DETAILED TABLE OF CONTENTS

A New Appeal to Canadian Military Justice: Constitutionality of Summary Trials under *Charter* s. 11(d)

INTRODUCTION:

> "An undisciplined military force is a greater danger to Canada than to any foreign enemy. Therefore, those involved in the development of the disciplinary system must constantly keep in mind not only the pressing arguments being made to modify the system but also the reasons why the system has developed into its present form. The rules created to meet the disciplinary needs of a particular era in history should be rejected if they are no longer valid, but those disciplinary procedures which have proven useful and enduring in controlling military forces should be retained unless compelling reasons for change exist."[1]

The *prima facie* infringement of section 11(d) of the *Canadian Charter of Rights and Freedoms* by summary trials poses the most fundamental problem for our Canadian military justice system. At present, commanding officers with no formal legal training may impose penal sanctions upon service members falling under their direct command and control. Due to the needs to ensure a swift form of military justice during combat, service members are neither entitled to full legal representation during their proceedings or a formal right of appeal. The matter is pressing and of highest national concern. As one commentator notes "the summary trial process, from an operational point of view, is so fundamental to the military system that, quite possibly, a military society could not govern itself without it. It is the crucial structure upon which the discipline of military society is based"[2]. The derogations to s. 11(d) are of significant consequence for the Canadian military justice system and the proper functioning of the Canadian armed forces considering that an imposing majority of military justice is dealt with by summary trial.[3] At its very core, the constitutional dilemma surrounding summary trials stems from irreconcilable tensions between deep-seated military traditions and disciplinary needs upon which our military justice system was designed almost four centuries ago, and relatively newly acquired fundamental rights and freedoms following the enactment of the Canadian *Charter* in 1982.[4] At a time of mutinies when armed forces where viewed with great distrust by the civilian populace,[5] the idea of protecting the rights of service members was unthinkable.

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[1] R.A. McDonald, "The Trail of Discipline**:** The Historical Roots of Canadian Military Law" (1985) 1 C.F. J.A.G. 1, at 28. [Hereinafter "McDonald"]

[2] J.E. Lockyer, "Charter Implications for Military Justice" (1993), 42 U.N.B.L.J. 243, at 250. [Herein after referred to as "Lockyer"]

[3] Andrew D. Heard, "Military Law and the Charter of Rights" (1987-1988) 11 Dalhousie Law Journal 514, at 8. [Herein after referred to as "Heard"]; That the summary trial system is the preferred service tribunal is a common characteristic of military justice systems of English origins; According to the latest annual J.A.G. report, 93.5% of all accused who were offered the opportunity to be tried by court martial chose to be tried by summary trial. The percentage of accused members who have elected trial by court martial has remained consistent over the past four years with the percentages ranging between 4.9% in 2004-2005 and 8.49% in 2006-2007, and with the overall average being 6.6%. Government of Canada, Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Armed Forces – Review from 2007 to 2008*, online: http://www.forces.gc.ca/jag/publications/office-cabinet/AnnRep-RappAnn2008-eng.pdf [Hereinafter J.A.G. Report]

[4] Ibid.

[5] 17th century Mutinies by English armies created distrust towards armed forces. While defense was originally a Crown prerogative, it was illegal for the monarch to maintain a standing army during peacetime without prior consent by parliament. This principle was recognized by article 9 of the *Bill of Rights 1689* (Eng.) following the Glorious revolution. The restrictions imposed upon the King were eased

In 1992, in view of the evident constitutional issues posed by an antiquated military justice system, a first significant wave of reform to the Canadian military justice system was instigated when the Supreme Court of Canada found that military judges sitting at a Court Martial lacked security of tenure and administrative autonomy, as required under section 11(d) of the *Charter*. Given that our Court Martial system shares close similarities with other like-minded military jurisdictions, the decision *R. v. Genereux*[6] swept across commonwealth countries, pressuring military justice reforms in England, Australia, New Zealand, and South Africa.[7] Considering the incidental percentage of military prosecutions dealt with by Court Martial under commonwealth military jurisdictions, what was perceived as a first step towards ensuring greater protection for the fundamental rights and freedoms of service members soon became an apprehension of a more important and pressing problem. Conscious of the deficiencies posed by their summary trial systems under article 6(1) of the *European Convention on Human Rights* and article 14 (1) of the *International Covenant on Civil and Political Rights,* England and Australia have recently overhauled their summary trial system to ensure its compliance with their domestic human rights norms. Inevitably, these recent reforms in other like-minded military jurisdictions lead us to question the viability of our own summary trial system in a 21st century context. Aside from mere "nuts and bolts tinkering", Canadian summary trials remain unchanged since their adoption under the 1950 *National Defence Act.*

In the 1980 decision *R. v. Wigglesworth,*[8] Wilson J. found that a matter falls within the ambit of s. 11 (d) of the *Charter* where the imposition of "true penal consequences" is involved. Undoubtedly, depriving a service member of his liberty for a period of thirty days falls under the terms enunciated by the Supreme Court of Canada. In *Genereux,* the Supreme Court of Canada also found that the *Charter* applies to service tribunals, a term which the Canadian *National Defence Act* defines as encompassing both Court Martial and summary trial systems.[9] Secondly,

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by the *Mutiny Act 1689* (eng.) due to the threat posed by the Scottish rebels led by James I. See generally Jonathan Turley, 'The Military Pocket Republic' (2002) 97 Northwestern Law Review 1, at 15-24.

[6] *R. v. Genereux* [1992] 1 S.C.R. 259. [Hereinafter "Genereux"]

[7] In 1992, the Supreme Court of Canada declared in *Genereux* that a general court martial was unconstitutional under s.11(d) of the Canadian *Charter* for want of judicial independence. In the 1997 decision *Findlay v. United Kingdom* 24 EHRR 221, the UK court martial was declared invalid pursuant to article 6(1) of the *European Convention on Human Rights* for want of judicial independence, prompting hasty legislative reforms by the UK Parliament. Following the adoption of its new Constitution in 1996, the 1999 South African decision *Freedom of Expression Institute and Others v. President, Ordinary Court Martial, and others* proved, for itself, to be a catalyst to the South African Military Justice reforms. Meanwhile, two countries south of the equator were also contemplating applying the wax and wane to their military justice systems. In Australia, a committee of inquiry into the effectiveness of the Australian military justice system noted that:"Australia's disciplinary system is not striking the right balance between the needs of a functional Defence Force and Service members' rights, to the determinant of both." In New Zealand, the decisions *Drew v. Attorney General* [2002] 1 NZLR 58 and *R v. Jack* [1999] 3 NZLR 331, 339 (CMAC) also underlined the need to reform its military justice system to ensure compliance with the *New Zealand Bill of Rights Act*. From this first wave of reform, a shared sentiment for a need civilianize their military justice systems was set into place. For a discussing on military justice reforms in commonwealth countries, see Chris Griggs, "A New Military Justice System for New Zealand" (2006) 26 New Zealand Armed Forces Law Review.

[8] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at 560. [Hereinafter "Wigglesworth"]

[9] *National Defence Act* (R.S.C., 1985, c. N-5), section 2 provides that: "service tribunal" means a court martial or *a person presiding at a summary trial.* [Hereinafter "*NDA"*]

allowing a commanding officer within the executive chain of command to adjudicate on the rights of those under his direct authority clearly runs counter to the right to an impartial tribunal as guaranteed under s. 11 (d), not to mention the structural deficiencies of summary trials under the independence criterion.[10] Finally, while the issue could be assessed under s. 7 of the *Charter*, the Supreme Court of Canada clearly stated in both *R. v. Parson* and *Genereux* that s. 7 should only be considered as an alternative to s. 11 (d).[11] In discussing the constitutional validity of summary trials in the Canadian military justice system, it may safely be ascertained that s. 11 (d) of the *Charter* is applicable to Canadian summary trials, and that the system in its current form is in clear violation of its requirements. This leads us to a third indisputable assertion: at present, the heart of the matter regarding the constitutional validity of summary trials remains whether the *prima facie* violations of s. 11 (d) by summary trials can be justified under s. 1 of the *Charter*. While the Supreme Court of Canada has recognized that the necessity of maintaining a high level of discipline in the special conditions of military life is a sufficiently substantial societal concern to justify the limitation of fundamental rights in a military context, a modern understanding of the distinct nature of *military* discipline alongside a shift in the special conditions of military life brought about by a modern security context reveals that there no longer exist a rational connection between the challenged structure of summary trials and the objective of ensuring a high level of military discipline. Quite to the contrary, in a 21st century security context, the Canadian summary trial system is not striking the right balance between the needs of an efficient armed force and service members' rights, to the determinant of both.

To prove this point, this work divides into two parts. Part I offers a discussion on the social context underlying the legal framework of summary trials. The issue surrounding summary trials is anchored in a broader political debate opposing military traditions to civilian values, a phenomenon commonly referred to as the "civilianization" of the military. Part I takes as a starting point the identification and assessment of the central argument maintained by conservative military officials in the debate against civilianizing the military. As it will be seen, their position reveals a central concern, based on traditional tenets and principles of military society, for the maintenance of discipline and order to ensure operational effectiveness and readiness. Part I proceeds with an in depth assessment of the traditional tenets of military society and more importantly, on the distinct nature of military discipline, its importance, and the best means to ensure and maintain it. Understanding these core principles of military life and society will enlighten our understanding of the purpose of summary trials, in their current form. Having outlined the central tenets of the military social context, Part II proceeds with a succinct overview of the central "nuts and bolts" that edifice the legal framework for our summary trial system, and how specifically it meets the traditional needs of a military. From this overview, the contraventions to s. 11(d) of the *Charter* will be apparent. Finally, whether these contraventions may be defended under section 1 of the *Charter* will form part of our end discussion. In this last portion, the validity of the old assumptions which have stood in firm opposition to the right to a fair trial, identified in Part I, will be tested against a modern security context. This will involve a discussion on the distinct nature of military discipline in light of modern military necessities. Lastly, we will turn to other free and democratic societies whose summary trials present close similarities to our own, namely England and Australia. Combined, Part I and II firmly establish

[10] The concepts of "independence" and "impartiality" found in s. 11(*d*) of the *Charter* are separate and distinct values or requirements. See generally *Valente v. R.*, [1985] 2 R.C.S. 673. [Hereinafter "*Valente*"]

[11] *Genereux*, supra note 6, at 310; *R. v. Pearson*, [1992] 3 S.C.R. 665, at 688; *Deghani v. Canada* (M.E.I.), [1993] 1 S.C.R. 1053, at 1076.

that a better balance between service member's rights and traditional military necessities may be achieved.

PART I: MILITARY SOCIETY, CULTURE, AND LAW

> "Sound changes cannot be properly advocated, evaluated, or implemented if one doesn't comprehend what our military justice system is intended to accomplish."[12]

A. The Approach: The Importance of Military Sociology

A sound and comprehensive approach to any aspect of the Canadian military justice system must undeniably include a sociological component, intertwined by history, social psychology, and political science.[13] Completing a legal analysis of summary trials with other academic disciplines finds value "in the simple truth that the military is a highly complex social phenomenon in itself and one that cuts through various levels, touches several different contexts, and is thus subject to multiple processes of interpretation."[14] As the law, of its own, does not embrace all human interactions, and as our military justice system's primary concern must be to harness and control the conduct and behavior of Canadian service members, assessing the viability of our summary trial system, most notably with what pertains to *Charter* s. 1 considerations, is futile without a clear understanding of how a military functions, as a social institution. To name one illustrative precedent, in assessing possible causes which lead to serious misconduct by Canadian service personnel, or Canada's "national shame", a special report headed by Federal Court Judge Mr. Gilles Letourneau scrutinized not only the deficiencies in the Canadian military justice system but also in military culture and ethics of the Canadian military, alongside its deeper institutional shortcomings.[15] In short, our military justice system and its underlying social context are both intricately and inextricably linked.

While invaluable for their assessment of the finer details, few of those who have taken on the meticulous task of evaluating our summary trial process under s. 11 (d) of the *Charter* can be credited for having paid sufficient attention to the broader social context which informs the formal structure. If the validity of summary trials is to be defended on the sole basis of ensuring a high level of *military* discipline in the special conditions of military life, for instance, one must have a clear comprehension of the precise meaning of *military* discipline, and conditions of military life, in a 21st century context. Thus, while the conclusions reached by previous studies may appear sound on the surface, an understanding of the underlying military social context reveals that these conclusions, let alone the fact that they are dated, are in fact discordant with

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[12] Major General William A. Moorman, "Fifty Years of Military Justice: Does the Uniform Code of Military Justice need to Be Changed?" 48 Military Law Review 185, at 3. [Hereinafter "Major General Moorman"]

[13] Giuseppe Caforio, *Handbook of the Sociology of the Military* (Springer US, 2006) at 3. [Hereinafter "Caforio"]

[14] Ibid.

[15] Government of Canada, Minister of Public Works and Government Services Canada 1997, *Report of the Somalia Inquiry* (1997) vol. 1, Introduction, online: http://www.forces.gc.ca/somalia/vol1/ [Hereinafter "*Report of the Somalia Inquiry*"]

the underlying modern social context of the military. Indeed, as one author rightly notes:"no legal system can remain static, each must change to reflect the needs and demands of society or risk becoming an anachronistic relic of a dead or dying society."[16]Modernizing the Canadian military justice system to ensure that it continues to meet the needs and demands of our armed forces should be the focal point of any legal survey on the matter.[17] As such, identifying the core principles and traditional tenets of military society, and understanding how they inform the laws that shape our military justice system proves to be a logical and imperative starting point. As one author correctly points out:"at root, the management of change in the affairs of armed forces requires a willingness to differentiate between 'traditional necessities' and 'necessary traditions'."[18]

B. The Debate: Traditional Necessities vs. *Charter* Rights and Freedoms

The heart of the debate surrounding summary trials in the Canadian military justice system and the right to a fair trial under s. 11 (d) of the *Canadian Charter of Rights and Freedoms* is, to a very large extent, rooted in a broader historical and political debate opposing long-standing military policies to Canadian societal values. Since the end of World War II, military jurisdictions around the globe have witnessed a progressive shift toward "civilianization" that is, the incorporation of civilian values into military society. Academics attribute this social phenomenon to relatively recent advancements in military technologies. Indeed, prior to the end of World War II, the Napoleonic *levee en mass,* industrial style of warfare whereby military success was said to lie in the largest standing force was the reigning military strategy among nations. With the United States emerging as a new world leader and a shift in security needs posed by the threat of a highly populated Soviet enemy, ensuring an increase in fire power of a smaller military through advanced military technologies became a central security concern during the cold war, and a shifting point in the way future warfare was to be conducted. As early as 1970, academics were commenting on the discernable impact on the military profession:

> "Technological trends in war-making have necessitated extensive common modification in the military profession.... The changes in the military reflect organizational requirements which force the permanent military establishment to parallel other large-scale civilian organizations. As a result, the military takes on more and more the common characteristics of a government or business organization. Thus the differentiation between the military and the civilian is seriously weakened. In all these trends the model of the professional soldier is being changed by 'civilianizing' the military elite to a greater extent than the 'militarizing' of the civilian elite."[19]

With a technologically advanced military came an inflow of specialized and skilled civilians and a progressive and settled integration of civilian norms and values within a traditional military society. Not infrequently have traditional military officials viewed the progressive assimilation

[16] Major General Moorman, supra note 12, at 2.
[17] Ibid.
[18] Ibid.
[19] Morris Janowitz, *Political Conflict: Essays in Political Sociology* (Chicago: Quadrangle Books, 1970) at 126.

of military values and norms as a threat to an established military way of life, and a nuisance to operational effectiveness.[20]

Since its inception in 1982, the *Charter* has and continues to be viewed by traditional Canadian military officials with skepticism. Many traditionalists described it as a creature by "civilian politicians and lawyers who had the problems of a civilian society and legal system in mind."[21] Underlying their suspicion was an overall weakening of the core institutional values requisite to an efficient fighting force. As one author describes it:"the sharp-toothed guard dog has been taken into the home to be made family pet."[22] Despite these concerns, the cardinal rule of English military law that "a person does not by enlisting in or entering the armed forces thereby cease to be a citizen, so as to deprive him of his rights or to exempt him from his liabilities under the ordinary law of the land"[23] has, except where the law provides otherwise,[24] been recognized by the Supreme Court of Canada.[25]Nevertheless, traditional military officials

[20] Richard A. Gabriel, *To Serve with Honor: A Treatise on Military Ethics and the Way of the Soldier* (Westport, Connecticut: Greenwood Press, 1982) at 98.
[21] Heard, supra note 3.
[22] Lockyer, supra note 2, at 25.
[23] In *R. v. Pinney*, Lord Tindal stated that: "the law acknowledges no distinction … between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation and invested with the same authority to preserve the peace of the King as any other subject" *R. v. Pinney* (1832) 5 Car & P 258, 258 (Lord Tindal CJ); Halsbury extrapolated the same principle in saying that: "a person does not, by enlisting in or entering the armed forces, thereby cease to be a citizen, so as to deprive him of his rights or to exempt him from his liabilities under the ordinary law of the land." LexisNexis, *Halsbury's Laws of England*, vol. 2(2) (2003, 4th ed. Reissue) Armed Forces, 'Chapter 1 – The Legal Position of the Armed Forces] [3], citing *Burdett v. Abbott* (1812) 4 Taunt 401, 449-450 (Lord Mansfield CJ); For a modern formulation of the same principle, see *Holden v. Evans* (1919) 35 TLR 642, 643-4 (McCardie J.); See also S Skinner, 'Citizen in Uniform: Public Defence, Reasonableness and Human Rights' [2000] *Public Law* 266, 273-5.
[24] *Canadian Charter of Rights and Freedoms*, s. 11 (f), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. [Hereinafter "*Charter"*]
[25] In *R. v. MacKay*, the Supreme Court of Canada stated that:"...it is a fundamental constitutional principle that a soldier does not, by virtue of joining the armed forces and the consequent military character he assumes, escape the jurisdiction of the civil courts of this country. Accordingly, the ordinary law that applies to all citizens also applies to members of the armed forces but by joining the armed forces those members subject themselves to additional legal liabilities, disabilities and rights, that is to say Canadian military law." *R. v. MacKay* [1980] 2 S.C.R. 370, at 399. [Hereinafter "MacKay"]; A 1997 report to the Canadian prime minister regarding the values and ethics of the Canadian armed forces reflects the importance of ensuring that the Canadian forces continue to reflect the values of the broader society which subsumes it: "The record of modern warfare clearly demonstrates that military effectiveness depends upon armed forces being integral parts of the societies they serve, not being isolated from them. The society in which and for which the CF serve is in the process of rapid legal, economic and social change. As a result, the Forces must respect women's rights, reject discrimination based on race or sexual orientation and conform to other Canadian legislation reflecting evolving social values." Government of Canada, Department of National Defence, *Military Justice at the Summary Trial Level* (2001), online: http://www.cfd-cdf.forces.gc.ca/websites/Resources, at PDF 14. [Hereinafter *"Military Justice at the Summary Trial Level"*]; To the same effect, Brig-General (Ret'd) David Broadbent held the view that "military forces are generally *in greater danger of failing to adapt to changed circumstances than of*

persist in disputing questions such as which particular individual right should be integrated within a military context and to what extent can or should they be curtailed to prevent interfering with the core institutional needs of the military. S. 2 of the *Charter*, for instance, which provides that everyone has the right of freedom of association, freedom of peaceful assembly, freedom of thought, belief, opinion and expression, finds limitation in a military context to ensure the political neutrality of the Canadian military.[26]Equality provisions under *Charter* s. 15 in relation to women and homosexuals have also, due to the now dated and stereotyped ideas that including women and homosexuals in the military would be detrimental to discipline and order,[27] been met with strong resistance by the military community.[28] The right to an impartial and independent trial under s. 11 (d) was also met with resistance in assessing the Canadian Court Martial system due to the unique disciplinary concerns of the military.[29]

Varying in nature, the integration of each separate *Charter* right within a military context raises a separate debate with its own distinctive questions. What these debates do have in common, however, is a central concern for the overall impact of including such rights on the distinctive character of military life, operational effectiveness, and more importantly *military* discipline. These questions have also generated debate regarding the extent to which civilian courts are in a position to adjudicate over such issues due to their lack of expertise in *military* affairs,[30] and perhaps more tellingly, on their lack of resources in determining the overall effect on discipline and order.[31]Consequently, comprehensively assessing summary trials under s. 11(d) of the *Charter* should necessarily measure its effect on operational effectiveness, and the distinct character of military life, and *military* discipline. As one author correctly posits, "change should be supported if, and only if, it improves the delivery of justice and also preserves the [military] discipline essential for military success."[32]Understanding this last proposition inevitably requires identifying the assumptions that underlay the position maintained by traditional military officials against the incorporation of individual rights, and the traditional tenets of military society that inform summary trials. The validity of these traditional assumptions of military life, and how s. 11(d) might affect them will also be tested against time in our s. 1 assessment.

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adopting changes that imperil military effectiveness. […] A military force exists to safeguard the interests and values of the society it defends." Heard, supra note 3, at 26

[26] *Military Justice at the Summary Trial Level*, supra note 25.

[27] As one commentator notes: "[That men are better suited for combat than women] *seems increasingly inconsistent with the realities of modern warfare*, which relies less and less on muscle power and more and more on firepower and technology. […] When compared with the effects of training, operational tempo, leadership, and materiel, *gender is not perceived as affecting readiness*.[…]The presence of women was also cited as *raising* the level of *professional standards*." Daniel A. Farber, William N. Eskridge, Jr., Philip P. Friceky, *Constitutional Law - Themes for the Constitution's Third Century*, 3rd Ed. (American Case Book Series, 2003), at 359. [Hereinafter "Farber, Eskridge, Friceky"]

[28] David J. Corry, "Military Law Under the Charter", (1986), 24 Osgoode Hall Law Review 1, at 5. [Hereinafter "Corry"]

[29] See generally *Geneux*, supra note 6.

[30] *MacKay*, supra note 25, at 162.

[31] Heard, supra note 3, at 2.

[32] Major General Moorman, supra note 12, at 6.

C. The Difference Argument

1) The Argument: Why Charter Rights Should be Limited within a Military Context

Central to the position advocated by opponents of *Charter* rights within a military context is the idea that military society, life, profession, necessities, and culture intertwine to form a distinct social fabric different from the one found in the broader Canadian society.[33] Rather than perceiving the military as a community within a broader community which carries out government policies and where service members represent all that is best in national character, the difference argument views the Canadian armed forces as "a distinct sub-set of the entire Canadian fabric."[34] Consequently, the treatment of military society under the eye of the law must also be different.[35] As such, fundamental rights and freedoms such as *Charter* s. 11(d) that are perceived as being inconsistent with the ideals of military society as a whole should therefore be limited.[36] As General George S. Patton explained in his "Speech to the Third Army" on June 5th, 1944, the eve of the Allied invasion of France, code named "Overlord": "an army is a team. It lives, eats, sleeps, fights as a team. This individuality stuff is a bunch of crap. The bilious bastards who wrote that stuff about individuality for the Saturday Evening Post don't know anything more about real battle than they do about fornicating."[37] A helpful and noteworthy explanation of the reasoning underlying the "difference argument" is provided by one commentator:

> "Arguments based on difference usually have two strands. The first strand is the suggestion that the qualities of an activity or profession are such to render it clearly different to others upon which the law has evolved. This strand makes a subtle appeal to the incremental nature of common law reasoning by suggesting that some of the fundamental tools of the common law, particularly the use of analogies to extend legal doctrine to new or novel areas, may not be appropriate. The second strand of any appeal to difference is usually the assertion that the application of normal legal principles *to the area of difference would impede the proper functioning of that area*. On this view, difference warrants different treatment."[38]

To draw upon our previous s. 15 equality rights example, a 1986 report by the Canadian Forces' *Charter* task force offered the following statement regarding the inclusion of homosexuals in the military: "the overall effect of the presence of homosexuals would be a decrease in the

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[33] As one author notes: "The key to justifying the limitation on the constitutional rights of a service member is identifying the core principles, or tenets, of military service.[…] Should the values of military service be undermined the armed forces could become ineffective and ill disciplined."*Military Justice at the Summary Trial Level*, supra note 25, at PDF 15; See also William Windham, quoted in Maj Louis E. Grimshaw, "Ethical Tensions for Senior Leaders in the Canadian Forces", notes for a seminar workshop at JSCOPE XVII, Washington D.C., January 1995.

[34] "Canadian Forces Officer General Specification", Revision 2 (A-PD-150-001/AG-001, October 1994), Preface, pp. ii-iii.

[35] Ibid.

[36] Canadian Forces' *Charter* Task Force, *Final Report,* Vol. 1, September 1986, Part 4, at 21.

[37] Franklin J. Schaffner and Karl Malden, *Patton* (A 20th Century Fox Film – Biography – winner of 7 academy awards, 1970), title 1, Chapter 1.

[38] Dr. Matthew Groves, "Civilianization of Australian military" (2005) 28(2) University of New South Wales Law Journal 364, at 1. [Hereinafter "Dr. Groves"]

operational effectiveness of the Canadian forces".[39] This last statement flowed from the idea that *military* discipline is dependent upon unit cohesion, group bonding, and camaraderie. The erroneous assumption was that including women and homosexuals within a group or unit would disrupt group bonding. It is now recognized that such stereotypes are "inconsistent with the realities of modern warfare […] which relies more and more on firepower and technology."[40]In fact, the presence of women has been cited as raising the level of professional standards within the military.[41]

2) The Assumption Underlying the Argument

Underpinning the idea that military society is different and therefore requires different treatment is the assumption regarding the traditional and ultimate end of an armed force: combat. Discussing the end objective of the Canadian armed forces, one report offers the following comment: "the ultimate role of the [Canadian] armed forces is to apply force, or the threat of force, in the furtherance of the interests of the state [...]."[42] On an individual level, the distinctive feature of the military profession finds expression in the "unlimited liability clause" to which servicemen and women are bound:"the essential basis of military life is the ordered application of force under an unlimited liability. It is the unlimited liability which sets the [service member] who embraces this life somewhat apart. He will be (or should be) always a citizen. So long as he serves he will never be a civilian."[43] In short, combat, the defining and end purpose of a military, and its implications for individual service members, have traditionally served as the distinguishing mark of military society in the difference argument advanced by military officials.

D. Military Discipline and Order: the Soul of the Military

1) The Importance of Military Discipline

> "To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for, and concerted action with, their comrades and a reverence for and a pride in the traditions of the service."[44]

In 1759, General George Washington emphasized that "discipline is the soul of an army. It makes small numbers formidable, procures success to the weak, and esteem to all."[45] A direct corollary of the distinct nature of the tasks traditionally ascribed to an armed force is the need to ensure *military* discipline and order.[46] Indeed, service member's being bound by an "unlimited

[39] Canadian Forces' Charter Task Force, Final Report, Vol. 1, September 1986, Part 4, at 21.
[40]Farber, Eskridge, Fricеky, supra note 27, at 359-60.
[41] Ibid.
[42] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 16.
[43] General Sir John Hackett, *The Profession of Arms* (London: Times, 1963) at 222.
[44] *Mackay*, supra note 25, at 399.
[45] General George Washington, Instructions to Company Captains (July 29, 1757) *in* 4 THE PAPERS OF GEORGE WASHINGTON, Nov. 1756—Oct. 1757 341, 344 (W.W. Abbot & Dorothy Twohig eds., 1984).
[46] Discipline is broadly recognized as the soul of an armed force. See, for instance, 18th century French General Maurice de Saxe who, in his 1732 work entitled "Mes Reveries", stated that: "After the organization of troops, military discipline is the first matter that presents itself. It is the soul of armies. If

liability" clause, executing lawful superior orders involving a high level of risk to life or limb,[47] or deliberately killing a human being in the pursuit of military objectives tend to run counter to human being's basic instincts of survival.[48] *Military* discipline upon which operational effectiveness is reliant, therefore, is highly contingent upon ensuring a habit of obedience to lawful superior orders, even in the most stressful and daring conditions of warfare.[49] As one author explains, the habit must be "so strong as to overcome the natural inclinations of [service members], and produce instant obedience under all circumstances, however trying they may be."[50] A broadly recognized definition of discipline contained in a 1960 report by the U.S. department of defense further underscores this last assertion:

> "A state of mind which leads to a *willingness to obey an order* no matter how unpleasant or dangerous the task to be performed--is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable."[51]

Collectively, an armed force therefore becomes "a collection of individuals who must set aside their personal interests, concerns, and fears to pursue the purpose of the group collectivity."[52] A the history of the Canadian armed forces has demonstrated in the past, a lack of *military* discipline has the potential to lead to disorder[53] and abusive, unlawful uses of force, and human

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it is not established with wisdom and maintained with unshakeable resolution you will have no soldiers. Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy...." Marshal Maurice de Saxe (1696-1750), My Reveries Upon the Art of War (published in 1757).

[47] *QR & O,* s. 19.01.provides for the obligation to obey all lawful commands, including those which might lead to death or serious injury and the potential to be penalized for failing to do so. *Queens Regulation and Orders* (*QR & O).*

[48] One commentator explains the sometimes harsh realities of the military profession in saying that: "The operations of the armed forces *place people in harm's way and may demand that they sacrifice their lives*. Often soldiers follow their leaders willingly and obey their orders even in the most trying situations. At other times, soldiers have resorted to mutiny and resisted every effort to compel them." *Report of the Somalia Inquiry*, supra note 15, volume 1; As Allan D. English explains, Maslow's hierarchy of needs, which posits that humans tend to fulfill their needs in a sequential hierarchical way, starts with basic physical needs of survival. Allan D. English, *Understanding Military Culture: A Canadian Perspective* (McGill – Queen's University Press, 2004) at 26. [Hereinafter "English"]

[49] Captain F.G. Stone, R.A., *Military Prize Essay*, "Discipline: Its Importance to an Armed Force, and the Best Means of Promoting and Maintaining it", Royal United Service Institution, Journal 33 (1889/1890), at 4. [Hereinafter "Captain F.G. Stone"]

[50] Ibid, at 33.

[51] U.S., Department of Defense, Report to Honorable Wilber M. Brucker, Secretary of the Army by Committee on the Uniform Code of Military Justice, Good Order, and Discipline in the Army ('Powell Report') (OCLC 31702839) (18 January 1960), at 11.

[52] *Report of the Somalia Inquiry,* supra note 15, volume 2, Discipline.

[53] The sit-down strikes aboard three Canadian warships in 1949 by Canadian sailors, who expressed discontent and distrusts towards their commanding officers following their arbitrary treatment, is once such instance where indiscipline may lead to disorder. It is further interesting to note that these disciplinary infractions lead to military justice reforms to increase the protection of rights of service members. See Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia*, (UBC Press, 2000), at p. 103. [Hereinafter "Madsen"]

rights abuses.[54]In short, *military* discipline being the soul of an armed force, individual rights and freedoms, to avoid limitation within a military context, must not, at a minimum, be detrimental to discipline and order.

2) The Distinct Nature of Military Discipline

In addition to the idea that discipline is a quintessential ingredient of an effective armed force against which even the slightest of change to our military justice system must be measured,[55]more vital to note for our purposes is the distinct nature discipline takes in a *military* context as opposed to its understanding in a broader society context, and the best means of promoting and maintaining it. One detailed extract provides a telling and exacting explanation of the distinct character of discipline, in a military context:

> "The word 'discipline' would seem to have *a distinct meaning when associated with the military as opposed to its application to society at large*, as manifested in judicial, legal, and police usage. In the larger *societal context*, discipline has come to mean the *enforcement of laws, standards, and mores in a corrective and, at times, punitive way*. […]
>
> However, it should be understood that the more important usage in the military entails the application of control in order to harness energy and motivation to a collective end. The basic nature of discipline in its military application is more *positive* than negative, seeking actively to channel individual efforts into a collective effort thereby enabling force to be applied in a controlled and focused manner."[56]

While discipline is commonly associated with the use of formal legal means such as penal sanctions, a wealth of academic literature on military sociology establishes that *military* discipline is best ensured through "uncodified patterns of social interaction among and between soldiers and their commanders."[57] In identifying three elements which contribute to obedience, for instance, one commentator ranks as first and most trustworthy the clear comprehension on the part of service members of the value of discipline, the hope of reward, followed by the fear of punishment, the lowest and least effective means.[58] That *military* discipline is best ensured through informal social means is also recognized by the Canadian armed forces:"It has been determined that the factors affecting the motivation of soldiers […] are *primary group allegiances* (*group cohesion and buddy loyalties*), *unit esprit*, manpower allocation, *socialization*, training, discipline, leadership, ideology, rewards, pre-conceptions of combat, combat stress and combat behavior (including self-preservation)."[59] In short, in addition to being a bedrock principle of military efficiency, *military* discipline and order are ensured first and foremost

[54] For instance, on March 14th and 15th, 1992, a Somali teenager was brutally tortured and killed while in detention in a Canadian compound. In assessing the wrongs committed by Canadian service members in Somalia, lack of discipline was critical in understanding what had gone wrong. *Report of the Somalia Inquiry*, supra note 15, volume 2, Discipline.
[55] Major General Moorman, supra note 12.
[56] *Report of the Somalia Inquiry*, supra note 15, volume 2, Discipline.
[57] Osiel, *Obeying Orders*, (New Jersey: Transaction Publishers, 1999) at 181. [Hereinafter "Oseil"]
[58] Captain F.G. Stone, supra note 49, at 17.
[59] See generally Anthony Kellett, *Combat Motivation: The Behaviour of Soldiers in Battle* (The Hague: Kluwar Nijhoff Publishing, 1982).

through a strong morale and *esprit de corp*. It follows that any proposed change to the Canadian military justice system must indisputably be measured by its positive effect upon morale and *esprit de corps*.

3) The Relationship between Military Discipline and Authority

A last crucial point to note with regard to military discipline is the vital role played by commanding officers in ensuring discipline, in a *military* context. Military discipline being ensured first and foremost through informal social norms such as positive group relations, confidence, and camaraderie, it necessarily follows that the personal character and perceived integrity of those who issue life or death threatening orders plays "a *direct* factor in the maintenance of discipline *from whichever point of view we regard it.*"[60] The relationship between positive military leadership and the maintenance of *military* discipline is succinctly encapsulated in the following passage:

> "As part of their responsibility for ensuring *operational effectiveness*, commanders build up effective *team relationships* within their units, thus fostering team *spirit* and a *climate* of *mutual trust* and *respect*. […] In this context, commanders have a responsibility to play an assertive and proactive role in creating a *climate of trust and mutual respect among soldiers* […]."[61]

To the same effect, in describing formal and informal means for commanding officers to ensure discipline, the Organization for Security and Co-operation in Europe found that: "the second approach underlines the role of the *moral leadership of commanders as a more effective means of maintaining discipline* in the barracks and of *creating an environment based on mutual trust*. […] Military leadership based on *mutual trust and respect*, contrary to that based on *threats and fear*, is the foundation for a *well-functioning army* and for *respect for human rights*."[62] In short, through positive moral leadership, commanding officers play a central role in ensuring *military* discipline. As any proposed change to our military justice system must be measured by its impact upon *military* discipline, any proposed change must necessarily account for its positive impact upon the perceived image of commanding officers.

E. Military Culture

> "All organizations attempt to control internal and external events and overcome obstacles to reaching their goals."[63]

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[60] Captain F.G. Stone, supra note 49, at 9.

[61] In discussing military leadership, the following statement is equally noteworthy: "Military leadership -- the ability to gain the willing obedience of subordinates -- is an essential component of command. Personal courage, *integrity*, sacrifice, a willingness to take difficult decisions, and "a clear sense of personal responsibility" have characterized military leadership throughout the ages. When this sense of responsibility is married to "a deep personal understanding of the troops and their problems, a clear purpose, discipline, and hard training", soldiers have followed leaders *without coercion*." *Report of the Somalia Inquiry*, supra note 15, volume 1, military chain of command.

[62] Hans Born, Ian Leigh, *Handbook on Human Rights and Fundamental Rights of Armed Personnel*, online: http://www.dcaf.ch/odihr/HRAF_factsheet.pdf., at PDF 115, 127, 212. [Hereinafter "Born and Leigh"]

[63] English, supra note 48.

If discipline and order are ensured first and foremost through informal social means, the next logical question to ask seems to be how informal social norms necessary to military discipline and order are themselves weaved. The answer is through a physical and social divide (the latter being the product of the former) between military and civilian society. Worded differently, an apparent isolation of military society enables the development of a distinct military culture, defined as a "set of meanings, ideas and symbols that are shared by the members of a [collectivity] and that *have evolved over time*"[64], which fosters the imperatives of a fighting force, discipline and obedience to authority.[65]As learnt institutional values have an immediate influence on human behavior,[66] military culture is considered to be the vital blood of an armed force; it allows to deconstruct the human psyche to facilitate overcoming psychological and physical obstacles in combat environments. A few apparent characteristics of military life serve to illustrate how a physical divide enables the creation of informal norms and values necessary to ensure military discipline and order.

1) Collective Values

On a physical level, for instance, a visibly distinct dress and insignia serve as a way of differentiating civilians from service members. Separate military barracks, bases, and housing located in relatively desolate locations in Kingston, Val-Cartier, Petawa, serve as separate working, training, and living grounds for military personnel and their families, minimizing contact with the civilian population. On a social level, isolation of military society creates a communal military way of life and strengthens bonds between service members.[67]The necessity of fostering strong bonds between military personnel flows from the idea that our basic physical need of survival is met first and foremost through the sentiment of belonging to a social group.[68]Indeed, as one authoritative commentator explains:"the superiority which disciplined soldiers have over undisciplined hordes is principally a consequence of the confidence each [individual] places in his comrade."[69]For this reason, the self-interest and individualism which is often found in civilian norms such as individual rights is said to have little or no priority in the military profession.[70] Both run counter to an *esprit de corps*, mutual respect, confidence, trust in comrades, and the "exigencies of the barrack room life style" necessary to ensure *military* discipline.[71]

2) Respect for Authority

A further observable instance which demonstrates how a separate military society contributes towards weaving a distinct military social fabric is provided through a separate military education and training system with their own curriculums, means, methods, and

[64] Caforio, supra note 13, at 237.
[65] *QR&O* 19.01.
[66] English, supra note 48, at 25.
[67] Caforio, supra note 13, at 248.
[68] English, supra note 48.
[69] Captain F.G. Stone, supra note 49, at 3.
[70] Charles C. Moskos, Institutional and Occupational Trends in Armed Forces, *The Military: More Than Just a Job* (London: Pergamon-Brassey's International Defence Publishers Inc., 1988) at 16-17.
[71] MacKay, supra note 25, at 399.

programs.[72] A finely tailored training system, for instance, ensures that service personnel are "sensitive to the need for discipline, obedience and the duty on the part of members of the military and also to the requirement for military efficiency."[73] A unique curriculum is designed to cultivate an appreciation, understanding, and respect for military rules, norms, and ethics contained in the laws of armed conflict, the *Code of Service Discipline*, the *National Defence Act*, the *Queens Regulations and Orders*, and the *Charter*.[74]As both training and education remain under the immediate control of the military chain of command that is,[75] a link between various levels within the military hierarchy,[76] a close supervision by officers allows for the intrusive and personal atmosphere upon which *military* discipline is said to be reliant.[77] As one author explains:"an essential feature of military discipline is that it is meant to be intrusive. As a means of socializing members of the armed forces, and particularly recruits, military control of the member's life must be much more pervasive than the control exercised by civilian society over its members."[78] In addition, frequent interaction between officers and service members in a variety of minor tasks and duties "affords many opportunities of *gaining the affection* of [their subordinates]."[79] Finally, a *hierarchically* organized military environment further cultivates a high regard for authority.[80]

3) A Separate Military Justice System and Body of Military Law

A last telling example of how a separate military society fosters a culture of obedience is expressed through the maintenance of a separate military justice system and body of law. *Military* discipline is meant to be personal. Maintaining a separate military justice system under the control of the military thus ensures the high level of control and intrusiveness necessitated by military discipline, and further serves to reinforce the perceived *authority* of the military chain of command. In assessing the constitutional validity of a separate Court Martial system, for instance, it is with regard to these particular values necessitated by *military* discipline that the Supreme Court stated that: "The *unique disciplinary concerns* of the military, *different from our society's general concerns with social order and discipline*, necessitate a separate and parallel system of military justice."[81]To a much greater extent, control and authority are reinforced through summary trials where commanding officers are directly responsible for *punishing* breaches of military law within their unit. Further commenting on the adequacy of civilian courts to meet the distinctive needs of the military, the Supreme Court of Canada stated that: "recourse to ordinary criminal courts would, as a general rule, be inadequate to serve the *particular disciplinary needs* of the military."[82]Succinctly stated, having a separate military justice system reinforces the value of authority.

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[72] *Report of the Somalia Inquiry*, supra note 15, volume 1, military culture and ethics.
[73] *Genereux*, supra note 6, at 295.
[74] *Report of the Somalia Inquiry*, supra note 15, volume 1, military culture and ethics.
[75] *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997, at 9.
[76] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 22.
[77] Ibid, at 20.
[78] Ibid, at 18.
[79] Captain F.G. Stone, supra note 49, at 5.
[80] Caforio, supra note 13, at 241.
[81] *Genereux*, supra note 6.
[82] Ibid, at 293.

Finally, a distinct body of military law instills a culture of obedience through its visible focus on protecting and reinforcing those elements within military culture considered vital to *military* discipline, namely authority, and strong group bonds. Thus, in addition to being subject to civilian infractions contained in the *Canadian Criminal Code*,[83] service members are subject to distinct *military* infractions that find no civilian counterpart. A statement by the Supreme Court of Canada offers some insight on the distinctive nature and purpose of military offences:

> "Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a *comrade*. In the service that is more reprehensible since it detracts from the essential *esprit de corps, mutual respect* and *trust* in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a *superior* officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is, for an officer to strike a soldier is also a serious service offence."[84]

That *military* discipline is highly reliant upon unit cohesion and respect for authority also serves to explain why, for instance, mutinies are considered one of the most serious military offences. The offence is defined as: "*collective insubordination* or a combination of two or more persons in the resistance of lawful *authority* in any of Her Majesty's Forces or in any forces co-operating therewith."[85]Another and more important offence that is particularly reflective of the military's disciplinary concerns is s. 129(2) of the *National Defence Act*, an "omnibus provision"[86] frequently used to sanction misconduct. The provision reads: "any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence."[87] One commentator provides a helpful explanation of its underlying purpose of the broad and all encompassing provision: "Since the habit of obedience requires a compliance with all but unlawful orders, no breach of orders can be overlooked. Failure to comply with even minor orders and regulations involves a *lack of respect for authority*. […]."[88]In short, military offences serve to protect those core *values* essential to *military* discipline. Only in that sense can military law be said to further *military* discipline.

Conclusion

To conclude Part I, a military must be understood by its social context. Since the advent of the civilianization of the military, conservative military officials have persisted in resisting the progressive integration of civilian norms within military society. With what pertains more specifically to the integration of *Charter* rights within military life, military traditionalists have centered their argument upon the idea that military society, culture, justice, and law form a distinct social fabric from the one found in the broader Canadian society. Political ideals of individualism, autonomy, and equality which imbue the *Charter* are said to be in stark opposition

[83] By way of s. 130 of the *NDA*, *Criminal Code* offences are incorporated within Canadian military law. Under s. 269.1, for instance, a service member could be punished for torture and inhumane treatment while on duty abroad. *NDA*, supra note 9, s. 130.
[84] MacKay, supra note 25, at 399.
[85] *NDA*, supra note 9, s. 2.
[86] Group Captain J. H. Hollies, "Canadian Military Law" (1961) 13 Military Law Review 69, at 2.
[87] *NDA*, supra note 9, s. 129.
[88] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 19.

to military values such as community, hierarchy, and respect for authority, all of which are quintessential ingredients of a military culture centered on ensuring military discipline, the soul of an army. With regard to military discipline, it further was said the *military* discipline is opposed to civilian discipline. Rather than being ensured through formal sanctions and punishment, as it is commonly understood in the broader societal context, *military* discipline is in fact ensured through *esprit de corps*, group bonding, camaraderie, trust, confidence, and positive relations. As the leader of the social group, it was also said that commanding officer play a central role in shaping military culture and ensuring *military* discipline. It is against these traditional tenets and principles of military society, and with this particular understanding of military discipline that a constitutional assessment of summary trials under section 11(d) of the *Canadian Charter of Rights and Freedoms* must imperatively be assessed.

PART 2 – CONSTITUTIONAL VALIDITY OF SUMMARY TRIALS UNDER SECTION 11 (D) OF THE CANADIAN *CHARTER OF RIGHTS AND FREEDOMS*

A. Summary Trials in the Canadian Military Justice System

1) *"Raison d'être"* of Summary Trials

As discussed in Part I, *military* discipline is ensured first and foremost through informal patterns of social interaction among soldiers and commanding officers within a distinct military culture.[89]These informal positive values are manufactured within a separate and distinct military environment that reinforces respect for authority, hierarchy, and collective values such as *esprit de corps*. Where military discipline fails and breaches of military law do occur, commanding officers must imperatively have at their disposal the necessary means to *sanction* and *punish* misconduct. The need to maintain a formal and functional legal mechanism to *penalize* breaches of military law is specifically provided under international law.[90] Article 43(1) of *Additional Protocol I*, for instance, provides that an armed force shall be subject to a formal internal system which "shall *enforce* compliance with the rules of international law applicable in armed conflict."[91] Article 28(1) of the *International Criminal Court Statute* also recognizes the responsibility of a military commander for failure to prevent or *punish* unlawful conduct by subordinates.[92] In Canada, the 1950 *National Defence Act* offers two main avenues: Court Martial and summary trial.[93]In commenting on the *raison d'être* of both service tribunals, the Supreme Court of Canada affirmed that both "serve the *purpose of the ordinary criminal courts*, that is, *punishing* wrongful conduct […]."[94]Summary trials are thus in place to provide a means to punish breaches of military law.

2) Court Martial System

A few comments on the general workings and characteristics of a Court Martial serve to provide a clearer impression and comprehension on the essence and purpose of summary trials. In contrast to summary trials, a Court Martial affords all the procedural safeguards requisite to a fair trial. It is intended to be the civilian service tribunal. The court martial is presided over by legally qualified and impartial military judges, an accused is entitled to full legal representation throughout the process,[95] and a formal right of appeal to the Court-Martial Appeal Court is provided to the accused following a Court Martial conviction.[96]Finally, and more importantly for

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[89] Oseil, supra note 57.

[90] Peter Rowe, *Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006) at 67. [Hereinafter "Rowe"]

[91] Under the principle of command responsibility, which implies a close relationship between commander and subordinate, failure to exercise due diligence in order to prevent a specific unlawful act or to repress unlawful conduct may trigger the responsibility of a commanding officer. *Additional Protocol I*, article 43(1); *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo,* No. IT-96-21-T, para.333 (16 November 1998).

[92] Article 28(1), *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

[93] *NDA*, supra note 9, "service tribunal", s. 2. The beginning of two levels of trial under British military law was originally marked by the *Army Discipline and Regulation Act, 1879.*

[94] *Genereux*, supra note 6, at 1.

[95] *QR & O* 101.20(f).

[96] *NDA*, supra note 9, s. 159.9.

our purposes, the powers of punishment at the Court Martial level are greater than those available at the summary trial level.[97] The maximum punishment available at a Court Martial is life imprisonment.[98] However, where an offence may be tried by either Court Martial or summary trial, the maximum power of punishment in the former is two years imprisonment, and 30 days detention in the latter.[99]

3) Dual Role and Importance of Commanding Officers

Due to the special and distinct character of the profession in arms, commanding officers are required to fulfill a dual function as leaders of their unit. First and foremost, commanding officers are responsible for ensuring *military* discipline in order to carry out efficient and successful military operations.[100] In this last regard, in light of the distinct character of military discipline, the *positive moral leadership* of commanding officers, rather than the threat or fear of *legal punishment*, is recognized as being the most effective means of ensuring and maintaining *military discipline* and efficiency of operations.[101]In addition, commanding officers are also in the best position to administer a summary form of military justice within their units, most notably during combat. Indeed, while commanding officers are not required to have formal legal training,[102] the experience they enjoy within the military profession, the close identification they maintain with members of their unit, and their first hand knowledge of military operations on the field of combat place commanding officers in the best position to administer a summary form of military justice tailored to operations.[103] One can conceive the hypothetical scenario where, for instance, an accused Canadian service member possessing unique characteristics, skills, and knowledge is immediately required on the field of operations to further a vital military objective. In that particular sense, commanding officers are in the best position to administer a summary justice tailored to military necessities. However, while commanding officers fulfill a dual function, it is important to underline that both adjudicative and leadership functions are separate and distinct. Commanding officers are not conferred adjudicative functions in order to ensure *military* discipline but rather to *punish* breaches of military law. Concluding otherwise would be confusing *military* and civilian discipline, the latter meaning "the enforcement of laws, standards, and mores in a corrective and, at times, punitive way."[104]

[97] Table to *QR&O* 108.24, 108.25 and 108.26; *NDA* ss. 139 and 166-168.
[98] Ibid.
[99] Ibid.
[100] In Canada, a commanding officer is defined as: "(a) the officer in command of a base, unit or other element of the CF, (b) any other officer designated a CO by the chief of the defence staff, or (c) for disciplinary purposes, a detachment commander. The CO has both disciplinary powers and powers like those available to a judge." Commanding officers are defined at *QR&O*, vol. I, art. 1.02, and vol. II, art. 101.01.
[101] Born and Leigh, supra note 62, at 127 and 212.
[102] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 40.
[103] *Report of the Somalia Inquiry*, supra note 15, volume 1, The Military Justice System.
[104] Ibid.

4) Structure and Purpose of Summary Trials

As briefly mentioned earlier on, the Canadian military justice system is comprised of two distinct service tribunals: summary trial and Court Martial. The purpose of maintaining a two-tier military justice system can be read into the stated purpose of summary trial enunciated at s. 108.02 of the *Queens Regulations and Orders*: "the purpose of summary disposals is to provide commanders with a method of dealing *expeditiously and simply* with less serious disciplinary infractions, whether they be in [Canada], at sea or in an overseas operation. *Such a system is not compatible with a complex and adversarial process.*"[105] That one of two service tribunals had to be summary in nature was first recognized by British Parliament with the passage of the *Mutiny Act* in 1689,[106] and subsequently confirmed by Canadian Parliament through the enactment of the 1950 *National Defence Act*.[107] Though used during training in time of peace, summary trials were carefully crafted for combat circumstances in time of war. Indeed, procedural simplicity avoids lengthy and complex hearings and ensures operational readiness during combat. As one author explains:"compromising a military objective or risking lives for the sole purpose of administering a civilian form of justice in time of armed conflict would unquestionably be a greater form of injustice."[108] Simplicity also ensures portability: "the physical circumstances in which military courts hold trials might be quite primitive. The courtroom might be a tent".[109]While designed for combat, maintaining a procedurally simple service tribunal in time of peace is justified by an established principle of English military law to the effect that a military justice system must be designed so as to make no distinction between peace and war.[110] In short, from what precedes, four elements are vital to retain: (1) the very reason for maintaining a two-tier military justice system lies in the essence of summary trials; (2) the essence of summary trials is to remain swift and simple to ensure portability and operational readiness during combat circumstances; (3) procedural simplicity is also the distinguishing feature between summary trials and Court Martial; (4) that "the summary trial process, from an operational point of view, is so fundamental to the military system that, quite possibly, a military society could not govern itself without it."[111]

5) Limited Right to Legal Representation, No Formal Right of Appeal

For our purposes, two particular features which characterize the procedural simplicity of summary trials should be underlined: a limited right to legal representation, and the absence of a formal right of appeal following a summary conviction. With regard to the first element, there exists no requirement for a commanding officer to possess formal legal training.[112] While an accused may request legal representation at his or her own expense,[113] this right is ultimately

[105] *QR & O*, s. 108.02.
[106] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 37.
[107] Ibid, at 37.
[108] Major General Moorman, supra note 12, at 7.
[109] Michael R. Gibson, "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity" 4 J. Int'l & Int'l Rel. 2008, at 18.
[110] *Engel v The Netherlands* (1976) 1 EHRR 647, at para. 59; *Genereaux* supra note 6; Dr. Groves, supra note 38, at 8.
[111] Lockyer, supra note 2, at 8.
[112] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 162.
[113] *QR & O*, Volume II, Chapter 108, section 1, article 108.03, Note C.

subject to the discretionary approval of a commanding officer. In this last regard, it should also be noted that only an incidental percentage of accused service members will make such a request. Where such a request is made, legal representation is only granted by the commanding officer from time to time.[114] While the procedural rules do provide for a designated officer to assist an accused in the preparation and presentation of his case before a commanding officer, and to inform the accused of his rights throughout the process, the designated officer is appointed by the commanding officer, within the military command control chain.[115]In addition, as the assisting officer is not a lawyer, no solicitor-client privilege exists between an accused and assisting officer, implying that an assisting officer may be required to disclose any information given to him by the accused.[116]As a general rule, it is safe to ascertain that an accused is not legally represented at the summary trial level, or that an accused will be in a position to challenge the structure of a summary proceeding. Finally, with regard to the second aforementioned element that is, the absence of a formal right of appeal, a right to *review* is provided to an accused following a summary conviction.[117]Neither is the review process an appeal nor does it present the characteristics of *Charter* s. 11 (d) compliant court. The review remains within the chain of command, albeit at the next level.[118]

6) Election Right

An election process offered to an accused prior to the commencement of a trial by commanding officer is said to operate a "safety valve" to the palpable derogation by summary trials of *Charter* s. 11 (d) procedural safeguards.[119] An election refers to the process by which "an accused who is triable by summary trial in respect of a service offence, but has the right to be tried by court martial, decides whether to elect to be so tried."[120]Save limited circumstances where specified punishments would not be warranted and an offence does not fall within one of five minor offences,[121] an accused will have a right to elect either trial by Court Martial or

[114]The most recent statistics issued by the J.A.G. on the workings of summary trials demonstrate that the overall percentage of accused service members who benefit from legal representation during a summary trial is low. The percentage of requests made and percentage of requests granted for legal representation during summary trials varies according to the respondent's perspective. From the commanding officer respondent group, 12% of accused service members were said to have made a request for legal representation, and 80% were said to have been granted legal representation by their commanding officer. From the assisting officer respondent group, the numbers are 4% and 60% respectively. Judge Advocate General Annual Research Program Survey on the Summary Trial Process, Part B: Survey Results, 2007, at PDF 5-6. Online: http://www.forces.gc.ca/jag/publications/index-eng.asp. [Hereinafter "summary trial survey results, Part B"]

[115] *QR & R*. Volume II, Chapter 108, s. 1, art. 108.14 (1).

[116] *Wigmore on Evidence* , vol. 8, at 633-635, cited in *Military Justice at the Summary Trial Level*, supra note 25, at PDF 118.

[117] *NDA*, supra note 9, s. 249(3) and (4); *QR&O* s. 108.45, 116.02 and 107.14.

[118] *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services (*March 25, 1997), recommendation 33.

[119] Summary Trial Working Group Report, 2 March 1994, at 25.

[120] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 149.

[121] Unless detention, reduction in rank or a fine in excess of 25 percent of monthly basic pay are likely outcomes of a summary proceeding, or where a commanding officer decides to refer a matter to the Court Martial, an accused will not have an automatic right of election if the offence falls within one of the following five offences: *NDA* s. 85 (Insubordinate behavior), *NDA* s. 86 (Quarrels and Disturbances),

summary trial.[122] In other circumstances where the risks of either detention, retro gradation, or a fine are not likely consequences, an accused will not have a choice: summary proceedings will be the automatic choice.[123] For other specific charges, summary proceedings will be the automatic choice.[124] In all other circumstances, the choice may be offered by a competent officer.[125]Where an election right is offered, refusal by an accused to elect will result in the matter being referred for trial by court martial.[126]In making his decision, the accused must be offered a reasonable opportunity to retain legal advice as to the appropriate choice.[127] In short, the two tier structure of the Canadian military justice operates a trade-off between procedural safe-guards and powers of punishment.

7) Powers of Punishment

Among the various formal legal means available to commanding officers[128] to punish breaches of military law, the most important one is unquestionably that of detention for a period not exceeding 30 days.[129]Other powers in the hands of commanding officers include reduction in rank and fines not exceeding 60% of monthly basic pay,[130]to other minor punishments.[131]Despite a lowering in the total number of days of detention from 90 to 30 days to match the situation in the United Kingdom,[132] detention remains a vital tool to a commanding officer to *punish* breaches of military law.

8) *NDA* S. 129 Offence: Conduct to the Prejudice of Good Order and Discipline

Despite having a broad range of disciplinary offences to chose from, the most commonly used military offence is that of an act considered prejudicial to good order and discipline, an "omnibus provision that is to be found in so many of the world's military discipline codes"[133]. In Canada, this *broadly defined offence* is found in s. 129(1) of the *National Defense Act*, which

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NDA s. 90 (Absence Without Leave), *NDA* s. 97 (Drunkenness), *NDA* s. 129 (Conduct to the Prejudice of Good Order and Discipline but *only* where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment. *QR & O* 108.17 (1) (a).

[122] *QR & O* 108.17

[123] *NDA* s. 85 (insubordination), s. 86 (Quarrel or disorder), s. 90 (Absence without leave), 97 (Drunkenness), s. 129 (Conduct to the prejudice of good order and discipline).

[124] *QR & O*, s. 108.17.

[125]Ibid.

[126]Ibid.

[127]Ibid.

[128] For the purpose of this paper, powers available to a Commanding Officer (Provided at s.108-24) must be distinguished from those available to a superior commander (provided at 108.26) and those of a delegated officer (provided at 108.25).

[129] QR&O, 108.24.

[130] QR&R, 108.26 and 108.24, punishment number 4, row C.

[131] See scale of punishment provided by *NDA* s. 139.

[132] *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the Provisions and operation of Bill C-25, An Act to Amend the National Defence Act and to make Consequential Amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c. 25,* Report Submitted to the Minister of National Defence, September 3, 2003, at PDF 57. [Hereinafter "*Lamer Report*"]

[133] Group Captain J. H. Hollies, "Canadian Military Law" (1961) 13 Military Law Review 69, at 2.

provides that: "any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence"[134]. Disobeying orders issued by commanding officers, at times broad in scope and vague in terms,[135] will be dealt with as a s. 129(1) offence. The latest statistics issued by the Judge Advocate General indicate that of the 2620 charges that were brought in 2008, 1398 or 53.35% were brought under the broad and all encompassing "good order and discipline" provision.[136]

B. S. 11 (d) of the Canadian *Charter of Rights and Freedoms*

1) Applicability of *Charter* s. 11 (d)

The applicability of s. 11 (d) of the *Charter* to summary trials under the Canadian military justice system is firmly established through the land mark decisions *R. v. Wigglesworth* and *R. v. Genereux.* In *Wigglesworth*, Justice Wilson established that a matter would fall under s. 11 (d) of the *Charter* "either because by its very nature it is a *criminal proceeding*" or more importantly "because a conviction in respect of the offence may lead to *true penal consequences*". The Supreme Court has found that the deprivation of liberty involved in military detention is considered a true penal consequence, so as to attract section 11 (d) scrutiny upon summary trials.[137] Furthermore, in finding that *Charter* s.11 (d) applied to a General Court Martial, the Supreme Court of Canada stated that:"*service tribunals* […] serve the *purpose of the ordinary criminal courts*, that is, *punishing wrongful conduct* […]."[138]In addition to supporting the claim that summary trials attract section 11 (d) scrutiny by way of the criminal nature of their proceedings, the term "service tribunal" is defined by the *National Defence Act* as including "a person presiding at a summary trial".[139]These decisions by the Supreme Court of Canada are squarely fitted with the traditional principle of English military law that a citizen does not

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[134] *NDA*, s. 129.

[135] *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the Provisions and operation of Bill C-25, An Act to Amend the National Defence Act and to make Consequential Amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c. 25*, Report Submitted to the Minister of National Defence, September 3, 2003, at PDF 79. [Hereinafter "*Lamer Report*"]

[136] For statistical purposes, section 129 was divided into four categories: (1) offences of a sexual nature, (2) offences related to drugs or alcohol, (3) offences where an election to be tried by court martial is given (excluding offences captured by the two first categories), and (4) offences where no election to be tried by court martial is given (excluding offences captured by the two first categories). For statistics released during the most recent reporting period, the proportion of total summary trials for each category was as follows: 0.73%, 5.27%, 16.26% and 31.11% respectively. Government of Canada, Department of National Defence, J.A.G. Annual Reports, *Summary Trials Report Period from 1 April 2007 to 31 March 2008*, online: <http://www.forces.gc.ca/jag/publications/surveys-sondages/Stats-0407-0308-eng.pdf>, at 4. [Hereinafter "Summary Trial Statistics"]

[137] *Wigglesworth*, supra note 8, at 558.

[138] *Genereux*, supra note 6, at para. 1.

[139] *NDA*, s. 2. To the same effect, Canada's office of the Judge Advocate General concluded that "a summary trial is therefore 'by nature' a criminal proceeding' and that "once the 'by nature' test is passed it is irrelevant if the summary trial awards penal sanctions." Office of the Judge Advocate General, Canada, *Summary Trial Working Group Report*, vol. 1 (2 March 1994), 51.

renounce to his fundamental rights and freedoms by enlisting or entering into the armed forces.[140]

2) *Charter* s. 11 (d): The Right to a Fair and Public Hearing by an Independent and Impartial Tribunal

The authority for judicial independence in Canada is *R. v. Valente.* In this case, the Supreme Court of Canada issued the following test for independence under s. 11 (d): "the test for independence for purposes of s. 11 (d) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably *perceived* as independent. *Both* independence and *impartiality* are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice."[141]While both independence and impartiality are determinant in finding constitutional validity under s.11 (d), the absence of either suffices to attract constitutional invalidity. For our purpose, attention will be specifically drawn to the impartiality criterion under section 11 (d). In the same case, the Supreme Court defined impartiality as "a state of mind or attitude of the tribunal in relation to the issues and the *parties* in a particular case." The word "impartial" [...] connotes absence of bias, actual *or perceived.*[142] Finally, while the issue at hand could be assessed in light of *Charter* s.7, the Supreme Court of Canada clearly stated in *R. v. Parson* and *Genereux* that section 7 should *only* be considered as an *alternative* to section 11 (d).[143]

3) Importance and Relevance of UK Military Case Law

It is undeniable that a constitutional assessment of our Canadian military justice system is incomplete without looking towards the situation in the United Kingdom. This last assertion stems from the fact that the history of the Canadian military justice system is in fact the history of the British military law.[144] Indeed, Canada has historically relied upon the customs, traditions and legislative developments concerning the British military forces.[145]Prior to the enactment of our 1950 *National Defence Act*, for instance, Canada's high commissioner in London noted while assessing the 1948 British Lewis report which dealt with reforms to the British Military Justice system that "much is to be said for harmonizing Canadian procedure to that of the United Kingdom."[146]The adoption of the Canadian Court Martial Appeal Court to hear appeals on Court Martial findings and sentences, for instance, was one of the two hundred submissions contained in the British Lewis Report which was adopted within Canadian military law.[147] In addition, it must also be underlined that accounting for the situation in the United Kingdom is not a matter

[140] *Burdett v. Abbot* (1812) Taunt 409 (Lord Mansfield).
[141] *Valente*, supra note 10, at para. 22.
[142] Ibid, at para. 15.
[143] *Genereux*, supra note 6, at 310. See also *R. v. Parson*, [1992] 3 S.C.R. 665, at 688, and *Deghani v. Canada* (M.E.I.), [1993] 1 S.C.R. 1053, at 1076.
[144] Brigadier-General Jerry S.T. Pitzul, Commander John C. Maguire, "A Perspective on Canada's Code of Service Discipline" (2002) 52 Air Force Law Review 1, at 2. [Hereinafter "Brigadier-General Pitzul, and Commander Maguire"]
[145] McDonald, supra note 1, at 252.
[146] Madsen, supra note 63, at 104.
[147] Ibid.

of "just because they did it"[148]. Rather, it is a necessary tradition within the history of the Canadian military justice system to ensure its continuous logical evolution and improvement. For our undertaking, two English decisions are particularly insightful: *Hood v. United Kingdom*,[149] and *Thompson v. United Kingdom*.[150]While our focus will remain on the UK, that Australia has also recently redesigned and modernized its own summary discipline system according to the changes made in the UK is also noteworthy.[151]

In addition to the clearly defined English roots of Canadian summary trials, article 6(1) of the *ECHR* under which English summary dealings in the UK were assessed[152] and section 11 (d) of the Canadian *Charter* seek to achieve a common objective within the "world wide movement for human rights".[153] In fact, the single most important authority within Canadian law to have dealt with the right to a fair trial under *Charter* section 11 (d) specifically turned to article 6(1) of the *ECHR* as a valid interpretative aid.[154] As Chief Justice Dickson explains:"the Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents

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[148] Christopher W. Behan, "Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members", (2003) 176 Military Law Review. 190, 193, 266, at 263.

[149] *Hood v. United Kingdom* (1999) (application no. 27267/95) online: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=hood%20%7C%20v.%20%7C%20united%20%7C%20kingdom&sessionid=51056718&skin=hudoc-en [Hereinafter "*Hood"*];

[150] *Thompson v. United Kingdom* (2004) *(Application no. 36256/97)* online: *http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Thompson%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=51056718&skin=hudoc-en* [Herein after "Thompson"]

[151] *Defence Legislation Amendment Bill 2007 – Modernization and Redesign of the Summary Discipline System* (AU).

[152] Following the ratification by the UK of the *European Convention on Human Rights* and absent a reservation to the effect that the relevant convention articles would not apply to discipline within the UK armed forces, the passing of the *UK Human Rights Act 1998* required the UK to ensure that various aspects of military justice were compliant with it when it came into force on 2 October, 2000. See Peter Rowe, "A New Court to Protect Human Rights in the Armed Forces in the UK: the Summary Appeal Court", (2003) 8(1) Journal of Conflict and Security Law, at 205. [Hereinafter "Rowe"]

[153] As Chief Justice Dickson explained in *Re Public Service Employee Relations Act*: "Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law--declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms--must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions." *Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313, at para. 57. [Hereinafter "*Re Public Service Employee Relations Act (Alta.)"*]

[154] *Valente*, supra note 10, at para. 16.

pertaining to human right."[155] The well-established principle that the Courts should seek to ensure compliance with international law in *Charter* interpretation was recently reiterated by the Supreme Court of Canada in the decision *R. v. Hape*.[156] In discussing how the law of other like-minded nations assists in the interpretation of the *Charter*, the Court affirmed that: "absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law."[157] Suffice to say that English case law under section 6(1) of the *European Convention on Human Rights* is not an unlicensed intrusion in the interpretation of Canadian military law under the *Charter*, especially not considering the "common nature of the tension existing between the ability of a commanding officer to enforce discipline and the human rights of those subject to his or her jurisdiction."[158] Succinctly stated, the human rights issue within both systems is the same.

Finally, a 21st century security context animated by joint UN sponsored humanitarian, peacekeeping, and peace building operations, alongside the increasing importance of ensuring structural interoperability between armed forces to address global security threats offer additional reasons to cross-reference between like-minded military jurisdictions such as the UK.[159]In this regard, United States Supreme Court Judges Sandra Day O'Connor offers three compelling rationales for adopting an international perspective: "1) the need to apply foreign law in domestic courts, (2) the ability to borrow beneficial ideas, and (3) the enhancement of cross-border cooperation." [160] Accounting for other like-minded military jurisdictions should be especially emphasized in dealing with issues of perception of fairness. Indeed, in an era of close cooperation, other military justice systems are likely to influence the perception of fairness Canadian service members hold towards our own military justice system.

4) Analysis: Compliance by Summary Trial with Section 11 (d)

a) Conflicting Nature of Summary Trials

The Supreme Court of Canada established in *Genereux* that "it was unacceptable for anyone in the *chain of command* to be in a position to interfere in matters which are directly and immediately relevant to the *adjudicative* function."[161] The concurrent adjudicative and military disciplinary responsibility of commanding officers within the Canadian military justice system is in clear violation of *Charter* s. 11 (d) requirements. One author astutely describes this structural deficiency in saying that: "[I]n spite of the integrity of the officers in the Canadian forces, the summary trial process is far from being fair, independent, and impartial. Given the conflict of duties, Solomon himself could not possibly maintain the degree of impartiality that is necessary

[155] *Re Public Service Employee Relations Act (Alta.),* supra note 153.
[156] *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 56 *(per* LeBel J.)
[157] Ibid.
[158] Rowe, supra note 152, at 1.
[159] Eugene R. Fidell, "A World-Wide Perspective on Change in Military Justice", (2000) 48 A.F.L. REV. 195, 203, at 202. [Hereinafter Fidell]
[160] Sandra Day O'Connor, Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law, INTERNATIONAL JUDICIAL OBSERVER, June 1997, at 2-3.
[161] Brigadier-General Pitzul, and Commander Maguire, supra note 144, at 9.

to render a just judgment at the summary trial."[162] A single explanation to this palpable derogation by summary trials is provided by the fact that summary trials were conceived prior to the enactment of Canadian *Charter*. Moreover, traditional military disciplinary necessities justified the need for a personal form of military justice. As one author explains: "[T]he summary trial is designed as a "personal" forum for the trial of minor service offences. This personal nature of the summary trial reflects the responsibility which the trying officer has for the discipline and the operational capabilities of the personnel under the command of that officer. [...] It is the personal nature of the summary trial which gives it this status."[163] As mentioned earlier on, the intimate knowledge of members within their unit and their responsibility for conducting successful military operations places commanding officers in a suitable position to administer a summary form of military justice. The close proximity between commanders and subordinates is common to most military jurisdictions and recognized under international law.[164]Concisely, the *raison d'être* and purpose of summary trials is diametrically opposed to s. 11 (d) *Charter* requirements.

b) Summary Dealings in the United Kingdom and Section 6(1) of the EUCHR

In this last regard, the decision *Hood v. United Kingdom*[165] by the European Court of Human Rights is particularly telling. In this case, the applicant was allegedly brought before his commanding officer and charged with absence without leave and two counts of desertion contrary to the 1955 *British Army Act*,[166]one of which was subsequently reduced to absence without leave. Following orders by the commanding officer, the applicant was detained in a cell under the pretext that the accused was "deliberately trying to undermine *discipline*."[167]Hood argued that he had been denied a fair hearing by an independent and impartial tribunal.[168] The *ECHR* unanimously concluded that there had been a violation of article 6 (1) of the *ECHR*.[169]The Court unanimously found the applicant's misgivings towards his commanding officer to be justified on the basis of a commanding officer's "concurrent responsibility for discipline and order in his command […]."[170]Throughout the series of cases brought before the *ECHR*, the UK Parliament responded by introducing various changes to its military justice system to ensure its compliance with article 6(1) of the *EUCHR.*[171]Among the key amendments were the equalization of punishments between summary and court martial levels and the introduction of an unfettered right to appeal by way of a complete re-hearing to a newly created summary court of appeal. Australia has also moved in this direction. The key legislative amendments introduced in the

[162] Lockyer, supra note 2, at 7-8.
[163] K.W. Watkin, *Canadian Military Justice : Summary Proceedings and the Charter*, Queen's University, Kingston, 1990, at 73-74.
[164] *AP I*, supra note 91; *ICC Statute*, supra note 92.
[165] *Thompson*, supra note 150.
[166] *Hood*, supra note 149, at para 12.
[167] Ibid, at para. 36.
[168] Ibid, at para. 46.
[169] Ibid, at para. 47.
[170] *Hood*, supra note 149, at 58.
[171] The *Armed Forces Discipline Act 2000* (amending, *inter alia*, section 75 of the Army Act 1955) and the *Army Custody Rules 2000* (Statutory Instrument 2000 No. 2368) which replaced the 1997 Regulations.

jurisdictions are discussed below. For our present purpose, suffice to say that the common human right concern underlying *EUCHR* article 6 (1) and *Charter* s.11 (d), the close historical ties between Canadian and UK military justice systems, and common nature of the commanding officer-subordinate relationship lend strong interpretative value to the *Hood* decision in assessing the viability of our own summary trial system under *Charter* s.11 (d).

c) Perception of Bias amongst Canadian Service Personnel

A last telling indicator that summary trials in the Canadian military justice system currently violate section 11 (d) is the perception of bias Canadian service members hold towards summary trials. The word "impartial" under section 11 (d) of the *Charter* "connotes absence of bias, actual or *perceived*."[172] In surveying members of the armed forces on their subjective perceptions regarding the fairness of summary trials, respondents were specifically asked to comment on what they considered to be unfair about the summary trial process. Among the three general areas of concern identified, the responders identified bias as one concern.[173] To this effect, the JAG report offered the following telling statement: "of the 72 comments on unfairness expressed by assisting officers, 22 related that conducting summary trials in the unit of the accused was unfair, and that there was an assumption of guilt towards the accused. *CO's* identified the perception of bias among presiding officers as a concern that impacts the perception of fairness within the summary trial process in 6 of 23 responses."[174]To the same effect, one respondent offered the following statement: "It doesn't seem like you can call yourself non-guilty if you choose a summary trial. If you go there, you will be found guilty"[175]

C. Waiver of Right

As discussed earlier on, a "safety valve" to the clear and palpable derogation of *Charter* s. 11 (d) by summary trials is said to exist in an accused's right to elect trial by court-martial, prior to the commencement of a summary trial.[176] That a party may waive a procedural requirement enacted to his benefit has been recognized by the Supreme Court of Canada.[177]In discussing what formalities should surround a waiver, the Supreme Court of Canada clearly underlined in the decision *Korponay v. Attorney General of Canada* that: "the validity of such a waiver [...] is dependent upon it being *clear* and *unequivocal* that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to

[172] *Valante*, supra note 10, at para. 15.
[173] JAG Report, supra note 3, at PDF 41.
[174] Ibid.
[175] Summary Trial Survey Results, Part B, supra note 114, at 5.
[176] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 30.
[177] *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41, at 48; *Middendorf v. Henry* (1976) 425 US 25; Canada, Ministère de la Défense nationale, Rapport du Groupe consultatif spécial sur la justice militaire et sur les services d'enquête de la police militaire : Rapport au Premier ministre, Ottawa, Le Groupe, 1997 aux pp. 6-9 (Président : B. Dickson), at 51.

protect and of the effect the waiver will have on those rights in the process." As mentioned previously, Canadian service members do not relinquish their *Charter* rights by joining the forces. Summary trials being in violation of *Charter* s. 11 (d) requirements, the question remains whether under the current summary trial process, the right of election offered to an accused prior to the commencement of a summary trial constitutes a clear and unequivocal waiver of the *Charter* s. 11 (d) right to a fair trial. The commanding officer-subordinate relationship, lack of adequate legal representation during the election process, and unequal powers of punishment between summary trial and court martial levels warrant a negative answer. Once more, the situation in the UK lends strong support to this last assertion.

1) The Situation in the UK

Similar to the situation in Canada, a waiver of right guaranteed by the *ECHR* is said to exist so long as the waiver is "established in an unequivocal manner and requires minimum guarantees commensurate to the waiver's importance."[178]Just as in the Canadian military justice system, the UK Court Martial was, until recently, furnished with greater powers of punishment than summary dealings. In finding that the circumstances surrounding the choice faced by an accused before a summary dealing did not constitute a valid waiver, the *ECHR* found in *Thompson v. United Kingdom* that the difference in powers of punishment would have been an influencing factor in an applicant's election.[179]In the learned opinion of the court, "the fact that the opinion was presented to an accused at all meant that his commanding officer considered him to be guilty as charged and, further, that he warranted more than a minor punishment."[180]That an accused was directly subordinate and in close structural proximity to his commanding officer was also deemed as a factor which, according to the Court:"undoubtedly would have affected the free and unambiguous nature of any choice between a summary trial and a court martial."[181]Finally, the Court also found that the accused was a "layman not in a position to evaluate his legal position" and that the circumstances surrounding the election process might have "rendered it difficult for a lawyer to comprehensively advise an accused during the following twenty-four hours when the election would have become definitive."[182]

2) Lack of Legal Representation During the Election Process

While the fact that an accused is offered the opportunity to consult a lawyer for a period of no less than 24 hours during the election process could arguably be considered as a securing a fully informed waiver of right,[183] recent statistics issued by the J.A.G. demonstrate that service members remain ill informed of this right. As mentioned earlier on, the responsibility of informing an accused of his legal rights during the summary trial process falls upon the assisting officer, designated by the presiding commanding officer. In a survey conducted on summary

[178] *Thompson*, supra note 150, at 43.
[179] Ibid, at 44.
[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] *QR&O* 108.17(2).

trials, 47% of respondents affirmed being informed of the right to legal advice during the election process;[184] 57% of respondents affirmed being fully informed of the difference between summary trial and court-martial;[185] and 45% affirmed being given a full explanation of the process they chose.[186] As these statistics demonstrate, the insufficient knowledge and comprehension of legal matters by commanding and assisting officers renders the availability of legal advice at the election process rather futile. Faced with these facts, one might jestingly suggest that legal advice should also be provided on the decision to obtain legal advice during the election process. Without more, the circumstances surrounding the election process do not lead to the conclusion that a clear and unequivocal waiver of right currently exists within the Canadian summary trial system, nor can it be said that an accused is informed of the legal rights *Charter* s. 11 (d) was enacted to protect. Finally, as the election is only provided *prior* to the conclusion of a summary trial, neither can it be ascertained that an accused will fully comprehend the ultimate effect the waiver will have on his fundamental rights and freedoms.

D. Justification under section 1 of the *Charter*

1) *Charter* s. 1: Sufficiently Substantial Societal Concern

a) *Maintaining a high level of discipline in the special conditions of military life*

Summary trials being in clear violation of *Charter* s. 11 (d) procedural requirements, and the current election process offering insufficient safeguards to establish a clear and unequivocal waiver of right, a vital question remains whether the current infringement by summary trials may be defended under s. 1 of the *Charter*. S. 1 states that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[187] To warrant overriding a constitutionally protected right or freedom, a first step under s. 1 of the *Charter* is the identification of a sufficiently pressing and substantial societal concern and the establishment of a rational connection with the means chosen to meet the said concern.[188] The Supreme Court of Canada has recognized in the 1992 decision *R. v. Genereux* that "the necessity of maintaining a high level of *discipline* in the *special conditions of military life* is a sufficiently substantial societal concern to justify the limitation of fundamental rights in a military context."[189]The question of whether the current infringement of s. 11 (d) by summary trials further the objective of ensuring a high level of *military* discipline in the special conditions of military life must be answered in the negative. As mentioned in the outset, a military is a complex social phenomenon and as such, it must be understood through its social

[184] J.A.G. Annual Report, supra note 3, at PDF 38-9.
[185] Ibid.
[186] Ibid.
[187] *Charter*, supra note 24, s.1; see also Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103. [Hereinafter "*Oaks"*]
[188] Ibid.
[189] *Genereux*, supra note 6, at para. 8.

context. Unlike when summary trials were first conceived, *military* discipline in a 21st century is no longer ensured through the threat of formal punishment but rather through positive informal values such as trust, confidence, *esprit de corps,* and morale. Strengthening the perceived fairness of the administration of justice, an objective which *Charter* s. 11 (d) purports to achieve, is not incompatible with modern *military* disciplinary needs. In addition, due to a change in our global security context, military values such as authority, collectivism, and hierarchy, which have traditionally stood in opposition to the integration of diametrically opposed *Charter* values, have progressively shifted towards individualism and autonomy. By the nature of the rights protected, *Charter* s. 11 (d) strikes a similar balance between these same values. As such, *Charter* s. 11 (d) is squarely fitted with the special conditions of 21st century military life. Finally, recent reforms to summary trial systems in other free and democratic military jurisdictions, namely the UK and Australia, indicate that a better balance between military traditions and individual rights is possible within our own military justice system so as to improve the efficiency of the Canadian armed forces.

i) *Underlying Policy of Charter Section 11 (d) and the Distinct Nature of Military Discipline*

"The record of modern warfare clearly demonstrates that military effectiveness depends upon armed forces being integral parts of the societies they serve, not being isolated from them."[190]One must think of an armed force as a complex *social phenomenon*.[191] As such, the relationship between military law and *military* discipline must be understood by the former's ability to promote those values within the special conditions of military life which are most conducive to the latter. The distinct character of certain military offences serves to further illustrate the relationship between military law and military discipline. To use the examples of Ritchie J. in *MacKay* and Lamer C.J.C. in *Genereux*, striking a superior officer or stealing from a comrade are conduct that would warrant more severe punishment in a military rather than civilian context because they *undermine important values such as authority* and *camaraderie*.[192] *Military* discipline was traditionally understood as being ensured by way of hierarchical values, and an iron-clad respect for authority backed by the threat of severe reprimand. Until its abolition in 1999, the death penalty within the military was one illustrative example of how the threat of punishment might ensure traditional military discipline.[193] In that sense, for conservative military officials, integrating *Charter* values such as individualism and autonomy and s. 11 (d) procedural safeguards into summary trials was perceived as highly undesirable.

In a 21st century military context, however, a wealth of academic literature in military sociology clearly and firmly establish that *military* discipline is no longer established through an

[190] *Military Justice at the Summary Trial Level*, supra note 25, at PDF 14.
[191] Caforio, supra note 13.
[192] Martin L. Friedland, "Military Justice and the Somalia Affair" (1997-98) 40 Criminal Law Quarterly I, 360-399, at 364.
[193] In discussing the changes to the Canadian military justice system brought about by Bill C-25, the Right Honorable Antonio Lamer notes that "Bill C-25 brought the system more closely in line with the civilian criminal justice system." For example, […] excessively harsh punishments were eliminated, including the death penalty." *Lamer Report,* supra note 135, at PDF. 57.

"iron fist" but rather through *positive* informal social values such as trust, confidence, unit cohesion, camaraderie, and *esprit de corps*. This nuance between old school and new school thought is easily and mistakenly confounded with the meaning discipline takes on in a *civilian* context where discipline remains understood as "the *enforcement* of laws, standards, and mores in a *corrective* and, at times, *punitive* way."[194] *Punishing* breaches of military law plays primarily a *criminal* function. As some military offences seek to protect those informal values essential to *military* discipline, only indirectly could punishing breaches of military law be said to further *military* discipline. The negative function of punishing is, however, no longer considered the primary means of ensuring military discipline. In 21st century special conditions of military life, military discipline takes on a *positive* informal meaning. Thus, albeit falling under the single role of commanding officers, the *judicial functions* of *punishing* breaches of military law through summary trials on the one hand, and ensuring *military discipline* through *positive moral leadership* on the other must be kept separate and apart from one another and must not be confused. It is only incidental to the nature of the military profession that commanding officers are in the best position to accomplish both functions. Military law affects *military* discipline only to the extent that it *promotes* those *values* which are essential to it, namely confidence, trust, and integrity towards commanding officers.

In light of the policy rationale underlying *Charter* section 11 (d), it is indisputably clear that the current infringement upon the same section by the Canadian summary trial process does not further the objective of ensuring a high level of *military* discipline within the special conditions of 21st century military life. Quite to the contrary, summary trials in their current form hinder *military* discipline. In describing the policy objective of *Charter* s. 11 (d), the Supreme Court of Canada offered the following telling statement: "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to *individual and public confidence* in the administration of justice. *Without that confidence the system cannot command the respect and acceptance* that are essential to its *effective operation."*[195] Commanding officers being responsible for summary trials *and* military discipline, military discipline will be better ensured if service members have trust and confidence in our summary trial system.[196] As British Captain Stone once noted that: "want of confidence in a commander on the part of the men is a far more deadly evil than absence of affection or lack of enthusiasm, for it strikes at the very root of moral discipline,

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[194] *Report of the Somalia Inquiry*, supra note 56.

[195] *Valente*, supra note 10, at para 22.

[196] Rubson Ho, "A World that Has Walls: A *Charter* Analysis of Military Tribunals" (1996) 54 University of Toronto Faculty of Law Review 149, at 31; Lt. Colonel J.B. Fay astutely notes: "If the military justice system fails to accommodate the *Charter* to the greatest extent possible, there is a danger that *military discipline would be undermined in the long-term by the perception that military justice is unjust*. At some point the efficiency of the Forces and the *recruitment of quality personnel* will be eroded by *the perception that members of the military are unfairly deprived of benefits enjoyed by civil society*. Indeed, a certain amount of attrition among forces personnel is already attributable to discontent with the *differences between service and civilian live*." He continues in saying that: "when [service personnel have] confidence in [their] commanders and [believe] in the organization, there is discipline… It if from military law that [service personnel receive their] most tangible indication of the relationship between [themselves] and those who command. It is under military law that [they are] tried and punished. If the military law system is a just system, then it will be recognized as such by [service members] and thus it will promote and support the discipline upon which the military organization is based." Lt. Colonel J.b. Fay, "Canadian Military Law: An Examination of Military Justice" (1975), 23 Chitty's Law Journal 120, at 123. [Hereinafter "Lt. Colonel J.b. Fay"]

and brings discontent, mutiny, and panic in its train." [197]Properly understood, it should also be noted that *military* discipline in a 21st century context takes recruitment as its starting point.[198] In that sense also, depriving Canadian service personnel from a fair justice system does not promote the objective of ensuring *military* discipline. As one authoritative commentator notes: "the efficiency of the Forces and the recruitment of quality personnel will be eroded by the perception that members of the military are unfairly deprived of benefits enjoyed by civil society. Indeed, a certain amount of attrition among forces personnel is already attributable to discontent with the differences between service and civilian life."[199]

ii) Traditional Military Values and the Needs of Modern Warfare

A decentralization in the military decision making process brought about by advancements in military technologies, the nature of modern security threats such as terrorists armed with CBRN weapons, and frequent use of guerilla tactics required by modern battlefields[200] weaken the necessity of maintaining traditional values such as hierarchy, authority, and collectivism, values which have traditionally colluded to form a cultural barricade against the infiltration of modern *Charter* values.[201] With particular regard to s. 11 (d) and summary trials, the individual values embodied under *Charter* s. 11 (d) were said to threaten the perceived authority of commanding officers. However, let alone the fact that *military* discipline is no longer perceived as being ensured through formal punishment, it is also perceived as a being a *self-imposed*, *individual* form of discipline rather than one imposed through top down authority. As one author notes: "the tendency of the old system of military training was to convert a man into the most perfect automaton possible; […] our aim in the future must be to *cultivate the individuality* of [service members] so that [they] may understand the value of obedience to orders, and *carry them out from a high sense of duty, and not from fear of punishment*."[202] In other words, orders are better carried out by service members who, from a strong sense of duty and

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[197] Captain F.G. Stone, supra note 49, at 10.

[198] For instance, Major General Moorman notes that:"if military trials were unfair or widely perceived to be, recruitment and retention efforts would be undercut. It would be impossible to maintain a high-quality, "all-volunteer" force. Major General Moorman, supra note 12, at 4. To the same effect, Captain F.G. Stone explains that: "there are indeed but two possible methods of obtaining a good and sufficient army, and of keeping it permanently on foot: one is the method of conscription, the other method of making the army a desirable profession for rational men" Captain F.G. Stone, supra note 49, at 15.

[199] Lt. Colonel J.b. Fay, supra note 196, at 123; To the same effect: "If military trials were unfair or widely perceived to be, recruitment and retention efforts would be undercut. It would be impossible to maintain a high-quality, "all-volunteer" force." Major General William A. Moorman, "Fifty Years of Military Justice: Does the Uniform Code of Military justice Need To Be Changed?" 48 Military Law Review 185, at 4; To the same effect: "Where recruitment to the armed forces is purely on a voluntary basis the government will need to pay attention to the terms and conditions of service in the armed forces, including the harshness or otherwise of the military disciplinary system, if it is to maintain recruitment at the level it requires. Rowe, supra note 90, at 62.

[200] Barry Cooper, *Canada's Military Posture: An Analysis of Recent Civilian Reports* (Vancouver, BC, Canada: Fraser Institute, 2004) at 8. [Hereinafter "Cooper"]

[201] In the words of Barry Cooper: "it is not clear how a conventional military hierarchy could engage and extinguish a terrorist network." Ibid.

[202] Captain F.G. Stone, supra note 49, at 4.

understanding, carry out orders from their own individual will instead of merely obeying blindly because they are trained to do as they are told without question.[203]

The changes in the special conditions of 21st century military life correspond to a change in the 21st century security climate. Due to their ineffectiveness in addressing modern security threats, forward deployed mass industrial armies have surrendered to smaller, technologically-able, highly mobile, and autonomous military units.[204] As one commentator rightly notes:"[it is] not clear how a conventional military force, even a robust one, would deter a terrorist armed with CBRN weapons. Nor [is] it clear how a conventional military hierarchy could engage and extinguish a terrorist network."[205]With a shift from mass industrial armies to smaller autonomous but more technologically efficient military units comes a parallel shift in the military decision making process. As one author explains:"the digitized battlefield would enable *any soldier to give orders* as well as receive them […] *lower ranks* would have the capability to steer the course of battle. Therefore, a *new balance will have to be struck between those who lead and those who follow*."[206] In short, operational effectiveness in modern warfare requires that a new balance be established between the traditional military values of *hierarchy* and *authority* on the one hand, and *individualism* and *autonomy* on the other. This is not to say that traditional military values no longer serve a purpose within military culture. Only that individualism and autonomy *do* find value within the special conditions of 21st century military life. By the nature of the rights it seeks to protect, *Charter* s. 11 (d) is itself well balanced between these same values. While the section does embody civilian values such as individualism and autonomy, it remains difficult to comprehend how judicializing military culture would entirely undermine traditional military values such as hierarchy and authority. Quite to the contrary, values with s. 11 (d) tend to reinforce the perceived legitimacy, intergrity, and authority of the decision maker, in this case commanding officers. In other words, s. 11 (d) of the *Charter* does not run counter to modern military culture. Quite to the contrary, it fits squarely within its social fabric.

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[203] Ibid.

[204] As one author explains:"Although ground forces will continue to be necessary, *their characteristics must change*. The unpredictable nature of the threats in today's international security environment necessitates that military forces have the ability to respond quickly to almost any situation. This, in turn, demands smaller, more mobile and flexible ground forces that are still highly lethal. The idea is to change form a forward-deployed industrial age army trained, equipped, and postured to stop a Soviet advance in Europe to an information age power-projection army." Sloan Elinor C., *Revolution in Military Affairs: Implications for Canada and NATO* (McGill – Queen's University Press, 2002) at 11. [Hereinafter "Elinor"] In discussing the efficiency of old military assumptions in the context of the 2002 Afghanistan campaign, for instance, another author explains that although it was chiefly a ground war, "it was fought in a new way, not by tanks and artillery using the techniques and procedures for which the Cold War planners had prepared the Western military alliance. Rather, it was fought for the most part by highly mobile light infantry, strongly supported by high-tech air power and intelligence […]. The superiority of "information age" formations to "industrial age" formations such as were mounted by the Iraqis, is beyond serious debate. The same author continues in saying: "that the *old strategic assumptions do not reflect the new realities conditioned by the revolution in military affairs and the growth of asymmetric and terrorist threats.*" Barry Cooper, supra note 200, at 10.

[205] Ibid, at 8.

[206] Elinor, supra note 204, at 16.

iii) Other Free and Democratic Societies

> "The balance between discipline and the rights of individuals is the key to achieving the operational effectiveness and success that the nation expects of its armed forces, and of which the nation can be proud."

That the Canadian summary trial system, in its current form, does not establish the best balance between 21st century military disciplinary necessities and individual rights of Canadian service members so as to maximize the efficiency of our armed forces is further evidenced by the situation in other free and democratic societies, namely Australia and the United Kingdom. The situation in these like-minded military jurisdictions is highly relevant considering the "common nature of the tension existing between the ability of a commanding officer to enforce discipline and the human rights of those subject to his or her jurisdiction."[207]The UK and Australia have introduced legislation to reform their military justice system in favor of greater protection for the individual rights of service members by providing for a fairer summary trial system. While Australia has only recently enacted its 2007 *Defence Legislation Amendment Bill*, the UK has introduced reforms to its system for quite some time already through its 2000 *Armed Forces Discipline Act*. That both the UK and Australia have been successfully and efficiently operating with a reformed summary trial system evidences that a new balance between individual rights and traditional military necessities can be struck within our own military justice system. Indeed, Commonwealth military jurisdictions have generally moved along parallel lines when rethinking their military justice systems.[208]For the above reasons, it is safe to conclude that our current summary trial system cannot be defended under s. 1 of the *Charter*. There is still much to be said about the current state of our military justice system that reaches beyond our summary trial system. Being the heart of our military justice system, rethinking how a fairer summary trial system can better reflect a 21st century security context is a first logical and positive step towards ensuring a more efficient Canadian military.

E. Finding a Better Balance between Military Traditions and Individual Rights

> "Those responsible for organizing and administrating Canada's military justice system have strived, and must continue to strive, to offer a better system than merely that which cannot be constitutionally denied."[209]

1) Reiterating the Heart of the Matter

Summary trials date as far back as the 1689 *British Mutiny Act*. At that time, protecting the rights of soldiers who were viewed with skepticism by the broader society was not a concern. Moreover, when the British concept of summary trials was adopted in the Canadian military justice

[207] Rowe, supra note 152, at 1.
[208] The Supreme Court decision *R. v. Genereux* stimulated reforms to the Court Martial systems in South Africa, New Zealand, Australia, and the United Kingdom. It must also be noted that unlike Canada, non-judicial punishments under article 15 of the United States *Uniform Code of Military Discipline* are not considered "accomplishing the purpose of an ordinary *criminal* court" but rather that of a purely *disciplinary* punishment. Had summary trials in Canada been considered purely *disciplinary* in nature, summary trials in Canada might have escaped *Charter* s.11 (d) requirements.
[209] Lamer, supra note 135, at PDF 31.

system through the 1950 *National Defence Act*, the *Charter* did not yet form part of the Canadian legal landscape. In other words, summary trials were not designed to make constitutional sense. More problematic is the fact that when summary trials were first conceived, military discipline was perceived as being ensured by way of threat or fear of formal punishment. In that sense, the legal means disposed of by commanding officers justified military disciplinary ends. In a modern military context, however, a wealth of academic literature firmly establishes that the best means of ensuring and maintaining *military* discipline is through *positive* informal primary group values. Even if one were to adopt a traditional understanding of military discipline, formal punishment only has positive effects upon discipline when the punishment is perceived as being fair.[210] In short, the current constitutional dilemma surrounding Canadian summary trials stems from the fact that the *means* of ensuring and maintaining a high level of *military* discipline have shifted from *negative* formal legal punishment to *positive* informal norms. To ensure a high level of *military* discipline, the law must fashion a legal mechanism that inspires *confidence* and *trust* towards commanding officers and military justice. By infringing upon *Charter* s. 11 (d), summary trials currently do not further this objective and they cannot be defended under s. 1. This is not to be interpreted as meaning that summary trials must necessarily be removed from our military justice system, only that that they cannot be reconciled with Canadian constitutional law. Notwithstanding its palpable derogations to the *Charter*, the issue of whether it is desirable for commanding officers to retain their position within the Canadian military justice system is a distinct and separate one.[211] In the affirmative,[212] the question remains as to how summary trials can be salvaged from constitutional wreckage while promoting a high level of *military* discipline.

2) Securing a s. 11 (d) Waiver of Right

Properly understood, *summary* trials were not and cannot be redesigned to make *Charter* sense.[213] Building into summary trials additional procedural safeguards to ensure their compliance with s. 11 (d) would undermine the very purpose of maintaining a *summary* trial system, let alone

[210] As one author notes:"The members of the unit are quick to sense command control; they feel that the trial was unfair, they *lose confidence in their leaders*, and *discipline is undermined*."Can Military Trials be Fair?: Command Influence Over Court Martials (1950) Vol. 2, No.3 Stanford Law Review 547, at PDF 8. [Hereinafter "Can Military Trials be Fair"]

[211] Consider, for instance, the following statement by UK Judge James W. Rant: "Once the decision was taken to attempt, as far as possible, to *preserve the commanding officer's position* ...". Judge James W. Rant, "The Military Justice System and Human Rights" (2000) RUSI Journal, Royal United Services Institute for Defence Studies, online: http://www.highbeam.com. [Hereinafter "Judge James W. Rant"]

[212] Australia and the UK have both opted for preserving their summary trial system, despite the derogations by their summary trial systems to domestic human rights norms regarding the right to a fair trial.

[213] As UK Judge James W. Rant notes about summary dealings and s. 6(1) of the *ECHR*, summary dealings in the UK military justice is "one area where "no-one had any doubt" that there existed a breach "in several respects". Judge James W. Rant, supra note 211; Squarely fitted with this same line of thinking, J.E. Lockyer explains that: "There is no doubt that the most common form of military trial is the summary trial process, but it is a process that is in direct conflict with the Charter on a number of fronts. […][I]t is highly unlikely that mere "tinkering" would allow it to accommodate the *Charter* or to escape its impact. Lockyer, supra note 2, at 7.

the underlying rational for a two tiered military justice system.[214] If the decision is made to salvage our summary trial system, it should be for the purpose of preserving the very essence of summary trials: procedural simplicity and swiftness. Furthermore, it must be noted that tailoring our military justice system so as to distinguish between peace and war would run counter to the established principle in English military law according to which a military justice system must make no distinction between peace and war.[215] Finally, while entering a *Charter* s.33 constitutional derogation on summary trials would alleviate the built-in tensions between military traditions and individual rights, *military* discipline would be directly undermined by projecting unfavorable conditions of service life through an unfair military justice system. Reforms to our military justice system should only seek its improvement.[216] Thus, if commanding officers are to preserve their judicial functions within the Canadian military justice system,[217] legislative reforms should concentrate on securing a "free and unambiguous" waiver of right by offering to service members a reasonable opportunity to be heard by a *Charter* 11 (d) compliant service tribunal.[218] In this regard, Australia and the United Kingdom, which have made the decision of maintaining the position of commanding officers within their military justice system, offer two solutions to securing a waiver of right: a downward equalization of the powers of punishment between summary trials and Court Martial, and instituting a formal right of appeal to a new *Charter* s. 11 (d) compliant summary appeal authority.

a) A Downwards Equalization of the Powers of Punishment

As previously discussed, our summary trial process currently operates a tradeoff between procedural safeguards and severity in punishment. Where a right of election is offered to an accused during a summary dealing, our military justice system must not lure an accused service member down a *Charter* 11 (d) derogating avenue through the fear or threat posed by the somber thought of a prospective harsher Court Martial punishment. No rational criminal law sentencing objective or

[214] Indeed, the very purpose of maintaining a formal civilian-like Court Martial is to remedy to the procedural derogations by informal summary trials.

[215] Dr. Groves, supra note 38, at 8.

[216] According to Major General Moorman:"change should be supported if, and only if, it improves the delivery of justice and also preserves the discipline essential for military success. Too many advocates of change focus only on promoting justice and fail to fully consider the unique needs of our armed forces, and our nation, have for a superbly disciplined troop. The two purposes must be carefully balanced to ensure proper functioning of the process and to promote the national security interest of the [State].Major General Moorman, supra note 12, at 6.

[217] Both the UK and Australia have already assessed this question. Despite palpable violations of domestic human rights norms regarding the right to a fair trial by their respective summary trial systems, both have made the decision to maintain the commanding officer's position within their military justice systems by securing a waiver of right.

[218] In discussing the deliberation process regarding the inception of a new summary court of appeal to hear summary convictions in the UK, UK Judge James W. Rant offers some insightful comments: "Once the decision was taken to attempt, as far as possible, to *preserve the commanding officer's position* it was *necessary to design some sort of machinery to allow a re-hearing* before a court that would meet all the criteria of the Convention. That is the reason, for example, why the appealed case must be re-heard. The option of sending these new cases to courts-martial for hearing under the existing regime was never a real possibility, for many reasons, and so the only remaining choice was to set up an entirely new court. Who would sit in it? What powers would it have? How would an appeals system work in practice? These were all questions that had to be addressed." Judge James W. Rant, supra note 211.

policy exists as to why a period of detention for thirty days for one offence before one form of tribunal should not be adequate for the exact same offence before a different form of tribunal. Canadian military law should not punish a service member who faces the prospect of being deprived of his liberty for a period of thirty days for opting to be tried by a *Charter* 11 (d) compliant hearing. Where an offence may be tried by either Court Martial or summary trial, the powers of punishment before either service tribunal should therefore not exceed thirty days detention.

b) A Formal Right of Appeal to a New s. 11 (d) Compliant Summary Court of Appeal

At present, an accused has no formal right of appeal following a summary conviction. While a review process is currently in place, the review is conducted within the executive command control chain. As the *ECHR* found in the similar case of the UK military justice system, perceptions of fairness and impartiality towards the Canadian military justice system cannot be dissipated by a review process conducted within an atmosphere of command control.[219] To remedy this deficiency within its military justice system, the UK now provides for a formal right of appeal by way of a complete rehearing to a newly created summary court of appeal, *in lieu* of its review process.[220] Noteworthy is the fact that Australia has also recently moved in the same direction by establishing a right to appeal summary convictions to a new permanent Australian Military Court (AMC).[221] In securing a waiver of right, the feasibility and workings of replacing our current review process for a formal right of appeal to a newly created *Charter* s. 11 (d) compliant summary appeal court should also be closely examined.[222] That Canada would adopt the UK idea of a new right of appeal to a newly constituted court of appeal would not be unprecedented. Indeed, the creation of the Court Martial Appeal Court by Parliament in 1959 was one of two hundred recommendations adopted from the 1948 British Lewis report to improve the perceived fairness of the Canadian military justice system.[223] Should Canada choose to assess the possibility of creating a new summary court of appeal for the Canadian military justice system,

[219] Can Military Trials be Fair, supra note 210, at 3; In the words of the ECHR, procedural deficiencies by UK summary dealings "[cannot] be corrected by subsequent review other than a first instance hearing which met the requirements of article 6(1)." *Thompson,* supra note 150, at 46.
[220] Judge James W. Rant, supra 210.
[221] *Defence Legislation Amendment Bill 2007 – Modernisation and Redesign of the Summary Discipline System*; See also Rachel Jones, "Recent Reforms to the Australian Defence Force Discipline System" (2007) 7 New Zealand Armed Forces Law Review 77, at 20*;* Despite these legislative reforms, in its 2009 decision *Lane v. Morrison,* the Australian High Court has declared the provisions creating the AMC as *ultra vires* from the Commonwealth's powers on the basis that the court was exercising judicial power of the Commonwealth without meeting the constitutional requirements of a Chapter III judicial Court. The interim measures found in the *Military Justice (Interim Measures) Act (No. 1) 2009* nevertheless still provide for a formal right of appeal from a conviction by a summary authority. *Lane v. Morrison* [2009] HCA 29.
[222] The possibility of integrating a formal right of appeal within the Canadian military justice has already been the object of one recommendation: "…we agree with the concept that a meaningful right of appeal or review should exist when a significant penalty is imposed following a summary proceeding. Such a right would improve the prospects that the constitutionality of the summary trial process would be upheld." The decision of placing a review mechanism instead, however, was the solution that was retained. This last statement would seem to suggest that integrating a formal right of appeal instead of a review mechanism within the Canadian military justice system is a workable solution. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (March 25, 1997) at 63.
[223] Madsen, supra note 53, at 103.

the establishment of the CMAC evidences that Parliament would be validly working within the parameters established by the *Constitution Act 1867*.[224] Thus, where an accused would decline on two separate occasions to be heard by a *Charter* s. 11 (d) compliant hearing - first by not electing to be tried by Court Martial prior to the commencement of a summary trial then by not appealing a summary conviction by way of a complete re-hearing to the summary court of appeal - [225] only then could it safely be ascertained that an accused has validly waived his right to a fair trial.

i) UK Summary Court of Appeal

As there is undoubtedly still "much to be said about harmonizing Canada's procedure to that of the United Kingdom", a brief overview of the salient features of the UK summary court of appeal are instructive. The UK summary court of appeal consists of three members (including a judge advocate) who may sit within *or outside* the UK.[226] A right to a complete rehearing exists on a finding of guilt or sentence.[227]At a hearing of a charge, the summary appeal court may confirm or quash a concerned finding, or substitute it with another finding regarding a charge that has been proven.[228]More importantly,[229] where a rehearing concerns a sentence, the court may vary the punishment awarded by the commanding officer but only with a punishment which was within the powers of the commanding officer and is *no more severe than the original punishment*.[230]In other words, the powers of punishment at the summary trial and appeal level are equal. Furthermore, an accused who appeals a summary conviction is entitled to full legal representation during a rehearing.[231]Since its inception, it is generally reported that the summary appeal court has brought a lighter case load than expected.[232]Moreover, findings demonstrate that the majority of the decisions by commanding officers at a summary dealing are upheld at the summary appeal level.[233]Finally, in assessing the general workings of the summary appeal court, the Honorable Judge James W. Rant, Judge Advocate General of the UK Armed Forces, offers some insightful remarks:"The `new' system has proved to be effective, modern and quite popular.

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[224] Lamer, supra note 135, at PDF 34.

[225] In the UK, the decision of sending appeals to Court Martial for rehearing under the existing system was, according to UK Judge James W. Rant, "never a real possibility, for many reasons". Judge James W. Rant, supra note 211.

[226] *Armed Forces Act 2006 (c. **52**) Part 6 — Summary Hearing and Appeals and Review Chapter 2 — The Summary Appeal Court*, s. 140.

[227] Ibid., s. 141(1)(a)(b).

[228] Ibid. s. 147(1)(a)(b).

[229] Wing Commander Simon P. Rowlinson, "British System of Military Justice" (2002) 52 Air Force Law Review 17, at 15. [Hereinafter "Rowlinson"]; Equal powers of punishment at the summary appeal level is also a hallmark of the new permanent Australian Military Court. While the new permanent Australian military court was declared invalid under the Australian constitution, the interim measures retain this aspect of the Court.

[230] *Armed Forces Act 2006 (c. 52)* S. 147(3)(a)(b)(i)(ii)

[231] Rowlinson, supra note 228, at 12.

[232] Ibid.

[233] Upholding the initial decision of commanding officer is likely to reinforce the perceived authority, integrity, trust and confidence towards commanding officer whose decision is being appealed. Moreover, the presence of an appeal mechanism and prospect of seeing one's decision overturned is likely to force commanding officers into deeper and more careful deliberation during a summary trial. Where a decision is overturned, justice is done and confidence in our military justice system would be reinstated. Ibid, at 15.

Even those who thought that the loss of the convening authority's functions and the whittling down of his power would be a bad thing have, at least to some extent, been converted."[234]

[234] Judges James W. Rant, supra note 211.