjutant General had to issue a directive on the duties and responsibilities of those officers and warn the other staff officers against passing off their responsibilities to the legal officer.² This might be one reason why, despite the advantages of locating in the main building of the major military headquarters being served, the offices of the military lawyers have frequently been placed in a separate building at their request.

The European Legal Team

For the Canadian forces being sent overseas, this war was to be run under a different type of organization from that of WWI. Unlike the First World War, there was no overseas ministry created. Instead, in the fall of 1939, Canada set up a Canadian Military Headquarters (Overseas) (CMHQ) in London to regulate the operations of the Canadian troops who would be sent over. The senior officer in charge of CMHQ was Colonel (later Lieutenant-General) the Honourable P.J. (Price) Montague. He had been a Justice of the Manitoba Court of King's Bench in his pre-war civilian capacity. In an unusual display of longevity in wartime, he would hold this position, or its equivalent, at CMHQ throughout virtually the whole war. Indeed, noted Canadian military historian Dr. J.L. Granatstein observed:

[S]ome of the staff officers at NDHQ and CMHQ were among the most efficient in the army. Price Montague ... became a Lieutenant-General and the Chief of Staff at CMHQ in November 1944. His was the highest rank achieved by a militia officer during the war, a tribute both to Montague's politicking for promotion and the smooth fashion in which he ran his headquarters.³

With Canadian naval, army and air force personnel serving in significant numbers in Europe at the start of the Second World War, there was a need for the same types of legal services there as were being provided in Canada. To meet this need, a parallel JAG organization was created at Canadian Military Headquarters. Originally it formed part of the Adjutant General's organization. In light of his legal expertise, Colonel Montague was given, in addition to his other duties, the position of Deputy Judge Advocate General for both the military and air forces of Canada in the United Kingdom.⁴ Besides Colonel Montague, the 1939 organization had Major W.A.I. Anglin as the Assistant Judge Advocate General. With responsibility for an increasing number of legal officers and staff as the war developed, Major Anglin was promoted to Lieutenant-Colonel in 1940. To deal with the need for legal officers in the field, Assistant Deputy Judge Advocates were deployed to each Division headquarters and a Deputy Judge Advocate served with the headquarters of each Corps and Headquarters Reinforcement Unit. On December 31, 1940, now Major-General Montague decided to separate the JAG organization from that of the Adjutant General and it became a stand-alone branch at the headquarters.⁵

With all the extra troops and vehicles in the country going hither and yon during military exercises, there was a considerable amount of damage being done to private property in the U.K. Early in the war the British Claims Commission handled demands for compensation resulting from the actions of the Canadian troops. With the increasing numbers of its forces being stationed in Britain, though, Canada wanted to take over the responsibility for handling claims itself. As of September 1, 1941, the authority for settling claims fell on the new Cana-

dian Claims Commission composed of the Senior Officer at CMHQ, the Deputy Adjutant General and the Assistant Judge Advocate General.

Besides the usual personal injury and property damage resulting from traffic accidents, one of the worst consequences of military manoeuvres was the effect on the farming community. England is a nation of hedges. They were usually there for a purpose. Other than providing privacy, they kept the livestock in the fields where they belonged. Tanks and other vehicles on manoeuvre tended to look upon hedges merely as minor obstructions. The result was large holes appearing in the hedges with alarming frequency. As the grass is always greener on the other side of the hedge, the livestock would take advantage of these unregulated gates to sample the more exotic cuisine outside. Because of wartime shortages, the farmers could not obtain barbed wire to block the holes and the pastures ef-



Major-General P.J. Montague, C.B., C.M.G., D.S.O., M.C., V.D.
Judge Advocate General, Canadian Army Overseas

fectively became useless for livestock. Therefore, when a hedge was damaged the appropriate government would receive a huge claim from the farmer not only for any lost livestock but also for the extra expenses arising from loss of the pasture. It got so bad that, despite the shortage, the Canadian Claims Commission finally authorized the claims investigators to draw barbed wire to give to the farmers in cases where Canadian troops had caused the damage.⁶

In April of 1941 the JAG's Branch at CMHQ had grown to include Major-General Montague as the Deputy Judge Advocate General, Lieutenant-Colonel Anglin as the senior Assistant Judge Advocate General, another Assistant Judge Advocate General in the rank of Lieutenant-Colonel for the Legal Section and a third for the Claims Section, a Deputy Judge Advocate in the rank of Major for each section, eight additional legal officers in the Legal Section and fourteen claims officers, of whom eight were in the field. By that fall CMHQ and National Defence Headquarters recognized the increasing need for legal staff with the result that the establishment was bumped to 16 legal officers and 17 claims officers in October of the same year.⁷

The other headquarters in the field also had their own legal officers who were responsible to the Assistant Judge Advocate General at the First Canadian Army Headquarters. A Corps received its legal advice from a Deputy Judge Advocate (Major) and an Assistant Deputy Judge Advocate (Captain). A Division was entitled to an Assistant Deputy Judge Advocate.

One of the cadre of legal officers that provided advice to the troops overseas in this time period, Roland Almon Ritchie, later rose to the Supreme Court of Canada. From 1941 until 1943 he held the post of Assistant Deputy Judge Advocate with 3rd Canadian Division.

In 1941 there was a concern at CMHQ about the representation of Canadian interests in the English courts because no Canadian military lawyers were allowed to argue cases. A lawyer had to be called to the Bar in the particular jurisdiction or else be given special dispensation before he or she could appear as counsel before a court. To resolve this difficulty, Canadian authorities arranged for four Canadian legal officers to be called to the Bar in England. This required a certificate from the Canadian Minister of Justice confirming that the officers were Barristers in good standing in their respective provinces and had at least five years experience at the Bar. This was done and Lieutenant-Colonel Anglin, Major Roche, Major MacDonald, and Major Embrury were all duly called to the English Bar.⁸

The legal officers assigned to the field were not left without direction as far as determining the scope of their duties during this period. Had they been, the commanders of the various headquarters and formations would undoubtedly have had them acting purely as staff officers half the time. JAG Overseas Headquar-

ters at CMHQ spelled out that legal officers at the headquarters of a field formation would do "staff work in connection with convening and confirming Courts-Martial" except in those areas involving policy such as the decision on disciplinary action itself or the reduction or suspension of a sentence. They could also act as Judge Advocates at General and Field General Courts Martial that involved such matters as joint charges or difficult points of law. On the non-disciplinary side, legal officers would advise other members of the staff on the interpretation of military and civilian law, provide legal aid to the troops and attend inquests when required.⁹

For the Assistant Deputy Judge Advocates of field formations, the duties were mainly related to discipline. They advised commanders, commanding officers and staff officers on questions of law and procedure, ensured applications for courts martial were properly prepared and the courts themselves were properly established and reviewed the proceedings once the case was over so that any illegalities or irregularities could be corrected. Although it must have been a rare case for an officer who was likely of Captain rank, he might even be appointed as a Judge Advocate for a trial. In addition to disciplinary matters, these legal officers would also provide advice on questions of law relating to Courts of Inquiry, Committees of Adjustment or Investigations. There were also a number of duties they were specifically not supposed to be assigned, including the general duties of a staff officer.¹⁰

Except for advice and services on discipline cases, probably the greatest source of business for legal officers overseas was legal aid. Soldiers, sailors, airmen and airwomen in a foreign country for lengthy periods almost inevitably ran into legal problems of some sort. For married personnel, the time apart often snapped the marital bond if the marriage had any weaknesses. There were problems with estates, real estate difficulties and the occasional tort or criminal matter to resolve. With no civilian lawyers to help the troops overseas in a timely fashion, the Forces filled the gap with free legal aid provided by legal officers.

As of November 1, 1945, over 3,000 legal aid files had been opened in the legal aid section at CMHQ. The fact that over 2,000 of these concerned divorce or annulment demonstrates the extreme stress that foreign service places on marriages. Even with these numbers, the total amount of legal aid provided was much higher. Often there was only a need for an interview or advice over the phone and no file was started.¹¹

The soldiers were only part of the equation when it came to civilian legal problems that arose during the war. The families and other dependants of the soldiers were normally involved as well. To deal with this aspect, the British Bar instituted a system of legal aid to meet their needs. Not to be outdone, the Canadian Bar Association followed suit. In most Canadian cities it created Dependants

Advisory Committees that could consider applications for legal aid and refer the applicants to a local solicitor if the case warranted such action.¹²

Discipline Overseas

When Canadians headed for combat again, the Canadian Government was determined not to waive its jurisdiction as it had done during WWI. Discipline of Canadian troops would be under Canadian control this time, even if British military law was still being applied because it was incorporated into the Canadian legislation. The changes that had taken place between the wars with respect to visiting forces were now put into practice. As a result, Canadian troops operating as part of Canadian formations were subject to Canadian, not British, discipline. By an Order in Council in January 1940,¹³ the Commander of the 1st Canadian Division and the Senior Officer at CMHQ in London were authorized to convene courts martial and to confirm and order the execution of sentences. There were, however, some types of sentences, such as death, penal servitude and dismissal from His Majesty's Service, that were reserved for the Governor in Council. As the war developed this straightforward authority had to be modified in order to meet the changing conditions. Throughout the war the disciplinary authority over Canadian forces was controlled ultimately by the Canadian Governor in Council. It would grant and revoke authority to Canadian commanders as the changes in circumstances required. It also retained the authority to confirm sentences awarded by courts martial in the most serious cases.¹⁴

Not all discipline of Canadians rested in Canadian hands, though. There were quite a number who had joined the Royal Air Force. They were therefore subject to its disciplinary jurisdiction, as were Canadians "attached" to British units. Under the *Visiting Forces (British Commonwealth) Act, 1933*, there were also times when other Commonwealth commanders were in charge of Canadian troops, including their discipline, and members of foreign forces were subject to discipline by Canadian commanders.

As in WWI, General or District Courts Martial would normally try Canadian troops in Canada and Britain. The Field General Court Martial tended to be the tribunal of choice for the units fighting on Continental Europe or in other theatres. JAG officers were still not in plentiful supply. Therefore, the prosecutor and defending officers would be line officers except in the most serious or complex cases. With the large number of lawyers in the other branches of the Forces during the war, however, even the line officers frequently had impressive legal credentials. While Judge Advocates would sometimes be lawyers serving in the Forces in an operational capacity, members of the JAG's office would usually be appointed to carry out this function if available.

Although Canada kept a much closer national control over its forces during WWII than it did during WWI, there was still a considerable amount of coordination with the British. In April, 1940, an Order in Council had stated that:

All Military and Air Forces of Canada which are present in the United Kingdom or on the Continent of Europe ... serve together with the Military and Air Forces, respectively, of the United Kingdom, and that all Military and Air Forces of Canada serving on the Continent of Europe shall act in combination with those forces of the United Kingdom serving on the Continent of Europe with which they may from time to time be serving...¹⁵

As a result of the *Commonwealth Status of Forces Agreement* and the *Canadian Visiting Forces Act*, this meant that many of the Canadian units and personnel were subject to the direction of the commanders of British forces if senior to the Canadian commander. In other cases, individual personnel were attached or seconded to the other forces in various capacities and would once again be subject to the orders of that force. Likewise, the Canadian commander would control foreign Commonwealth forces where he was the senior commander.

The integration of personnel even extended to the legal officers. For instance, the terms of reference for the Canadian Assistant Judge Advocate General assigned to the First Canadian Army stated:

Because of the fact that the differences between British and Cdn Military law are slight and in general involve only certain matters of detail, it has been possible to establish a complete and practical working integration of British and Cdn Legal Staffs, but without formal sanction. The British Legal Staff report direct in respect of legal matters to the Deputy Judge Advocate General, 21 Army Gp., instead of to the Judge Advocate General, Canadian Army Overseas. Where formal action on behalf of the British Judge Advocate General is required, e.g. the approval of charge sheets involving British personnel, such action is taken by the ADJAG (Brit) who is responsible to the Deputy Judge Advocate General, 21 Army Gp. Save in respect of such matters and matters of detail wherein action by British Legal Officers is restricted, officers of either service carry out their duties in respect of all troops under command HQ First Cdn Army whether such troops be British or Cdn.¹⁶

The references to the British legal officers relate to personnel included in the Assistant Judge Advocate General's organization for the First Canadian Army. Besides the Assistant Judge Advocate General himself, there was also a British Lieutenant-Colonel as Assistant Deputy Judge Advocate General, two Canadian Majors as Deputy Judge Advocates, a Canadian Captain as Assistant Deputy Judge Advocate, and a British Captain just designated as "Captain (Legal)."¹⁷ To one not familiar with the distinctions, the titles were likely somewhat confusing due to their similarity.

Although only a Lieutenant-Colonel, the Assistant Judge Advocate General had considerable influence at the First Canadian Army Headquarters. For one thing, he was one of the few officers who had direct access to the Army Commander as a matter of right. Besides overseeing his subordinates and providing general legal advice, his duties concentrated on the military justice system. For instance, he had to approve charge sheets before particularly grave cases, such as murder, fraud and indecency, could go to trial. He was also responsible for assigning Judge Advocates for General Courts Martial and, where an experienced prosecutor was needed, for Field General Courts Martial. Other duties included keeping custody of the court martial proceedings, instructing in military law, advice on courts of inquiry and liaison with legal officers of other Allied forces.

A Separate Overseas JAG

One of the difficulties in dealing with foreign forces is the need for status of some sort in order to have any credibility and influence. With the growth in the overseas component of the JAG Office there was a concomitant need for an on-site leader who could deal with foreign leaders of the military and civilian legal communities on an equal basis. Major-General Montague had a solution. A separate JAG could be appointed for the Forces overseas in the same way as a separate Minister had been appointed during WWI. Not surprisingly, as the incumbent Deputy Judge Advocate General, Major-General Montague considered himself the logical choice for the position.

As early as the fall of 1941 Montague had been politicking with the Chief of the General Staff and the Minister to be appointed "JAG Canadian Military and Air Forces in the U.K." He argued that though the head of a Branch at CMHQ should normally be called a Deputy, he should be an exception because his legal services organization came under the Adjutant General at the headquarters who was only a Brigadier while, because of his primary position as Senior Officer at the headquarters, Montague was a Major-General. Brigadier Orde, not happy with having an overseas rival for overall control of the legal staff, told the Chief of the General Staff that Montague already had all the powers he needed. Furthermore, it would be inconsistent to give Montague a title other than Deputy Judge Advocate General because the overseas headquarters was not a separate Ministry but rather, in effect, an advance National Defence Headquarters.¹⁸

The power struggle continued for over two years, but Orde eventually lost. Montague began calling himself the JAG Canadian Army Overseas at the beginning of 1943 after an Order in Council had removed his authority with respect to the RCAF but had extended it to include Canadian Army personnel in the United Kingdom or on the European continent.¹⁹ His right to do so was made clear in a further Order in Council in December of that year that he "be and he is hereby vested with the powers, duties and functions of the Judge Advocate-General and, in the exercise thereof in such capacity, he shall be described as the Judge Advo-

cate-General, Canadian Army Overseas."²⁰ Although Brigadier Orde was not particularly enthralled with this turn of events, he did not object when the designation was finally made.

Despite the formal appointment of Major-General Montague as the JAG Canadian Army Overseas, the effect was limited. Colonel Anglin was the day-to-day head of the organization in London as Major-General Montague had too many duties to perform in his other capacities. However, the rivalry between Montague and Orde did not abate simply because an organization chart spelled out a specific chain of command. Throughout the war Brigadier Orde still considered Anglin to be his man in Britain rather than Montague's.

Activity at Home

Brigadier Orde was probably fortunate that he did not have to take on the supervision of the overseas legal establishment as well as that in Canada. There was plenty of work at home to keep his plate full. Each year of the war saw an increase in the volume and complexity of the legal work. Vehicle accidents in Canada resulted in 985 claims in 1940-41. By the end of the 1944-45 fiscal year, this had risen to almost 4,500. Claims for ship collisions went from 25 in 1941-42 to over 200 in 1944-45.²¹ Aircraft were not immune from the plague of negligence either. While only 121 such claims were received in 1940-41, the total rose to 432 claims in 1944-45. These types of increases are not really surprising considering the increase in the size of the Forces and their activities during the period in question and the relative lack of experience of many of the young operators. However, the fact that the figures were understandable in no way lessened the workload for the legal officers involved.

It was not only the litigation matters such as claims that rose in volume. There were constantly new leases and agreements to be drafted, ships to be requisitioned and regulations and Orders in Council to be developed. In 1942-43 alone over 5,000 submissions for changes in these areas either had to be drafted or reviewed by legal officers before they were forwarded for approval. Even this list fails to take into account the approximately 19,000 requests for advice that required a written response or the approximately 70,000 telephone queries that same year.

Besides the solicitor types of work being done by the JAG's organization during this period, it also had to ensure that the discipline system kept up to date with the needs of the Forces. One of the modifications to the discipline system during the Second World War was the creation of Permanent Presidents and Prosecutors for courts martial in each of the Military Districts in Canada.²² A precedent had been set during World War I when the Adjutant General had set up Standing General Courts Martial in each of the districts. This change enabled courts to

be led by officers with experience in handling a trial and dealing with the issues that might arise.

Another development in the army was the creation of a new type of court martial—the Standing Court Martial. This new court, established by Order in Council in May of 1944,²³ was modelled on the Magistrate's Court in the civilian justice system. Although the Order in Council itself would have permitted a Standing Court Martial to try officers, warrant officers, non-commissioned officers and soldiers on a wide variety of offences, the Minister of National Defence, J.L. Ralston, immediately restricted its jurisdiction to non-commissioned members and soldiers in Canada or its territorial waters. He also delayed the commencement of any trials by these courts until July 1st and limited the offences they could try to absence without leave, desertion, and loss of equipment by neglect.²⁴ However, in 1945 the new Minister, A.G.L. MacNaughton, expanded the jurisdiction of these courts to include all offences committed by soldiers (but not officers or warrant officers) that were authorized in the Order in Council.²⁵

Originally, this type of court martial consisted of officers appointed by the Adjutant General. As a nod to the increasing need for courts martial to be familiar with legal principles, the Adjutant General was restricted to appointing officers with legal qualifications. The jurisdiction of the court martial was limited to a maximum punishment of imprisonment with hard labour for the more serious offences and penal servitude for the rest. While all of the officers were appointed to the one Standing Court Martial, each officer could sit alone and exercise all of the powers of the court. Practically speaking, this meant that trial before a Standing Court Martial meant trial before one legally trained officer called the President of the court.

This new type of court martial had the distinct advantage of speed. Trials that might have taken a day could now sometimes be done in an hour as the need for the Judge Advocate to instruct the court was eliminated, as were many of the other time consuming aspects of a General or District Court Martial. During the war, permanent presidents were appointed for these tribunals. This rapidly improved the expertise of those conducting the trials and was an additional reason for their efficiency. The offences they could consider were strictly military in nature. That way the offender would not be stuck with a conviction that might "leave a stigma on a man's character on his return to civil life."²⁶ The JAG stated in his annual report for 1944-45: "It is thought that this is the first radical change in the system of disposing of offences against military law since the Duke of Wellington introduced Field General Courts-Martial during the Peninsular War."²⁷

Court Martial Centre

The length of time it took to conduct Field General and District Courts Martial was still a serious impediment to maintaining effective discipline under wartime

conditions in Europe. Therefore, late in the Second World War the Canadian Army followed the British example and set up a centre solely for the purpose of conducting courts martial. This organization, called 1 Canadian Court Martial Centre, was established on May 14, 1945, at Ghent, Belgium.²⁸ There had been a significant volume of Field General Courts Martial in 2 Combat Brigade Group because the 1st Canadian Discipline Centre was under its command. The discipline centre was the holding location for all of the Canadian soldiers who were apprehended or surrendered themselves behind the army area. Serious cases from operational units at the front were also sent to the Court Martial Centre as it was a "static" unit. The unit did not waste any time before commencing proceedings. Two cases were tried the day it was set up.

The Court Martial Centre consisted of four courts. A prosecutor and a defending officer were assigned to each court as were trying officers and the necessary administrative personnel. The trying officers on the courts martial panels were assigned to the Centre from 1 Canadian Discipline Centre, 2 Canadian Brigade Group and Canadian Military Headquarters in London.

If the unit's war diaries are any indication, the experiment was of questionable success.²⁹ It started off well with up to 11 cases being tried in a day. The average over the first month was about four a day. However, in the following months the number of courts per day dropped drastically. The court panels themselves were also trying cases in Paris, Nice, Antwerp and a variety of other locations. This type of mobility did not lend much support to the rationale for a "static" court martial centre. Part of the rapid decrease in cases was likely due to the repatriation of a significant number of troops after the German surrender. The unit moved to Brussels at the end of July and then to Alverna, Holland, in mid-December. At the end of December, the Court Martial Centre closed its doors for the last time before being disbanded in early January 1946.

Trials of Interest

Not only members of the Canadian Forces were subject to Canadian military discipline. In Canada the discipline system was also having an impact on German troops. Among those who could be court martialed under Canadian law were Prisoners of War (POWs). In October 1942, two German non-commissioned officers (NCOs), Herbert Widmayer and Harold von Chappis, found this out when they were court martialed at Seebe, Alberta. They were charged with combining with others to hold a British Army officer and other ranks against their will within the POW enclosure. There had been a riot in the compound and these two admitted their involvement. To the utter shock of the other German prisoners, they were sentenced to seven years imprisonment. On review, the officer commanding Military District 13 remitted four years and the two were sent off to Prince Albert Penitentiary in Saskatchewan to undergo their sentences. However, the JAG notified the military authorities that it was not le-

gal to send them to the penitentiary until after the Governor in Council had approved the sentence. After some bureaucratic wrangling with penitentiary authorities, the two were returned to military custody.³⁰

The senior German officer in the POW camp did everything in his power to have the sentence reduced. He petitioned Canadian military and civilian authorities and even got the Red Cross involved. His statements strongly suggested that the soldiers had merely acted honourably and taken the fall for their comrades. Eventually, the Minister of National Defence mitigated the punishments to nine months detention.³¹

The legal officers did not always like the regulations and orders they were required to interpret. Toward the end of the war one of the most draconian policies inflicted by the Supreme Allied Commander was that of non-fraternization with the Germans. Signs were everywhere in the Allied occupation area: "Here ends the civilized world—Don't fraternize" or "You are now entering Germany—Don't fraternize."³² Examples of fraternization included shaking hands, permitting children to congregate around military premises or climb on military vehicles, making small gifts—even to children, and even smiling at a German. There were a number of courts martial of Canadians to enforce the policy, which, fortunately, was relaxed in mid-1945.

During WW II only one Canadian soldier was executed pursuant to a court martial sentence. Private Harold Joseph Pringle of the Hastings and Prince Edward Regiment was tried in Rome, Italy, in February 1945, on a charge of murder. The evidence showed that Private Pringle joined the Canadian Active Service Force in 1940 and had been in trouble ever since, particularly for being absent without leave (AWOL). In February 1944, he was sent with other reinforcements to join the Canadian forces in Italy. In June of that year he went AWOL again and joined up with a gang of others who were in the same situation. One of these was another Canadian Private by the name of McGillvary (ironically known as "Lucky"). On the evening of November 1, 1944, a fight broke out between McGillvary and another member of the gang. McGillvary was shot and severely wounded. Pringle and three others took McGillvary to a spot outside Rome. Pringle and another gang member then shot him again and left him dead in a ditch.

The trial was a General Court Martial, the only level with the jurisdiction to try a charge of this seriousness. Interestingly, the President of the court was a medical officer, Colonel R.W. Richardson of No. 5 General Hospital. The Judge Advocate was Major W.A.D. Gunn. At that time he was the Assistant Deputy Judge Advocate at the Headquarters of the 1st Canadian Base Reinforcement Group.

The only major issue at the trial was whether McGillvary was already dead at the time that Pringle shot him. The medical testimony was conflicting on the point.

However, the court found that he was still alive when shot. On February 22, 1945, the President pronounced Pringle guilty of the charge. He was sentenced "to suffer death by being shot." Four days later Pringle submitted a petition to Canadian Military Headquarters in London against the finding and sentence.

Before a sentence of this nature could be carried out it had to be confirmed by the Governor in Council in Ottawa. The proceedings were first reviewed at Canadian Military Headquarters by Lieutenant-General Montague, in his capacity as the Chief of Staff. He recommended to the Adjutant General at National Defence Headquarters that the findings and sentence be confirmed. In doing so, he added his weight as a Judge in civilian life, stating that if he were on a Court of Appeal he would find no reason for interfering with the conviction. Although the matter was in Ottawa's hands by late May, it took almost a month for the final decision to be reached. In the end, after a JAG review found that the finding and sentence were according to law, an Order in Council was issued confirming the finding and sentence and giving precise instructions as to how the execution was to take place.³³ The decision may have been influenced by the fact that two British soldiers who were tried for the same incident had already been convicted and executed. At eight o'clock in the morning on July 5th a white circle was placed over Private Pringle's heart, the officer in charge of the firing squad gave the order and the rifle shots that followed signalled the last execution of a member of the Canadian Forces.

The RCAF Overseas JAG

Although Major-General Montague's control of the overseas army's legal team did not end until 1945, his status in relation to the RCAF did not last as long. One of the reasons for his original air force appointment was likely the dearth of lawyers on the RCAF establishment in London. In 1940 the proposed establishment for RCAF Headquarters did not include any lawyers at all. By the summer of 1941, this situation had only marginally improved when the Air Officer Commanding authorized one legal officer in the rank of Squadron Leader to be taken on the staff of the headquarters. As the war progressed, though, the air force came to realize the need for military lawyers. In February of 1942, the establishment at RCAF Overseas Headquarters was increased to include a legal staff of one Wing Commander, one Flight Lieutenant legal, nine Flight Lieutenants, fifteen Flying Officers and a number of clerical staff. Two days after this establishment increase was authorized, RCAF HQ Overseas sent a cable to Ottawa saying, in part:

Increase in number of courts martial in Canadian Squadrons here necessitates employment of experienced prosecutor. Strongly recommend immediate posting of legal officer experienced in advocacy as prosecutor. Following RAF practice on establishment should not repeat not be higher than flight lieutenant.³⁴

The headquarters got its wish and Flying Officer Martin was sent over to fill the position.

By January of 1943 the worldwide operations of the RCAF and the separate RCAF Headquarters made it impractical for Major-General Montague to continue wearing two legal hats by serving as JAG Overseas for both the army and the air force. At that time, the Governor in Council appointed Wing Commander (later Group Captain) J.A.R. Mason, A.F.C., to take over the JAG's responsibilities relating to the RCAF for Europe, Asia and Africa³⁵ while Major-General Montague retained them for the Canadian Army Overseas. Wing Commander Mason had previously been the Assistant Judge Advocate General, No. 1 Training Command. He was a distinguished member of the Ontario Bar and had been a pilot during the First World War where he had earned the Air Force Cross. Even with this appointment, the significant number of Canadians serving with RAF units around the world still necessitated delegating disciplinary powers to British officers in a number of locations. As his army colleagues had done in 1941, Wing Commander Mason went through the process of being called to the English Bar in 1943.³⁶

The RCAF's legal officers shared many of the locales of its units and headquarters during the war. While the majority of both were concentrated on the British Isles for most of the time, legal officers also sweated in the heat of Cairo and drank in the more pleasant airs of liberated Rome. Cairo was the RCAF District Headquarters for the Middle East and accordingly had an Assistant Judge Advocate General posted at the headquarters. For most of 1944 this was Squadron Leader B.W. Hopkins. He was a lawyer who was used to hard work and found that the load in Cairo just was not heavy enough to suit his tastes. After his original query about the need for a legal officer with the headquarters was politely rebuffed, he took to travelling to make sure legal services came to the field. From Tel Aviv to India to Italy and many points in between he provided legal aid, sat as a Judge Advocate at courts martial and generally made himself useful. He even acted as the commanding officer of the RCAF District Headquarters for a period until a new one could be posted in. His reward was a switch to Italy at the end of the year when Squadron Leader C.A. Edwards relieved him in Cairo.

Effective February 1, 1945, Group Captain Mason handed over the responsibilities of JAG RCAF Overseas to Wing Commander (later Group Captain) Walter M. Martin who carried on in the job until the end of the war made it redundant.³⁷

Besides its explosive wartime expansion, the RCAF attained a more solid legislative foundation at the beginning of the war. It was finally put on the same statutory base as the other two services with the passage of the *Royal Canadian Air Force Act* of 1940.³⁸ As a separate service, the RCAF had always issued its own orders with respect to the JAG and his responsibilities. In 1943 it listed his duties as follows:

76. Duties - The duties of the Judge Advocate General with regard to the air force shall be:-

- (a) to review the proceedings of general, field general and district courts martial and to report any irregularities to the Minister;
- (b) to keep a record of the proceedings and final disposition of the proceedings of general, field general and district courts-martial;
- (c) to advise convening and confirming officers of courts-martial on all questions relating to air force law;
- (d) to advise and have direct communication with the assistant judge advocates general at commands on matters of a purely legal nature;
- (e) to perform such services as may be assigned to him in connection with the revision of air force law; and
- (f) to advise the appropriate authorities at Air Force Headquarters, when requested, on matters of a purely legal nature.

The RCN Goes Its Own Way

Despite the separate organizations overseas, the army and the air force were both satisfied receiving legal advice from the JAG. It was not so for the RCN, even though it had been doing so since 1922. Early in the war Brigadier Orde needed legal officers for all three services. In June of 1941, the Chief of the Naval Staff transferred Lieutenant Duncan K. MacTavish to the Special Branch so that he could serve with JAG as the Assistant Judge Advocate General (Navy). He was promoted to Lieutenant-Commander at the same time. MacTavish was only there for six months before being transferred back to the Naval Secretariat. Lieutenant W.W. Chipman took his place in January of 1942. During a major reorganization in 1942 the RCN was interested in establishing its own legal branch. However, there were technical difficulties with this approach so it created the position of Deputy Judge Advocate of the Fleet instead. This officer was in a considerably different situation from those operating within the Office of the JAG. To begin with, the first Deputy Judge Advocate of the Fleet was Paymaster Captain M.J.R.O. Cossette, appointed effective May 1, 1942. As can be inferred from his rank, he was not a lawyer. Apparently the RCN was still fixated at this time on copying the traditions of the senior service, the Royal Navy. In the Royal Navy the Judge Advocate of the Fleet (JAF) was always a lawyer and the DJAF was usually a supply officer. Because the RCN wished to appoint Captain Cossette, a supply officer, it only created a DJAF. Despite the title, Captain Cossette was not a deputy to anybody.

The DJAF did not take over as a naval equivalent to the JAG. Theoretically his only responsibilities related to disciplinary matters in the Navy. Once again, this was in keeping with the Royal Navy's tradition. Instead of formal terms of reference, a memo of May 7, 1942, detailed his duties as follows:

D.J.A.F. will deal with all matters relating to Courts Martial, Disciplinary Courts, Boards of Inquiry, Punishment Warrants, etc., the files dealing with which should be routed to him via "Staff."³⁹

The JAG's office still handled the rest of the legal matters for the Navy such as leases, damage claims, requisitioning of ships, etc. Furthermore, if any legal questions arose on the review of disciplinary matters, the DJAF was to refer these to the JAG.

Late in 1942 the Navy was not satisfied with having just a DJAF as he could not provide legal advice. It then managed to have a position of Deputy Judge Advocate General (Navy) created within the JAG's organization. This officer was a lawyer. Nominally, he was responsible to the JAG for his professional advice. However, the Deputy Judge Advocate General (Navy) sat as legal adviser to the Naval Board and Naval Staff Headquarters and acted virtually as a JAG for the Navy. In fact, at one point where the Deputy Judge Advocate of the Fleet disagreed with a legal opinion given by the JAG, the Deputy Judge Advocate General (Navy) concurred with his naval colleague. This suggests that the relations between his and the JAG's Office were cordial, but somewhat strained. This impression is reinforced by a memo to the Chief of Naval Staff in 1943 in which the Deputy Judge Advocate General (Navy) outlines his duties but fails to mention the JAG at all.

The Navy ultimately appointed a lawyer to replace the Deputy Judge Advocate of the Fleet at the end of the war. Because he was a lawyer, the title was changed to Judge Advocate of the Fleet (JAF). The first JAF was Commander (later Captain) Phillip R. Hurcomb, who had been a senior civilian lawyer in Ottawa prior to the war, served in the Office of the JAG, and remained on with the Regular Force at the war's end. He held this position for almost all of its existence, retiring in 1964 just months before the position disappeared.

Despite its very close ties to the Royal Navy, the RCN became the first service to fully Canadianize its discipline system. The *Naval Service Act, 1944*⁴⁰ included a comprehensive disciplinary code that was not a mere incorporation of British legislation by reference, although there were numerous similarities. This Act did not, however, have an impact on the discipline of the RCN during WWII as the legislation was not brought into force by Order in Council until September 7, 1945,⁴¹ after the war had ended. Because of the Canadian nature of its provisions, the RCN legislation became the basis for many of the disciplinary provisions of the *National Defence Act* that was to follow six years later.

Winding Down the War

In early 1944 there were 21 legal officers on the staff of the JAG at National Defence Headquarters and 28 with the Military Districts and Commands in Canada.⁴² The rank structure was somewhat unusual in that there were two Briga-

diers, Orde (JAG) and Nolan (Vice JAG), but the four Deputy Judge Advocates General were all Lieutenant-Colonels or equivalent. At the peak of its strength during the war, the Legal Branch had grown to approximately 200 officers both in Canada and abroad. This was quite a change from the lonely vigil that Brigadier Orde had held for so many years.

By the end of the war, Major-General Montague had been promoted to Lieutenant-General and made the Chief of Staff at CMHQ. He then relinquished his position as JAG Canadian Army Overseas. The position itself disappeared. Colonel Anglin received a promotion to Brigadier and was made Vice JAG in June of 1945. However, the office was rapidly shrinking as Canadians were repatriated. Brigadier Anglin was not a career legal officer and wanted to return to his civilian practice. In December of that year he went home and Colonel G.E. Tritschler took over the position of Vice JAG for a brief period before he, too, was repatriated. In April 1946, he was replaced by Lieutenant-Colonel W.B. Bredin. The RCAF JAG Overseas also disappeared. Although for many years to come a legal officer would continue to serve Europe from London as an Assistant Judge Advocate General, the Canadian Forces were back to just one JAG, Brigadier Orde in Ottawa.

War Crimes Trials

The end of the European war on VE-Day and the war in the Far East on VJ-Day did not end the war-related activities of the Legal Branch by any means. Near the end of the war the Government had set up a War Crimes Advisory Committee to provide the Government with advice on the prosecution of alleged war criminals. A legal officer had been appointed secretary and investigating officer for the Committee. Another, more-senior, member of the Branch acted as the Department of National Defence representative on the Committee. With the Branch's intimate involvement in the area, it was no surprise that legal officers were also closely associated with the drafting of the *War Crimes Regulations (Canada)* in 1945. These regulations set out the process for prosecuting alleged war criminals and the JAG was made responsible for reviewing the proceedings of all the courts that resulted. In carrying out his duties in this respect, Brigadier Orde proceeded to Europe to advise on the conduct of the first trials.

At the end of the war, the four major powers of the time, the U.S., Britain, France and the Soviet Union, had agreed that they would conduct trials of major war criminals, particularly those politically involved in the running of the Axis countries. One set of trials was held at Nuremberg, Germany, and are commonly known as the Nuremberg Trials. The other, known as the International Tribunal for the Trial of War Crimes in the Far East, was held in Japan. For those military personnel charged with war crimes on a smaller scale, the jurisdiction for trial depended on the nationality of the victims involved. Using the information developed by an Allied war crimes commission, Canada set up the No. 1 Canadian

War Crimes Investigation Unit headed by Lieutenant-Colonel Bruce J.S. MacDonald. Its role was to investigate war crimes against Canadian military personnel and obtain evidence that might be used in any resulting prosecutions.

One of the resulting cases that attracted considerable public attention was the 1945 trial of S.S. Major-General Kurt Meyer. It concerned the alleged murder of Canadian prisoners of war by German forces during the early days after the D-Day invasion on June 6, 1944. The 3rd Canadian Infantry Division had the task that day of attacking through the gap between the towns of Bayeux and Caen while British troops were to take the towns themselves. By the next day the Canadian troops, consisting of the 7th and 8th Brigades and the 6th Armoured Regiment, had not yet reached their objectives. In the meantime, the Germans had sent forward the 12th S.S. Panzer Division (Hitler Jugend) to stem the Allied tide in the area. One of its formations, the 25th S.S. Panzer Grenadier Regiment, was headed by Colonel Kurt Meyer.

Meyer realized that if he hesitated to attack the whole German plan for reinforcement would likely fail. He attacked and his soldiers overran several Canadian positions.⁴³ Reports from surviving Canadians, French civilians and captured German soldiers painted a gory picture of captured prisoners being interrogated and then shot at the direction of the senior German officers of the 12th S.S. Panzer Division.

In one incident a seventeen-year-old Pole who had been conscripted into the German Army told of seven Canadian prisoners being brought to the l'Ancienne Abbaye Ardenne that Meyer was using as his field headquarters. Meyer was reported to have shouted: "Why do you bring prisoners to the rear? The murderers do nothing but eat up our rations." The witness then saw the prisoners searched, interrogated and marched singly through an opening into a small garden. As each one went through the opening he was shot in the back of the head.

The Polish witness was able to lead the investigators to the place where all this happened and his story was verified when a total of 18 bodies were eventually dug up, many of whom had been shot in the back of the head. Identity disks and other evidence showed them to be Canadians captured during the German offensive on the 7th and 8th of June.

When Meyer was captured later in the war he had risen to the rank of Major-General. When the evidence of the offences solidified, Meyer was charged with five charges of committing a war crime. One was for giving the order to have the seven Canadian soldiers shot, with an alternative to that charge of his being responsible for the seven soldiers being killed by troops under his command. The other three charges concerned the killing of the eleven other soldiers whose bodies were found at the murder site, counselling his soldiers to deny quarter to Al-

lied troops and being responsible for troops under his command killing twenty-three Canadian prisoners of war near two villages in Normandy.

The head of the No. 1 Canadian War Crimes Investigation Unit, Lieutenant-Colonel MacDonald, was selected to prosecute Meyer. Although he was not a member of the Legal Branch himself, MacDonald was a highly respected lawyer in his civilian capacity before the outbreak of the war. This was not unusual as there were numerous well-qualified lawyers throughout the Canadian Forces during the war who were performing operational or administrative functions unrelated to their civilian qualifications. Members of the Branch were, however, deeply involved in the case in other capacities. Major Carroll assisted Lieutenant-Colonel MacDonald in the interviewing of German prisoners of war held in Canada. Brigadier Orde himself was a member of the War Crimes Advisory Committee. Group Captain C.M.A. Strathy of the JAG's office was a member of a sub-committee that drafted regulations to govern war crimes trials by Canadian courts martial, along with Lieutenant-Colonel MacDonald and Wing Commander Hopkins. At the trial itself, Branch members included the Judge Advocate, Lieutenant-Colonel W.B. Bredin, and Major Dalton G. Dean (a former Rhodes Scholar) who was assisting the prosecution.

The trial commenced on December 10, 1945, in a reconstructed conference room at the naval barracks in Aurich, Germany. It generally followed the format and rules of a Field General Court Martial, although there were some special evidentiary rules to allow for written testimony to be read where the witnesses were not available due to death, release from the military or other factors. Lieutenant-Colonel MacDonald's main assistant for the prosecution was Lieutenant-Colonel Clarence Campbell, later to become President of the National Hockey League. The Defending Officer was an experienced trial lawyer, Lieutenant-Colonel Maurice W. Andrew, DSO, who had commanded the Perth Regiment during the Italian and North-West Europe campaigns.

The JAG, Brigadier Orde, attended the trial. He had enough court reporters appointed so that they could change every fifteen minutes and transcribe their notes in between their shifts. As a result, at the end of each day he had a full transcript of the proceedings for review. He also arranged for the orderlies in the courtroom and others working in nearby areas of the building to wear rubber soled shoes during the trial as the regulation boots were so loud on the hardwood floors that they would drown out the proceedings.

Despite the uniqueness of this first war crimes trial before a Canadian court martial and the gruesome nature of the offences, it proceeded normally. After the court and all the officials were sworn in, the prosecution gave an opening statement and called its witnesses. It brought evidence as to the military formations in the area at the time, the command structure of the German forces and the instructions that the German troops had received with respect to taking no prison-

ers of war. It also brought witnesses as to the actual killings that took place, the circumstances surrounding the death and the identity of the soldiers who were killed. At one point, to obtain the testimony from a former German soldier Lieutenant-Colonel MacDonald had to resort to standing between the witness and General Meyer as the witness was coming apart under the General's glare.

When the defence took its turn, General Meyer was immediately called to the stand. Meyer vehemently denied ever telling his soldiers not to give quarter and scoffed at some of the witnesses' statements alleging he had done so. He denied knowledge of the shooting of the seven Canadians on June 7th or of any of the other killings until informed later.

Meyer had a feeling that he was going to be convicted and possibly sentenced to death. He had a note sent to Brigadier Orde outlining his financial situation and asked the JAG if he could ensure that Meyer's wife and daughter received the money. Orde was touched by the request. He drove down to the British controlled sector where Meyer's home was located and arranged with the British authorities to have the matter taken care of.

It took the court only three hours to arrive at a verdict—guilty on three of the five charges, including the one concerning giving no quarter. Despite the strong testimony of the Polish soldier, Meyer was not convicted of ordering the seven Canadians shot. This may have resulted from a lack of evidence that he had given a direct order to have them killed. The other acquittal was on the alternative charge, as he could not be convicted of both charges where one is an alternative to another. He was sentenced to suffer death by being shot.

The proceedings and sentence had to be reviewed by the JAG for any illegalities and confirmed by the Convening Officer, Major-General Vokes, before the sentence could be carried out. Brigadier Orde reported the proceedings were regular and recommended confirmation. In the meantime, Meyer had petitioned Vokes for clemency. After receiving the JAG's report, Vokes confirmed both the findings and the sentence. However, the execution was delayed due to some technical problems stemming from the Americans' wish to interview Meyer and a question as to whether Lieutenant-General Simonds, the Chief of the General Staff, had a right to review the proceedings. During the delay Vokes had second thoughts. Given a second opportunity to consider the sentence, he commuted it to life imprisonment. Meyer was initially imprisoned in Dorchester Penitentiary in New Brunswick. He was later transferred back to a German jail and, with the agreement of the Canadian Government, his sentence was reduced to 14 years imprisonment by a joint British-German review panel. He actually served considerably less after time off for good behaviour.

It is said that Meyer turned up a number of years later at a Canadian Officer's Mess at Soest, Germany. The first time this occurred he was treated with cool

politeness. The second time it was made quite clear that he was not welcome.⁴⁴ Although he may have lacked in mercy, Meyer did not lack in gall.

Unlike the army in the Meyer case, the RCAF was not as reluctant to execute convicted war criminals. After the war it held a number of war crimes trials for the murder or attempted murder of captured airmen. Four Germans convicted of murdering Canadian airmen after their capture were shot by firing squad in the spring of 1946.⁴⁵ Squadron Leader A. A. Cattanach, later appointed to the Federal Court of Canada, was the legal officer sent over to act as judge advocate for the courts martial.

Legal officers were also involved in the war crimes trials in the Far East. Although Canada held no trials of its own due to the lack of forces in the area, the Americans and the British were sympathetic to Canadian participation in the trials they held. The Canadian public and politicians were anxious to see Japanese war criminals brought to trial in light of the suffering and torture inflicted on Canadian prisoners of war captured during the fall of Hong Kong in 1941. The British tried the cases involving Canadians but agreed to have a Canadian officer on the court and to have Canadians assisting with the prosecutions. Major J.T. Loranger, who would later be the first AJAG in the Far East for the Korean War, was made available for the court duty. Lieutenant-Colonel O. Orr and Major G.B. Puddicombe, two lawyers who had served during the war in other branches of the forces rather than the Legal Branch, headed the prosecution team. Captains J.H. Dickey and J. Boland from the JAG's office were also sent to join the prosecution team.

The most senior legal officer involved in the International Tribunal for the Trial of War Criminals in the Far East in Tokyo, as the court was officially called, was the Vice JAG, Brigadier Henry Granton (Harry) Nolan, C.B.E., K.C. For two years, from 1946 to 1948, he was involved in the prosecution of the major political figures rather than those involved specifically with the mistreatment of Canadians. His efforts for the International Tribunal received considerable praise from the American Chief Prosecutor in his correspondence back to the Secretary of State in Washington. Brigadier Nolan commenced the prosecution against the former Japanese Premier, Minister of War and Chief of Staff, General Hideki Tojo, by setting out the Japanese constitutional law that formed one of the cornerstones of the prosecution. After leaving the Forces, Brigadier Nolan was ultimately appointed to the Supreme Court of Canada only a year before his death in 1957.

Adapting to Peace

In wartime the only way to keep up the needed strength of military forces is through a gluttony of recruiting to replace those lost to combat, disease, accident and desertion. When peace ultimately prevails it is inevitably time for the crash

diet of demobilization. Then the hard decisions have to be made as to what the country really needs in the way of military forces in the post-war era. In the view of the Chiefs of Staff after the Second World War, the need for military lawyers was obviously minimal. On April 30, 1946, the Chief of the General Staff informed Brigadier Orde that the army was willing to support a maximum of twenty-five personnel in the Office of the JAG, including support personnel. The JAG was to provide a proposed peacetime establishment within those limits.⁴⁶

In a masterful display of in-house politics, instead of proposing an army establishment for lawyers, Brigadier Orde set out a plan that was to shape the way in which legal officers would still be serving at the end of the century.⁴⁷ He proposed a tri-service legal organization under the JAG with each of the services providing funding and personnel. He pointed out the fact that army and the air force law was very similar and lawyers from either of those services would be qualified to provide advice to authorities of the other. He also commented that the volume of work done by the JAG for the Navy was very small compared to the other two services. The JAG suggested that if the Navy wanted to receive services from the JAG organization it should either provide the personnel or else funds for the work. The alternative was for the Navy to set up its own legal service. With this new organization the legal officers would not only provide legal advice to their own services, but also to headquarters, units and commanders of the other services in their regions or in Ottawa.

While the Chiefs of Staff agreed to the proposal for the Army and Air Force, the Navy balked. Theirs was not the final say. In 1947 the Minister of National Defence decided that the legal duties for the Department of National Defence and the three services would all be concentrated in the Office of the JAG, as it was for the Army and Air Force during the war and the three services before that time. The Navy came on board and posted Lieutenant-Commander J. P. (Jack) Dewis to fill the naval position in the JAG organization. However, not to be cowed, it did not give up its own Judge Advocate of the Fleet position that had been established during the war.

In the meanwhile, a major change had taken place in the organization of the Canadian Army in Canada. In January, 1946, the Army had switched from the former concept of thirteen Military Districts across the country to a system of five Commands. Western Command encompassed British Columbia, Alberta, the Northwest Territories and the Yukon. Prairie Command included Saskatchewan, Manitoba, and Northwest Ontario. Central Command controlled the rest of Ontario. Quebec Command was self-explanatory and Eastern Command had the rest of the country. The legal services had to change as well to accommodate this new structure.

The resulting organization for the JAG in 1947 included one Brigadier as JAG, one Colonel as Vice Judge Advocate General, a Lieutenant-Colonel and a Wing

Commander as Deputy Judge Advocates General, nine Majors/Lieutenant-Commanders/Squadron Leaders as Assistant Judge Advocates General, two Captain legal officers and a Captain administrative officer. All would be stationed at National Defence Headquarters in Ottawa, except for six Majors or equivalent who would serve in the field as Assistant Judge Advocates General at Vancouver, Winnipeg, Toronto, Trenton, Montreal and Halifax. Despite being a part of the field headquarters, the Assistant Judge Advocates General would still be responsible to the JAG for professional matters. In other words, fifteen legal officers would provide the dedicated legal services to the whole of the Canadian Forces.⁴⁸ It was not enough.

By 1949 Brigadier Orde had nineteen officers under his command, including Colonel Lawson who was at National Defence College. He asked for an additional three legal officers and succeeded in persuading the relevant authorities of the need. However, Orde was interested in quality as well as numbers. The small size of the Branch necessarily resulted in slow promotions. As the Director of Army Personnel pointed out: "The present establishment of the JAG's office would appear to be a child of expediency based on the fact that most of the lawyers available at the end of the war were majors. As a result, the present organization is most inflexible, presenting a wonderful career for the one Lt col but almost a brick wall for the seven majors."⁴⁹ That fact and the low pay rates made it difficult to attract new lawyers or retain experienced ones. Therefore, he also asked for a \$60 professional pay to be added to the salaries, a right for legal officers to all retire at 55 regardless of rank and automatic promotion to the rank of Lieutenant-Colonel or equivalent based on years of service. He was successful on the pay and the retirement proposals and partly so on the promotion request. One can sense that he was pushing his luck with the three service Chiefs as they also ordered an examination of whether the JAG's office should operate on a civilian basis.⁵⁰

In responding to this last item the JAG pointed out his perception of the differences between military and civilian government lawyers:

There is inevitably a certain conflict between civilian and service interests within the Government. It is one of the duties of the civilian side of the Government to restrain and limit the Military side. The principal restraints on the expansion power of the Military are legal and financial. ... It is no part of the function of the Judge Advocate General and his staff to exercise control over the Forces in legal matters. Legal officers who are members of the Services owe a Military duty to their respective Chiefs of Staff and their Commanders to study every problem referred to them with a view to suggesting some legal means whereby the desired objective can be achieved. If this Office were staffed by civilians, however, we feel that they would inevitably attempt to exercise some sort of legal control. ... Rather than co-operating with the Services and attempting to find le-

gal means for carrying out those activities which the Services have decided as a matter of policy to carry out, they would tend to search for legal flaws in proposals which would enable them to say that they could not be carried out.⁵¹

He also pointed out the need for uniformed lawyers to be sent to places of conflict and for them to have an intimate knowledge of the working of the military. The notion of switching to civilian lawyers was shelved.

Much of the work for the Branch at the end of the war was cleaning up matters that were war-related. There were still a large number of courts martial immediately after the war (2,723 worldwide in 1946-47) as demobilization gradually diminished the size of the forces, but these were down considerably from their wartime peaks (8,484 the preceding year not including those in Europe, Asia and Africa).

At the end of WWII, Great Britain and the United States both initiated major reviews of their military laws. Canada did likewise. With an eye to the changes being developed by our allies, and the deficiencies that were evident in the existing Canadian legislation, Brigadier Orde oversaw the development of uniquely Canadian legislation to govern the military—the *National Defence Act*. Work was started in 1947 on this revolutionary piece of legislation that unified under one Act the statutory authorities governing the Department of National Defence, the Royal Canadian Navy, the Canadian Army, the Royal Canadian Air Force and the Defence Research Board. These authorities had previously been spread out over at least eleven different Canadian and British statutes.

It took three years of hard work and consultations involving a senior officer of each of the three services, JAG officers and Department of Justice draftsmen to whip the Act into shape. Brigadier Orde had removed himself from most of the day-to-day activities of the Branch during that period in order to devote his time to developing this Act. Senior Justice counsel were involved in reviewing the drafts, as were Department of Finance officials. The Minister of National Defence, Brooke Claxton, had the advantage of being a lawyer with a considerable knowledge of military law. He reviewed each clause of the proposed Act and made suggestions for amendments. Not to be left out, the Minister of Veterans Affairs, Colonel Hughes Lapointe, did the same. Finally, all the technical hurdles were resolved and the Bill was introduced in the Senate on November 8, 1949. Although the Senate passed the Bill, it did not make it to the House of Commons in that session and lapsed. It was reintroduced in the House in the first session of 1950.⁵²

By the end of the forties the Legal Branch was well back into a peacetime routine. However, the threat of Communist advances and the wide variety of sub-

jects that now required legal input ensured that it would never again slide back to its undernourished pre-war condition.

Chapter 4. Hot and Cold War

Unlike the forties, the fifties and sixties saw no world wars. Neither did they see peace. The Korean War, the Suez Crisis, the Vietnam War and the 1967 Arab-Israeli War are but some of the better-known examples of the conflicts that continued to plague the world. Except for its support of the United Nations operations in Korea, Canada avoided becoming a participant in any hostilities and did its best to promote peace. The Canadian Forces earned respect within the country and respect for Canada throughout the world through their peacekeeping activities and assistance during national and international disasters.

This was a time of organizational growth and development for the Office of the JAG. The number of legal officers gradually increased as the complexities of society demanded more expert legal advice in both the civilian and military spheres. The renewed involvement of the Canadian Forces in operations saw legal officers being deployed to the field with the troops once again. But throughout the two decades the Branch enjoyed relative stability when compared to decades such as the forties and nineties.

A New JAG

While the 1950s were years of amazing technological progress, there was constantly the threat of nuclear war. The size of the Forces had dropped considerably from the wartime establishment, but there were still a much larger number of personnel than had been the case pre-war. Unlike the false sense of security that had existed between the two world wars, western nations appreciated the danger of renewed world conflict in a nuclear age. In 1949 this led to twelve countries, including Canada, joining together in the North Atlantic Treaty Organization (NATO). The invasion of South Korea by the North in 1950 added to this wariness. The western nations, anticipating aggression from the communist countries, began to rearm. In addition to a new age of warfare, the Canadian Forces had also entered a new legislative age, the era of the *National Defence Act*. The Legal Branch also started the decade with change. On May 5, 1950, Colonel William J. (Bill) Lawson, the Vice JAG, was promoted to Brigadier and appointed JAG to replace Brigadier Orde.

Brigadier-General Lawson was a Toronto Lawson, born there on February 20, 1909. He attended the University of Toronto to earn his B.A. in 1931 and his M.A. in 1932. The next stop was the not-to-distant law school at Osgoode Hall. After receiving his LL.B. in 1933 he was called to the Bar the following year. In Toronto he was raised and in Toronto he stayed, practicing law there until 1940.

It was during his university years that Lawson got his first taste of the military. He joined the Canadian Officers Training Corps and later continued his military



Brigadier-General William J. Lawson C.D., Q.C.

service while practicing law. On March 29, 1938, he received his commission as a Lieutenant in the Queen's York Rangers (1st American Regiment) in Toronto.¹

In 1940 there were quite a number of lawyers who answered the call to arms and Lawson was one of them. When he joined the Legal Branch he did not waste any time, progressing through appointments as an Assistant Judge Advocate General, Deputy Judge Advocate General, and Vice Judge Advocate General. This included time in England with the office there during the Second World War. It took him only ten years from joining the Branch to reach the top. In 1950, he was only 41 when he was promoted to Brigadier and

appointed JAG. Two years later Lawson was granted his "King's Counsel" in recognition of his legal service and expertise.

Although a somewhat reserved and formal man by nature, Brigadier-General Lawson had that innate ability to lead. When he gave advice to the Minister, Deputy Minister, or one of the Chiefs of Staff, they listened. The fact that he was a man of independent means did not hurt his credibility. It did, however, cause him some confusion at times when his lower-paid subordinates appeared reluctant to become involved whenever he suggested a pleasant, but expensive, outing. The Brigadier was able to maintain his contacts within the Ottawa power structure through his membership in the elite Rideau Club.

Lawson was an inveterate traveller. Every year he would visit the field legal offices across the country and in Europe. He even visited the Korean theatre in 1954. Travelling on duty did not seem to satisfy his wanderlust, though. Whenever he went on leave it seemed it was to some exotic location outside the country.

Golfing has been the passion of many a JAG. Like his predecessor, Brigadier-General Lawson belonged to the prestigious Royal Ottawa Golf Club and worked on his game religiously. However, he was no Jack Nicklaus. A young Major in the Branch down on a visit from Montreal, Reilly Watson (later Mr. Justice Watson of the Federal Tax Court), was playing a round with him one day

and the Brigadier-General was obviously in a good mood. He was constantly calling the Major by his first name and being very pleasant. On the tenth hole the Brigadier hit a very good drive. His second shot was also quite respectable. Unfortunately, it was still a foot short of Watson's first drive. One could feel the temperature drop as the Brigadier commented: "You're obviously playing too much golf in Montreal, Watson." The rest of the round was devoid of first names.

After almost nineteen years at the helm, Brigadier-General Lawson was the senior Brigadier in the Canadian Forces when he retired on February 20, 1969. Brigadier-General Lawson passed away on May 5, 1986.

The National Defence Act

Brigadier-General Lawson took over the Legal Branch at a significant point in the history of Canadian military law. The *National Defence Act* finally received Royal Assent on June 30, 1950. When dealing with new laws there is always a delay of one sort or another. Despite having received Royal Assent, all of the *National Defence Act* did not come into force immediately. New *King's Regulations and Orders* and their accompanying administrative orders had to be drafted to implement the changes. Because they depended on the wording of the Act for their authority, they could not be drafted in final form before the Act was passed. As a result, the Act was brought into force piecemeal with the final provisions not taking effect until February 1951.

All of the basics were covered. The *National Defence Act* set out the authority for the civilian Department of National Defence, as well as its composition. A separate part did the same for the Canadian Forces. A third organization, the Defence Research Board, also received statutory recognition in the Act. Other parts addressed miscellaneous issues ranging from salvage to exemption from jury duty.

An entire Part was devoted to aid of the civil power setting out who may call out the Forces, under what circumstances and under whose control.² Where the government of a province determined that an emergency existed that was beyond its ability to handle with its own resources, the Attorney General of the province could send a requisition for military forces directly to the officer commanding the army command in the area (later changed to the Chief of the Defence Staff). That officer was required to comply with the requisition, but it was up to him to decide what forces were sent. Any forces provided remained under the leadership of their military officers, but control over the general situation rested with the civil authority. In other words, the civil authority determined the result desired; the military commander determined how the result would be achieved.

However, by far the greatest percentage of the Act was taken up with the new Code of Service Discipline that set out the statutory basis for the whole system of military justice for the three services.

From the Legal Branch perspective, one of the important changes brought about by the Act related to the Branch itself. The new Act, for the first time in a Canadian statute, specifically provided for the appointment of a Judge Advocate General for the Canadian Forces. It also imposed certain statutory duties. Previously, all of the provisions relating to the appointment and duties had been included only in regulations and orders. Section 10 of the Act now stated:

10. (1) The Governor in Council may appoint a barrister or advocate of not less than ten years standing to be the Judge Advocate General of the Canadian Forces.

(2) The powers, duties and functions of the Judge Advocate General may be exercised by such other person as the Minister may authorize to act for the Judge Advocate General for that purpose.

The statutory duties imposed on the JAG included the appointment of commissioners to take evidence, receiving statements of appeal, the preliminary disposition of appeals respecting the legality of a court martial conviction, the review of court martial proceedings, the certification of illegalities on review, receiving petitions for new trials, and the certification of desertion in cases of civil proceedings for harbouring a deserter. Other duties continued to be set out in regulations and orders.

No mention is made in the Act of the JAG's chain of authority. When the 1922 Act originally created the Department of National Defence there was an Order in Council issued making the JAG responsible to the Deputy Minister. However, by including the JAG as a Governor in Council appointment under the new *National Defence Act* in the same way as the Deputy Minister and the Chiefs of the three services, the question was raised of whether the JAG was now directly responsible to the Minister rather than the Deputy Minister.

The drafters of the *National Defence Act* also did a large favour for future generations of military lawyers trying to interpret it. They created a volume of explanatory materials that contained each section of the new Act along with reference to the sections of the old Acts on which the provisions were based. It also contained a brief rationale for each section. With a fresh new statute and new regulations on which to operate, the Forces marched into the second half of the century.

The *National Defence Act* of 1950 was one of the first statutes, if not the first, in a country following the British traditions of military justice to unify the disciplinary codes of all three services. (The American Uniform Code of Military Justice dates from 1951.) The Code of Service Discipline married the eleven different

British and Canadian sources of law regulating discipline in the three services to create something entirely Canadian.

One noteworthy change created by the *National Defence Act* was in the names of the courts martial. Because the Act was unifying the courts for all three services, there was a compromise in the terminology. The former navy term "Court Martial" ceded to the army term of "General Court Martial." However, the former army name of "District Court Martial" was changed to "Disciplinary Court Martial," adopting the title from the naval "Disciplinary Court." As the Army's "Standing Court Martial" had proved so effective during the war, it too was included in the new Act. Despite its frequent use in the field during both world wars, the Field General Court Martial was relegated to the storage bin of history.

As mentioned previously, during the first half of the century courts martial were frequently prosecuted by non-lawyers or, later on, by lawyers serving in other capacities in operational units. Defending officers were also usually from the operational units and may or may not have had legal training. JAG lawyers would normally only prosecute or defend the more serious or complicated cases. The only legal officer at the trial was often the Judge Advocate, and even he was only required for the General Courts Martial or the complicated cases. In 1952 the JAG received authority to provide military lawyers to conduct both the prosecution and defence at all courts martial. To meet this commitment, the military lawyers' involvement with the court martial system in Canada escalated and the JAG created special prosecution-defence teams to deal with cases as they arose in the Far East theatre or in Europe. The officers would normally alternate in the prosecution or defence role rather than just doing one or the other.

Technically, the authority that convened the court martial appointed the prosecutor. However, in practice the JAG organization would designate a prosecutor and the convening authority would rubber stamp the appointment as one of the many documents involved in setting up the trial. Normally, the prosecutor would be the local Deputy Judge Advocate or Assistant Deputy Judge Advocate for the region. He or she would be at the Major or Captain rank and would be responsible for providing advice on which cases should go to court martial based on a legal analysis of the evidence. The Deputy Judge Advocate would also prepare the documents to have the trial convened and prosecute the case when the trial was held. In some cases the local Deputy Judge Advocate would not be available or there was a reason why that officer should not prosecute. In such circumstances a legal officer from another area would be brought in.

One of the difficulties in this system of prosecutions was the important role played by the chain of command. While the convening authority might rubber stamp the appointment of a prosecutor, that authority retained control over the actions that the prosecutor might take. Military prosecutors did not have the broad prosecutorial discretion that is standard for civilian prosecutors. For in-

stance, an accused might be charged with alternate offences under the Code of Service Discipline. This meant that if the facts at trial did not prove the first offence then the accused could still be convicted of the second one if the facts supported it. The accused could not be convicted of both. If the accused wanted to plead guilty to the second (alternate) charge, the prosecutor had to obtain the approval of the convening authority to accept the plea and had to inform the court that the approval had been obtained. This continuing involvement of the convening authority was to be seen as a weakness in the system when it was later reviewed by the courts during the eighties using the standards of the *Canadian Charter of Rights and Freedoms*.

Court Martial Appeal Board

Probably the most significant change to the discipline system established by the new Act was the creation of the Court Martial Appeal Board.³ This body was set up as an independent appeal mechanism for those convicted by a court martial. Prior to that time, any Forces' member who wanted to have his or her case reviewed had only administrative remedies. The jurisdiction of the Board did not cover all aspects of the case, however. It was restricted to considering appeals as to the legality of a finding or sentence. The Board could not deal with appeals concerning the severity of the sentence awarded by the court martial. These severity appeals still had to go an administrative appeal route on the theory that military authorities would have a better understanding of the appropriate sentence required to maintain discipline.

The Act also detailed the composition of the new Appeal Board. The Chairman of the Court Martial Appeal Board had to be either a judge of the Exchequer Court (which later became the Federal Court of Canada) or a judge of a superior court of criminal jurisdiction. The members of the Board could be either retired or serving judges of the Exchequer Court or a superior court of criminal jurisdiction or a barrister or advocate of not less than five years standing. Normally, three judges would sit to hear an appeal.⁴ In 1959, the *National Defence Act* was amended to change the name to the "Court Martial Appeal Court."⁵ Barristers or advocates were no longer permitted to be members of the court. Instead, at least four members of the Exchequer Court had to be appointed, one of whom was designated as President of the Court. The remaining judges could be either from the Exchequer Court or a superior court of criminal jurisdiction. No limit was placed on the maximum numbers of judges that could be appointed. In 1984 the title was changed once again. It was renamed the "Court Martial Appeal Court of Canada."⁶

The first case decided by the Board was not a murder or the grounding of a ship but the somewhat more squalid sexual activities of an army officer. Captain J.F. MacKay had been convicted by a General Court Martial on two charges of disgraceful conduct for incidents of fellatio and groping two lower-ranked members.

The appeal concentrated on the fact that the date specified for the first offence was so far off from the date established by the evidence that it cast doubt on the rest of the testimony. Furthermore, the witnesses against the accused were accomplices in the offences. The counsel for the Forces was Lieutenant (and later Colonel) Frank Leger who would eventually become a military judge himself. By a three-to-two margin the court dismissed the appeal.⁷

The Legal Branch was not quite sure whether the Court Martial Appeal Board decisions should be used as precedents. After the MacKay decision came out, JAG Headquarters sent a copy out to legal officers with the Monthly Letter. It came with the admonition:

There is some doubt as to whether publication of the Reasons for Judgement of the Court Martial Appeal board will best serve the ends of justice in the armed services since there will undoubtedly stem from such publicity the tendency to cite these decisions as precedents. It is thought, however, that since the Court Martial Appeal proceedings are public property, members of the Judge Advocate General's staff should have the Reasons for Judgement available to them in case they are confronted with the situation where such citations are made by civilian counsel.

You will be kept advised of the policy on the question as to whether they should be used as precedents.⁸

When the Board became the Court no doubt remained. The decisions of the Court Martial Appeal Court were as binding on courts martial as the decisions of a provincial court of appeal were on the criminal courts of the province. Only the Supreme Court of Canada could overturn its judgement. As a result, this court has had a tremendous influence on the military justice system.

While having a court composed of civilian judges review court martial decisions helped to keep the system in line with the legal philosophy being applied in the civilian courts, it did have some disadvantages. For instance, the large number of judges appointed to the court meant that each judge only had an infrequent opportunity to sit and decide military cases. This could result in some inconsistency as, depending on the judges selected, the judicial philosophy of the court could change every time it heard a case.

While the first decision involving the Board may have been somewhat mundane, it was not long before the Board was dealing with some of the most serious offences in Canadian law. The Korean War had started.

The Korean War

It had only been five years since the end of the Second World War when the divided country of Korea became the scene of another brutal conflict. This was not the first time that Korea had been a battlefield. After a thousand years of domina-

tion by the Chinese, the Korean kingdom felt the first tentacles of Japanese infiltration in the late 19th century. This influence became cemented after the Sino-Japanese War of 1894 and the Russo-Japanese War of 1905 to the extent that Japan annexed Korea as a colony in 1910. Japan's defeat in WWII left the Allies with the problem of what to do about Korea. Ultimately it was agreed that the Soviet Union would occupy that part of the country north of the 38th parallel while the U.S. would do the same in the southern part of the nation. The ultimate aim, supposedly, was to disarm the Japanese and then hold national elections for the whole country. However, the USSR and the North Koreans ignored the Temporary Commission set up by the UN to supervise the elections.⁹

In 1948 the General Assembly instructed the Temporary Commission to hold elections in the U.S. controlled zone and the Republic of Korea was born. In response, the Soviet Union established a one-party communist state in the north known as the Democratic People's Republic of Korea. Both claimed authority over all of Korea. While the south had been going through a period of reconstruction, the north had been taking the opportunity to re-arm. When the Soviets and Americans pulled out the majority of their forces from the peninsula, the time was ripe for military action.

Its communist northern neighbour invaded the South on June 25, 1950, and the world was confronted with the most serious act of international armed aggression since the formation of the UN in 1945. Due to the temporary absence of the Soviet Union from the Security Council, the United States was able to have a resolution passed authorizing assistance under the UN's flag to help South Korea resist the invasion. As a founding member of the UN and a close ally of the US, Canada agreed to provide forces for the UN contingent. Three destroyers were sent from Esquimalt, British Columbia. Soon after, the air force was deeply involved in supplying the UN forces trapped at Pusan on the southern tip of the Korean Peninsula where they had been driven by the North Korean assault.

By mid-July, 1950, Canada was examining the possibility of providing ground forces to aid the UN in Korea. One of the main problems was the seriously depleted number of soldiers remaining in the Army after the Second World War demobilization. The whole Active Force (i.e., regular army) consisted of only about 20,000 personnel. In August the decision was taken to create a Canadian Army Special Service Force as well as similar forces for the RCAF and RCN. Not surprisingly, the JAG, Brigadier Lawson, was one of the vital figures in determining the course to be followed in establishing these organizations.

In a preview of problems that would arise again forty years later in the Gulf War, Brigadier Lawson pointed out the need for a "precautionary period" before any force that was raised was placed on active service for UN duties.¹⁰ The precautionary period would last from the time the force was created to the time it was placed on active service. Under the new *National Defence Act*, Parliament had to be informed within ten days of the force being placed on active service. As

be informed within ten days of the force being placed on active service. As Parliament had been prorogued for the summer, the forces could not be placed on active service until ten days before Parliament was scheduled to resume sitting or else it would have to be recalled for a special sitting. An additional complication was the fact that the applicable sections of the new Act had not yet been proclaimed in force. Although one of the former single-service Acts could have been used, Brigadier Lawson believed that placing the forces on active service should be done using the new *National Defence Act* to avoid future confusion.

A second legal difficulty involved the status of the new force. Eventually the decision was taken to incorporate it into the Active Force rather than the Reserves so that the new units would simply become part of existing Active Force units. The personnel would be recruited for 18 months or a longer period if required to meet Canada's obligations. Enlistment standards were lowered to meet the recruiting objectives. By February of 1951 Canada had recruited and trained 10,000 soldiers for the Special Service Force brigade it had promised to the UN and had sent the first element into action.

As with any war, the Canadian Forces needed to maintain discipline, settle claims resulting from accidents, develop and maintain legal relationships with the nations hosting Canadian troops and the other allied UN nations with troops fighting in the conflict, etc. As the Office of the JAG was the source of legal expertise in these areas, it was inevitable that legal officers would once again be sent to the scene of the action.

During the Korean conflict an Assistant Judge Advocate General's office was established with locations both in Korea itself at the headquarters of 25 Infantry Brigade Group and with 25 Canadian Reinforcement Group in Kure, Japan. Another sub-office was later set up in Kobe, Japan when Canadian rest and recreation facilities were located there. While the business quarters in Japan were spartan, those originally provided in Korea were positively unique. The office was in the back of a 2½ ton truck. About the only furniture was a bench. Here the legal officer would conduct legal aid, amend regulations and law books, and carry out other routine tasks. If a court martial had to be held, as was frequently the case, a tent would be set up at the location of the trial and the proceedings would carry on.¹¹

During the war the court martial system was running at full tilt. Alcohol seemed to play a major part. While many of the disciplinary problems were the usual, relatively minor, infractions, there were several of the most serious character. One notorious case concerned a group of Canadian soldiers charged with murder, attempted rape and assault. The 2nd Battalion, Princess Patricia's Canadian Light Infantry had been pulled out of the front lines in the middle of March 1951 for rest. Five or six of its soldiers and two from the British Middlesex Regiment had been drinking heavily during the evening of March 17. One of the men alleg-

edly knew the location of a bawdy house. The men obtained a jeep and headed off the camp. Several miles later they spotted a farmhouse that they thought was the bawdy house. Some of the men went to the house only to discover it was occupied by a number of Korean officers and men. There were also two women in an adjoining room, one of whom was the sister of one of the Korean officers. Rather than resulting in the withdrawal of the Canadians, this scenario was to lead to murder.

The soldiers who had gone to the farmhouse threatened the Korean soldiers and violently beat several of them. One of those assaulted was the officer who attempted to save his sister. The women were also assaulted and attempts were made to rape them. The Canadians were there for about half an hour. When they left, someone threw a grenade into the room that held the Korean soldiers. There were also several shots fired. Two of the Korean soldiers were killed. The men then returned to their camp in the Jeep.

As a result of this atrocity, three of the Canadians, Privates Blank, Davis and Gibson, were charged. Private Blank was charged with murder for having allegedly thrown the grenade. He was convicted of manslaughter. Blank's conviction was overturned by the Court Martial Appeal Board due to legal errors made by the Judge Advocate when summing up the evidence to the court. It ordered a new trial on a charge of manslaughter. However, service authorities determined that a new trial would be impracticable. Davis had six charges against him but three were thrown out at trial. He was convicted of the other three by the court martial but service authorities refused to confirm two of them. He appealed the last outstanding conviction. The Court Martial Appeal Board overturned the conviction. Gibson was convicted of two charges of attempted rape and one of conduct to the prejudice of good order and discipline for being involved in an affray. The Court Martial Appeal Board overturned one conviction for attempted rape but the other two convictions stood.

Major J.T. Loranger had the privilege of the initial tour in the Far East until relieved by Major R.R. Brown in April of 1952. As with all military establishments in the field, there was a chronic shortage of staff in Japan and Korea. This included court reporters who performed both administrative duties and court martial duties. Two Korean veteran court reporters that would serve the Branch for many years afterward were Sergeant Dick Pucci and Sergeant Fred Figg.

A significant problem existed in Korea in 1952 with the length of time it took between an offence being committed by a member and the proceedings of the resulting court martial reaching Ottawa. Although military justice is supposed to be speedy, there were always delays due to the time needed for initial investigation, the distances involved, the limited transportation available, the scarcity of members for courts, the time required to type transcripts considering the paucity of court reporters in relation to the number of trials, the time it took for the appro-

priate authority to review the case, etc. As the JAG was concerned about the fairness to the individuals and potential criticism in Parliament, he put considerable pressure on Major Brown to speed things up. He also realized that more assistance would have to be sent to the Far East for Major Brown to do so and gave priority to those needs to the extent possible within the limited JAG personnel resources. In late 1952, Major Brown was supported by Captains Bickell, Hamelin and Roach. The latter two, originally not part of the Far East JAG establishment, had been sent over by Headquarters mainly for the purpose of prosecuting and defending courts martial but were also available for other legal duties.

All through the war there were ongoing negotiations between the Japanese government and the UN military forces operating in Japan in support of the Korean campaign. Japan was the staging area for most of the UN troops and provided rest and recreation areas for troops on leave. All of the countries with forces located in Japan needed to develop agreements with the host country as to the status of the troops, the jurisdiction of the host country and the visiting forces with respect to offences, the applicability of taxes, and all the other myriad details that complicate international relations. Major Brown spent a good portion of his time involved with negotiations in an attempt to reach an agreement. One of his main preliminary successes was in having Canadian soldiers transferred to Canadian custody when the Japanese police arrested them. Canadian disciplinary tribunals would try the soldiers and the Japanese authorities would be informed of the outcome. Invariably the Japanese charges would then be dropped.

Although disciplinary matters, travel and liaison matters took up a considerable amount of the legal officer's time, there was no lack of legal aid matters with which to contend. At one point Major Brown was averaging fifteen legal aid interviews a day. Everything from a change of name to divorce depositions came within the ambit of daily routine.

To maintain morale and provide experience to a number of personnel, it is usually a good idea to rotate members posted on operational tours on a reasonably frequent basis, though they needed to stay in theatre long enough to acquire experience and put it to good use. The standard tour decided on for the army was one year and the JAG personnel followed the same pattern. In January of 1953 Major Brown welcomed his replacement, Lieutenant-Colonel G.A. Nantel and soon after Flight Lieutenant MacDonald arrived to join the prosecution/defence team.

Lieutenant-Colonel Nantel's tour was along the same lines of that of his predecessor. The negotiations on a UN-Japanese Status of Forces agreement continued and were finally concluded in 1953. One important aspect of the agreement was the primary jurisdiction that the Japanese authorities would enjoy when Canadian soldiers were arrested off duty outside the camp. The Japanese now had

to consider in each case whether to exercise that jurisdiction or to waive it in favour of disciplinary action by Canadian military authorities. A sailor off H.M.C.S. *Athabaskan* picked up for assault on a Japanese woman was the first to be subjected to this new process. It took over three days for the Japanese to decide to let the Canadians deal with it. In a somewhat unflattering commentary on his view of Japanese justice at the time, the JAG expressed appreciation to Nantel in a letter stating: "I am glad to know you are still being successful in keeping our men out of the clutches of the Japanese courts."¹²

Although the talks on an armistice in Korea began in 1951, it was not until 10:00 A.M. on July 10, 1953, that agreement was finally reached among the combatants and the killing ceased. Despite the cessation of fighting, it was only an armistice and not a peace treaty. As a result, there was a continuing requirement for UN troops in case the fighting resumed. Over the next two years the Canadian military presence in Korea was reduced until all of the fighting troops finally returned home. While one might think that this process of reducing the number of troops would also decrease the need for legal officers, the opposite turned out to be true. Lieutenant-Colonel Nantel was worried that the flood of troops being repatriated through Japan with some time on their hands would create an increasing number of incidents with the local population. He managed to convince the JAG to send naval Lieutenant Doug Sherlock over to help with the anticipated load in Kobe.

Lieutenant-Colonel Nantel seemed only too happy to get home when Lieutenant-Colonel J.E.A. (Fred) Crowe replaced him in January, 1954. By this time legal matters had calmed down considerably in Japan and Korea. There were few courts martial or other disciplinary incidents requiring the Assistant Judge Advocate General's attention. Probably the most exciting thing to happen was the inspection visit to Japan and Korea by Brigadier Lawson in March and April of that year. Letters and cables were going back and forth at a furious pace to make the necessary arrangements. Brigadier Lawson was also planning ten days of leave while there. Lieutenant-Colonel Crowe, however, seemed to have some reservations as to his ability to act as a knowledgeable host. In one letter he stated:

I am now familiar with the places where we have duties to perform and know all the various officials we have to meet, but I feel that I will be a poor guide in Tokyo or Kure as to the places where you can get Sukiyaki dinners... Since my arrival here I prefer to spend all my spare time either reading or doing leather work in our hobby shop. However, I will obtain information from the many "experts" we have here on this line and should be able to advise you as to where to go if you wish to attend a Japanese style dinner party. Lt. Col. Nantel was well known here as an expert in these matters and should certainly be able to give you valuable information or suggestions.¹³

In November, 1954, the forces of the Republic of Korea took over the Canadian positions on the armistice line and the fighting forces began their return to Canada. By January, 1955, legal officers had started leaving the theatre. All had returned to Canada by the beginning of May. No more war, no more troops, no more lawyers.

Expanding Duties

The year 1950 was a busy one for the JAG. Besides the events already mentioned, the Minister appointed the JAG as Chairman of the Board for the administration of the *Defence Services Pension Act* in September of that year and approved the appointment of an officer from the Legal Branch as secretary to the Board.¹⁴

To provide the necessary legal services for the Department of National Defence and the Canadian Forces in the early fifties, the JAG headquarters was broken down into sections dealing with the major subjects requiring legal advice. Under the JAG were three Deputy Judge Advocates General representing the three services. In 1952 the naval Deputy was Captain John (Jack) Dewis. Group Captain Harold Alexander (Mac) McLearn represented the air force and Colonel (Mac) Shaw acted for the army. The sections that were responsible to these Deputies had little relationship to the services they represented. The sections included Claims, Pensions, Courts Martial, General (including international law), Property, Estates and Patents. At the end of 1952 there were 34 legal officers providing advice to the Department of National Defence and the Canadian Forces. Between the Korean War and the changes in the Forces themselves, these officers were hard pressed.

Not all of the military lawyers belonged to the JAG organization at this time. The three services each had an administrative directorate that included lawyers. In the RCN the Judge Advocate of the Fleet, Captain Hurcomb, was also the Assistant Chief of Naval Personnel (Administration). As JAF he only dealt with disciplinary matters. However, in this second capacity he would provide advice with respect to Boards of Inquiry, applications for redress of grievance, administrative deductions, voting in elections and other personnel-related issues. He had the assistance of a junior lawyer belonging to the Special Branch of the RCN. The Army's Director of Administration and the Air Force's Director of Personnel Administration provided the same type of personnel legal advice. They were not lawyers themselves but had military lawyers on staff along with other personnel administration specialists. The army lawyers belonged to the General List while the RCAF lawyers belonged to the Personnel Legal Branch. Although the JAG might be consulted on legal issues relating to these organizations, he did not have these lawyers under his command.



Maj. G. Turner, LCdr. H.G. Oliver, and F/L J.M. Simpson
at 1 Air Division, Metz, France, August, 1954.

While the specialists were ensconced in Ottawa, much of the day-to-day legal advice to the Forces emanated from the field offices. At the beginning of the fifties the country was split into three major areas for legal services, Western, Central and Eastern. Assistant Judge Advocates General supervised subordinate offices from their headquarters in Edmonton, Oakville and Montreal respectively. The lawyers in the field offices would ensure their commanders received appropriate advice on serious disciplinary cases, reviewed charge reports to determine if there were any significant errors, provided legal aid to service members, advised Boards of Inquiry and generally assisted with any problems that had an even remote relationship to the law. They would also often act as prosecutors or defending officers for those courts martial that were considered serious or complicated enough to require their services.

On February 5, 1951, the Minister of National Defence announced dramatic spending increases for the Forces. There were to be 100 ships for the Navy, 40 RCAF Squadrons, and an infantry division. A brigade group and an air division were to be established in Europe to help meet any Soviet threat. Therefore, besides the contribution of legal officers to the Korean campaign discussed above,



Meeting of JAG Officers, 1956

the Branch had to support the establishment of these new European organizations.

On January 2, 1952, Squadron Leader A.E. (Tony) Cobus, who had just been promoted the day before, left with the Air Attaché to help set up the Air Division in France. At first the headquarters of the Air Division was located in Paris until a more permanent site was established in Metz in 1953. The headquarters was provided with its own complement of legal officers. In Paris there was a Deputy Judge Advocate and also a Command Legal Officer. The Assistant Judge Advocate General responsible for Europe was located in London, England, at this time. When they moved to Metz, the Deputy Judge Advocate and Command Legal Officer were situated cheek by jowl in the same office. This made it somewhat incestuous at times as the Command Legal Officer would normally provide the disciplinary advice to the units in the Air Division and conduct the prosecutions. The Deputy Judge Advocate would do the defences and the Assistant Judge Advocate General would act as the Judge Advocate for the trials.

There was plenty of work for all concerned as the Air Division grew on the continent. Stations were added at Baden Sollingen and Zweibrucken in Germany as well as Marville and Grostenquin in France. The Assistant Judge Advocates General and Deputy Judge Advocate would be involved mainly with courts martial and claims, while the Command Legal Officer would be sweating over Board of Inquiry reviews, disciplinary advice, etc. It was a challenging time for all as it was the first time that the RCAF had deployed a large number of units with a purely Canadian chain of command. During the war the Canadians were under

the British or Allied chain. One result was a need to develop new agreements in France and Germany to deal with the needs of the Canadians and their relationships with the host countries. For instance, contracts had to be negotiated with the French national railway for the transport of all the goods the Air Division would need.

The 27th Canadian Infantry Brigade was operating with the British Army of the Rhine and stationed at Soest in northern Germany. It, too, had the pleasure of hosting a legal office with a Deputy Judge Advocate and several Assistant Deputy Judge Advocates. A legal officer was also stationed at the Canadian Embassy in Bonn to provide advice and services with respect to military relations with the host country as well as liaison with other allied forces with troops stationed in the country. All in all, a considerable number of legal officers were able to savour the continental cuisine of a European tour.

At home, cars continued to crash, people still fell on the ice at military bases, and aircraft still flew too low so that foxes in fox farms ate their young. In other words, claims continued to pour into the Claims Section in Ottawa. The volume of claims that had to be handled by the Branch increased dramatically during the early fifties. For instance, in March of 1952 there were 320 new claims received. This was almost double the monthly average in 1950.

It appears that in the early fifties the senior military authorities began to appreciate once again the need for a sufficient number of legal officers to provide advice to themselves and their subordinate commanders. For instance, the Army encouraged both an increase in the Legal Branch establishment and an upgrading of ranks for certain legal officers. In the fall of 1950 the General Officer Commanding Central Command recommended that his Assistant Judge Advocate General position be raised to the rank of Lieutenant-Colonel and that new legal officers be appointed who would be stationed at the army bases at Kingston, Petawawa, and Camp Borden.¹⁵ Although the JAG did not support the Kingston position due to the availability of the legal officer from nearby Trenton, the Chiefs of Staff approved the rest.

Since its inception, the Legal Branch had used a hodgepodge of titles with only a passing relationship between the rank and the title. The army initiative set the stage for the JAG to standardize the terminology applicable to JAG appointments and their rank structure three years later. In 1953 Brigadier Lawson proposed such standardization to the Rank Structure Committee and it was approved.¹⁶ The ranks, for some reason, were given using only the naval rank structure. The appointments were:

Commodore	Judge Advocate General
Captain	Deputy Judge Advocate General
Commander	Assistant Judge Advocate General

Lieutenant-Commander	Deputy Judge Advocate
Lieutenant	Assistant Deputy Judge Advocate

The period of the early to mid-fifties also brought in a new generation of legal officers. The veterans in the Branch had wartime experience, either as legal officers or in other branches of the military. While this was also true for some of the new crop, for the most part they joined the Legal Branch or transferred to it from other branches without the trial by fire endured by their predecessors. That is not to say that the times were uninteresting. Lester B. Pearson made sure of that when he proposed the formation of the first UN peacekeeping mission to help resolve the Suez crisis of 1956.

The role of the Legal Branch in UN peacekeeping operations has varied with the times and the nature of the operation itself. The early peacekeeping duties for the Canadian Forces were concentrated in the Middle East and the Mediterranean areas. The first legal officer deployment resulted from the Suez crisis itself. To maintain the peace in the region, the UN established the United Nations Emergency Force (UNEF) and Canada was one of the major contributors. A unique description of the initial involvement of legal officers is included in the JAG Monthly Letter of December, 1956:

During the month of November the tidal wave from Suez rose high above the lofty escarpments of NDHQ, and at its flood, one Sunday afternoon, surged into the crevices in the ivory tower of JAG, washing W/C Cobus and WO1 Stringer out upon the broad and muddy stream of history in the making. When last sighted they were drifting rapidly toward the Levant and a rendezvous with destiny, bearing aloft, if not the bright torch of the law, (which is not readily available), at least the smoky lantern of the "legal angle," for the solace of Major-General Burns and the tribes he is to lead into the wilderness of Sinai. It is understood that the approved scale of legal equipment has been revised to reflect the strides made in the last 26 centuries, the Mosaic tablets of stone having been replaced by a typewriter and three volumes of QR. Furthermore, in keeping with the more rapid tempo of our times, the posting is not expected to last for 40 years, although this opinion is without prejudice, and may have to be revised in light of developments.

The initial tour did not last 40 years and a succession of legal officers followed in the pilgrimage to the Sinai.

Courts Martial

In Canada, the court martial system continued to deal with an eclectic mixture of offences. For instance, the Royal Canadian Navy was usually quite displeased when one of its warships was grounded. Captains who did so could expect little sympathy. The Hens and Chickens shoals in Halifax harbour have always been a favourite location for this embarrassing, and dangerous, mishap to occur. The

Navy also considered it very poor form for a Captain to let his ship collide with a jetty. Lieutenant-Commander T.F. Owen, the Captain of the minesweeper H.M.C.S. *Thunder*, was to have the unfortunate opportunity to learn this lesson personally.

On January 30, 1958, Lieutenant-Commander Owen was court martialed on a charge of negligently hazarding his ship. The *Thunder* had been berthed with her starboard (right) side to a jetty. Another jetty was close astern at ninety degrees to the first. The wind on the fateful day was blowing from starboard to port. When preparing to depart, Lieutenant-Commander Owen had planned to slip all of the lines, let the wind push the *Thunder* away from the jetty, and proceed ahead under power. All went well except for the last step. Instead of ordering the engines "ahead," he ordered them "astern." The well trained crew responded with alacrity. The collision with the jetty aft of the ship came long before the corrective orders could take effect. Although Lieutenant-Commander Owen appealed the finding of guilty, the conviction stood.¹⁷

Since the creation of the Air Division and the Brigade Group in Europe in 1952, dependants had been allowed to accompany service personnel on overseas postings. Under the *National Defence Act*, these civilians were subject to the Code of Service Discipline if they committed an offence while accompanying the member outside of Canada. The agreement with the host countries concerning jurisdiction over offences allowed Canadian courts martial, in most cases, to try civilians who were subject to the Code. The Code not only included Canadian civilian and military offences within its list of offences, it also included offences against foreign law committed while in the foreign country. Therefore, a Canadian dependant could be tried by a Canadian court martial in Germany for an offence against either Canadian or German law. Other Canadian civilians, such as defence contractors, might also be subject to the Code depending on the circumstances. For the most part, Canadian civilians seemed to prefer appearing before a Canadian court, even if it was a military one, to taking their chances with a foreign court proceeding held in a foreign language.

In most cases, if a dependant got into trouble he or she would be repatriated to Canada. However, to deal with serious cases an amendment was made to the *National Defence Act* in 1955 that made an offence committed outside Canada subject to trial by any Canadian court that would have had jurisdiction if the offence had been committed within its territory.¹⁸ This provision was used in at least two cases involving a homicide. A civilian judge was brought in from Canada to try the cases in Europe. However, the vast majority of the cases that needed to be tried were of a less serious nature such as shoplifting or driving while impaired.

One of the innovations that was brought in during the fifties to assist the functioning of the military justice system was a codification of the rules of evidence that were to be used during courts martial. Up to that time, the Common Law

rules of evidence were used. These were based on precedents set by the courts and often required considerable research. A panel of experts composed of Dean Horace Read of Dalhousie Law School, Dean William R. Lederman of Queen's Law School, and Professor Graham Murray of Dalhousie Law School were requested to prepare the evidence code. After thoroughly researching the law in the area, they drafted a complete set of evidentiary rules. These greatly simplified the tasks of the legal officers and Judge Advocates in both the preparation for trial and when presenting arguments concerning evidence during the trial. The Military Rules of Evidence were approved by the Governor in Council and came into force on October 1, 1959.¹⁹

Although the Air Force had a general reluctance to use the discipline system if administrative action was at all feasible, it was not totally immune from the occasional necessity to hold a court martial. When one did occur, it often had an interesting twist. For instance, in 1958, a young Flying Officer, R.T. Edwards, was alleged to have engaged in "low flying" in violation of flying orders. He had taken his cousin up for a flight in a Harvard and flew over a ranger station during the flight. The station was in a hollow surrounded by trees. Witnesses on the ground at the base of the ranger station's tower saw the plane go overhead and they estimated the height to be well below the authorized limit. One managed to get the aircraft's identification number as it went over. However, at trial the accused testified that he never flew below 1,000 feet and his passenger estimated their height at 2,500 feet. After the prosecution and defence had completed their cases, the court took the dangerous step of trying to resolve the discrepancies using its own initiative.

The President ordered an experiment in which three Harvards would overfly the site at different heights. Three officers on the ground would separately act as observers and later give an estimate as to the height of each aircraft and testify as to which of the aircrafts' numbers could be read. The prosecutor and defending officer were to supervise the experiment. While ingenious, this attempt at clarification had several flaws. For one thing, two of the three observers were in the court room when the President stated the heights at which the aircraft would fly. Furthermore, different aircraft were used that may have had duller or brighter paint than the one on which the charge was based. In addition, there was considerable doubt as to the authority of the court to order such an experiment. Not surprisingly, the appeal was granted and a new trial ordered. The Court Martial Appeal Board found that the evidence from the experiment "seems strangely irrelevant" and may have improperly influenced the court in convicting the accused.²⁰

Traditional and Unusual

On the social side, the Legal Branch started establishing a number of traditions in the fifties. It would have been hard for Brigadier Orde to develop any kind of esprit among the Branch officers between the wars when he was the only one.

Likewise, things were tight during the Second World War. In the more-relaxed atmosphere of the fifties, though, Brigadier Lawson was able to initiate some get-togethers to foster a Branch spirit. These breaks from duty also provided great opportunities to get to know the people behind the professional facemasks and to develop a sense of camaraderie. Every year there would be a grand picnic at his large house on the Ottawa River near the Royal Ottawa Golf Club. All the families were invited and games were organized for the kids. The professional relationships were not neglected either. An annual conference and mess dinner were occasions to meet new members and swap lies with old friends. The ceremonies would be topped off with an annual Branch picture to commemorate the event.

The routine work in the field offices could have its bizarre side. For instance, Assistant Judge Advocates General were responsible for settling most of the claims against the Crown that resulted from damage caused by the units in their regions. During Commander Harold (Harry) Ferne's tour in Halifax from 1958-61 he had to pay a claim by a farmer in Manitoba for a "seeing-eye horse." Apparently the Navy had set up a flying training facility in Rivers, Manitoba, with an outline of the deck of the aircraft carrier H.M.C.S. *Bonaventure* so that the pilots of the new jets destined for the carrier could practice their landings. There was also a rocket firing range for them to practice on. One day an old farmer in the area was using his two horses to haul a wagon of manure from the barn. One of the horses was blind and the other would guide the blind one. All of a sudden there was a great explosion as the manure wagon blew to bits. The "seeing eye horse" was, alas, killed. It turned out that one of the jets had a malfunction with its rocket launch system and the rocket let loose at the wrong time, arching off into the wild blue yonder to land in the manure wagon. The farmer, after being assured that the country was not being invaded, successfully claimed \$156 for the dead horse and ruined wagon.²¹

As the fifties closed, the Legal Branch was settling into a routine. The most senior officers had held their positions for virtually all of the decade, and would for the next one as well. While there was always a minicrisis on the go, this too was routine. The Branch had expanded somewhat but there was no significant expansion or reduction foreseen in the near future. The legal world in National Defence was running as smoothly as one could expect.

A New Decade

While many in North America basked in the freedom of the love generation of the sixties, the Office of the JAG continued to be inundated with life's more mundane issues. However, these tended to be the ones most essential to maintaining a functioning military. The early sixties saw Canada involved in governmental discord with the final years of the Diefenbaker era and the introduction of the Pearson years. National Defence was often in the limelight with issues such as the introduction of nuclear weapons into Canada and the Cuban missile crisis.

As the Branch entered the generally prosperous sixties, there were serious concerns about its future. No application for enrolment as a legal officer had been received in any of the three services in the first eleven months of 1960. Of the seventy-seven positions in all establishments (of which fifty-four were with the Office of the JAG), there were nine vacancies. The JAG was expecting a number of applications for release from experienced officers unless problems with pay and career advancement in comparison to the lawyers in other Government departments were resolved. To deal with the crisis, the JAG obtained approval to reduce the number of legal officers in the Branch by eight and upgrade the rank structure for the remaining members. The new rank pyramid contained one Brigadier, five Colonels, fourteen Lieutenant-Colonels, thirty-six Majors and thirteen Captains.²² He also obtained approval to bring in two Department of Justice lawyers to work in the property law section that year. There was some successful recruiting. A future notable joined the Legal Branch in February of 1963. Lieutenant (later the Right Honourable Chief Justice) Clyde Wells finished his articles in Halifax and joined the Property Section of JAG in Ottawa. He had previously worked with the Branch as a summer student in 1961. He was promoted to Captain later in 1963 but took his release in the summer of 1964 and returned to Newfoundland.

In 1962, the Department of External Affairs was seeking JAG assistance in Germany. NATO was negotiating with the German Government on the "Supplementary Agreement" to the Status of Forces Agreement that governed NATO forces in that country. The Canadian Ambassador to Germany set out the need for a National Defence Liaison Officer in Bonn to help deal with the Defence issues involved. Commander Scott Henderson was posted to Germany to fill the slot. Although it was only anticipated to require an officer for a year, the position was to last a great deal longer.²³

Discipline Developments

At the beginning of the sixties the court martial system became a little more professional. Although there had been a section in JAG responsible for courts martial, it was only in January of 1961 that an official organization specifically responsible for Judge Advocates came into being. Group Captain Jack Hollies was appointed to the newly established position of Chief Judge Advocate.²⁴ Gradually the practice of having Assistant Judge Advocates General sit as Judge Advocates in their own regions was phased out. Those involved with military justice recognized that having the legal officer responsible for advice in the region also sitting in a judicial capacity when his or her client laid charges was jeopardizing the appearance of impartiality. Since the Second World War, legal officers in those positions had been held on the JAG establishment rather than the Commander's just so they would not be under the Commander's direct control. While this may have reduced the potential for a Commander's influence on a Judge Advocate in reality, it did not improve appearances, as few would know about the technical-

ity. The policy was replaced with one that only allowed them to sit as Judge Advocates on courts outside their regions. In addition, an appointment as an Assistant Judge Advocate General no longer carried with it the automatic authority to sit as a Judge Advocate. The Chief Judge Advocate now determined who was suitable to perform this function. However, it was not until the end of the seventies before the remnants of the old practice disappeared. Until then, the Senior Legal Adviser Europe in Lahr, Germany, would still preside over cases in which both the prosecutor and defending officer were physically located in the same office complex as he was. These officers were also subject to his direction in other tasks assigned to legal officers.

The Judge Advocates were designated on an individual basis. One might head a directorate at JAG Headquarters in Ottawa while another might be an Assistant Judge Advocate General in the field. In the forties, fifties and sixties the Judge Advocate might be a Major or a Lieutenant-Colonel depending on the area where the trial was taking place and the seriousness of the trial. Starting in the early seventies they usually, if not always, held the rank of Lieutenant-Colonel. One exception was the Chief Judge Advocate who was a Colonel.

Due to their rank, position and personalities, Chief Judge Advocates tended to be figures of respect to members of the forces and their fellow legal officers. The original, Group Captain Jack Hollies, was held in awe by many of his subordinates, and even his contemporaries, for his legal knowledge and experience. His impact on his Judge Advocates was evidenced by an incident during a court martial at the air base in Baden Sollingen, Germany, in the late sixties. Lieutenant-Colonel Al Beaupré had just taken over as Assistant Judge Advocate General at Soest and was doing his first court martial as a Judge Advocate. It was a rather complex case that lasted several days. Lieutenant-Colonel Beaupré noticed that Group Captain Hollies was in the audience taking notes each day. The novice judge almost had a heart attack when one day Hollies left in the middle of the trial. Fearing that he had made a fatal error in his handling of the trial, Lieutenant-Colonel Beaupré saw Group Captain Hollies at the mess at lunch and asked him why he had left so suddenly. It was just the urgent call of nature. "You're doing fine" he said to the much-relieved officer.

As mentioned earlier, civilians who were subject to the Code of Service Discipline outside Canada were normally involved in minor offences such as traffic violations. Bringing a civilian judge from Canada to try these types of offences was impractical. To resolve this potential waste of judicial and military resources, while still ensuring the offender was prosecuted, the *National Defence Act* was amended in the mid-sixties to include a new type of court martial, the "Special General Court Martial."²⁵ This type of court martial had only a single judge, called the Presiding Judge, who decided all matters of law and fact and awarded the sentence if there was a conviction. The sole purpose of this type of court martial was the trial of civilians. The Presiding Judge appointed was normally one of

the military judges in the region. Like the Standing Court Martial for military personnel, this new court for civilians was much faster and more efficient than the previous system had been.

Other than the addition of a new type of court and the creation of the Chief Judge Advocate position, the military justice system remained much as it had during the preceding decade. Although the 1960 *Canadian Bill of Rights* was applicable to the Canadian Forces, it did not have a major impact on the way in which the military justice system functioned. Despite its moral authority, that Act was just another piece of legislation passed by Parliament as far as the courts were concerned. It did not form part of the Constitution that would have given it undoubted precedence over other inconsistent federal legislation. In addition, the sixties were not a time of significant judicial activism in the Supreme Court of Canada. Except for one case in which the Court struck down legislation under the *Indian Act*,²⁶ the Court tended to defer to the legislative authority of Parliament when legislation was challenged under the *Canadian Bill of Rights*.

UN Duty

Legal officers were still being sent on deployments with Canadian troops on UN duties in the sixties. In 1960 it was Major Jim Fay's turn as the UNEF legal officer. Like his predecessors, he provided advice on discipline, handled claims, did



JAG Visit to Metz, France, 1961
 Front, left to right: F/L A. Beaupré, Brig W.J. Lawson, Cdr J. Scott
 Rear: F/L Just Letellier, F/L R.L. Martin, S/L C. Rippon, Maj J.B. Fay

legal aid, etc. However, his tour was somewhat unique. Several months after he got there the Camp Commandant was sent back to Canada for medical reasons and there was no one to replace him in the near term. The Commander of the Canadian contingent called Major Fay in and told him he was going to be the new Camp Commandant. For the next seven months Major Fay handled both the duties of legal officer and those of his new appointment.

This dual role did allow for some fun. Major Fay had come to Egypt after a posting with the office in Soest, Germany. While in Egypt he received a barrack damage report claiming about \$3 for a damaged ice cube tray in his married quarter in Germany. Major Fay did not believe he was liable for the damage so he wrote a personal reply to the Camp Commandant explaining his reasons. As Camp Commandant he then obtained an opinion from the legal officer (himself) and forwarded his agreement with those two that Major Fay was not liable to the Contingent Commander. It just so happened that Major Fay was also third in the chain of command as Commander of the contingent. As his two superiors were away at the time, he was acting Commander as this mini-drama unfolded. He proceeded to send a response to National Defence Headquarters in Ottawa in his capacity as Acting Commander, enclosing the other opinions and agreeing with them. After suitably stirring the ants' nest in Ottawa and Germany, he finally received a personal letter from his superior at JAG Headquarters acknowledging that he had had his fun and the Headquarters had paid the \$3 to the unit in Germany. Please remit.

After fourteen months, Major Jack Wolfe followed Major Fay in the UNEF posting. Not having the advantage of holding the Camp Commandant position to keep the days full, Major Wolfe suggested to the Contingent Commander that the legal officer also be given a staff position. However, no positions were available. Although the workload was light, following the usual safety precautions kept him on his toes. One always had to check the shoes in the morning to ensure that no scorpions had taken up residence overnight. A Canadian election did add some interest to the tour. Major Wolfe was the Deputy Returning Officer for the Canadian Forces in the area. One of his duties involved travelling around picking up the votes from the Canadian detachments in Egypt and Israel. Despite this extra work and the usual duties of a legal officer, it was evident to the Contingent Commander and Major Wolfe that there really was not enough to do to justify a full time legal officer with UNEF. Three months after Major Wolfe arrived, Ottawa accepted the recommendation to close the position.

Egypt was not the only trouble spot in the Middle East. Since the independence of Cyprus in 1960 there had been tension between the Greek and Turkish Cypriots that resulted in open fighting on several occasions. After the 1964 conflict, the United Nations established the United Nations Peacekeeping Force in Cyprus (UNFICYP). Separating the hostile Turkish and Greek factions in Cyprus was the longest peacekeeping operation involving a significant number of Canadian

troops, stretching from the initial deployment in 1964 until the withdrawal of the Canadian battalion in 1993. Canada was still contributing three members to that peacekeeping force at the end of the century.

When the mission was first established in Cyprus, Major Ed Caron went along to provide the legal services. Discipline, contracts with local firms and advice to the contingent commander took up his time initially, but it became evident that there was not enough work to keep a full time legal officer stationed in Cyprus. No one replaced Major Caron when he departed. Instead, the legal needs were handled by phone from the office in Germany where possible. In order to provide legal aid and other legal services on site, a legal officer would be sent over on a regular basis from Germany for a short visit. If serious problems arose, such as the need for a court martial, the necessary legal officers, staff and military judges would be sent from Germany and Canada to conduct the proceedings.

DPLS

On the organizational front, the 1962 Royal Commission on Government Organization (the Glassco Commission) had recognized serious problems with the administrative structure of the Federal Government, including the armed forces. The structure of committees for the three services was inefficient and cumbersome due to duplication and inter-service disagreements. In addition, the administrative "tail" of the Forces was getting too big. The Commission proposed that a single chairman for the Chiefs of Staff be appointed to hold executive authority for the three services. The Glassco Commission report did, however, solidify the position of the JAG in the context of governmental legal advisers. With a few exceptions, the Commission recommended that the Department of Justice provide the legal services to federal government departments. One of the exceptions was National Defence. The Commission recognized the specialized nature of military law and other matters relating to National Defence. As a result, it recommended that the JAG continue to provide legal advice to the Department of National Defence and the Forces rather than having Justice take over that responsibility.²⁷

The 1964 Government White Paper on Defence went much farther than the Glassco Commission recommendations. It proposed to create a single defence staff at National Defence Headquarters, then reorganize and integrate the field command structure and, ultimately, unify the three services into a single force. Not wasting any time, Parliament passed Bill C-90 to start the integration process in July of that year.

One of the immediate impacts of integration on the Legal Branch was the Navy's loss of the Judge Advocate of the Fleet position. Naval Captain Allan O. Solomon had taken over as JAF from the retiring Captain Hurcomb on June 1, 1964, for the few months remaining before integration of the Forces took effect. Inte-

gration also resulted in the elimination of the legal officer positions in the personnel services of the Canadian Army and the RCAF. These were all brought under the umbrella of the new Directorate of Personnel Legal Services. Captain Solomon took over as its first director.

As this Directorate reported to the Chief of Personnel (later the Assistant Deputy Minister (Personnel)), the JAG did not have jurisdiction over this group of lawyers in the same way as he did those under his direct supervision. When it was being created, however, the JAG convinced those responsible for its design to bring all the legal officers under his establishment. The JAG was also made responsible for their training and professional competence. In addition, he had the final say on appointments, promotions, postings, performance reviews, and other matters relating to the officers themselves. Therefore, while the Director was independent from JAG when carrying out his duties, the JAG had control over which lawyers would be sent there and for how long.

When Captain Solomon became DPLS the Admiral to whom he had reported as JAF once again became his boss as Chief of Personnel. Not surprisingly, many of the attitudes and views of the relationship between JAG and DPLS were similar to those that had existed between the JAF and the JAG. The working relationship was a cordial one, but each protected his area of responsibility with vigour from incursions by the other. A 1981 JAG study into the way in which the two organizations interacted stated:

[T]he study group formed the view that many of the things that touched the JAG-DPLS relationship grew not in a completely planned and deliberate way, but often by expediency to progress the tasks that came to be undertaken by DPLS. The study group further formed the view that the personality and previous working experience of the various incumbents played the most important role in defining the relationship.

These factors were to create many a memorable turf war until the Directorate breathed its last in 1998.

The fact that Captain Solomon reached that august naval rank and, after retirement, went on to become Chairman of the Canadian Pension Commission shows that early commentaries are not always fatal where talent is concerned. One such commentary on young Solomon is reported to have stated: "This officer does not smoke, drink, or swear. However, there is yet hope that he will develop into a satisfactory naval officer."

Outside Canada

Canadians have enjoyed an enviable reputation among other nations as being helpful and competent. This was particularly true during the sixties in former British colonies that had recently become independent. With independence came

the need to draft purely national laws, including those governing their armed forces. Several of these countries turned to Canada for assistance. For instance, in the summer of 1961 Group Captain McLearn went to Ghana for a month to assist in this task.

In 1965 the Tanzanian Government requested help from Canada in drafting its new defence legislation. Major Jack Wolfe was selected and spent the next year and a half in Africa. While working there his main contacts were the British Principle Secretary and the Vice President of Tanzania. The Vice President would review his drafts of the legislation to make sure they met Tanzanian needs. Major Wolfe quickly learned that one always has to be aware of local conditions when involved in a drafting exercise. He had modelled much of the Tanzanian legislation on its Canadian counterpart, including a provision that serving members of the armed forces were not to be involved with politics. The Vice President pointed out the reality in Tanzania that it was a one party state and it was a condition of joining the armed forces that one become a member of the ruling party. The "no politics" section was quietly shelved.

When the legislation was finished, Major Wolfe took some leave before getting to work on the regulations. He warned the Tanzanian Government not to put the Act into force until the regulations were done as it could not work on its own. The inevitable happened and he returned from leave to find the legislation already in force. Only a steady diet of 16 hour days enabled him to get the disciplinary portion of the regulations done before any major disasters occurred. Before all of the regulations were finalized, Major Wolfe was transferred back to Ottawa to take over the General and International Law Section at JAG Headquarters. Lieutenant-Commander Peter Partner was sent over to replace him for the final push on the regulations.

The JAG organization in Europe got a shake-up in 1965. Up to that time the senior legal officer in Europe had been a Lieutenant-Colonel or equivalent going under the title of Assistant Judge Advocate General Europe. In August of that year approval was received from National Defence Headquarters to upgrade the position to a full Colonel or equivalent. Naval Captain J.P. (Jack) Dewis was sent over as the first Deputy Judge Advocate General (Europe). This title would later be changed to Senior Legal Adviser (Europe). Because the major concentration of forces was in the Federal Republic of Germany (FRG), his office was set up in the Canadian Embassy in Bonn. The finalized organization saw him accompanied by a National Defence Liaison Officer (legal) in Bonn with another in the Embassy in Paris. There were two Assistant Judge Advocates General. One was with the Army in Soest, FRG, and the other was at the Air Division Headquarters in Metz, France. Both these offices had additional legal officers to handle the workload.



JAG Conference, 1967

In keeping with the traditions of the military, things hardly had time to settle down before they were reorganized. In the late sixties the Forces were once again changing their setup in Europe. The army bases in the north, including Soest, were closed and their personnel moved to the air force base at Lahr in the Black Forest region. This caused a considerable amount of work for the legal officers in the theatre as there had to be negotiations with the Germans on the residual value of the property the Canadians were leaving behind. Among those involved were the Senior Legal Adviser (Europe), Captain Al Solomon, and the National Defence Liaison Officer (legal), Captain Scott Forster. The Germans were hard negotiators and were trying to depreciate the value of the assets as much as possible, preferably to zero. They did, however, make a major mistake.

The Germans had two distinct organizations involved in the financial aspects of the closure. One dealt with the reception and offsetting of funds where Canada might owe Germany for a cost of the closure. The other dealt with disbursing funds owed to Canada. On a Friday afternoon Captain Forster received a call from the office in charge of disbursing funds and was told that approximately four million marks (one million Canadian dollars) were ready to be transferred to the Canadian authorities for the value of one of the buildings that was being vacated. What was the account number to which it could be transferred? Captain Forster could not find the account number and no one was around to provide it so he told them to transfer it to his personal account. He immediately called Ross Cameron, the person in charge of the financial side of the closure, in London, England. Cameron told him to get a cashier's cheque for the amount and bring it over by hand to London that afternoon as the Germans would undoubtedly try to get the money back on Monday for some reason. Forster did so and Cameron immediately deposited the cheque in an English account. As predicted, when Monday morning rolled around the Germans wanted to withdraw the money from his account as their disbursing authority had not checked with their receiving authority to see if there were any German claims that might be offset against

the amount. They were most disgruntled to find that the money was no longer in the country. The Canadians, on the other hand, were very pleased with the leverage this gave them in disputing the German valuations of the other properties they were vacating. Forster admits that when they announced a flight to Rio as he was waiting for a flight to London holding a cashier's cheque in his hands made out to him for the equivalent of a million dollars Canadian, he was momentarily torn as to which flight he should take.

Change

Over the course of the three and a half years between the integration of the services in 1964 and their unification in 1968, there was turmoil and strenuous debate on the changes. Numerous senior officers resigned or were involuntarily retired due to their opposition to unification. In 1968, the process was taken to its ultimate conclusion when the *Canadian Forces Reorganization Act*²⁸ came into effect. The Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force ceased to exist on February 1, 1968.

While integration and unification were traumatic for much of the Canadian military, they did not cause major changes for the JAG Branch. JAG had been providing legal advice to the militia since 1911 and the air force and navy since 1922. With unification, the Legal Branch merely had to switch its air force and naval officers to army rank titles and do some consolidation of its organization.

Another changing of the guard took place in 1968. Colonel Hollies was succeeded as Chief Judge Advocate by naval Captain H. G. (Bert) Oliver. The court martial training and experience in running a judicial organization were obviously valuable as Oliver was later appointed as a Provincial Court Judge in Alberta in 1975. His skills ultimately lead to his appointment as Assistant Chief Judge of that court.

Transfer of Responsibility

The tradition of long term JAGs also came to an end in 1968. Brigadier-General Lawson retired. Colonel McLearn was elevated to Brigadier-General and appointed JAG. Considering the fact that McLearn had been a Group Captain and Deputy Judge Advocate General for nineteen years, he had no trouble sliding smoothly into the senior post. As was the case with many of the Canadian Forces legal officers, Harold Alexander (Mac) McLearn did not start his military career in the Legal Branch. Born in North Sydney, Nova Scotia, in 1912, he remained on Cape Breton Island until he left for Queen's University. Not satisfied with the B.A. he received in 1934 from Queen's, he continued his education at Osgoode Hall Law School, earning his LL.B. in 1937. He was called to the Bar of Ontario that same year. Before the war changed everybody's life, McLearn practiced his legal skills with the T. Eaton Co. in Toronto.



Brigadier-General H.A. McLearn, C.D., Q.C.

Like numerous patriotic Canadians, Brigadier-General McLearn joined the Forces in 1941, deciding that the Royal Canadian Air Force was the place to be. However, he kept his legal credentials to himself. After brief stints in Toronto and then Pennfield Ridge, New Brunswick, he was attached to the Royal Air Force as a flying control officer in the UK for seven months. In the summer of 1942 it was back across the pond to St. John's, Newfoundland, to serve with 1 Group Headquarters. Only after the war did he switch to the Legal Branch. He attended the War Staff College in Toronto in 1945 followed by a tour at the Directorate of Personnel Administration at Air Force Headquarters starting in January of 1946. Rising

quickly through the ranks, by 1949 McLearn was made a Group Captain and appointed Deputy Judge Advocate General (Air).

The Imperial Defence College in London seems to have been a training ground for JAGs. Group Captain McLearn became an alumnus of that institution on completion of the 1955 course. For a year in the 1957-58 period, he was on loan to the Department of Justice where he assisted in the preparation of the Report of the Fauteux Committee (Inquiry into Remission and Correctional Services) as well as those of other committees and commissions. As were many legal officers, McLearn was an active member of the Federal Lawyers Club and served a term as its President.

Due to his position as the senior air force officer in the Branch, McLearn acted as the father confessor to his light blue subordinates. If it looked like the army or navy legal officers were receiving an advantage, McLearn would go to bat for the air force. He was also an easy person to talk to (for those who were not scared off by his exalted rank). Unlike his more reserved predecessor, McLearn was not one to stand on protocol. He was widely respected within the Branch and by his clients for his keen intellect and his legislative drafting abilities. As mentioned earlier, in the summer of 1961 he was sent to Ghana at the request of that country's government to help prepare their defence legislation.

On December 17, 1968, now-Colonel McLearn (post unification) was made a Queen's Counsel. Soon after, on February 20, 1969, he received the promotion to Brigadier-General and was appointed the JAG. Unlike his predecessor's lengthy term, he was only to hold the post for three and a half years before time caught up with him and he reached the age for compulsory retirement. On his retirement as JAG in 1972, Brigadier-General McLearn did not give up the lifelong habit of working for the Federal Government. He went to work for the Department of Justice, retiring again in 1977. He passed away on April 16, 1990.



The JAG Legal Branch Crest

One of the early changes in the McLearn era related to the development of a distinctive emblem for the Branch. Symbols are the language of emotion. Military forces rely on that emotion, under the titles of morale or *esprit de corps*, to motivate their members to carry out the mission to the utmost of their capabilities. Having a symbol, whether a flag, an arm patch, or a coloured headdress, gives the unit's members that needed sense of belonging. Until the sixties the Legal Branch lacked a unifying symbol to proclaim its identity.

This changed in the mid-sixties when a search for a JAG crest and a two or three word motto was initiated. In March 1969, the search ended when Her Majesty, Queen Elizabeth II, approved the crest of the Legal Branch of the Canadian Forces. Its motto—*Fiat Justitia* (Let Justice Prevail)—became a fitting goal for the new decade and beyond.

The sixties closed with a new page being turned for the Legal Branch. Brigadier-General Lawson was gone, the three services had transformed into one, and the country looked to be heading for a bright and peaceful future. Only the Cold War, the possibility of American civil unrest spilling over the border, and the ac-

tivities of a militant Quebec separatist organization still loomed as shadows of danger for a country that had just passed its 100th birthday.