Canadian Arrangements for Aid of the Civil Power

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For a long time after the end of the Second World War, the Canadian Forces were not called upon to act in aid of the civil power, under Part XI of the National Defence Act and previous legislation. This role again became an active one in 1969 when the forces were required in connection with disturbances in Montreal that the local police were not available to handle.

There has been a great deal of confusion as to the meaning of the curious expression "aid of the civil power" and with respect to the legal principles that apply. It is, therefore, desirable to commence with an explanation of the circumstances to which the role applies and the procedural steps required to invoke it. This can be done most conveniently by first describing the situations to which it does *not* apply.

Aid of the civil power has no application to the following:

(a) Disasters declared by the Governor-in-Council under section 35 of the National Defence Act to be of national concern;

(b) Assistance given to provincial and municipal authorities in connection with natural disasters of a local character, such as floods, forest fires and the like, which are dealt with under *ad hoc* arrangements between federal and provincial authorities;

(c) Matters for which municipal, provincial or federal police are normally responsible but that they cannot deal with effectively because of other commitments and which then fall within the executive responsibility of the Government of Canada; examples are the guarding of federal buildings and the protection of those carrying out federal functions, and the protection of diplomatic property and persons;

(d) Disturbances in federal penitentiaries;

(e) The "reading of the Riot Act" (Section 68 of the Criminal Code), which may occur either without the invoking of aid of the civil power or as a separate step in an aid of the civil power situation.

The circumstances to which aid of the civil power *does* apply are described in the following section of the National Defence Act:

> "219. The Canadian Forces, or any unit or other element thereof, or any officer or man, with material, are liable to be called out for service in aid of the civil power, in any case in which a riot or disturbance of the peace requiring such service occurs, or is, in the opinion of an Attorney General, considered as likely to occur, and that is beyond the powers of the civil authorities to suppress, prevent, or deal with."

It is clear from this provision that aid of the civil power cannot properly be invoked where a "riot" or "disturbance of the peace" is a minor incident. It is confined to cases which the Attorney General of a province considers to be "beyond the powers of the civil authorities to suppress, prevent, or deal with". It is clear that available police resources, municipal, provincial and federal, must be considered by a provincial Attorney General to be inadequate before he calls upon the Canadian Forces to participate.

Although the expression "civil power" encompasses all levels of government in Canada, municipal, provincial and federal, it applies, in the context of Part XI of the National Defence Act, only to situations falling within the executive responsibility of a province. The justification for the use of the Canadian Forces in this role has been questioned on the ground that the interjection of the military to deal with a riot or disturbance of the peace may serve to exacerbate an existing situation. Although this point may appear to be a good one, its validity disappears where aid of the civil power is invoked as an essential step because of the inadequacy of police forces to deal with riots or disturbances of the peace. In such situations there is no other choice, and the military would have to be involved even if no statutory or other provisions existed prescribing the procedures for seeking their assistance and the manner in which they are to be so employed. In England, the use of the troops in this capacity has a very long historical background, and there are few examples of their having been employed ineffectively in that capacity. In Canada, military participation in aid of the civil power situations has been resorted to from the early colonial period to the present time, and there surely is no doubt as to their effectiveness in that role since Confederation, except in the case of a few incidents in the 1870s and 1880s when difficulties did occur because of apparent inadequacies of the Militia at that time and the lack of regular troops *

Aid of the civil power is founded for the most part on the common law. Arrangements for aid of the civil power in the colonies that were federated by the British North American Act were initiated, as they are in England today, at the municipal level by the action of a mayor, warden or magistrate. The division of powers between the federal and provincial levels of government provided for in the British North America Act, 1867, made it necessary that there be a federal statutory provision relating to aid of the civil power. This was so because section 91 of that Act allocated the responsibility to make "Laws for the Peace, Order and Good Government of Canada" and "Militia, Military and Naval Service and Defence" to the federal Parliament, and section 92 allocated the "Administration of Justice" to the provincial legislatures. The statute containing the provision respecting aid of the civil power was the Militia Act, Chapter 40, 1868, the relevant section of which reads in part as follows:

> "27. The Corps composing the Active Militia shall be liable to be called out with their arms and ammunition in aid of the Civil Power in case of riot or other emergency requiring such services, whether such riot or emergency occurs within or without the Municipality in which such Corps is raised or organized; and it shall be the duty of the Deputy Adjutant General of the District, or failing him of the Brigade Major, or failing him of the senior Officer of the Active Militia present at any locality, to call out the same or such portion thereof as is necessary for the purpose of quelling any riot, when thereunto required in writing by the Mayor, Warden or other Head of the Municipality in which such riot takes place, or by any two Magistrates therein, and to obey such instructions as may be lawfully given him by any Magistrate in regard to such riot; and every Officer, non-commissioned officer and man of such Active Militia or any portion thereof, shall on every such occasion, obey the orders of his Commanding Officer; and the Officers and men, when so called out shall, without any further or other appointment, and without taking any oath of Office, be special constables, and shall be considered to act as such so long as they remain so called out; but they shall act only as a military body, and shall be individually liable to obey the orders of their Military Commanding Officer only . . ."

Except for the appointment of officers and men as special constables, this section preserved in essence the sort of arrangement that had previously existed and still exists in England.

Although a number of amendments to section 27 of the Militia Act were made in the intervening years, none was of particular interest for the purpose of this article until the amendments of 1924. In that year, serious riots occurred in connection with a strike of steel workers at Sydney, Nova Scotia, which resulted in the calling out of the Active Militia in aid of the civil power. Following settlement of the dispute, a federal Royal Commission was appointed to inquire into the cause of the unrest and "the circumstances which occasioned the calling out and retention of the Militia in aid of the civil power . . ." The report of the Commission (called the Robertson Report after its chairman) was submitted in 1924 and recommended, among other things, that "it is desirable that the Militia Act should be amended in such a manner as to provide that a requistion requiring the Active Militia to be called out for active service in aid of the civil power may be made only by a judge and the Attorney-General of a province acting jointly in making the same, and that the requisition should contain a statement by the Attorney-General of the province to the effect that he shall as soon as possible, and not later than one week thereafter, cause an inquiry to be made into the circumstances which occasioned the calling out of the Active Militia . . ."

*For details of incidents involving aid of the civil power in Canada, during the 44 years following Confederation, see Desmond Morton, *Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867 - 1914:* Canadian Historical Review, Volume II, No. 4, December, 1970.

The Government of Canada acted promptly upon the recommendation of the Robertson Commission (except with respect to a requisition being made jointly by a judge and a provincial Attorney General) by proposing to Parliament in the same year comprehensive amendments to the Militia Act which, with certain later amendments of detail, formed the basis of the present provisions of Part XI of the National Defence Act. Among those amendments was one made by the Royal Canadian Air Force Act, Statutes of Canada, 1940, Chapter 15, which provided for units, officers and men of the RCAF to be called out in an ancillary role to assist the army. This ancillary role was extended to the Royal Canadian Navy by subsection (3) of section 221 of the National Defence Act, Chapter 23 of the Statutes of 1950.

In the United States, the division of powers between the federal and state governments in respect of maintenance of law and order is substantially similar to that which exists in Canada. Each state has a responsibility for dealing with riots and disturbances of the peace that are of local concern. Every state maintains units of the National Guard which are available to fill the role of a state "army" to back up the police where police resources are inadequate. A state National Guard can be taken over for federal use by order of the President when a situation has become one of national concern. In Canada, the absence of provincial "armies" is taken care of by the power of an Attorney General of a province to requisition the federal forces to come to his aid when police resources are inadequate to deal with riots and disturbances of the peace. It is appropriate, and indeed essential, that the response to a requisition of an Attorney General should, as our present law provides, be mandatory and immediate and not subject to a policy decision by the Government of Canada. This is assured by the following sections of the National Defence Act.

"221. In any case where a riot or disturbance occurs, or is considered as likely to occur, the Attorney General of the province in which is situated the place where the riot or disturbance occurs, or is considered as likely to occur, on his own motion, or upon receiving notification from a judge of a superior, county or district court having jurisdiction in that place that the services of the Canadian Forces are required in aid of the civil power, may by requisition in writing addressed to the Chief of the Defence Staff require the Canadian Forces, or such part thereof as the Chief of the Defence Staff or such officer as he may designate considers necessary, to be called out on service in aid of the civil power."

"222. Upon receiving a requisition in writing made by an Attorney General under section 221, the Chief of the Defence Staff, or such officer as he may designate, shall call out such part of the Canadian Forces as he considers necessary for the purpose of suppressing or preventing any actual riot or disturbance, or any riot or disturbance that is considered as likely to occur."

"226. The Canadian Forces or any part thereof called out in aid of the civil power shall remain on duty in such strength as the Chief of the Defence Staff or such officer as he may designate deems necessary or orders, until notification is received from the Attorney General that the Canadian Forces are no longer required in aid of the civil power; and the Chief of the Defence Staff may, from time to time as in his opinion the exigencies of the situation require, increase or diminish the number of officers and men called out."

These provisions are consistent with the responsibilities and needs of a provincial Attorney General and avoid imposing upon the federal government a requirement to make a decision which, in my opinion, it should not be burdened with. It will be noted that the above-mentioned sections of the National Defence Act leave to the Chief of the Defence Staff the discretion as to the numbers of officers and men to be made available for, and maintained on, duties in aid of the civil power. Although the Act does not so provide, it is probably implicit in those provisions that the Chief of the Defence Staff has authority to take into account, in determining the size of the force to be made available, other urgent and essential tasks upon which the Canadian Forces may be engaged.

Prior to June 26, 1970, Queen's Regulations and Orders required that when parts of the Canadian Forces made available in aid of the civil power arrived at the scene of a riot or disturbance of the peace, the officer in command was to be accompanied by a magistrate whose role was to determine whether the civil power was unable to deal with the situation and that it demanded the interference of the Canadian Forces by action. It was then his duty to request the officer in command at the scene to take action, whereupon the officer in command would consider whether immediate action was necessary and, if so, take the action that appeared to him to be requisite. British law has always required that a magistrate accompany the forces acting in aid of the civil power, although the forces may, in cases of urgency, act in his absence. It would appear that there were three main reasons for this.

First, his presence was a manifestation of the supremacy of the civil power under the British constitution; secondly, a magistrate under British law had a responsibility to quell riots; and thirdly, he had power to require military authorities to provide military forces to assist in quelling a riot. The Criminal Code of Canada, RSC 1927, provided in section 94 that it was an offence for a magistrate who had become aware that there was a riot in his jurisdiction to omit to do his duty in suppressing the riot. This provision was not perpetuated in the

1953-54 revision of The Criminal Code. There are other reasons why it is no longer appropriate for a magistrate to accompany the forces:

(a) As a magistrate does not wear a uniform, he is not readily identifiable by most people in large communities as a representative of the provincial authority;

(b) Magistrates as such have no expertise through experience or training to determine when the police have lost, or appear to be losing, control of rioters;

(c) The age or physical condition of a magistrate could militate against his being present with the armed forces for long hours, day and night, perhaps in inclement weather;

(d) During a riot or extensive disturbances, a magistrate's case load would be larger and need more rapid handling than normal and therefore require his presence in court;

(e) A magistrate who observed and identified particular persons participating in a riot or disturbance would be barred from trying them;

(f) It has been found that sufficient magistrates are not available where continuous duty over a long period is required.

In view of the foregoing, discussions were held with the Deputy Attorney General of each of the provinces and it was generally agreed, with a slight exception in the case of Newfoundland, that magistrates were not the most suitable persons to fill the role mentioned, and that it would be preferable to have senior members of police forces, qualified by training and experience to assess the need for action by the military, to accompany the officer in command of the troops for this sole purpose. The relevant regulation in Queen's Regulations and Orders was amended on June 26, 1970, to make this possible.

The following section of the National Defence Act is of interest:

"225. Officers and men when called out for service in aid of the civil power shall, without further authority or appointment and without taking oath of office, be held to have and may exercise, in addition to their powers and duties as officers and men, all of the powers and duties of constables, so long as they remain so called out, but they shall act only as a military body, and are individually liable to obey the orders of their superior officers."

The question arose in 1942 as to whether members of the Canadian Forces called out in aid of the civil power in connection with a strike of the Montreal police could be ordered to act as individual policemen or whether the wording of the Militia Act and regulations in effect at that time required that they act only "as a military body". It was the opinion of the law officers of the Crown that the regulations then in force required the forces to act in formed bodies only, including an officer, and accompanied by a magistrate. Regulations have since been changed, and it is now the opinion of the law officers of the Crown that members of the Canadian Forces performing duties in aid of the civil power may be employed in whatever manner may be reasonably necessary for the purpose of suppressing or preventing a riot or disturbance of the peace, including patrol duty ordinarily performed by members of a police force to protect persons and property or to keep the peace, and also to guide traffic. Broadly speaking, the ordinary layman, under sections 434 and 436 of the Criminal Code, may arrest without warrant a person whom he finds committing an indictable offence, or a person whom he believes to have committed a criminal offence and to be escaping from, or freshly pursued by, persons who have the necessary authority. On the other hand, a peace officer, including a serviceman acting in aid of the civil power, may under section 435 of the Criminal Code arrest without warrant a person who has committed an indictable offence, or whom he believes has committed or is about to commit an indictable offence, or whom he finds committing a criminal offence.

It would appear that, under section 225 of the National Defence Act, the powers of constables therein given to members of the Canadian Forces would include the power to enforce provincial and municipal laws, as well as federal laws, relevant to

the riot or disturbance of the peace for which they were requisitioned. Where civil police are available, however, the enforcement of such provincial and municipal laws would normally be their responsibility.

What has just been said raises a question as to whether the Canadian Forces acting in aid of the civil power are an adjunct to the civil police and act as such under provincial authority. It has always been considered a vital principle that the military acting in aid of the civil power remain under military command and carry out their functions in a military way, thus assuring that the aid they give is not merely supplementary police aid, but aid of a different character. This principle is implicit in section 225 of the National Defence Act by the words "but they shall act only as a military body, and are individually liable to obey the orders of their superior officers". It is fundamental that the aid given should not involve force unless force is necessary. If it is necessary, no more force should be used than the situation from time to time demands.

Officers and men may find themselves in a very difficult position because of their obligation under military law to obey the orders of their superiors even though complying with such an order may constitute the commission of a criminal offence. This dilemma can occur in a purely military context, such as on a field of battle in wartime. The legal position of such an officer or man is founded upon principles of the common law. It is of interest, however, to note that Parliament, by the following institution of the Criminal Code, has made specific provision for the position of members of the Forces acting in the suppression of a riot:

> "32. (2) Every one who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot unless the order is manifestly unlawful."

In addition, the National Defence Act provides as follows:

> "74. Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment."

It is obvious that these provisions, while they may be of considerable comfort after the event, do not provide much guidance to a person confronted with such a dilemma, because he would normally not, except in very clear cases, be qualified to decide whether the order of his superior is lawful or unlawful, or if unlawful, is "manifestly unlawful". Depending what he decides to do, he may be severely punished upon conviction by court martial or, in the alternative, by a criminal court.

The following excerpt is from an article in the *Law Magazine*, Volume IX, 1833, at p. 72:

> "Suppose the military law were differently framed, and the word *legal* omitted, and the soldier were obliged to obey every command of his officer. An instance might then occur in which an officer, either through ignorance or barbarity, might give orders to fire upon a multitude, whose conduct did not justify the attack; hundreds might be butchered within a few minutes, and the whole evil be attributable to the error of a single individual. A soldier would always be justified in shedding blood, provided his commander gave the command; and the person in authority would be a giant of a hundred hands for the execution of evil. Such principles are abhorrent, not merely from the condition of free citizens, but also from the laws of humanity. Soldiers would become the objects of general apprehension, for every man would remember that in all institutions, however well regulated and however much approved by experience, some members will always be found destitute of principle, or wholly incapable of regulating their passions, who, to gratify their feelings of revenge, or in perfect recklessness of the miseries they are producing, may employ their formidable strength in oppressing or destroying their fellow-subjects. Such a case is an extreme case, and highly improbable, and is suggested merely to show the tendency of such an alteration of the law. If the soldier is to be justified in obeying every command of his officer, the justification will include the worst as well as the best command; but if any line is to be drawn where the duty of obedience shall terminate and that of disobedience begin, we are at a loss to discover a line less inconvenient to all parties than that which is drawn upon the principle of legality."

In this connection, Dicey, in the 9th Edition of his *Law of the Constitution*, 1939, at page 302 *et seq*, states:

> " When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence . . . A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in a *bona fide* obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one.
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> During a riot an officer orders his soldiers to fire upon rioters. The command to fire is justified by the fact that no less energetic course of action would be sufficient to put down the disturbance. The soldiers are, under these circumstances, clearly bound from a legal, as well as from a military, point of view to obey the command of their officer. It is a lawful order, and the men who carry it out are performing their duty both as soldiers and as citizens.
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> An officer orders his men to fire on a crowd who he thinks

could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The order, therefore, to fire is not in itself a lawful order, that is, the colonel, or other officer, who gives it is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view, the duty of the soldiers? The matter is one which has never been absolutely decided; the following answer, given by Mr. Justice Stephen, is, it may fairly be assumed, as nearly correct a reply as the state of the authorities makes it possible to provide: — . . . "Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior . . . The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army.' "

It does not fall within the purpose of this article that more be said about the legal aspects of this matter and the moral considerations that apply.

*It is evident from the above that the horns of the dilemma upon which a serviceman may find himself cannot be removed, but the consequences of a wrong decision on his part can be, and doubtless would be, ameliorated. In such a situation, if he erred by failing to obey a lawful order of a superior officer, he would undoubtedly be treated by military authorities with such leniency as the circumstances would justify. If he erred by obeying an unlawful order of a superior officer and thereby committed a criminal offence, there are many ways whereby officers of the Crown charged with application of the criminal law could ensure that the action to be taken would be in consonance with justice.

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*For readers who may be interested, an excellent treatment of the subject may be found in an article by Professor L. C. Green of the University of Alberta, *Superior Orders and the Reasonable Man*, The Canadian Yearbook of International Law, 1970.