FRIEDLAND, Martin L., 1932-, *Controlling Misconduct in the Military: a Study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, [Ottawa]: Minister of Public Works and Government Services Canada 1997, vi, 181 p., ISBN: 0660168685, cat. No. CP32-64/2-1997E;

Commission of Inquiry
into the Deployment of
Canadian Forces to Somalia

CANADA

Commission d'enquête
sur le déploiement des
Forces canadiennes en Somalie

Controlling Misconduct in the Military

a study prepared for
the Commission
of Inquiry into
the Deployment of
Canadian Forces
to Somalia

Martin L. Friedland

Controlling Misconduct in the Military

Controlling Misconduct in the Military

a study prepared for
the Commission
of Inquiry into
the Deployment of
Canadian Forces
to Somalia

Martin L. Friedland, O.C., Q.C.
Faculty of Law at
The University of Toronto

May 1996

Printed and bound in Canada

Available in Canada through
your local bookseller or by mail from
Public Works and Government Services Canada — Publishing
Ottawa, Canada K1A 0S9

Catalogue No. CP32-64/2-1997E
ISBN 0-660-168685

Canadian Cataloguing in Publication Data

Friedland, M. L. (Martin Lawrence), 1932-

Controlling misconduct in the military : a study

Issued also in French under title: Contrôle de
l'inconduite dans les forces armées.
ISBN 0-660-16868-5
Cat. no. CP32-64/2-1997E

1. Military discipline — Canada.
2. Military police — Canada.
3. Courts martial and courts of inquiry — Canada.
I. Commission of Inquiry into the Deployment of Canadian Forces to Somalia.
II. Title.

FC603.F74 1997 355.1'33'0971 C97-980055-2
F1028.F74 1997

Contents

Acknowledgements

I am indebted to five exceptionally able University of Toronto law students who helped produce this document. Caroline Ursulak, a recent graduate, assisted in the early stages of the project with the section on military justice. Robert Brush, completing third year, and Craig Martin, second year, worked closely with me over the summer and during the academic year in collecting material, helping me organize my thoughts, and assisting me in checking references. Elizabeth Evans and Rita Samson, both completing their third year, assisted with some specific tasks for part of the summer. Allyn Chudy provided excellent secretarial services. Very helpful comments on a preliminary draft of the study were received from a number of experts within and outside the Commission of Inquiry. I am indebted to the Commission Secretary, Stanley Cohen, for his comments and for his help in developing the framework of the study. Others within the Commission also willingly answered questions, supplied material, and provided detailed comments on a draft of the study and I would particularly like to thank Douglas Bland, François Lareau, David Pomerant, Jim Simpson, Jack Vance, and Donna Winslow. Incisive comments on the draft were also given by Charles Cotton, Deborah Harrison, Kent Roach, and Janet Walker. Linda Cameron, the librarian at the Commission, Shawn Goudge of the JAG library in Ottawa, Cathy Murphy of the Canadian Forces College library in Toronto, and the staff of the Faculty of Law library at the University of Toronto graciously supplied the author with requested material. To all these people I offer my sincere thanks. I am also grateful to the Faculty of Law and the Canadian Institute for Advanced Research for their continuing support and encouragement. The study is current as of May 1996.

M.L. Friedland

CHAPTER ONE

Introduction

On March 16, 1968, a company of U.S. soldiers in Vietnam was involved in slaughtering defenceless civilians in the hamlet of My Lai.[1] That event and its cover-up and investigation was a crucial defining moment for the American public and military and led to a determination to seek ways to control such misconduct in the military in the future.

Precisely 25 years to the day after the My Lai massacre — on March 16, 1993 — a young defenceless Somali was tortured and beaten to death by members of the Canadian Airborne Regiment in Somalia.[2] This event and its aftermath will also turn out to be a crucial defining moment for the Canadian public and the Canadian military. A number of Canadian practices have already been changed as a result of the Somalia affair, and no doubt more will change as a result of the investigation and report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (the Somalia Inquiry).[3]

When researchers for the Somalia Inquiry met with senior U.S. Army officials in Washington in the summer of 1995, they were told that since the My Lai massacre, "the U.S. Army has now reached the stage where they are sure that a situation such as the conduct of 2 Commando at Belet Uen could not occur in the U.S. Army."[4] The task of the Somalia Inquiry, in my view, is to set the stage so that the Canadian military will be able to say the same.

I was asked by the Somalia Inquiry to prepare a background study examining various techniques used to control misconduct in the military.[5] No doubt my interest in sanctions and rewards in the legal system and my study of various institutions, such as my recent work on the judiciary, were responsible for the invitation.[6] (It was not because of my knowledge of the military, which before starting this project was based on three months in 400 Fighter Squadron one summer during high school.) The study looks at a range of military structures and institutions that provide

controls on behaviour and analyzes how they can be improved to make members of the military more accountable for their conduct, without at the same time diminishing their effectiveness as a fighting force.

The project has been particularly interesting to me because of the light it sheds on ways to control conduct in non-military situations. There are many valuable aspects of military justice and other ways used by the military to control undesirable conduct. The military, like the academic world, uses rewards as a way of motivating desirable conduct (see Chapter 2), a technique that is not used to the extent it could be to control undesirable conduct in civilian society.[7] Further, the military, like the tax system, does not come in with its heavy guns of courts martial whenever wrongdoing is discovered.[8] As we will see, administrative sanctions are often used, as are summary proceedings. Summary trials constitute 98 per cent of military trials. There are about 4,000 summary trials (conducted by a commanding officer or a delegated officer) each year and only about 100 courts martial (see Chapter 6).

In civilian society, we give too much prominence to the criminal trial. We punish and stigmatize. The military generally tries to reintegrate the wayward soldier back into military society. Soldiers that cannot be reintegrated under any conditions, sociologist Lawrence Radine has written, "must be punished or expelled from the Army in such a way as to maintain the legitimacy of the Army in other soldiers' (and civilians') eyes."[9] Reintegrative shaming, such as occurs in summary proceedings before the commanding officer, is making a resurgence in criminological theory. As John Braithwaite states in his book, *Crime, Shame and Reintegration*, "Reintegrative shaming is superior to stigmatization because it minimizes risks of pushing those shamed into criminal subcultures, and because social disapproval is more effective when embedded in relationships overwhelmingly characterized by social approval." "Under the time-honored naval tradition of 'Captain's mast'", Braithwaite writes, giving an example of reintegrative shaming, "a seaman who fell asleep on watch...could be denounced by the captain in the presence of members of the ship's company assembled on deck for the purpose of shaming him."[10] In the civilian criminal justice system — this is particularly so in the United States — we tend to push wrongdoers into criminal subcultures by too harsh penalties.

The military is, of course, different from civilian society. There is what is referred to as "unlimited liability", that is, the obligation to risk one's life as a member of the military.[11] "Acceptance of this concept more than anything else," the military told the Somalia Inquiry at a policy hearing,

"sets the service member apart from other members of society."[12] A member of the military may not simply quit when he or she wishes. Another significant difference is that members of the military may not "combine with other members for the purpose of bringing about alterations in existing regulations for the Canadian Forces"; may not sign or solicit signatures for "petitions or applications relating to the Canadian Forces"; and may not without authorization "enter into direct communication with any government department other than the Department of National Defence on subjects connected with the Canadian Forces."[13] Finally, unlike others in Canadian society, military members are governed by a Code of Military Discipline in addition to being subject to the regular civilian laws.

This chapter examines a number of introductory issues, looks at the available statistics on the extent of misconduct in the military, touches on the so-called mystique of the paratroopers, and outlines various possible techniques for controlling misconduct.

INSTITUTION OR OCCUPATION?

One of the questions much discussed in the military literature is whether the military can be classified as an institution or an occupation.[14] The more the military is cut off from society, the more it can be said to be an institution — or, in Erving Goffman's words, a "total institution", that is, "a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life."[15] Goffman was writing in 1962 about mental institutions, which, like prisons and penitentiaries, have been moving away from being total institutions and moving slowly toward normal society.[16]

The same is true of military institutions.[17] Some military forces are consciously in the 'occupation' camp. Germany, for example, deliberately chose to create a civically integrated military.[18] Members of the military can join unions and run for parliament, and they are tried by civilian courts for the more serious military offences. Israel, on the other hand, has a permanent force that is closer to the institutional model. Reuven Gal, a former chief psychologist with the Israel Defence Force, notes that the Israeli military "is a professional organization that maintains its institutional characteristics, but these characteristics are not as pure and idealistic as they were initially."[19]

Not surprisingly, Canada, England, and the United States are somewhere between these two positions.[20] Charles Moskos and Frank Wood,

two leading writers on the institution/occupation debate, think that "creeping occupationalism" makes a "real difference in military effectiveness... institutional identification fosters greater organizational commitment and performance than does occupational." Charles Moskos has shown that in the United States, at least, "the marked trend towards occupationalism in the 1970s has been countered somewhat by a renewed emphasis on institutionalism in the military in the 1980s."[21] One of the examples cited by Moskos is the 1987 U.S. Supreme Court case, *Solorio*[22] (discussed in Chapter 6), which overturned the 1969 decision in *O'Callahan* v. *Parker*,[23] which had required a "military nexus" between the crime committed by a member and military service. As a result of *Solorio*, a military tribunal may take jurisdiction in the United States for any offence allegedly committed by a military person, whether or not there is a military nexus.

Charles Cotton, a Canadian writer with a military background, does not think the Canadian military have done very well in solving the tension between the institutional and occupational models. The Canadian military, he wrote in 1988, "is a specialized federal bureaucracy with weak and ambiguous ties to society, while at the same time it exhibits internal dissent and strains. Its links to national values and social fabric and its internal cohesion have both suffered in recent decades." He points out that "an attempt to increase internal cohesion does not always imply a parallel decrease in the link with society."[24]

Trying to achieve internal cohesion, which is clearly important for a military organization, and yet at the same time avoid isolating the military from Canadian society and its values, including of course the *Canadian Charter of Rights and Freedoms*, is an objective that will not be easy to attain. The report of the Somalia Inquiry can, perhaps, offer some guidance. The Supreme Court of Canada provided some support to the institutional model in 1992 by upholding the concept of a separate system of military justice in *Généreux*,[25] but within the context of Charter values. Many members of the military had feared that the dissent by Chief Justice Laskin and Mr. Justice Estey in the 1980 case, *MacKay*,[26] who wanted military justice to be handled by the regular courts, would carry the day. As we will see in Chapter 6, there is still considerable uncertainty about the constitutionality of the system of summary justice. The view is expressed in a later discussion that the Supreme Court of Canada is likely to uphold the system of summary justice, particularly if some suggested changes are made. The system of summary justice has been upheld by the Supreme Court of the United States,[27] a fact that will carry weight in Canada

because in both the law and military matters Canada is moving much closer to the United States than to the United Kingdom.[28]

MISCONDUCT IN THE MILITARY

In 1985, Major General C.W. Hewson led a study team investigating discipline infractions and antisocial behaviour in Mobile Command (i.e., the Army), with particular reference to the Special Service Force and the Canadian Airborne Regiment. That report is the latest that I have seen that attempts to compare military and civilian misconduct. The study points out difficulties in comparing civilian and military crime statistics. Military police investigations, for example, include dependents and civilian employees, but incidents involving military personnel dealt with exclusively by civilian authorities may not come to the attention of the military police.[29] Moreover, the comparison made was between the military population and the overall civilian population, which includes elderly people and children. The Hewson Report concluded:

> Although a statistically valid comparison is not possible there appears to be a lower incidence of serious pathology and violent behaviour in the Canadian Forces than in the Canadian population at large. There is a relatively higher frequency of sexual offences which should be further investigated.[30]

All in all, it is difficult to base firm conclusions on the data collected, and the Somalia Inquiry may wish to gather current statistics on the subject. The figures from the 1980s do suggest, however, that criminal conduct in the military is not out of control. In the general population, the mean number of assaults per 100,000 population for the years 1979 to 1982 was 468, whereas for the military for the same period on military establishments (amounting to perhaps 100,000 persons including civilians and dependants) it was 133.[31]

Military personnel are, by the nature of their activity, aggressive. As Anthony Kellett states, "If an army is to fulfil its mission on the battlefield, it must be trained in aggression."[32] The wonder is that there is not more spillover[33] criminal activity by members of the military than there is.

One area of continuing concern identified by the Hewson Report is sexual assault.[34] As Clifton Bryant states in *Khaki-Collar Crime*, "Young males cut off from traditional informal controls, bolstered by a masculine

and aggressive military subculture, and faced with a situation of relative unavailability and inaccessibility of females are prime candidates for sexual crimes against [the] person."[35] The Hewson Report identified this isolation as a particular problem at Petawawa (where the Airborne Regiment was stationed in Canada), leading to fights with the local male population. The Hewson Report states:

> The young single soldiers in Petawawa are not greatly interested in base sponsored clubs, sports or activities. They prefer to spend most of their off-duty time in the limited number of local entertainment establishments, socializing and meeting girls. There is a limited number of girls in the local area and they are attracted to the soldier with his car, regular pay and job security. This antagonizes the local male population which is already frustrated by unemployment (particularly in Quebec). According to the local police, most incidents of violence involve disputes over girls.[36]

The Canadian Airborne at Petawawa, the Hewson Report found, experienced a higher number of assault cases than other units, indeed, twice the number of any other unit.[37]

There is also concern about domestic violence in the military. As was stated by two American authors:

> Many characteristics of military life affect the risk for violence. Perhaps the most significant is the removal of the military family, usually young and inexperienced, from the support systems of the extended family and family friends. They are distanced from parents, grandparents, uncles, aunts, siblings, cousins, friends, and neighbors who usually provide support, instruction, companionship, and a sense of perspective to young couples. Frequently, military couples have to live in quarters assigned according to rank. Their neighbors, therefore, are also young people with little more experience in marriage and parenting than they have.[38]

Canadian authors Deborah Harrison and Lucie Laliberté, who analyzed the literature and conducted interviews with Canadian military personnel, also reached the conclusion that wife abuse was high. Writing in 1994, they quote the Adjutant of one Canadian army unit who recently speculated: "I think there are 93 married people [in the] unit. You could talk to every one of the wives, and you would possibly find a dozen wives that have been beaten [in the last two months]." Their explanation is that this could be a spillover into personal lives of violence used for legitimate

purposes and that this reflects "a subculture in which physical aggressiveness is positively valued."[39]

PARATROOPERS

Physical aggressiveness is particularly valued for paratroopers. They are volunteers from other units who have passed the formal parachute course and have met higher physical fitness standards than in other infantry units.[40] Because of helicopters, parachuting — although still important — may not in fact be needed for military purposes to the extent that it was required in the past, but it has been continued, some maintain, "as a means of identifying action-oriented individuals."[41] It encourages aggressive behaviour. In an article published in 1975, a Canadian major states: "Jumping encourages self-confidence, determination, self-reliance, masterful activity, aggression, courage, and other items symptomatic of the Phallic-narcissistic type, all of which are very important in the military setting, especially in paratroop commando units, which rely heavily on individual action and are aggressive in nature."[42] Paratroopers, one American writer states, "consider themselves superior to all other such groups — not only in their military virtues but in their vices as well. A paratrooper is supposed to be able to outdrink, outbrawl, and outwhore any other member of the armed forces."[43]

Members of airborne units consider themselves an elite, with a special beret and a distinctive uniform. The Hewson Report states, however, that "in Canada, the reality is that they are no more than highly-spirited dismounted infantry." The mystique of the airborne, Hewson continues, does "enhance group cohesion and morale", and the "perceived elitism attracts young men who associate the 'airborne mystique' with the essentially fictitious content of military/paramilitary television programs, movies and magazines."[44]

Selection of an airborne unit for certain types of activities may be counterproductive. The U.S. military had to remove the airborne as occupation troops from Yokohama after the Second World War because of alleged rapes, robberies and murders. One American writer states that it is "troublesome, if not impossible, to convert finely honed combat soldiers into nonaggressive occupation troops."[45] It was parachutists (the 'paras') who killed 13 Catholics in Northern Ireland on Bloody Sunday in 1972, leading Henry Stanhope to write that "the affair led a number of people to question whether the paras were the right kind of troops to carry out peacekeeping operations, where restraint was called for."[46] Nevertheless,

the Board of Inquiry on Somalia concluded that it was "quite appropriate" to send the Airborne to Somalia because of the very difficult and unpredictable conditions there. The Airborne had apparently performed well in Cyprus.[47] One of the tasks of the Somalia Inquiry will be, of course, to determine the appropriateness of sending the Airborne to Somalia.

ALCOHOL ABUSE

The use of alcohol can increase the incidence of violent behaviour. As the Hewson Report stated in 1985, "higher intake of alcohol reduces the threshold for potential violence and acts of antisocial behaviour."[48] The report found that drinking was high in Petawawa, although they did not compare this with the level at other bases.[49] "One reason for the military's high alcoholism rate," Deborah Harrison and Lucie Laliberté point out, "is the easy access to cheap alcohol on most bases, especially those overseas."[50] Drinking was accentuated at Petawawa because much of the drinking took place on the Quebec side where the bars stayed open later than in Ontario.[51] The problem at Petawawa obviously continued after 1985. The 1993 Board of Inquiry suggested a relationship between "incidents of insubordination by 2 Commando personnel and the heavy use of alcohol." In 1992, alcohol was banned from the quarters of 2 Commando.[52]

The Board of Inquiry noted that "military authorities throughout the Canadian Forces have instituted guidelines for drinking on National Defence premises that are consistent with national norms and even more strict rules were instituted for operational theatres such as Somalia."They found that "there is no evidence that drinking or drugs were a problem during operations in Somalia."[53] This is a matter that the Somalia Inquiry will want to explore carefully, because the videotapes of soldiers drinking beer in their quarters in Somalia suggest that drinking in Somalia was not in fact carefully controlled.

The U.S. Forces, in contrast, did not permit their troops to use alcohol in Somalia, a policy that had been adopted during the Gulf War.[54] This is also a matter that the Somalia Inquiry will wish to explore. The Canadian military has adopted a number of fairly recent rules and regulations relating to alcohol and drugs,[55] including various forms of drug testing and apparently strict rules relating to the mission in Bosnia,[56] but nothing goes as far as the U.S. rule prohibiting drinking (and, of course, drugs) while on foreign missions like Somalia.

Alcohol and drugs have been a serious problem in the U.S. Army, and it would be surprising if they were not also a problem in the Canadian military. Many writers have documented the widespread use of alcohol and drugs in military forces. "Their use is infinitely more widespread than bland official histories might suggest," states one military writer. Giving liquor to the troops was, in some cases in the past, official policy. Rum, for example, was given to British troops during the First World War. In some battalions a double ration of rum was given in coffee before troops went over the top.[57]

Drinking has also been considered important in the small group bonding process. Deborah Harrison and Lucie Laliberté surveyed Canadian military personnel for their book, *No Life Like It*, published in 1994, and they concluded that "most members still believe that units who drink together will bond more effectively."[58] Another writer suggests other reasons why alcohol may be tolerated or even encouraged: "From the standpoint of the authorities, alcohol serves to help solve the problem of morale and boredom and helps prevent the build up of potentially disruptive frustrations."[59]

During the Vietnam War, as is well known, drug use was a serious problem. By 1971, for example, a little over 50 per cent of U.S. Army personnel in Vietnam had smoked marijuana and over a quarter had taken heroin or opium.[60] Gabriel states that as many as 600,000 soldiers became addicted during their tours of duty.[61] The problem continued after the war. Alcohol has also been a serious problem. In a 1980 survey, more than a quarter of the 15,000 active U.S. military personnel surveyed reported work impairment resulting directly from alcohol misuse.[62] The pattern with respect to alcohol appeared to be somewhat the same in Canada at the time. At one Canadian Forces base, 15.3 per cent of the members reported that they considered themselves dangerous drinkers, according to a 1978 survey.[63]

More recent Canadian surveys continue to show widespread alcohol problems in the Canadian military, although they appear to have declined in the early 1990s.[64] In a survey in 1989, almost half the respondents reported being sick as a result of alcohol use, and about one-third had had blackouts during the past year. A 1994 random survey of almost 2,000 Regular Force members concluded that "a fifth of members had been drunk four or more times in the last three months and one in twenty-five show evidence of significant problems related to their alcohol use."[65] It

may be getting better, but it is still serious. Controlling alcohol abuse is therefore an important ingredient in controlling undesirable conduct.

SELECTION

Selection of military personnel is the starting point in controlling misconduct. With full conscription, the military will roughly reflect the general population. But with an all-volunteer army, as Canada has, this is not necessarily so, because economic necessity will be a strong factor for those seeking a military career. One study of the 2,500 applicants to the Canadian Forces in the summer of 1975 showed that about 50 per cent were unemployed.[66] Although the Maritime provinces are home to only 10 per cent of the population, the region represents 20 to 35 per cent of recruits, no doubt partly because of high regional unemployment.[67] The minimum qualification for recruits is still grade 10 education, even though for civilian police it is normally at least completion of high school.

The quality of the intake will therefore vary with economic conditions. During the depression, the military more or less reflected the general population,[68] as a very high percentage of the population was unemployed. In the good times of the mid-1980s, recruiting was likely much more difficult and the quality of the applicants correspondingly lower. The U.S. military found a marked drop in quality when conscription was abolished in the early 1970s. As retired U.S. Vice-Admiral J.B. Stockdale stated: "With the closing down of obligatory military service, the armed forces lost the strength of a cross-section of the nation's youth. Now they must make do with the least highly qualified segment of the nation's young people. They have to deal with illiteracy, drug abuse, alcoholism, as well as with an increasing rate of desertion and criminality."[69] Richard Gabriel cites data showing that in the U.S. military "the reading level of the average soldier dropped from the twelfth-grade level in 1973 to the fifth-grade level in 1980."[70] This problem may be particularly acute in less specialized units. Anthony Kellett points out that today "the tendency to specialization in modern armies has led to a perception among combat arms that they receive the marginal applicant, with low technical skills and mental classification scores."[71]

This writer has not examined military recruitment in any depth, and it may not reflect the U.S. experience. (Recruitment is the subject of a separate study for the Somalia Inquiry.)[72] The 1985 Hewson study contained some disturbing facts, however. One was that inadequate checks were made on the recruit's prior criminal record. A 1985 study of more than

500 members of the Airborne Regiment found 34 cases of undisclosed serious crimes, including 12 cases where civilian police files were marked "violent" or "extremely violent".[73] The Somalia Inquiry will wish to ensure that adequate background checks on prior criminal records are now made.

Another issue discussed by the Hewson Report is psychological testing. It was not done then in the Canadian military, although it is apparently done for certain purposes in the U.S. military.[74] The Hewson Report recommended against it on the basis that it might violate human rights and would not be cost-effective, stating on the latter point: "The sheer volume of tests, added screening procedures and increased staff requirements would make added psychological fitness testing of questionable value." Again, this is a matter that the Inquiry may wish to explore. Although the present system can probably spot those with very serious mental problems, persons with personality disorders can slip more easily through the cracks. One of the studies done for the Hewson Report showed that although the incidence of serious mental illness was lower in the military than in the general population, there was a higher rate of personality disorders.[75]

A further question that might be explored is whether it would be desirable to select more women for peacekeeping operations. Female children are not normally socialized to be as aggressive as males.[76] "The very presence of women in military units," Clifton Bryant observes, "may well foster better conduct among the men." Bryant notes that the integration of male and female inmates in some correctional institutions tends to promote good behaviour.[77] The same effect occurs with female prison guards and female police officers.[78] For standard peacekeeping operations, greater integration may produce a very desirable moderating influence on conduct.

A recent article by Laura Miller and Charles Moskos shows that this was probably the effect of having women as part of the U.S. contingent in Somalia. Unlike the virtually all-male Canadian force, 12 per cent of the 25,000-member U.S. contingent was female. Two Somalis died as a result of the use of excessive force by U.S. military personnel between December 1992 and May 1993 — fewer than were killed by the 1,000-member Canadian force. The analysis by Miller and Moskos shows that "women were less likely than men...to view the locals negatively." They found that "the strategy of creating negative stereotypes, rejecting the humanitarian role, and treating the Somalis as enemies was objectionable...to most women soldiers." They contrast this approach with the exclusively

(by military policy) male combat troops who tended to adopt a "warrior strategy" and "construct negative stereotypes of Somalis and perceive them as the enemy." This may be understandable in wartime because, as Miller and Moskos state, "Combat soldiers must be emotionally detached from their enemies in order to kill them, a task assisted by negative racial and cultural stereotypes."[79] It is not, however, applicable to a humanitarian mission. There was therefore a danger that many of the combat-ready Canadian Airborne forces approached their task as "warriors" rather than as humanitarians. Having women in the contingent might have had a beneficial effect on the behaviour of the Canadian troops.

TECHNIQUES OF CONTROL

Careful selection of personnel for the armed forces is therefore the first, but very crucial, technique for controlling misconduct. In this section we review a range of other techniques. Some are more applicable to combat situations, but all seek to have the soldier obey lawful rules and commands and meet military objectives.

Training is also of major importance in influencing behaviour, although no attempt to survey that vast subject will be attempted here. The repetitive basic training of the recruit is designed in part to produce an almost conditioned reflex of obedience, clearly necessary in battle.[80] Training also instills in members of the military their lawful duties and obligations. The U.S. Army, for example, teaches the following nine minimum principles as part of its initial entry training. The basic law of war rules, referred to as "The Soldier's Rules", are as follows:

1. Soldiers fight only enemy combatants.
2. Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superior.
3. Soldiers do not kill or torture enemy prisoners of war.
4. Soldiers collect and care for the wounded, whether friend or foe.
5. Soldiers do not attack medical personnel, facilities, or equipment.
6. Soldiers destroy no more than the mission requires.
7. Soldiers treat all civilians humanely.
8. Soldiers do not steal. Soldiers respect private property and possessions.
9. Soldiers should do their best to prevent violations of the law of war. Soldiers report all violations of the law of war to their superior.[81]

Internalization of such rules by Canadian forces members would perhaps have been helpful in Somalia.

Sensitivity training with respect to gender and racial issues is also important. The use of derogatory racial labels in Vietnam probably contributed to the My Lai massacre. Recent commentators on the twenty-fifth anniversary of My Lai noted the "tendency by some of the members of Charlie Company to view the Vietnamese people as almost subhuman."[82] Clifton Bryant, writing in the 1970s, noted the risk of atrocities in future "police actions" in Third World countries because of the relative ease of "conceptualiz[ing] the enemy and the local civilian population as inferior, backward, or even subhuman."[83] The 1993 Board of Inquiry on Somalia noted the use of derogatory names by Canadian soldiers in Somalia.[84] In 1994, the Canadian military issued a Canadian Forces Administrative Order with respect to racist conduct and it includes policies on education and training.[85] The Somalia Inquiry will no doubt explore the issue carefully in relation to events in Somalia.

Leadership is also a vast subject, which will not be explored in depth here. Leadership is particularly important when military operations are undertaken. The military brief to the Somalia Inquiry defines leadership as "the art of influencing human behaviour so as to accomplish a mission in the manner desired by the leader." The military brief points out that "leadership styles vary with individual personality and what works for one person in a specific situation may not be effective for another person or another circumstance."[86] Leadership for wartime, for example, may require different characteristics than leadership in peacetime.[87] A leading military encyclopedia correctly notes that "the 'secret' of good leadership continues to elude explanation."[88] The Canadian Forces Military Training Manual, *Leadership in Land Combat*, states:

> This manual is addressed to the combat leader who must be a manager, a commander and a leader. The combat leader is a manager by virtue of the fact that he must plan his mission, organize his men, and ensure that they are fit, equipped and provided with the necessities to carry out a mission in battle. He is a commander by virtue of the legal authority he holds. He becomes a leader, however, only when his men accept him as such. For leadership requires much more than management skills or legal authority. The leader is the vital member of the unit team; for he is the person who motivates the other members. He is personally responsible for seeing that his men are prepared for their tasks; that they are

cared for if sick or wounded; comforted if dying; buried, when dead. He shares their lives — the discomforts, the risks, the joys and the victories. In this sharing, the combat leader, whether corporal or general, is set apart. Leadership is a twenty-four hour a day responsibility. "The commander is responsible for all that his men do or fail to do" is an old army truism.[89]

Leadership by example also is of importance. One much-discussed factor in leadership is the extent to which an officer is willing to risk his life in battle. British officers represented a greater proportion of those killed or wounded during the First World War than their percentage of the total force. The percentage of Canadian officers killed or wounded appears to have been even higher.[90] German officers in the Second World War, considered good leaders, also died in disproportionate numbers.[91] The Israeli Army is noted for the sacrifices made by its officers. In the 1967 Six-Day War, almost half the 1967 Israeli fatalities were officers. "There is no doubt," one study of the Israeli Army concluded, "that the fact that so many commanders, proportionately, fell in battle had a salutary effect on the morale of the troops... they were not being asked to give their lives for something for which the commander would not give his own."[92]

Both the 1985 Hewson Report and the 1993 Board of Inquiry discussed leadership. The Hewson Report emphasized the important role of junior leaders, particularly lieutenants and master-corporals. "In the last 10 years," the report states, "this relationship between the men and their immediate leaders has been increasingly eroded." One of the primary reasons for this, in their view, was the temporary absence of personnel from the unit to undertake other tasks or to attend courses. "In the absence of constant and effective leadership," they observed, "prolonged stress may lead to low morale and disciplinary infractions."[93] The Board of Inquiry also noted the relationship between leadership and discipline, stating: "Good discipline depends on good leadership. Discipline is established and maintained by officers and non-commissioned officers." They concluded that "discipline was somehow flawed within 2 Commando."[94] Obviously, this is a question that will be explored in depth by the Somalia Inquiry.

In the case of Israel, a high level of patriotism has been a strong motivating force. Patriotism is used as a motivating factor in all wars, particularly in the early stages of a war. The First World War poster stating that "England expects every man to do his duty" achieved the desired response.[95] But, as Robert Graves has written, the troops in the trenches in the First World War were less interested in King and Country than in their regiment and their fellow soldiers.[96]

Anthony Kellett has shown in various writings that regimental pride is a very important element in motivating troops in Commonwealth armies.[97] The U.S. Army, however, uses larger units; it experimented with a regimental system in the early 1980s but did not adopt it.[98]

Loyalty to a very small fighting unit, such as a platoon, a squad, or the soldier's "buddies" is probably the most important motivating force.[99] General S.L.A. Marshall stated in 1947 that "the thing which enables an infantry soldier to keep going with his weapons is the near presence or presumed presence of a comrade."[100] In Barry Broadfoot's oral history of Canadians in the Second World War, one person is quoted as stating that you fought for "your outfit, the guys in your company, but especially your platoon."[101] This small-unit cohesion[102] is obviously very important in combat motivation, although as the Americans discovered in Vietnam, it can also operate negatively. A large number of officers were deliberately killed by their own men (so-called fragging),[103] and in the great majority of these cases it was a group rather than an individual act.[104] Leadership and group cohesion are not discussed further in this paper, despite their enormous importance.

The use of rewards is also an important technique for controlling behaviour. As discussed in Chapter 2, no major institution in society makes such a display of rewards as the military does. Janowitz and Little rightly anticipated in 1965 that "military authority must shift from reliance on practices based on *domination* to a wider utilization of *manipulation*."[105] The use of rewards is a deliberate process of manipulation. Unfortunately, as Anthony Kellett has observed, "little consistent thought appears to have been given to the question of material and psychological rewards, despite the fact that psychological learning principles demonstrate that positive reward is more effective in producing desirable behavior than punishment is in eliminating undesirable behavior."[106]

In Chapter 3, we look at the various duties imposed on military personnel to report wrongdoing. The Queen's Regulations and Orders contain a provision requiring all members of the military to "report to the proper authority any infringement of the pertinent statutes, regulations, orders and instructions governing the conduct of any person subject to the Code of Service Discipline,"[107] although an officer has to do so only if he or she "cannot deal adequately with the matter."

Administrative and informal sanctions are extremely important in controlling conduct in the military. These are normally applied to redirect less serious undesirable conduct before more formal disciplinary proceedings are used. For example, a non-commissioned member may be

given a Verbal Warning or a Recorded Warning, be subject to Counselling and Probation, or be given a Compulsory Release. An officer may also be given what is called a Reproof. These mechanisms are described in some detail in Chapter 4.

In civilian society great reliance is placed on the police as means of controlling conduct. The same is true in the military. Unfortunately, as we will see in Chapter 5, the number of military police sent to Somalia was far less than was required. The U.S. military operates with a greater concentration of military police. A restructuring of the Canadian military police is now taking place, and I argue later that it would probably be unwise to reduce their numbers significantly.

A lengthy chapter is devoted to military justice, a crucial technique for controlling misconduct in the military (see Chapter 6). The Somalia Inquiry will wish to explore carefully whether the decline in the use of military justice in the 10 years preceding the events in Somalia may have contributed to the lack of discipline that was evident in the Airborne Regiment in Somalia. The most important part of the military justice system is the system of summary justice, and the Supreme Court of Canada is likely to uphold its constitutionality, particularly if some changes related to effective waiver of the right to a court martial and the amount of punishment a commanding officer can impose are introduced.

Another form of deterrence, which may become increasingly important in world affairs, is the international criminal tribunal, such as is now operating under United Nations auspices with respect to events in Yugoslavia and Rwanda.[108] Such courts are considered part of international law.[109] These tribunals go beyond those in Nuremberg and Tokyo following the Second World War, which can be categorized as victors' courts.[110] The International Law Commission has produced a draft statute for a permanent international tribunal,[111] and it is possible that one will be set up in the next few years. The search for a permanent court has a long history. The Red Cross suggested one in 1895, as did the League of Nations in 1937.[112] Further, many countries, including Canada,[113] permit domestic prosecutions of war crimes and crimes against humanity. These tribunals — domestic and international — will probably have an increasing effect on military conduct.

In Chapter 7 we consider civil control of the military, integration, and various forms of oversight, noting that Canada does not have a military ombudsman or a general ombudsman with jurisdiction over the military. Nor does it have an Inspector General for the military, as in the United States. Nor does it have a civilian complaints tribunal, as is applicable to

the RCMP. The Somalia Inquiry will wish to explore carefully whether some such body could be an important additional technique for controlling improper conduct in the military.

An earlier study by the author, along with colleagues Michael Trebilcock and Kent Roach, into methods of regulating traffic safety placed much emphasis on what is termed an epidemiological approach.[114] "In a traditional legal framework," the study stated, "much energy is devoted to isolating and punishing blameworthy behaviour, whereas in the epidemiological framework, attention is devoted to whatever source will be most effective in reducing injuries and their harmful consequences."[115] In the context of the events in Somalia, an epidemiological approach would focus, for example, on ways to control the use of alcohol and drugs, how best to prevent infiltration into military compounds, the use of non-lethal weapons, and how to ensure that persons taken prisoner are immediately given into the custody of the military police. Controlling conduct in such a way is obviously better than prosecuting persons after the fact.

THE RULES GUIDING THE MILITARY

An obviously fundamental ingredient in securing compliance with military rules is to make persons aware of the rules. This section looks at the various rules guiding the military. What are the rules and how are they made known?

The military does reasonably well in making their rules accessible to their members — certainly much better than civilian society.[116] Civilian society can learn much from the military about how to make the law more accessible.

The *National Defence Act* is the basic law governing the military.[117] It is as dense and difficult to read as most other statutes. At a second, more readable, level are the Queen's Regulations and Orders (QR&Os). This four-volume set of rules repeats, where applicable, parts of the *National Defence Act* and contains regulations and orders authorized to be made under the Act.[118] The QR&OS also contain helpful notes fleshing out the sections of the QR&Os.[119] At a further level of detail are Canadian Forces Administrative Orders (CFAOs), issued by the Minister of National Defence or the Chief of the Defence Staff, and "contain administrative policy, procedures and information of continuing effect" which "supplement and amplify the Queen's Regulations and Orders."[120]

There are also Canadian Forces Organizational Orders (CFOOs) dealing with the organization of various units. For example, CFOO 1.327,

issued on 10 February 1993, was the original order dealing with the Canadian Joint Forces in Somalia. Further, there are command orders, standing orders for bases and units, routine orders, and oral and written commands or orders.[121] Thus, there are myriad regulations and orders, and many other official publications are issued under the authority of the Chief of Defence Staff,[122] such as training manuals and military police procedures.[123] Rules of Engagement, which loom large in the Somalia Inquiry, are also issued by the Chief of Defence Staff.

The QR&OS impose duties on military personnel to "become acquainted with, observe and enforce" the *National Defence Act*, QR&OS and "all other regulations, rules, orders and instructions that pertain to the performance" of the officer's or member's duties.[124] The QR&OS also impose duties on commanding officers to give publicity to the various regulations, rules, orders and instructions. QR&O 1.12 states that "a commanding officer shall cause regulations and orders issued in implementation of the *National Defence Act* to be readily available to all members whom they concern." And QR&O 4.26 provides that "a commanding officer shall ensure that all regulations, orders, instructions, correspondence and publications affecting members, whether in the performance of their duties or in the conditions of their service, are given such publicity as will enable those members to study them and become acquainted with the contents."[125]

The *National Defence Act* and the QR&Os contain provisions stating that a member will be deemed to have knowledge of regulations or orders in certain cases. Section 51 of the act provides that "all regulations and all orders and instructions issued to the Canadian Forces shall be held to be sufficiently notified to any person whom they may concern by their publication, in the manner prescribed in regulations...". Further, QR&O 1.21 provides that:

> ...all regulations, orders and instructions issued to the Canadian Forces shall be held to be published and sufficiently notified to any person whom they may concern if:
> (a) they are received at the base, unit or element at which that person is serving; and
> (b) the commanding officer of the base, unit or element takes such measures as may seem practical to ensure that the regulations, orders and instructions are drawn to the attention of and made available to those whom they may concern.

This appears to take away a mistake of law defence that might otherwise be applicable with respect to regulations not published in the *Canada Gazette*,[126] but some commentators argue that there is still scope for such a defence in relation to orders issued by bases and other units.[127]

Both the *National Defence Act* and the regulations make it an offence to disobey a lawful command of a superior officer.[128] Section 83 of the act makes a person who so disobeys liable to imprisonment for life by a court martial. Notes to the regulations accurately state that a member should not obey a "manifestly unlawful order."[129] "A manifestly unlawful command or order," a note states, "is one that would appear to a person of ordinary sense and understanding to be clearly illegal; for example, a command by an officer or non-commissioned member to shoot a member for only having used disrespectful words or a command to shoot an unarmed child." Section 129 of the act makes it an offence prejudicing good order or discipline to contravene the act, or any regulations, orders, instructions, or general or standing orders. A note to the QR&Os states that the section covers duties imposed "by law, practice or custom and of which the accused knew or ought to have known."[130]

How does a breach of a rule of engagement fit into the picture?[131] Rules of engagement are defined by Canada, the United States, and NATO as "directions issued by competent military authority which delineate the circumstances and limitations within which armed force may be applied to achieve military objectives in furtherance of national policy."[132] Rules of engagement (ROE) are a relatively recent concept. They first appeared in relation to air combat by the Americans in the Korean War[133] and were later adopted by the Navy and Army. Canada began its own development of a rules of engagement system in the late 1970s when it adopted the NATO maritime ROE for national use by Canada's Maritime Command. Canada's Air Command adopted its ROE system from NORAD, while the Land Force Command, until recently, employed ROE on an ad hoc basis.[134] The Canadian military issued rules of engagement for Somalia in December 1992[135] — very late in the day for an operation that was about to commence — and in June 1995 issued an official manual specifically on rules of engagement.[136]

What is the status of rules of engagement? The recent *Mathieu* decision of the Court Martial Appeal Court held that the rules of engagement under which Lieutenant-Colonel Carol Mathieu (the commanding officer of the Airborne Regiment in Somalia) operated constituted lawful orders

and not mere guidelines. The Court also held that Mathieu could be prosecuted under section 124 of the *National Defence Act* for "negligently perform[ing] a military duty imposed on that person" and that negligent conduct was to be judged by an objective test.[137] The Court Martial Appeal Court in *Brocklebank* subsequently took the same approach.[138] Canadian law appears to differ from that of the United States and England, where rules of engagement are said to constitute guidelines only and have no legal force of their own.[139]

An article by Major Mark Martins of the U.S. Army Judge Advocate General (JAG) argues persuasively that there is too much reliance on a legislative approach to rules of engagement. It would be preferable, he argues, to indoctrinate soldiers with respect to rules of engagement using a training-based approach.[140] No doubt the Somalia Inquiry will consider this issue carefully, because the 1993 Board of Inquiry found that "during training, the overall criteria of minimum and graduated escalation of force was not well understood in all sub-units."[141]

A CODE OF ETHICS?

A further issue is whether a code of ethics would be helpful. The author has recently argued in favour of a code of conduct for the judiciary.[142] Would such a code be useful for the military? Many writers favour adopting one.[143] Richard Gabriel, for example, states that "one needs a very clear statement of the ethical obligations that one ought to observe if one is to be expected to behave ethically." He sets out a suggested one-page code of ethics, containing provisions such as these: "A soldier will never require his men to endure hardships or suffer dangers to which he is unwilling to expose himself. Every soldier must openly share the burden of risk and sacrifice to which his fellow soldiers are exposed" and "No soldier will punish, allow the punishment of, or in any way harm or discriminate against a subordinate or peer for telling the truth about any matter."[144]

An even shorter, more general code was proposed by Lt. Colonel C.A. Cotton:

A Canadian Military Ethos

Having freely joined Canada's military community, members of the Canadian Forces are expected to serve their nation with:

Pride
in its political, social, cultural and military institutions;

Concern
for the welfare and integrity of all citizens, both in and out of uniform;

Commitment
to place the performance of their military duties and the operational effectiveness of the Canadian Forces above their own concerns;

for selfless acceptance of the unlimited liability of military service is the essence of a free society's defence capability.[145]

To give another example, in a staff college paper in 1992, Major A.G. Hines set out his proposal as follows:

Having enrolled in the Canadian Forces of my own free will, I recognize the unique sense of purpose and commitment I have to all Canadians.

I believe in a strong and free Canada and accept the Canadian Forces exist for the preservation of an acceptable way of life for all Canadians.

I have been charged with and accept the responsibility to maintain the security and sovereignty of Canada through the use of military force if necessary.

I will discharge my duties to the best of my ability, upholding the values of integrity, honesty, loyalty and courage in all undertakings.

I will perform all of my duties with the good of my country, superiors and subordinates, in that order, foremost in my mind.

I will act in accordance with all laws, regulations and orders.

I will uphold the values espoused by the Canadian Constitution and Charter of Rights and Freedoms.

I will conduct myself in a manner to reflect credit on the Canadian Forces and Canada.

I will not become engaged in any activities which would use my position in the Canadian Forces for personal benefit or gratification.

I accept the unlimited liability of military service as an obligation of my membership in the Canadian Forces.[146]

Hines argues that having a code "can bring the topic [of unethical behaviour] to the forefront and get people talking about right and wrong." "It may not help," he rightly concludes, "but it can't hurt!"[147]

CIVIL LIABILITY[148]

There is some potential for controlling undesirable conduct through civil lawsuits. It should be noted that the Canadian military in Somalia paid $15,000 U.S. (said to be the equivalent of 100 camels) to the family of Shidane Arone, the murdered Somali teenager, for a complete release from civil liability.[149] It is not at all clear, as we will see, whether a civil suit brought in Canada by the family of the deceased would have been successful.

It is difficult to say whether the threat of liability has very much effect on the conduct of Canadian military personnel. There are, in fact, very few reported cases involving members of the military. There are a number of reasons for the paucity of cases. One important reason is that under Canadian costs rules, unsuccessful plaintiffs have to pay not only their own costs, but also a significant portion of the defendants' costs.[150] Another factor is that the military person who caused the damage is usually without substantial funds and so would not be able to satisfy a judgement awarded.[151] The lawsuit would therefore be aimed at the government.[152] But under the rules of vicarious liability, an employer is liable only for torts committed in the course of the wrongdoer's employment, which is often not the case.[153] It is likely, however, that a court would hold that the harm done to Shidane Arone was done in the course of the members' employment. Moreover, it is necessary under the law governing Crown liability to be able to hold an individual responsible before the Crown is liable,[154] "a costly and difficult (if not an impossible) task in large organizations."[155] Further, members of the military or their estates cannot sue the Crown if they are receiving compensation from the government "in respect of the death, injury, damage or loss in respect of which the claim is made."[156] Some of these rules could be changed, which would make civil liability easier to achieve, but it is not likely that the government

will wish to go very much further to expose itself to more liability than it has at present. There is also a legitimate fear that civil liability may "overdeter" the conduct of officials and prevent them from vigorously pursuing their duties in the public interest.[157] One change that should be considered, however, is to amend the *Crown Liability and Proceedings Act* to make the Crown liable even if a specific individual may not be liable, where it is shown that one or more employees were in fact responsible for the damage, even if the person responsible cannot be pinpointed.

One section of the *Crown Liability and Proceedings Act* relates specifically to the military. Section 8 provides that nothing in the previous sections "makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training or maintaining the efficiency of, the Canadian Forces." Peter Hogg has commented that this "is a sweeping immunity for military activity, drawing no distinction between war and peace; between combat, training and discipline; or between injured civilians and injured members of the forces."[158] He points out that "the United Kingdom, Australia, New Zealand and the United States have not enacted any such blanket immunity, leaving the courts to adapt the common law to the unique characteristics of military activity."[159] Hogg advocates a less categorical and more liberal approach in which the public interest in the particular military activity would be considered in determining the reasonableness of the impugned conduct.[160] This seems to be an appropriate solution that would prevent the military from being held liable for necessary damage caused by its legitimate operations. At the same time, however, the military would know that it could always be held civilly liable for unreasonable conduct.

Section 8 might not have been a barrier to a civil suit by the Arone family, however, because its language refers to "the defence of Canada", and a humanitarian mission does not seem to fit that language, although it could be argued that the activity was "for the purpose of...maintaining the efficiency of the Canadian Forces." Moreover, a Federal Court trial judge held in a 1981 case that "the immunity conferred by [section 8] only applies inasmuch as the power exercised is exercised in a normal and reasonable manner"[161] — and clearly in the Arone case it was not. The ruling is a sensible one and should be built into the legislation.

A further hurdle is the questionable act of state doctrine which prohibits an action brought by an alien in certain cases for an act committed outside the country. But this is a bar to a civil suit only if the act complained of was "committed on the orders of the Crown or was subsequently

ratified by the Crown." Peter Hogg ventures the opinion that "the decision to command or ratify must have been taken by cabinet or at least by an individual minister."[162] The doctrine would not therefore have been a bar to a suit by the Arone family.

This brief survey suggests that civil liability has some potential for controlling improper conduct in the military but appears not to be as potent a force as other techniques. It is to these techniques that we turn now.

CHAPTER TWO

Rewards

The military uses rewards as an important technique for controlling behaviour. No other major institution in society makes such a display of rewards. Military personnel wear their rewards on their sleeves and chests, and the rewards system permeates all aspects of military life.

Rewards are used widely in other institutions as well. Universities rely extensively on rewards for both faculty and students — marks, ranking, reference letters, employment, tenure, professorial ranks, publications, honours, merit pay, and so on. Because of their importance, misstatement of academic qualifications is taken as seriously as wearing undeserved military medals.[1] Business and industry also use rewards to motivate employees. A behavioural organization psychologist, Hugh Arnold, has observed that although "there is no doubt that punishment can and does have an impact on employee behaviour...there is emerging consensus that the effects of punishment on performance are not as strong as the influences of reward."[2] The problem with punishment, he points out, is that it "has a tendency to create resentment, anger, and hard feelings toward the punishing agent and the organization in general", and it is effective only as long as the potential punishing agent or some independent monitoring device is present to observe behaviour.[3] There is also a growing trend toward the use of incentives in the area of public regulation.[4]

In combat situations, discipline is becoming a less crucial control technique because of the changing nature of warfare. The massing of armies characteristic of military operations up to and including the First World War required great discipline. The Second World War changed the focus. As S.L.A. Marshall wrote shortly after the war, "The philosophy of discipline has adjusted to changing conditions. As more and more impact has gone into the hitting power of weapons, necessitating ever-widening deployments in the forces of battle, the quality of the initiative in the individual has become the most praised of the military virtues."[5] "In combat," Janowitz and Little wrote in 1965, "the maintenance of initiative

has become a requirement of greater importance than the rigid enforcement of discipline... The technology of warfare is so complex that the coordination of a group of specialists cannot be guaranteed simply by authoritarian discipline... Improvisation is the keynote of the individual fighter or combat group." The authors believe that "military authority must shift from reliance on practices based on *domination* to a wider utilization of *manipulation*. Traditional or ascriptive authority relies heavily on domination, while manipulation is more appropriate for authority based on achievement."[6]

HISTORY OF MILITARY REWARDS

In earlier periods, the rewards of battle were the opportunities for plunder, prize money, and ransoming prisoners.[7] Medals and rewards for bravery were not used widely until the nineteenth century. Only one British soldier, for example, received an award for gallantry during the American War of Independence.[8] A medal for those who fought against Napoleon in the Peninsular War was not approved until 1848, and the Victoria Cross was not instituted until 1856, during the Crimean War. Napoleon, on the other hand, had created the highly sought after Legion of Honour in 1802. Apparently Napoleon expressed surprise at the absence of medals on the seasoned British troops aboard the ship taking him into exile and noted: "Such is not the way to excite or cherish military virtues."[9]

During the 1800s the British started to issue campaign, long service, and good conduct medals in greater numbers, in some cases accompanied with a small annuity. The writings of Winston Churchill, as Anthony Kellett points out, indicate his strong desire for medals and being mentioned in dispatches. When his period in India was over in 1898, Churchill tried to join Kitchener's army in the Sudan and told his mother: "It would mean another medal — perhaps two — and I have applied to wear my Cuban decoration so that with a little luck I might return quite ornamented. Now do stir up all your influence."[10]

In earlier times U.S. troops had even less chance than the British of winning medals. Although the Purple Heart was instituted in 1782 as a reward for conspicuous military service, a negligible number were awarded during the War of Independence. The decoration was revived in 1932 and given to all those wounded in the First World War or any other campaign. The Confederate forces did not award medals for bravery but adopted the perhaps equally desirable reward of recording names on a roll of honour and publishing it in newspapers.[11]

During the Vietnam War, military medals were awarded in significant numbers. There was considerable criticism of the number of medals awarded and questions about the merit of those who received them. By early 1971, one and a quarter million medals for bravery had been awarded, compared with one and three-quarter million medals awarded to U.S. soldiers in all of the Second World War.[12]

The writings of soldiers show the importance of medals, although few are as openly covetous as Churchill was. One soldier, for example, wrote that "a ribbon is the only prize in war for the ordinary soldier. It is the outward visible proof to bring home to his people that he has done his job well."[13] Another wrote: "Civilians may think it's a little juvenile to worry about ribbons, but a civilian has a house and a bankroll to show what he's done for the past four years." One knowledgeable person who conducted research on motivation in the military recently stated: "whatever men might say in public about decorations, in private they were eager to discuss them at length, and my notes on decorations eventually came to fill more index-cards than those for any other single subject."[14] Let us turn to examine the various rewards in the Canadian military.

REWARDS AND INCENTIVES IN THE CANADIAN MILITARY

Chapter 18 of the Queen's Regulations and Orders, as well as various Canadian Forces Administrative Orders, contain much material on rewards and incentives. Perhaps the most substantial incentive is promotion to a higher rank, which also brings higher pay and greater status.[15] This affects even such things as the number of rounds fired at the individual's military funeral.[16] Even within the same rank there are several categories; individuals who meet "performance standards" are paid at the "next higher incentive pay category."[17] For a captain, for example, there are 10 incremental categories.[18] Yearly performance evaluation reports sent to National Defence Headquarters affect all aspects of a person's career progression.[19] Reports on officers are done by the immediate superior in the chain of command. The officer being evaluated reads and signs the evaluation. "Outstanding" and "adverse" reports are reviewed at all higher levels of command.[20] No mention of having the opportunity to read a report done on a person below the rank of officer is mentioned in the applicable CFAO,[21] although the practice is to allow members to read a portion of the report. Only NDHQ keeps copies of these evaluation reports. All duplicates and drafts are to be destroyed.[22] Further, recommendations by one's superiors in the chain of command also control to a

great extent whether individuals have access to particular training courses,[23] often an important prerequisite for career advancement. Similarly, the views of superiors affect such things as future postings.

Conduct sheets are kept for all non-commissioned members.[24] Conduct sheets for officers are set up only when an entry is necessary. Conduct sheets contain records of convictions as well as special acts of gallantry and commendation. These follow the individual and are not confined to NDHQ. The CFAO provides an incentive to have certain Service Code convictions (i.e., where the punishment was a fine of $200 or less or a minor punishment) wiped out within a certain period (e.g., 12 months during which no other conviction has been entered). In such a case a new conduct sheet is prepared, containing all the other entries.[25] Further, a commanding officer can in certain cases later change a punishment awarded in a summary proceeding, for example, by remitting in whole or in part the fine paid.[26] Having a good military record also affects career prospects after discharge from the military, although perhaps less so in Canada than in Israel, where potential employers apparently take military records very seriously.[27] Finally, pensions are seriously affected if members are forced to take compulsory release.[28] In short, incentives are found in most aspects of military life.[29]

There are medals for campaigns and deployments, medals for bravery,[30] the Meritorious Service Cross,[31] and the Chief of Defence Staff Commendation.[32] A service medal for service in Somalia has been officially proposed, designed, and minted under the authority of the Chief of Defence Staff, but still awaits the approval of the Minister. Honours and awards have already been given, however, for individual acts of note.[33] The United Nations has issued a number of medals that Canadian personnel are entitled to wear "if they have not been convicted of any serious offence during their period of assignment with the U.N."[34] In addition, military personnel are eligible to be nominated for the Order of Canada.[35] Further, 12 years' good conduct in the military lead to a decoration and the right to use the initials C.D. (Canadian Forces' Decoration) after one's name.[36]

There are also awards for candidates taking leadership, trade, and classification training courses. In addition, some honours are awarded to a unit rather than individual members.[37] This puts peer pressure on all members of the group to perform well.[38] In wartime, having the unit mentioned in dispatches is a much-sought goal.[39]

Even military detention entails specific and elaborate incentives.[40] Detention is in two stages. During the first stage, which cannot be less than

14 days and can be much longer, the inmate is not entitled to "a communication period", "a smoking period", or "visitors, other than official visitors." When an inmate is promoted to the second stage, the person is "entitled to the prescribed privileges" and commences to earn remission of punishment. Second-stage privileges are 30 minutes a day to communicate with other inmates, 30 minutes for smoking, the use of the library, and permission to receive visitors. Each day the inmate may earn up to 8 marks and cannot be promoted to the next stage unless 112 marks (i.e., 14 days at 8 marks a day) have been earned. There is an elaborate system of earning remission during the second stage. Marks earned in the first stage do not count. An inmate can gain a remission of two-fifths of the remaining time by earning the maximum of eight marks a day. Fewer marks mean less remission. Combined with this reward system are the following possible corrective measures for misbehaviour: "close confinement; No. 1 diet; No. 2 diet; loss of privileges; and forfeiture of marks earned for remission." Number 1 diet, for example, when applied for a period of three days or less, consists of 14 ounces of bread a day and unrestricted quantities of water."

CONCLUSION

A 1989 study by the Bureau of Management Consulting on "Career Progression and Rewards System in the Canadian Forces" contained statistical analysis of how military personnel viewed various rewards in the military. Of the 7,500 questionnaires sent out, more than 7,000 completed responses were received. Of all the factors considered important by non-commissioned members, pay ranked highest. Other rewards, such as "more status (e.g., mess privileges, marks of respect)" were rated the lowest of the various categories. In all ranks, 65 per cent rated "more pay" as very important, but only 19 per cent rated "more status" as very important ("higher rank" was in a different category). Not surprisingly, the higher the rank of the member, the more that status was valued. Whereas only 17 per cent of those in the low ranks of non-commissioned members ranked status as very important, 30 per cent of those in the high ranks did so. Responses to another question showed, however, that status in the form of recognition of rank is very important. When asked questions about designation of rank on one's uniform, 71 per cent of those of low rank thought it was very important and 95 per cent of those of high rank thought so. So rewards in the form of rank are very important to most military personnel independent of salary considerations. Surprisingly, only about

25 per cent thought that unit or command affiliation was very important. The item that was least important on the list was years of service in a rank, because this tells the world that one had been passed over for promotion.[41]

More work should be done to assess the value of rewards as a motivating force in the military. As Anthony Kellett states, "little consistent thought appears to have been given to the question of material and psychological rewards, despite the fact that psychological learning principles demonstrate that positive reward is more effective in producing desirable behavior than punishment is in eliminating undesirable behavior." He goes on to argue that lack of recognition "can often have very detrimental and lasting effects" and that "seemingly arbitrary and capricious rewards policies are potentially counterproductive."[42] This is clearly an area where further studies are warranted to find the appropriate balance between the use of sanctions and the use of rewards.

CHAPTER THREE

Reporting Wrongdoing

In contrast to civilian law, military regulations and orders impose a great many duties on military personnel to report wrongdoing. There is no general duty on civilians to report even very serious offences. The old offence of misprision of felony has not survived,[1] and the law imposes a duty to take positive steps to prevent or report harm in only a handful of cases.[2]

In the military, it is important for those higher up the chain of command to be aware of serious misconduct by persons lower in the chain, so they can ensure that problems are dealt with adequately. There is also a desire on the part of the government and senior military officials to be kept abreast of issues so as to be able to respond to events. Thus, there are detailed reporting requirements. There may, however, be reluctance to bring an incident to the attention of those higher up, because of the possibility that a report will reflect poorly on those who allowed the incident to occur. Seymour Hersh makes this point in *Cover-Up*, his analysis of the My Lai disaster:

> Koster [a very senior officer in Vietnam] could, of course, have court-martialed some violators of international law for their crimes. This might have limited the number of such violations, but it also would have signaled to higher headquarters that such infractions of law did occur. Koster's efficacy as a commander would have been questioned and the name of the division sullied by the inevitable press reports. That this difficult situation exists is well known to officers throughout the Army, but the theme rarely emerges in public.[3]

Let us look at the duties to report in the Canadian military. It is military regulations and orders, rather than the *National Defence Act*, that impose the various duties to report. A breach of regulations, orders, or instructions constitutes "an act, conduct, disorder or neglect to the prejudice of good order or discipline", which is an offence under section 129 of the *National Defence Act*. The only duty to report mentioned in the *National*

Defence Act is section 89(a), which makes it an offence for a person to fail to report a known desertion: "being aware of the desertion of a person from any of Her Majesty's Forces, does not without reasonable excuse inform his superior officer forthwith."[4]

The Queen's Regulations and Orders contain a number of reporting provisions. Under QR&O 4.02(e), officers are required to "report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline when the officer cannot deal adequately with the matter." QR&O 5.01(e) relating to non-commissioned members does not include the qualification about not being able to deal adequately with the matter. It states: "A non-commissioned member shall...report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline."[5] QR&O 105.14 provides that reports be sent to National Defence Headquarters "where an officer or non-commissioned member above the rank of sergeant is arrested." These two QR&Os therefore cover a wide area. There are more. QR&O 202.01(2) imposes a duty on an accounting officer of any rank to report immediately "to his commanding officer any shortage or surplus of public funds." Further, QR&O 36.10 states that "Any officer or non-commissioned member who discovers the loss of or damage to materiel shall immediately report the circumstances to the commanding officer." And QR&O 19.56 requires a member of the military to report his or her arrest by civil authorities to the member's commanding officer.

The QR&Os also contain a duty by an officer commanding a command to report unusual incidents. QR&O 4.11 states: "An officer commanding a command shall report immediately to National Defence Headquarters and to the Regional Headquarters concerned any serious or unusual incident that occurs in or affects any base, unit or element in the command, which is not required to be reported by any other regulations or orders, has a military significance, and is likely to be the subject of questions to National Defence Headquarters."

QR&O 4.11 relating to reporting unusual incidents is extended in the Canadian Forces Administrative Orders. CFAO 4-13 "Reporting of Significant Incidents" was issued in April 1995. It clarified the earlier CFAO 4-13, which was entitled "Unusual Incidents", but dealt with both "unusual" and "significant" incidents. The replacement CFAO does not use the word "unusual" except in the first paragraph outlining the purpose of the CFAO: "This order outlines the procedures for reporting unusual occurrences

that happen in, or affect, any base, station, unit or other element of the Canadian Forces (CF), and that may engender public interest or that might otherwise come to the notice of senior departmental officials by means outside the normal military reporting chain." "Significant incident" is defined as "any occurrence, major or minor, including news reports, that will, or may create public interest, or is likely to be the subject of questions to the Minister or other senior departmental officials."[6] The object therefore is to enable the military and the Department of National Defence to be aware of matters that will be the subject of news reports or questions to the DND or in the House of Commons. The CFAO states that significant incidents "must be assessed against the criterion: Is it possible that this incident will arouse the interest of the public or the media and be the subject of questions to the Department of National Defence?" The CFAO goes on to state: "It is inappropriate for ministers, or other senior departmental officials, to learn of Department of National Defence (DND) related events through questions from the news media, or through press reports, public queries, or questions in the House of Commons." The object of the CFAO would seem to be to give the military and the minister time to respond to questions and to exercise some damage control.

The reporting is "to the officer commanding the command, with a copy to the Land Force Area commander and to the local DND Public Affairs (DNDPA) office." The CFAO goes on to provide — no doubt influenced by the Somalia affair — that "a Canadian contingent commander of a United Nations (UN) contingent or other international command shall report incidents of national interest directly to NDHQ/NDOC (National Defence Operations Centre) with a copy to the commander commanding the command who is the office of primary interest (OPI) in addition to meeting UN or international reporting requirements."

There are many other duties set out in the CFAOs to report incidents. CFAO 4-13, "Reporting of Significant Incidents", states specifically that "A report of an incident as 'significant' does not preclude the requirement to report it through other means and other channels in accordance with current regulations and orders." Some of these other reporting requirements are to report any "injury except a minor injury such as a superficial cut or bruise" to a "higher authority no later than seven days after the event."[7] Another CFAO requires that NDHQ be notified when a person above the rank of sergeant is proceeded against under the Code of Service Discipline or is suspended from duty.[8] Air infractions — to give an example — must be reported by any member of the military: "Members of the Canadian Forces (CF) shall report all incidents that appear to

contravene air regulations, flying orders or air traffic control orders."[9] There is also a CFAO dealing with "the action to be taken by her Majesty's Canadian (HMC) Ships in reporting an accident or serious incident"[10] and another dealing with the reporting of "objects that are found or sighted, which by their unusual nature or circumstances may be of intelligence interest to the Canadian Forces (CF) and the Department of National Defence (DND)."[11]

Other CFAOs do not spell out what should be done with respect to certain incidents, but require that the standing orders deal with the matter. So, for example, CFAO 71-4 provides that "commanding officers shall ensure that...a reliable and efficient system of processing ammunition accident, incident, defect and malfunction reports is established."[12] And CFAO 30-2, dealing with fires, provides that "local standing orders shall contain an instruction requiring that the person discovering a fire must report it immediately to the designated authority."[13] Breaches of standing orders are, as we have seen, violations of section 129 of the "good order and discipline" section of the *National Defence Act.*

There were, of course, orders for the Somalia operation, which also contained reporting requirements on top of the requirements already mentioned. "Operation Deliverance Operations Orders 01 of December 12, 1992, for example, provided in paragraph 4C: "(1) Daily SITREPs will be sent to HQ CJFS by HMCS PRESERVER and Cdn AB Regt BG accurate as at 0300Z to arrive NLT 0600Z commencing 15 Dec 92. (2) A consolidated SITREP will be sent to NDHQ/J3 Ops by HQ CJFS accurate as at 0600Z to arrive NLT 1100Z commencing 15 Dec 92."[14]

The military police have special reporting obligations set out in CFAO 22-4 and in volume 4 of Police Procedures.[15] CFAO 22-4 provides that "significant or unusual incidents having criminal, service or security implications and involving the CF or DND will be reported forthwith by the military police via a Military Police Unusual Incident Report (MPUIR)...directly to DG Secur."[16] The submission of such a report, the section goes on to state, "does not absolve commanders of the requirement to submit a Significant Incident Report (SIR) in accordance with CFAO 4-13, Unusual Incidents." A commanding officer also has a duty under CFAO 22-10 to notify the military police "When loss of or damage to public or non-public property is suspected to be the result of a criminal offence."[17] If there are no military police in the locality, they should notify the civilian police and then "report immediately the theft or loss" to the base Security Officer and to the Director of Police Operations NDHQ.[18]

Chapter 48 of volume 4 of Police Procedures deals with the Military Police Unusual Incident Reports.[19] Reports are sent directly to NDHQ/ Police Operations. "The Military Police (MP) Unusual Incident Report (MPUIR)", the document states, "is a means of providing early notification of important security and police related events directly to National Defence Headquarters". The report "shall be used to advise NDHQ/D Police Ops, commanders, security advisers and other staff as appropriate, of unusual incidents, involving DND, which come to the attention of MP. MPUIRs are used each working day morning by DG Secur to brief CIS (Chief of Intelligence and Security) and principal staff at NDHQ on incidents which require the attention of the Chief of the Defence Staff and/or the Deputy Minister."[20] The reports, a later section states, "allow rapid advice to be provided to formation commanders and to NDHQ for the appropriate staff actions. MPUIRs may also assist in the preparation of press releases by DND."[21] So there is the "damage control" aspect of reporting, but there is, of course, also an advice and supervision aspect.

The document gives examples of "unusual incidents" that are to be reported, which include "serious injuries or death when there are criminal or security implications...theft, loss or recovery of all types of weapons...theft or fraudulent use of public property...other criminal or serious service offences involving DND establishments or personnel that may come to the attention of media as newsworthy, or may result in questions to NDHQ by the Ministers, Parliamentarians, commanders or the public."[22]

A new police policy, Bulletin 14.0/94, published in 1994, deals with the reporting requirements of Canadian military police employed as part of a Multi-National Force.[23] As noted in Chapter 5, no doubt the experience in Somalia caused a tightening up of military police procedures. The policy makes it clear that "all incidents involving Canadian Contingent members which would be reportable if they had occurred in Canada, must be reported to D Police Ops" (paragraph 9) and that a copy of all reportable incidents that have been investigated be sent to D Police Ops (paragraph 10). This was probably already a requirement, but the new policy now makes it clear.[24]

The Somalia Inquiry will no doubt carefully explore compliance with these various reporting requirements in relation to events in Somalia. Were reports of the various incidents appropriately sent to NDHQ by the military police and the commanding officers?

The Inquiry will also wish to explore the techniques used by the U.S. inspectors general. In Chapter 7, the U.S. system of internal military

inspectors general and the more recently established statutory civilian Inspector General for the Department of Defense are explored in detail. Both the internal and external statutory inspectors general receive complaints from civilians as well as the military, provide anonymity to persons, protect whistleblowers[25] and have a toll-free hotline. No such formal system exists in Canada. The Canadian regulations and orders do not contemplate anonymous complaints, although undoubtedly many are submitted. The U.S. system would not only help bring matters to the attention of senior military personnel, but it would help ensure that the normal reporting mechanisms are followed because of fear of later exposure through anonymous channels.

Protecting whistleblowers — by providing anonymity and preventing reprisals[26] — may also be an effective deterrent against improper conduct in the first place. In a recent study of corporate behaviour in Canada, whistleblowers were seen as an important technique for controlling undesirable conduct.[27] The authors of one of the chapters in the study rightly state: "one of the most generally held tenets of contemporary criminology is that increasing the likelihood of detection and prosecution tends to be a more effective means of strengthening deterrence than making sanctions more severe." They recommend that "whistleblowing bounties" be considered, as are now available in the United States.[28] The military is, in effect, a giant corporation. The position of the whistleblower in the Canadian military should clearly be enhanced by giving anonymity, where possible, and by preventing reprisals, even if the next step, rewarding whistleblowers, is not taken.

A great variety of reporting provisions for the military are set out in this chapter. As stated at the beginning of the chapter, reporting is required in part to ensure that problems are dealt with adequately and in part to enable the military and the government to keep on top of issues and respond as necessitated by events. Both purposes are important, but one senses that the latter, being able to respond to issues, often tends to be the dominant consideration. Discouraging and dealing appropriately with improper conduct through reporting and protecting whistleblowers are at least as important, and many would say more important. A considerable amount of loyalty to fellow soldiers and to one's unit is desirable for cohesion. The question the Somalia Inquiry will want to answer is whether this protective philosophy has gone further than it should in Canada.

CHAPTER FOUR

Administrative and Informal Sanctions[1]

It is helpful to conceptualize the system of mechanisms, processes, and institutions that function to control improper behaviour within the military as lying along a continuum. The more formal and severe forms of control, considered later, can be seen as lying at the upper range of the continuum. The spectrum continues down through administrative actions to non-legalistic forms of control, those rooted in custom and tradition. These latter forms are much more difficult to bring into clear focus. One of the difficulties arises from the fact that the controls at the lower end of the continuum are seldom set out in statutes, regulations or orders, but rather flow from tacit understandings, long-established custom, and less formal standard operating procedures.

Much of what is done in the military is founded in its organizational culture. What distinguishes the military perhaps from other organizations is two opposing functional requirements: strict maintenance of control and discipline on the one hand, and maximum flexibility for the leadership in the field on the other. The tension between these two imperatives effectively drives the exercise of control down the scale, to invest a great deal of authority that is exercised at the discretion of individual leaders, guided by unwritten codes that form a highly developed organizational culture, and one that has become cloaked in custom and tradition over time.

This, of course, makes it somewhat difficult to draw an analogy between the lower end of the spectrum and the civilian experience, or at least civilian society broadly conceived. It is easier to do so with the system of summary trials and courts martial, as a judicial system designed to enforce compliance with law, regulations, and orders, supported by police and prosecutorial institutions. In civilian society, however, such institutional mechanisms would normally constitute virtually the entire range of state mechanisms to control deviant behaviour. In the military, these mechanisms and institutions form only the upper end of the spectrum,

the lower end of which is also well developed and subtle in its operation. The difficulty of grasping clearly the functioning of the lower end makes it easy to overlook. But this lower end is in fact crucial to the operations of the military, a vital element in the matrix of controls designed to mould and shape individual talents into a cohesive disciplined force. The corollary of harnessing "the good" for collective effort, however, is that lower-end mechanisms also serve to check deviation from the desired norm, and so serve to control misconduct as well. Seen one way, such mechanisms are a positive element in shaping the best possible fighting force; seen another way, the operation of lower-level controls is very important in maintaining order and discipline within the military.

It is not possible here to provide an in-depth examination of this more ephemeral aspect of the military sub-culture. However, two features of the lower end of the scale — or perhaps more precisely, aspects that fall outside the formal disciplinary system of control mechanisms — should be highlighted. The first is the nature of administrative sanctions, as contrasted with disciplinary action under the Code of Service Discipline. Administrative action, as will become clear, can well be viewed as extending into the upper extremes of the spectrum, with release from the service being part of the array of possible sanctions. Administrative action is also quite clearly authorized in regulations and orders and so is not part of our concept of the informal sanctions imbedded in organizational culture. The second feature is the informal or non-legally authorized application of disciplinary action within the military.

ADMINISTRATIVE ACTION

Two avenues can be pursued in applying sanctions or attempting to apply negative controls against individuals in the military: the administrative system and the disciplinary system. A commanding officer has a choice of taking administrative action, disciplinary action, or both. CFAO 19-21 on drug control programs, for example, provides that a member is "liable to administrative action or disciplinary action, or both."[2]

The aims of the two systems are different. It is often said that the administrative system is remedial in nature and that it constitutes action taken to correct or improve a member's performance rather than punish bad conduct. Nonetheless, as the following illustrates, administrative action can have a very negative impact on a member's career and is certainly a mechanism for shaping behaviour. The system that encompasses

the summary trial process, up to and including the court martial process, is strictly part of the disciplinary system, and the punishments listed in QR&O 104.02 as being punishments that can be applied under that system are purely disciplinary sanctions. A decision to pursue the avenue of disciplinary sanctions involving a summary trial or court martial thus involves a presumption of innocence as well as certain evidentiary, procedural fairness, and levels-of-proof considerations. The other avenue, avoiding many of these considerations, is to apply administrative sanctions or, as it is often called, "take career action" as a means of controlling undesirable behaviour.[3]

Such action typically moves through several increasingly serious stages, ending with release if the undesirable behaviour persists. The process is similar for officers and non-commissioned members, though the specifics differ. The procedure for non-commissioned members is as follows:

(i) Verbal Warning
(ii) Recorded Warning[4]
(iii) Counselling & Probation
(iv) Suspension from Duty[5]
(v) Compulsory Release.[6]

The verbal warning stage can be omitted or merged with the recorded warning, but the recorded warning is usually considered a necessary precondition to moving on to Counselling and Probation.[7] The Recorded Warning does not have any effect on promotion, training, posting or pay, though it stays permanently on the member's file. By contrast, Counselling and Probation, which is considered "the final attempt to salvage a member's career",[8] does affect eligibility for training selection and promotion, as well as eligibility for incentive pay.[9] Counselling and Probation effectively places the member on probation for a six-month period, during which he can be released at any time, under QR&O 15.01, "unless there is notable and continuous improvement and the shortcomings are corrected."[10]

The process for officers is similar. The interesting difference is that rather than a Recorded Warning, the lower-level mechanism is a "reproof". A reproof can also be given to a non-commissioned member of warrant officer rank or above. The reproof appears to be something of a hybrid mechanism, in that it is promulgated in the disciplinary volume of QR&Os and has a more disciplinary character than the Recorded Warning; yet the

QR&O states clearly that a reproof "is not a punishment and shall not be referred to as such."[11] The reproof is effective for a 12-month period, after which the record of reproof is supposed to be destroyed.[12]

Instead of Counselling and Probation, officers are subject to a Report of Shortcomings, which is also "considered as a final attempt to salvage the career of an officer of the Regular Force or Reserve Force."[13] A reproof is not considered a necessary condition precedent to placing an officer on Report of Shortcomings. All that is required by the CFAO is that the commanding officer personally have informed the officer of his shortcomings, counselled him on ways and means to overcome the shortcomings, and stipulated a period in which the officer must improve to avoid being the subject of a Report of Shortcomings.[14] As in the case of Counselling and Probation, the Report of Shortcomings is effective for a period of only six months, though it can be extended for one three-month term, after which a decision is made on the retention or release of the officer. That decision is made at NDHQ. Also, a record of the report remains on the officer's file.[15]

Administrative action is not subject to the burdens of proof or fairly high requirements for procedural fairness that disciplinary action is. This is illustrated in a letter from Brigadier General Dallaire, dated 23 September 1992, that is one of the exhibits before the Somalia Inquiry. The letter is an Official Incident Report involving a junior officer; in it General Dallaire points out that the Judge Advocate General's office had advised that in situations involving the violation of certain orders or regulations, it must be shown that such orders or regulations both existed and had been published in such a way as to have been sufficiently available to the accused before the alleged offence was committed. Specifically, the Judge Advocate General's office had not advised that it would be possible to prove the culpability of the officer in question beyond a reasonable doubt. General Dallaire had therefore concluded that the Incident Report should be placed in the officer's personal file and that further administrative action be taken. In response to the Incident Report, the officer was issued with what was termed a Verbal Warning, but given the manner in which it was recorded, it would have to be classified as something akin to a Recorded Warning — only two steps away from release — for an incident for which it was determined there were insufficient grounds to proceed by way of discipline.[16]

In applying administrative action there is no need to prove culpability or to adduce any evidence in any formal way, so there is no opportunity for the impugned party to respond in any meaningful way to the case

against him or her or to present a counter-argument. Yet the results of such action can later be adduced as evidence of culpability in a disciplinary hearing. An instance of this is the court martial of Major Seward in the Somalia affair. Major Seward had received a reproof for three specific perceived shortcomings in his leadership of 2 Commando in the field in Somalia in January 1993. The court challenged both the reproof's legal existence (because it was more than 12 months old) and its admissibility under the rules of evidence regarding character evidence. At the end of the *voire dire*, having heard testimony undermining the relevance of the reproof, the prosecution abandoned the attempt to use it as evidence. Nevertheless, the prosecution had clearly sought to rely on an administrative action — which required no proof and attracted no evidentiary burden or presumption of innocence when it was executed — as evidence to support an inference of wrongdoing in a disciplinary proceeding.[17]

To be fair, the use of administrative action as a substitute for disciplinary action is discouraged, at least on paper. For example, the CFAO on Report of Shortcomings states that "A Report shall not be considered a substitute for disciplinary action. A CO shall consider taking action under the Code of Service Discipline with respect to shortcomings attributable to misconduct which may, by their seriousness or repetition, result in a Report of Shortcomings."[18] However, to take another example, the CFAO on Personal Relationships states that, with respect to conduct between service 'couples' in violation of this CFAO, "Disciplinary action is to be considered when the conduct is so unacceptable that disciplinary action is more appropriate than administrative action, *or when administrative action has failed to correct the inappropriate conduct.*"[19] This would seem to suggest that the application of administrative action has a lower threshold, despite the fact that it has potentially more extreme career ramifications. Further, taken in conjunction with the incidents described above, it is possible to infer that administrative action may be deemed more "appropriate" when the circumstances simply make it difficult to apply the disciplinary process.

In terms of procedural fairness requirements in accordance with principles of administrative law, the mechanisms include a process for giving the subject 'notice' of the action taken and a theoretical opportunity to respond, albeit in a very limited way.[20] Also, the Redress of Grievance process provides for any member to make formal submissions in response to perceived unfair treatment of either a disciplinary or an administrative nature.[21] There is apparently a very strong perception within the system, however, that availing oneself of the Redress of Grievance process is likely

to attract reactions unfavourable to career progression and be counter-productive in the long term. It is therefore a process that is resorted to only in the most egregious or serious cases of perceived injustice.

The ease with which these sanctions or controls can be applied, coupled with their potentially serious impact on the member's or officer's career progression, makes them an important element in the military system of controls.

INFORMAL SANCTIONS

Control is also exercised through less formal means used to maintain discipline and good order. To make clearer just what is meant by "informal" or "non-legally authorized", we start with a look at the regulations. QR&O 104.02 details the "Scale of Punishments", in accordance with the *National Defence Act*:

> The following punishments may be imposed in respect of service offences:
> (a) death,
> (b) imprisonment for two years or more,
> (c) dismissal with disgrace from Her Majesty's service,
> (d) imprisonment for less than two years,
> (e) dismissal from Her Majesty's service,
> (f) detention,
> (g) reduction in rank,
> (h) forfeiture of seniority,
> (i) severe reprimand,
> (j) reprimand,
> (k) fine, and
> (l) minor punishments,
> and each of the punishments set out in paragraphs (b) to (l) shall be deemed to be a punishment less than every punishment preceding it.[22]

With respect to "minor punishments", the QR&OS go on to amplify section 146 of the *National Defence Act* as follows:

> the following minor punishments may be imposed in respect of service offences:
> (a) confinement to ship or barracks;

(b) extra work and drill;
(c) stoppage of leave;
(d) extra work and drill not exceeding two hours a day; and
(e) caution. (article 104.13(2))

In a note to the article, the QR&Os continue with "the punishments prescribed in paragraph (2) *may only be imposed at summary trials* held under Chapter 108 (Summary Trials by Delegated Officers and Commanding Officers)" (emphasis added). This would seem to imply that the lower end of the spectrum of disciplinary sanctions are these "minor punishments", which can be imposed only as a result of a summary trial conviction. Yet it appears that anyone who has served any time in the military is fully aware that there are circumstances under which almost the entire array of the minor punishments listed here can be and are applied in normal daily operations.[23] They are imposed utterly independent of any summary trial process; indeed, they can be imposed in a manner that appears, to the outside observer, divorced from any process at all. If these minor punishments are to continue — and no doubt they will — there is much to be said in favour of recognizing and regularizing the practice in the QR&Os.

It is the imposition of "minor punishments" without benefit of summary trial that is referred to here as "informal". And it is in this apparent contradiction or inconsistency between rules and regulations and practice that we find the notion of tacitly understood rules and operating procedures, of unwritten codes and collective understandings of how things are done. In short, it is the operation of an organizational culture. This is not unlike the informal operating procedures and organizational culture of any large organization.

Before examining the concept in more abstract terms, we should first explore the actual operation and range of such authority and how it is understood by members of the military. When long-serving officers were asked what authority they had to impose informal sanctions, they were somewhat nonplussed — unable to point to official authority empowering them to impose sanctions — but clearly quite confident of the legitimacy of their exercise of such authority. The application of these sanctions is not grounded in any formal authority, but nor are they meted out as arbitrarily as might first appear. The authority rests on a tacit understanding that permeates the organization: a cultural or corporate perception of authority legitimately vested in both rank and position. Furthermore, the manner in which this authority is to be exercised is understood quite clearly,

and there are also well understood limitations and boundaries to both the range and application of such authority.

An example may make this clearer. On a ship (as one example of an operational unit), senior officers, particularly the executive officer and the combat officer (and of course the commanding officer through the executive officer) feel quite free to impose such sanctions as additional duty, denial of leave, or withdrawal of wardroom privileges on junior officers. The authority to impose such punishment is tacitly accepted (although there must still be a reasonable relationship between the seriousness of the transgression and the sanction). However, officers certainly do not act in such an "arbitrary" fashion with regard to enlisted men, and greater consideration is given to maintaining the forms of "due process". This is done, for instance, by exercising authority through the chain of command, possibly even giving a non-commissioned member's direct superior discretion to determine what sanction to apply and how best to apply it. Here too there is an informal system — no less complex for being informal — for moulding behaviour.

There are also mechanisms to check perceived abuses of this authority and prevent the crossing of the understood boundaries for its exercise. The formal routes include the Redress of Grievance procedure, but informal checks and balances are also essential features for smooth operation of the organizational culture, serving to legitimize and reinforce informally exercised authority and thus enhance the effectiveness of this form of behaviour control. An example will help to clarify how these mechanisms function.

Returning to the example of the ship, suppose that a junior officer, in his capacity as divisional officer, begins to impose punishments in a way that is seen as arbitrary or heavyhanded. This perception would begin to circulate informally, eventually reaching other officers. They would likely exercise some influence to bring the 'offender' back into line. If the conduct persisted, however, discontent would increase. Acting perhaps on a personal complaint (or simply responding to general perceptions), the coxswain (the senior non-commissioned officer aboard ship) would likely approach the executive officer. The 'rogue' officer would then find his behaviour the subject of possible administrative action by the executive officer. In this manner, the officer's conduct would either be brought back in line with tacit and formal norms of behaviour, or he would become the subject of formal sanctions.[24]

This complex system of checks and balances, often functioning through informal and semi-formal communication networks, extends beyond the

operational unit. The coxswain has the ear of the command chief (the highest non-commissioned officer in the Navy) at Maritime Command Headquarters and so can advise the admiral informally of problems in the exercise of a commanding officer's authority. Such links outside the formal chain of command are not only recognized but are accepted as essential (again, within tacitly understood limits) and are therefore fostered and encouraged.[25]

Finally, the boundaries and limits on the exercise of informal authority — the character of the organizational culture — can vary with circumstances and from one operational unit to another. In training situations, for example, sanctions might range from push-ups to denial of leave or withdrawal of mess privileges, and punishments might even extend to sanctions that would be considered unique, if not bizarre, with little or no serious questioning of the authority to impose them. In an operational unit such actions would be less apparent. At NDHQ, attempts to exercise informal authority in this way would be seen as utterly inappropriate, and the imposition of sanctions would not likely escape challenge on the spot by the recipient. This point is important in the context of the sub-cultures of isolated units, which can become infused with norms and attitudes that begin to deviate from the broader culture of the Canadian Forces as a whole.

The tendency to function on the basis of the informal dictates of organizational culture is no different in the military than in large civilian organizations. The difference is one of degree, and the reason for that lies in the inherent tension referred to earlier: the tension that arises from the traditional need for strict discipline and the exercise of authoritarian leadership on the one hand, and the need to maintain maximum flexibility for leaders in the operational theatre on the other. The need for flexibility in battle, and the inability to foresee and regulate for all likely scenarios, creates pressure to allow a considerable degree of discretion in the exercise of leadership and leads to reliance on informal standard operating procedures. Yet the extreme conditions for which members of the military must be trained, the precision demanded in operations, and the dire consequences of failure, not to mention the aggressive temperament required of the organization — all speak to the need for a well developed and somewhat rigid system of control, implemented unsparingly and rigorously enforced. Means of balancing these conflicting needs is therefore needed — and it is reliance on the informal exercise of authority and implementation of disciplinary controls in accordance with tacitly understood organizational norms rather than rigidly defined rules and regulations that provide this balance.

This equilibrium is often unstable, however. This is where differences in organizational culture between units become important. Sometimes organizational culture is corrupted or distorted in such a way as to destroy the equilibrium. This is particularly so in small, isolated units and units where informal norms have become exaggerated to the point of elevating traditions and customs to sacred status — in short, in so-called elite units. As Lieutenant-Colonel (Ret'd) Charles Cotton recently put it in relation to events in Somalia:

> Members tend to identify themselves with their warrior tribe and to reject the standards expected from the more general military population. Simply put, their cohesive spirit is a threat to the chain of command and wider cohesion... It is with the concept of an elite unit itself, a unit ideal which nourishes and makes possible an 'above-the-law' outlook among its members.[26]

In other words, it is the discretion and latitude to exercise authority informally — so essential for general operations and for maintaining discipline and good order — that paradoxically create the potential for corruption of the system. This must not be confused with *informal leadership*, a very different phenomenon. Informal leadership is the influence wielded by members of an organization in whom little or no formal authority has been vested. This too manifested itself in problematic ways in 2 Commando, but that is not the focus here. Of concern here is the *informal exercise of authority* within the duly authorized chain of command.

CONCLUSION

It has not been possible to convey fully in this chapter the intricate nature or the importance of mechanisms at the lower end of the spectrum of control mechanisms. What should be understood, however, is that although the functioning of lower-end processes is more difficult to grasp or bring into sharp focus, their significance should not be overlooked as a result.

CHAPTER FIVE

Military Police

Military police play a very important role in controlling misconduct in the Canadian military. There are now about 1,300 authorized Security and Military Police (SAMP) positions in the Canadian Forces,[1] out of a total regular force of about 65,000 persons[2] — that is, about one military police position for every 50 members of the military. Some military police are attached to bases, some to units, some are stationed at NDHQ, and some form platoons in each of the brigades that could be deployed as a unit.

Outside the military, the figure is about one police officer per 500 persons.[3] But the figures for military police are not as dramatic as they first appear. A number are involved in policing Canadian embassies around the world, more than a hundred are seconded to the United Nations forces, and about two dozen are on loan to NATO. Moreover, the military police staff the detention barracks and the service prison in Edmonton.[4] Further, a significant proportion of military personnel is made up of younger males who, in the general population, account for a significant proportion of criminal activity. (In addition, spouses, children, and the elderly are not included in the figure of 65,000 military personnel, yet if they live on a base, they are subject to military discipline.)

Military police nevertheless account for about two per cent of military personnel. In the U.S. army, however, they make up three to four per cent of the force.[5] As we will see, the U.S. army military police also play a modest combat role.

HISTORY OF THE MILITARY POLICE

Military police have been part of the military for many centuries, from ancient Rome through the Crusades to the present. Military leaders have found military police a valuable component of military campaigns. George

Washington appointed a Provost Marshall in 1776, and Congress established a Provost Corps in 1778.[6] Napoleon is quoted as saying, "Two or three hundred cavalrymen more or less, do not mean much. Two hundred more policemen ensures serenity in the army and good order."[7]

The *International Military and Defense Encyclopedia* states that "military police originated from the need to ensure that stragglers on the battlefield were put under military control and returned to the battle and that prisoners were taken into custody." The military police also help control the movement of traffic in a battlefield. This function was very important in both world wars and, almost half a century later, in the Gulf War:

> Complex movements, such as the flanking manoeuver of U.S. and coalition forces for Operation Desert Storm in February 1991, require close coordination of military convoys to ensure that units arrive on time where they are needed. The movement plan is based on route reconnaissance performed by the MP units.[8]

In recent overseas operations, controlling the flow of refugees has been another important military police task.[9]

There is apparently no record of military police in Canada until late in the First World War.[10] In April 1918 the Canadian Corps of Military Police was created by order in council, and in November of that year the first Provost Marshall was appointed. Further research would no doubt show that in earlier periods the military police role was filled by others. The Corps of Military Police ceased to exist in early 1920, and until 1939 there were only garrison-level police within the Canadian military. With the onset of the Second World War, a new Canadian Provost Corps was formed, whose first company consisted almost entirely of RCMP volunteers (113 of 115 were RCMP personnel). Traffic was a principal concern. One writer states: "The task of the provost section was to ensure, as far as possible, that designated routes and timings were followed, congestion avoided and accidents prevented."[11] In 1942 they also assumed responsibility from the RCMP for apprehending absentees and deserters.

By 1944 8,000 members of the Canadian Provost Corps were serving overseas and another 3,500 in Canada. There were also large numbers of police for the navy and airforce. The latter had about 5,000 military police by the end of the war, concerned mainly with protecting the security of air bases. The numbers naturally declined after the war but grew again with the Cold War and Canada's involvement with NATO, Korea, and West Germany.

The three services continued to have their own military police and intelligence services. In August 1964, however, the first step toward unification of police and intelligence services was made by integrating the intelligence functions of all three services into the Director General of Intelligence under the Vice Chairman of Defence Staff.[12] This followed the report of the Royal Commission on Government Organization (the Glassco commission) in early 1963 and Paul Hellyer's White Paper on Defence, tabled in March 1964. At the same time, all police and security functions at Canadian Forces Headquarters in Ottawa were to be organized into a single directorate, later called the Directorate of Security, which assumed responsibility for functions previously performed by the security units of the three services.

Unification of security and intelligence functions occurred in 1968. The many twists and turns leading to unification in 1968 and the *Canadian Forces Reorganization Act*[13] are documented in an article in *On Guard For Thee*, published in 1993 on the 25th anniversary of the founding of the Security Branch. One significant change occurred in 1982 when a separate Intelligence Branch was formed. Counter-intelligence, however, remained with the Security and Military Police.[14]

MILITARY POLICE POWERS

This is not the occasion for a full discussion of the powers and jurisdiction of the military police. Two official military volumes discuss this in detail: volume 4 of the Security Orders for the Department of National Defence and the Canadian Forces, *Military Police Procedures* (1991);[15] and a volume of Police Policy Bulletins. A very much revised version of *Military Police Procedures*[16] appeared in late 1995, incorporating many of the bulletins. The earlier versions are referred to in this study because they were the documents in use at the time Canadian Forces were in Somalia. Moreover, the process of incorporating the bulletins is not yet complete.

In brief, military police are "specially appointed persons" under section 156 of the *National Defence Act*[17] and have the power to arrest,[18] investigate,[19] and use force in certain circumstances.[20] Military police do not, however, have the authority to initiate the laying of a charge (including a charge for a criminal offence) under the Code of Service Discipline. That authority resides in the commanding officer of the unit or his or her delegate (see discussion of MP independence, later in this chapter). Specially

appointed persons are also peace officers[21] within the meaning of section 2 of the *Criminal Code*, which states that a peace officer includes

officers and non-commissioned members of the Canadian Forces who are (i) appointed for the purposes of section 156 of the *National Defence Act*, or (ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers.

The Queen's Regulations and Orders provide that for purposes of subsection (ii) of section 2 of the Code,

it is hereby prescribed that any lawful duties performed as a result of a specific order or established military custom or practice, that are related to any of the following matters are of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of police officers: (a) the maintenance or restoration of law and order; (b) the protection of property; (c) the protection of persons; (d) the arrest or custody of persons; or (e) the apprehension of persons who have escaped from lawful custody or confinement.[22]

As civilian peace officers[23] they can arrest for *Criminal Code* offences under section 495 of the Code and can lay charges in civil courts without the concurrence of the commanding officer.

Military Police Procedures describes the jurisdiction of the military police as follows:

7. MP are the primary police force of jurisdiction and exercise police authority with respect to:
a. persons subject to the Code of Service Discipline, without regard to their rank, status or location; and
b. any other person, including civilian employees, dependants, visitors or trespassers, in regard to an event, incident or offence, real or alleged, which occurs or may occur on or in respect to defence establishments, defence works, defence materiel or authorized Canadian Forces programmes, activities or operations.

8. Prior to exercising police authority off a defence establishment, MP must first satisfy themselves that some other police agency does not have a right of primary jurisdiction. A connection, or nexus, to the Service is an essential prerequisite. In the absence of such a nexus, police authority should only be exercised

by MP with the concurrence of the appropriate civil authority. Police authority is clearly distinct from the implicit duties and responsibilities of any good citizen.

9. Where an offence has been committed in Canada by a person subject to the Code of Service Discipline outside of a defence establishment, the matter should be dealt with by the appropriate civilian authorities, unless a Service connection, or nexus, is apparent. In these latter cases, the matter may be considered a Service offence and dealt with accordingly.

10. NDA, Section 70, provides that certain offences shall not be tried by a Service tribunal in Canada. When an offence which should be dealt with by civil authorities is reported to MP, it shall be the responsibility of the appropriate MP or of a security adviser to ensure that the incident is expeditiously reported to the appropriate crown prosecutor or civil police. Subsequent MP enquiries will normally be conducted parallel to or in concert with any civil police investigation. Such incidents will, in any event, be documented by means of an MP report. Should the civil authority fail to act in such an instance, then an MP enquiry will be completed and recorded to the extent deemed necessary by the appropriate security adviser. Should the circumstances so warrant, local authorities will be advised of the outcome of MP inquiries conducted separately from those of the civil authority. Where appropriate, an information may be sworn. Outside of Canada, MP will investigate and report in accordance with international agreements and practices. (Chapter 2-1, paragraph 7 and following)

This describes the commonly understood working relationship between the police and civil authorities for an offence committed in Canada. If there is a clash between civil and military authorities over who has primary jurisdiction to try a person, they would, of course, attempt to resolve it. This writer's view is that if it cannot be resolved, the civil authorities have primary jurisdiction.[24] If primary jurisdiction is to belong to the military as a matter of law, it should be clearly spelled out in the *National Defence Act*. There is a long history of civil authorities having ultimate power to control the army in England and Canada. The matter might, however, be different for the Navy and for offences committed abroad.[25]

Persons subject to the Code of Service Discipline are set out in section 60 of the *National Defence Act*, which states:

60.(1) The following persons are subject to the Code of Service Discipline:
(a) an officer or non-commissioned member of the regular force;
(b) an officer or non-commissioned member of the special force;

(c) an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is
    (i) undergoing drill or training, whether in uniform or not,
    (ii) in uniform,
    (iii) on duty,...
(f) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;
(g) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person attending an institution established under section 47;
(h) an alleged spy for the enemy;...

(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).

The military use the military justice system whenever possible. As a military police warrant officer told the Somalia Inquiry in October 1995, "If it can be handled within the military, it is handled within the military."[26] This view is set out in various official publications. Police Policy Bulletin 3.0/94 provides that for persons subject to the Code of Service Discipline the military police should use "the military disciplinary system whenever legally possible", whether the conduct occurred on or off DND property. Similarly, paragraph 13 of chapter 2-1 of *Military Police Procedures* states:

13. MP shall not resort to the indiscriminate use of the civilian courts in dealing with persons subject to the Code of Service Discipline, when it would be more appropriate to permit a commanding officer to deal with such persons in a Service proceeding. Notwithstanding the foregoing, prosecutions for drinking and driving offences on a defence establishment in Canada, involving privately owned vehicles, shall be processed through the appropriate civilian courts.

The civilian courts are used for drinking and driving offences because military tribunals do not have the authority to prohibit a convicted person from driving.[27]

MILITARY POLICE IN SOMALIA

One of the issues the Inquiry will want to examine carefully is why only two military police went to Somalia with the Canadian contingent. With a total Canadian force of more than 1,000, two military police amount to less than one-fifth of one per cent of the force. By comparison, military police accounted for about seven or eight per cent of the U.S. force in the Gulf in 1990-91.[28]

One reason that so few Canadian military police went to Somalia was that cabinet had set an upper limit on the number of troops that could be deployed.[29] DG Secur had recommended that a much larger number of military police be sent,[30] but those deciding who was to go had to choose between military police and other important personnel such as soldiers and cooks. Although it would have been possible to go back to cabinet for permission to increase the number, this might have caused the military embarrassment for not getting the number right in the first place. It is clearly desirable for the government to determine the degree of commitment to an operation, but there should perhaps be some flexibility. Legislation could provide, for example, that a percentage — say 10 per cent — above the established number could be permitted with the approval of the Minister of National Defence.[31]

Another reason why so few military police were sent to Somalia is that when the force was first organized, it was to be deployed in the context of a Chapter VI United Nations peacekeeping operation.[32] In such operations, the United Nations usually provides most of the military police, made up of police from other forces. Individual forces may have their own police — the United States always does — but in such cases there is obviously less need for a large number of police. There was also the feeling that U.S. military investigators could be used, an idea that was looked upon with disfavour by DG Secur.[33]

In December 1992 the operation turned from a peacekeeping to a peacemaking operation under Chapter VII of the United Nations Charter.[34] In this type of operation, the individual forces usually bring their own military police (although in Bosnia, also a Chapter VII operation, there were both United Nations and Canadian military police). It seems, then, that cabinet established the troop numbers when Somalia was a Chapter VI operation and did not change them when it became a Chapter VII operation.[35] With the change in the mission, the U.S. military police could not provide effective back-up for Canadian forces, because they were deployed hundreds of miles (and perhaps 10 or 12 hours) away.

It seems reasonably clear from the documents I have seen that DG Secur wanted substantially more military police than the two who were sent. The Provost Marshall for the mission, Major J.M. Wilson, argued throughout December 1992 for more police.[36] "Two MP are not sufficient," he wrote on 18 December 1992, "to provide the required MP support. There should be capability to conduct the following functions concurrently: (1) investigation, (2) service detention, (3) handling detainees, (4) security duties, and (5) police patrol."[37] He had wanted a staff officer assigned to Canadian headquarters in Somalia and, in addition to military police attached directly to the Airborne Regiment, there should have been a second line MP unit, which "could vary from a section of 12 commanded by a Sergeant up to a small platoon, depending upon anticipated employment."[38] Major Wilson anticipated problems with respect to persons detained for criminal acts, which of course is one of the problems that did occur in Somalia.

In May 1993, five more military police personnel went to Somalia, including Major Wilson.[39] In an after-action report in May 1994, Wilson again emphasized the need for first-line military police and a platoon "to properly support an operation the scope of OP DELIVERANCE."[40] It is difficult to disagree with Colonel A.R. Wells, DG Secur, who wrote to the Board of Inquiry:

> If there had been a military police presence in theatre both of the Somalia incidents [March 4th and 16th, 1993] which brought such discredit on the Canadian Forces in general and the Airborne Regiment in particular may have been avoided.[41]

Colonel Wells went on to state that one of the reasons for having military police take the responsibility for prisoners — and this would apply to detainees — is that it "gets the captured combatants away from the front line troops where the heat of emotions is high."[42] These are issues that the Somalia Inquiry will undoubtedly explore in depth.

SPECIAL INVESTIGATION UNIT

One issue that has persisted in the police and security area is the extent to which the security function should be separate from the police function. After unification, the special investigation elements of the forces were combined into the Special Investigation Unit (SIU). One of its principal tasks is to handle security clearances. It also handles security investigations and, until recently, conducted serious criminal and service discipline

investigations. In 1990, however, a report by the Honourable René Marin recommended that the SIU's criminal and service discipline function be removed.[43] Part of the motivation for this separation was the same as the one that had influenced the separation of the security service (now CSIS, the Canadian Security Intelligence Service) from the RCMP, following the McDonald Royal Commission.[44] Marin referred to the "very different investigative skills" required for security and criminal investigations.[45]

As a result of Marin's report, security investigations and criminal investigations were separated. The SIU, which had consisted of about 200 persons spread out in various detachments, continued. Marin did not recommend that a specialized criminal investigation unit be set up. "It would be preferable," he wrote, "to explore ways of ensuring that MP detachments, and their Commanders, find ways of sharing resources and co-operating in cross-jurisdictional investigations."[46]

The co-operative approach did not work out, however. In his 1994 follow-up report, Marin stated: "I now understand that experience has shown that resource sharing between Commands has not worked well and, as a consequence, a National Investigation Section (NIS) has been established within the Directorate of Police Operations."[47] He was not impressed with this solution, however, stating that he remained "somewhat sceptical of the wisdom of placing a police operational unit under the direct command and control of a headquarters policy unit."[48] Marin had also wanted the link between the military police and the SIU to be broken in another respect, stating that "selection criteria for SIU duties should be broadened to facilitate entry from other occupations within the CF."[49] But the link has remained, and personnel move back and forth between the police and the SIU.[50]

The National Investigation Service was apparently set up shortly after the Somalia events in March 1993, when police personnel from headquarters were sent to investigate the situation. It was clear that a criminal investigation unit was needed, and seven persons were subsequently transferred into the new NIS. The NIS has not as yet been referred to officially in a CFAO; rather, its existence is recognized by a memorandum of understanding. A recent document prepared by the military police states that the role of the NIS is to "conduct nationally mandated criminal investigation beyond the scope of base/command resources or those of an extremely sensitive nature."[51]

The situation still seems to be in flux. The SIU is still called the Special Investigation Unit, even though Marin had recommended that it be renamed the Security Investigation Unit.[52] Moreover, the CFAO dealing with

the SIU has not been changed since the 1990 Marin Report, a fact he comments on in his 1994 report.[53] Further, there seems to be a strong desire by the military to link security and military police by adopting the acronym SAMP — Security and Military Police — when they discuss their operations. The term SAMP is now used in *Police Policy Bulletins*[54] and in current writings.[55]

I am not in a good position to analyze what is happening behind the scenes. I suspect that most personnel in DG Secur do not agree with Marin's 1990 report. I personally find it unpersuasive. Separating the security service from policing by setting up CSIS made considerable sense on the national scene. In that area, the skills and techniques required by the two services are indeed quite different. CSIS is protecting the security of the country and may well be more interested, for example, in "turning" a "spy" to act as a double agent than in prosecuting the individual. I cannot see the security side of the military engaging in such activities; indeed, I would not want them to do so, but would prefer that CSIS be called in to handle the situation. There seems to me to be a fairly clear link between security and policing in the military, although the emphasis for each aspect may be somewhat different. Arson, theft, sabotage, and mutiny, for example, are both security and criminal matters. A clear separation may not be possible. But what the organizational structure should be I leave to others to work out.

One major difference between SIU personnel and military police is that the latter are part of the chain of command of the base or unit where they serve, and their career prospects are determined within that structure. The SIU, on the other hand, is centrally organized under NDHQ command, with four detachments across the country. There is therefore greater autonomy for its operations. The military police now operate under the chain of command of the base or unit, with the possibility of intervention by the NIS. One of the questions the Somalia Inquiry will want to examine is whether police investigations should have the same independence from the base or unit chain of command as the SIU. We examine this issue in the next section.

MILITARY POLICE INDEPENDENCE

As a result of the 1990 Marin Report, police investigations were removed from the semi-autonomous SIU. In a 1994 follow-up report, however, Marin expressed concern about the independence of military police:

...I remain unconvinced that a serious problem of accountability will not develop in the future. Military Police personnel are, after all, soldiers by trade and police officers by selection. The existence of a rigid military culture which demands, first and foremost, total loyalty to its own beliefs and institutions may not always be compatible with the dynamics of the law in its reflection of public values and attitudes. For example, while the civil police are held accountable to the public they serve, not only by the Courts, but by various external oversight committees, boards and commissions, the Military Police respond primarily to their own internal command structure...

I should add that there is some question in my mind as to the Military Police officer's individuality, or independence of action and ability to exercise the discretionary powers of a peace officer in view of the 'tasking' philosophy prevalent in organizations which place great emphasis on 'chain of command'. The fact that a Commanding Officer, who may have little knowledge of the law or criminal procedures, is in a position to influence the course of a police investigation certainly bears further scrutiny.[56]

There is no question that the military police are part of the chain of command within their units. Various official orders make this clear. The *Military Police Procedures* volume of the Security Orders for the Department of National Defence of the Canadian Forces, for example, states under the heading "Chain of Command":

MP form an integral part of CF organizations and are operationally responsible to their commanders and commanding officers (COs) for the provision of effective police and security services. Specialist advice and technical direction, on these services, is provided by security advisers within their respective organizations.[57]

A recently promulgated Police Policy Bulletin reinforces this position. The military police, the document states, "are subject to orders and instructions issued by or on behalf of Commanders." "Police and investigative functions," the document goes on to state, "must be conducted in such a manner to, within the law, support the Commander's legitimate operational mission." Another section states: "Specially Appointed Persons [i.e., the military police] and Commanders share a common interest of maintaining discipline and reducing the incidence of crime and criminal opportunities. Specially appointed persons must therefore be the agent of their Commander and his community in the attainment of this goal."[58]

There are, however, some significant links to National Defence Headquarters. Chapter 1-1, paragraph 12 of the volume on *Military Police Procedures* states that the military police are "technically responsible" to Headquarters: "MP assigned to bases, stations and CF units are under the command and control of the appropriate commanders or commanding officers (CO). However, when performing a specific policing function related to the enforcement of laws, regulations and orders, they are also technically responsive to NDHQ/DG Secur and D Police Ops."[59] The Director General of Security, according to CFAO 22-4, paragraph 5, "is the Department's senior security and police advisor, and is responsible for the technical direction, coordination and supervision of all security and police matters in the CF and DND." DG Secur in turn is responsible to the Deputy Chief of Defence Staff.

It is not clear to me when National Defence Headquarters should be called in. Perhaps it is simply when the military police on a base consider they are in over their heads or when National Defence Headquarters indicates they would like to be involved. The senior military police personnel in Somalia, for example, called in NDHQ as a first step. As stated earlier, there were only two Canadian military police in Somalia. The evidence of Sergeant Robert Martin during the court martial of Private Kyle Brown in relation to the death of Shidane Arone on 16 March 1993 illustrates the involvement with Headquarters:

Q. Sergeant Martin, good afternoon. Could you please identify yourself for the court by the use of your full name, your rank, service number, and would you spell your last name, please?
A. Sir, I am R59 092 863 Sergeant Martin, M-A-R-T-I-N, given names Robert, Alan, I'm an MP 811. I'm currently employed at the Canadian Forces School of Intelligence and Security in Borden.
Q. And that would indicate that you are a military policeman by trade, Sergeant Martin?
A. Yes, sir.
Q. How many years have you been in the Canadian Forces?
A. I'll have 20 years in May, sir.
Q. What is your present position at Canadian Forces School of Intelligence and Security?
A. I'm the Platoon 2IC for the basic training platoon.
Q. Could you please indicate to the court to what unit you were posted in March of 1993?
A. In March '93, I was with the Canadian Airborne Regiment on duty in Somalia.

Q. And with the Airborne Regiment, what was the position that you held?
A. I was the Regimental MP Sergeant.
Q. Sergeant Martin, it's my understanding that you became involved in an investigation related to the death of a Somali prisoner on or about the 18th of March 1993, is that correct?
A. Yes, sir, it's correct.
Q. How did you become involved in that investigation?
A. On the 18th of March '93, I returned from two weeks leave in Nairobi, Kenya. On arrival back into the country of Somalia, I was advised by my 2IC that there had been an incident on the evening of the 16th, the morning of the 17th, in which a person, a local Somali had died under unusual circumstances while in custody of 2 Commando.
Q. What did you do as a result of that information being conveyed to you?
A. After initially talking with my 2IC, I went and I had a conversation with the Deputy Commanding Officer, Major MacKay, and he gave me information to the fact that a serious incident did occur, a Somali did die, and they were, the Regiment itself, had begun an investigation into the matter itself.
Q. And what did you do as a result of that information?
A. For the rest of the night, I went back. I discussed things over with my 2IC to find out exactly what we should do as military police, and...
Q. What did you decide?
A. We decided that there should be a military police investigation conducted immediately into the circumstances surrounding the incident.
Q. What did you do to effect that?
A. The next morning, the morning of the 19th, I went and talked again to Major MacKay. I told him of my decision I had made, and I requested to him that he ceases any investigation that the Regiment was doing itself as I was going to assume responsibility for a military police investigation into the matter.
Q. And what were your steps of investigation. How did you commence?
A. Well, my first step was to request through my Headquarters a special investigation team from Ottawa to come over and take over the investigation from me, because I have limited experience in this type of investigation. I felt that much more was required in order to achieve the results.[60]

Various official orders attempt to tie the military police into National Defence Headquarters. CFAO 22-4 provides in paragraph 5 that "The Director General Security (DG Secur) is the Department's senior security and police advisor, and is responsible for the technical direction, coordination and supervision of all security and police matters in the CF and DND." The same CFAO also provides that "significant or unusual incidents"

be reported to headquarters. Paragraph 14 states: "Significant or unusual incidents having criminal, service or security implications and involving the CF or DND will be reported forthwith by the military police via a Military Police Unusual Incident Report (MPUIR)...directly to DG Secur." The submission of such a report "does not absolve commanders of the requirement to submit a Significant Incident Report (SIR) in accordance with CFAO 4-13, Unusual Incidents."[61]

A new police policy, published in 1994, deals with the reporting requirements of Canadian military police deployed as part of a multi-national force. No doubt the experience in Somalia caused a tightening up of military police procedures. Police Policy Bulletin 14.0/94 now provides (paragraph 6) that "the senior Canadian Military Police member appointed as a SAMP Advisor of a Canadian Contingent deployed overseas shall be at least a Warrant Officer notwithstanding the size of the Canadian Contingent." If the policy had been in place in 1993 a sergeant would not have been the most senior Canadian military police person in Somalia. The SAMP Advisor is to "ensure that all investigations involving members of the Canadian Contingent are conducted in accordance with DND Police Standards and Policies." (paragraph 8) The policy makes it clear that "all incidents involving Canadian Contingent members which would be reportable if they had occurred in Canada, must be reported to D Police Ops" (paragraph 9) and that a copy of all reportable incidents that have been investigated be sent to D Police Ops (paragraph 10). This was probably already the requirement,[62] but the new policy now makes it very clear.

Another section encourages widespread communication outside the chain of command, by providing: "To facilitate the resolution of matters related to police and security inquiries, lateral and vertical channels of communication are authorized between military police at all levels.[63] In addition, Military Police Investigation Reports of more than "local significance" are sent to NDHQ.[64]

Another important control technique to prevent the chain of command improperly influencing military police decisions is to require Headquarters approval to stop an investigation. Paragraph 20 of CFAO 22-4 states that military police "shall consult NDHQ/Director Police Operations (D Police Ops), through the appropriate chain of command, PRIOR TO discontinuing or cancelling military police investigations."[65]

A further section is relevant. Police Policy Bulletin 3.2/95 provides that a military police person must notify the senior local military police person if "aware of an attempt, by any person, to influence illicitly the

investigation of a service or criminal offence" (paragraph 25). Further, paragraph 27 states that "if the allegation of illicit influence involves a Superior Specially Appointed Person, the member shall submit their complaint to the next senior Specially Appointed Person in the military police technical net/channel." Police Policy Bulletin 3.11/94 (paragraph 14-10) provides that a military police appointment may be suspended for "submission to improper or illicit influences with respect to the performance of their duties." These provisions recognize the danger of influence being exerted by persons within the chain of command, particularly by those higher up the chain.[66] Thus there are important specific linkages and techniques designed to give the police a measure of autonomy from command influence within the unit or the base.

How can the military police be accountable to the commanding officer and yet still be able to act independently? The techniques described above help achieve both objectives. Should further changes be made? Should the military police be entirely outside the chain of command, just as the Judge Advocate General's branch is? This would not seem to be a practical solution because of the great importance of the military police in battle situations — for example, in directing military traffic. There is certainly much to be said in favour of having the military police attached to a unit integrated with the chain of command for purposes of cohesion and internal discipline. But there should be some independent military police unit for serious misconduct. A solution adopted by the U.S. Army is an independent military body, the U.S. Army Criminal Investigation Command, to conduct and control all Army investigations of serious crimes as well as certain other categories of offences. In addition, the body provides criminal investigative support to all U.S. Army elements and conducts sensitive or special investigations as directed by certain senior bodies.[67] The command was apparently set up during the Vietnam War because of black market operations by the military police within the units.[68] Serious crime is defined in another regulation[69] to include all felonies and a limited number of misdemeanours (s. 3-3(3)), except as prescribed by regulation. Another Army regulation provides that "military police/security police will refer all crimes, offences or incidents falling within CID investigative responsibility to the appropriate CID element for investigation... Investigation of other crimes, incidents, or criminal activities will be conducted by military police, unless responsibility is assumed by USACIDC in accordance with established procedures."[70] Routine criminal cases therefore remain within the chain of command. The U.S. Army procedure is one that the Somalia Inquiry may want to examine.

A different approach is taken in England, where in addition to military police for each service[71] there is a unified Ministry of Defence Police force made up of civilian police officers. The force consists of 5,000 police officers, the fifth largest civil police force in Britain. The force has responsibility for crime prevention and detection, physical protection of defence establishments, and the security of Crown property. Offences committed by civilians relating to the military are dealt with by Ministry of Defence police forces. Offences by military personnel are generally dealt with by the service police, although in certain garrison towns ministry police operate like a general police force with respect to civilians and military personnel.[72] Such a civilian force might be considered by the Somalia Inquiry for policing in Canada. The RCMP could be an appropriate body to take on this task.

If the U.S. Army approach is thought to go too far — and I do not believe it does — it might be possible to achieve greater independence by ensuring that performance evaluation and career decisions, at least for the very senior military police, are not made by the regiment or unit chain of command but by NDHQ. Such assessments are now done within a base or unit chain of command, usually by the base administrative officer. Senior military police, in turn, evaluate those who report to them. This would give Headquarters more clout in controlling the military police in the regiments and would remove from the military police the fear that there might be consequences of opposing those higher up the chain of command.

Another change that might be considered is to give the military police the power to charge persons with military offences,[73] without obtaining the permission of the commanding officer or his or her delegate. Military police can now charge persons with offences in civilian courts without such authorization. If they have this power, why not the normally less serious power of charging persons with military offences? National Defence Headquarters should, however, have the power of staying a military charge, just as the attorney general can now enter a *nolle prosequi* or a stay in civilian proceedings.

The military police have the authority to commence investigations. Commanding officers, as we have seen, cannot in theory block the start of an investigation or stop one that has started (see CFAO 22-4, paragraph 20), although they can dismiss a charge "where, after investigation, a commanding officer considers that a charge should not be proceeded with."[74] The authority to commence an investigation in spite of a summary investigation or a board of inquiry should also be made clear.[75] One problem faced by the military police in Somalia was initial resistance to DG Secur's

desire to send a team to Somalia to investigate the 4 March 1993 incident. Although DG Secur could investigate, understandably they required permission from CDs to go to Somalia.[76]

RESTRUCTURING THE SECURITY AND MILITARY POLICE

The security and military police, like other parts of the Canadian Forces, are going through a restructuring. They anticipate a substantial reduction in their numbers. One knowledgeable insider anticipates that numbers may be reduced from the present 1,300 to 1,000.[77] Some fundamental questions are being asked. Can they continue to do all the things they do now? How can they avoid inappropriate command influence? How can they effectively task and control major military police investigations? Are they too top heavy with command and control structures? What training should they receive? What oversight of the military police should there be? Should they rely more on the civilian police? How can they ensure that enough military police are available for combat operations? These are the questions a task force, known as Operation Thunderbird, is exploring.[78] Draft proposals from Operation Thunderbird will likely be available in the fall of 1996.[79]

I do not have sufficient knowledge or experience in military matters to offer strong views on these important issues. The Somalia Inquiry may wish to explore some of these matters. The following observations are based on reading some of the literature and discussing the issues with military personnel and others.

A large number of military police are obviously required for conventional wars. They control battlefield traffic, provide area security, deal with prisoners of war, and maintain law and order among the troops. As we saw at the beginning of this section, the U.S. military has been able to sustain almost double the proportion of military police that Canada has, and the Canadian proportion may well decline further. One difference between the U.S. and Canadian military in relation to military police is that U.S. military police, starting with the Vietnam War, have been given greater tactical battle responsibility.[80] They were involved in jungle patrols, locating and destroying Viet Cong tunnels, and in active strike operations.[81] Like the Canadian military police, the Americans are rethinking the role of the military police in the light of the fact that non-war operations will continue to constitute a major part of military activities.[82] One solution that will likely be explored in both countries is to use the reserves more in such operations.[83] It is arguable that a member of the reserve will

be as effective in routine policing operations as a member of the regular force. Indeed, greater objectivity in policing could be provided by persons for whom the military is not the sole means of livelihood.

There may also be some operations where the military police will serve a mission better than regular combat forces. The United States, for example, deployed military police, rather than combat arms, to Cuba in 1991-92 in support of the Haitian relief operation at Guantanamo Bay. This was done because of their training in riot control and their ability to handle civilians with restraint.[84]

Military police will be understandably reluctant to rely on civilian police for extensive policing of the military within Canada. Civilian police are also pressed for resources and may not willingly take on the task. Moreover, a civilian police force may not be sensitive to the needs of the military. They might not treat a matter (e.g., striking a military officer or theft in the barracks) with sufficient seriousness, or might treat a matter more seriously than is warranted from a military perspective. Still, greater co-operation between the military and civilian police may provide a measure of security for emergency situations and avoid some duplication of resources. And, as we saw earlier, the U.K. special civilian force for patrols within England is worth careful consideration for Canada.

In any event, there could, for example, be even greater co-operation between the military and the RCMP. This is already fairly extensive.[85] The RCMP and the military share a number of activities, generally under the auspices of memoranda of understanding, for example, in drug enforcement, counter-terrorism, and aid to the civil power. The Oka situation in 1990 was a recent example of military aid to the civil power.[86] Co-operation is also found in external missions. The military gave logistical support, for example, to the RCMP mission to Namibia in 1989. (The RCMP went to Namibia to support the United Nations Transition Assistance Group and help monitor the country's elections and move to independence.)[87] Co-operation might also work the other way; the RCMP could accompany military missions such as the one to Somalia. The RCMP are now playing a role in the mission to Haiti, and it will be recalled that the first military police at the start of the Second World War were RCMP officers.

Operation Thunderbird will probably also consider the issue of recruitment. The vast majority of military police join by direct entry, while a minority transfer from other trades and classifications within the military. In 1991, 72 per cent of MPs had joined by direct entry and the remainder by transfer.[88] René Marin suggested that military police not be

recruited directly, so that more mature personnel could be recruited.[89] Commander Paul Jenkins, deputy head of Operation Thunderbird, has written that consideration should be given to at least equalizing the numbers recruited through the two types of entry, "thereby improving maturity at the working level and probably resolving other problems such as the large number of transfers to civil policing."[90] Young recruits appear to be more likely to consider policing an occupation (rather than being attracted to the military as an institution) and are therefore more likely to be lost to civilian forces, where the pay is better.[91] Recent documents suggest that transfers now require higher educational qualifications than direct entry to the military. A high school diploma is mandatory, and post-secondary certificates, diplomas or degrees are preferred.[92] This is in line with civilian policing standards across the country.

CONCLUSION

The military police provide an obviously important means of controlling improper conduct in the military in addition to their importance in battlefield operations and in security. It would probably be unwise to reduce their numbers significantly. Ways should be found to increase numbers for specific operations by using reserves or civilian police such as the RCMP in addition to the regular military police. Certainly, a future Somalia-type operation should not be forced to operate in the absence of sufficient numbers of military police. A larger number of military police than were sent to Somalia have recently been sent to Bosnia as part of the 1,000-person contribution to the NATO force.[93]

In this chapter we have considered how to achieve greater independence from command influence for the military police. One change suggested is to have the career prospects of military police determined outside the regimental chain of command. Another is to permit the military police to bring charges for military offences without the consent of the commanding officer. Still another is to consider adopting something similar to the U.S. Criminal Investigation Division, a military body that investigates all serious offences but whose command structure is independent of the units to which accused persons belong.

CHAPTER SIX

Military Justice

The military justice system is the core technique for controlling misconduct in the military. When less harsh controls — leadership, loyalty to one's unit or comrades, administrative sanctions, rewards — fail, it is the military justice system that is expected to deter improper conduct on and off the battlefield. In his excellent study, *Combat Motivation*, Anthony Kellett states that the "first and, perhaps, primary purpose of military discipline is to ensure that the soldier does not give way in times of great danger to his natural instinct for self preservation but carries out his orders, even though they may lead to his death." A further purpose, he writes, "is to maintain order within an army so that it may be easily moved and controlled so that it does not abuse its power. If an army is to fulfil its mission on the battlefield, it must be trained in aggression; however, its aggressive tendencies have to be damped down in peacetime, and the medium for this process is discipline." Kellett adds a third purpose: "the assimilation of the recruit and the differentiation of his new environment from his former one." The military requires almost instinctive obedience to lawful military orders. Drill is used to instill instinctive obedience, Kellett writes.[1] The military justice system also serves this purpose.[2]

During the second half of the nineteenth century, discipline was widely used in the British Army. Flogging was used until abolished in 1881. Courts martial involved between 10,000 and 20,000 men each year. During the First World War, discipline was particularly harsh; there were more than 300,000 courts martial, more than 3,000 men were sentenced to death, and almost 350 of them were actually executed. Twenty-five Canadians were shot for disciplinary offences during the war.[3] By contrast, only one American was executed for desertion (11 were executed for murder or rape), and no Australians were executed for desertion. Instead, the Australians' sentences were commuted to imprisonment and their names sent to their home towns. During the Second World War, the desertion rate for British troops was lower than in the First, even though

the death penalty had been removed.[4] A great number of German troops on the Eastern Front were executed for desertion, however. On the Western Front, the cohesiveness of small units and the relationship between officers and men created high morale, but this broke down on the Eastern Front after very heavy losses and, as recent evidence shows, more than 15,000 men were executed by their own officers for desertion and similar offences.[5]

Let us first examine the issue of a separate system of military justice.

SEPARATE SYSTEM

In the 1992 case *Généreux*, the Supreme Court of Canada upheld the concept of a separate military system of criminal justice.[6] Chief Justice Lamer asked: "is a parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns, *by its very nature* inconsistent with s. 11(d) of the Charter [trial by an independent and impartial tribunal]?"[7] Chief Justice Lamer, writing for the Court, answered in the negative — indeed, it was conceded by all parties that there is a need for separate tribunals:

> The purpose of a separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[8]

The Court held, however, that the tribunals as constituted at the time were not "independent".

In an earlier case, *MacKay*, decided in 1980, the Supreme Court had held that military tribunals did not violate the Bill of Rights.[9] Justice Ritchie stated for the Court: "The power to allow prosecutions by military authorities is a necessary aspect of dealing with service offences, which have always been considered part of military law."[10] As Chief Justice Lamer had done in *Généreux*, Justice Ritchie referred to theft from a comrade and striking a superior officer as examples of conduct that would warrant more severe punishment by a military than a civilian tribunal.[11]

Chief Justice Laskin (with whom Justice Estey concurred) dissented, holding that ordinary criminal law offences (both MacKay and Généreux had been convicted of offences against the *Narcotic Control Act*) should be tried by the regular courts:

> In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a Court of justice, separate from the prosecution and free from any suspicion of influence of or dependency on others. There is nothing in such a case, where the person charged is in the armed forces, that calls for any special knowledge or special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved.[12]

A number of other countries — West Germany, Sweden, Austria and Denmark — abolished their court martial systems after the Second World War. "The need for reexamination," one author states, "was most critical in Germany whose World War II court-martial system reflected both Prussian severity and Nazi arbitrariness."[13] Commanders may, however, still give minor penalties for minor offences.

Canada has maintained a separate system, but has brought the standards of military justice applied by military tribunals closer to those of the civilian criminal justice system. In my view, this is a better solution than abolishing military tribunals. As Joseph Bishop has written, "Military discipline cannot be maintained by the civilian criminal process, which is neither swift nor certain... An army without discipline is in fact more dangerous to the civil population (including that of its own country) than to the enemy."[14]

We turn now to a brief look at the present system.

THE PRESENT SYSTEM

Conduct subject to military justice is set out in Part V of the *National Defence Act*. It ranges from serious offences such as behaving "before the enemy in such a manner as to show cowardice", which is subject to the death penalty if the "person acted traitorously", to drunkenness by a member not on duty, which is subject to up to 90 days' detention (sections 74(1), 97). Military offences — referred to in the *National Defence Act* and QR&Os as service offences — include some offences with an exact counterpart in civilian law, such as stealing and receiving property obtained by crime (sections 114-115).

Others offences have no civilian counterpart. Section 129 of the *National Defence Act*, for example, involving conduct to the prejudice of good order and discipline, is widely used. Section 129(1) states: "Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace" and may be sentenced to imprisonment for less than two years. Subsection (2) states that an act or omission constituting a contravention of the *National Defence Act*, "any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or...any general, garrison, unit, station, standing, local or other orders, is an act, conduct, disorder or neglect to the prejudice of good order and discipline."[15] The section has been upheld constitutionally as not being too vague.[16] One knowledgeable military observer recently observed, "its use is seen as the most expedient and efficient way to deal with many cases, and reflects an attitude that serious criminal charges should be reserved for the true criminals who are to be weeded out of the military community while disciplinary charges should be used in the case of misconduct that is correctable."[17]

In addition, section 130 of the *National Defence Act* provides that a breach of the *Criminal Code* or any other act of Parliament, whether the conduct takes place in Canada or abroad, is a service offence and is punishable by the same penalties as prescribed in the *Criminal Code* or other federal statute. Service tribunals cannot, however, try certain offences committed in Canada. Section 70 of the *National Defence Act* states that a service tribunal shall not try a person charged with committing the offence of murder, manslaughter, sexual assault, or abduction of a young person if committed in Canada. Murder charges arising out of incidents in Somalia were possible because the offences were not committed in Canada.

Further, section 132 of the *National Defence Act* makes it an offence to commit an act outside Canada that "would, under the law applicable in the place where the act or omission occurred, be an offence if committed by a person subject to that law." Penalties are to be "in the scale of punishments that [the tribunal] considers appropriate, having regard to the punishment prescribed by the law applicable in the place where the act or omission occurred and the punishment prescribed for the same" conduct in Canada. None of the offences tried by courts martial arising from the incidents in Somalia was the subject of a charge under section 132 of the *National Defence Act* as offences under Somali law. Most charges were for the military offence of negligent performance of a military duty under section 124 of the *National Defence Act*. Some charges were laid under section 130 of the act, however. Private E.K. Brown, for example, was charged, under section 130, with murder and torture in contravention of the *Criminal Code*[18] and was found guilty of manslaughter and torture.

Section 139 of the *National Defence Act* sets out the punishments that can be imposed in respect of service offences: death, imprisonment for two years or more, dismissal with disgrace from Her Majesty's Service, imprisonment for less than two years, dismissal from Her Majesty's Service, detention, reduction in rank, forfeiture of seniority, severe reprimand, reprimand, fine, and minor punishments. The military's brief to the Somalia Inquiry on military justice noted that "instruction has been given to take steps to remove" the punishment of death from the *National Defence Act*.[19] Minor punishments are set out in QR&O 104.13: "(a) confinement to ship or barracks; (b) extra work and drill; (c) stoppage of leave; (d) extra work and drill not exceeding two hours a day; and (e) caution."[20] Any term of imprisonment imposed on an officer is deemed to include dismissal from service, but dismissal is discretionary for non-commissioned members.[21]

Who is subject to military discipline? Section 60 of the *National Defence Act* states that all full-time military personnel are subject to the Code of Service Discipline. The same is true of members of the reserve force in certain limited circumstances, such as when they are in uniform or on duty. Further, the Code covers certain civilians such as a person "who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place." Persons who have left the military are still technically subject to military justice for offences committed while they were in the military. There is, however, a three-year limitation period for all military offences except mutiny, desertion, absence without permission, offences for which the maximum penalty is

death, and certain breaches of the Geneva Convention.[22] With this background, let us look at the various types of military tribunals.

There are two main types of military justice proceedings in Canada: summary proceedings and courts martial. Summary proceedings are by far the most prevalent. There are usually up to 4,000 summary trials each year, but fewer than 100 courts martial.[23] Summary trials therefore account for about 98 per cent of all military trials.

The chain of command is central to the military justice system. It is the commanding officer of the offender's unit who decides how a matter will proceed. Some incidents are so serious or are so much in the public eye that courts martial are convened. As explained below, courts martial can impose greater sentences than summary trials. The summary trial, on the other hand, is generally used more as a means of instilling military values and reintegrating the member into the military culture.[24] "The summary trial", the brief on military justice states, "is meant to be corrective with the goal of socializing members to the habit of discipline, while at the same time fostering morale, esprit de corps, group cohesion, good order, and operational effectiveness and capability."[25] The brief states that the summary trial system "provides speedy, uncomplicated proceedings and is administered by officers holding positions in the chain of command who are not only directly responsible for the maintenance of discipline in the Canadian Forces, but who also must lead in armed conflict."[26]

There are four different forms of courts martial and three types of summary proceedings. The highest form of court martial, the general court martial, consisting of five officers,[27] has jurisdiction to try any military offence against any person who is subject to military discipline.[28] All the courts martial arising out of the Somalia affair were general courts martial. A general court martial can award any punishment,[29] including death.[30] Legal aspects of the proceedings (for example, rulings on evidence and the charge to the members of the tribunal) are handled by a judge advocate,[31] appointed by the chief military trial judge.[32] The accused is entitled to be defended by a military legal officer, provided by the military at public expense, or by his or her own legal counsel[33] at his or her own expense.[34]

The procedure followed at general and other courts martial resembles that in the civilian criminal courts.[35] There is an exhaustive code of rules of evidence[36] but no preliminary inquiry. Instead, the accused is given a synopsis setting out the evidence and witnesses to be called by the prosecution.[37] Guilt or innocence, as well as the appropriate sentence,[38] are decided by majority vote (in the absence of the judge advocate).[39]

A disciplinary court martial, consisting of three officers,[40] is for the most part similar to a general court martial. It cannot, however, award a punishment of imprisonment of two years or more[41] and cannot try officers above the rank of major.[42]

The little-used special general court martial can try (as can a general court martial) civilians subject to military jurisdiction. The trial is conducted by a judge who is a judge of a superior court in Canada or is a barrister or advocate of at least 10 years' standing.[43]

Finally, in a standing court martial,[44] the accused is tried by a military judge alone; as in a disciplinary court martial, the judge cannot sentence an accused to two years or more.[45] Standing courts martial are by far the most commonly used form of courts martial, as the following statistics show:

Year	*Total*	*GCsM*	*SCsM*	*DCsM*	*SGCsM*
1988	95	4	67	10	14
1989	96	2	65	17	12
1990	72	4	35	23	10
1991	72	4	38	19	10
1992	59	6	43	10	0
Total	**394**	**20**	**248**	**79**	**46**[46]

Summary proceedings are of three types: those conducted by the commanding officer, by a superior commander, and by a delegated officer. In brief, a commanding officer can try persons below the rank of warrant officer as well as officer cadets.[47] Warrant officers and officers (below the rank of lieutenant-colonel) can be tried summarily only by an officer referred to as a "superior commander".[48] More senior officers (lieutenant-colonel and above) cannot be tried summarily and must be proceeded against by court martial.[49] Civilians cannot be tried by a summary trial.[50]

A superior commander can issue a reprimand and a fine equal to 60 per cent of the officer's monthly basic pay.[51] A commanding officer has wider powers of punishment. Among other punishments, for example, sergeants down to privates can be sentenced to 90 days' detention, be given a fine equal to 60 per cent of the member's monthly basic pay, and be reduced in rank. In addition, privates can be given 14 days' extra work and drill and 21 days' confinement to ship or barracks.[52] If more than 30 days'

detention is given to a private or any detention to a person above the rank of private, approval of the sentence by a higher authority is required.[53]

The accused tried by a commanding officer or superior commander[54] has the right to elect a court martial in certain circumstances. In the case of trial by a commanding officer, the accused has the right of election when tried for a listed offence or when "the commanding officer concludes that if the accused were found guilty a punishment of detention, reduction in rank or a fine in excess of $200 would be appropriate."[55] The list includes a number of serious military offences, as well as civil offences that can be tried by service tribunals under section 130 of the *National Defence Act*.[56] The accused is then given not less than 24 hours to decide whether to elect to be tried by court martial.[57] The accused is entitled to the assistance of a non-legal assisting officer[58] appointed under the authority of the commanding officer[59] and may, at the discretion of the commanding officer, have legal counsel.[60] The assisting officer explains to the accused the following differences between a summary trial and a court martial: a court martial has greater powers of punishment; the accused has the right to legal counsel at a court martial; the military rules of evidence apply at a court martial; and, unlike a summary trial, there is a right of appeal from a court martial.[61] The commanding officer must, as in a court martial, find that the charge "has been proven beyond a reasonable doubt" before convicting.[62] If the CO finds that the powers of punishment are inadequate, the case can be stopped and sent to court martial.[63]

The third type of summary trial is by a "delegated officer,"[64] that is, an officer to whom a commanding officer has delegated some powers of punishment within the limits prescribed in the *National Defence Act* and the QR&Os. A delegated officer (who must hold the rank of captain or above) can try summarily members below the rank of warrant officer.[65] Punishments that can be imposed are limited to a reprimand, a fine of up to $200, stoppage of leave for 30 days, and, for privates, confinement to ship or barracks for 14 days and extra work and drill not exceeding 2 hours a day for 7 days. The accused is not entitled to elect another method of trial[66] but is entitled to an assisting officer.[67] The delegated officer is precluded from hearing the case if the delegated officer considers his or her "powers of punishment to be inadequate having regard to the gravity of the alleged offence";[68] nor can a delegated officer try an accused for any offence for which an election would have been required if tried by a commanding officer.[69]

U.S. MILITARY JUSTICE

The U.S. military justice system is fairly similar to the Canadian one. Although the terminology differs, there are three types of courts martial.[70] The general court martial, like the Canadian general court martial, can be used to try anyone subject to military discipline and impose a penalty of death. It is composed of at least five members but at the request of the accused can be composed of a military judge alone.[71] A special court martial is like the Canadian disciplinary court martial in that it is composed of at least three members (but like the general court martial the court can consist of a military judge alone at the request of the accused) and has a limited jurisdiction to punish. The U.S. special court martial can impose confinement at hard labour for six months.[72] Finally, the summary court martial is like the Canadian summary trial by a commanding officer. The accused is tried by a commissioned officer, who may be (but need not be) a lawyer, and is not assigned a military lawyer, although he may have a civilian one at his or her own expense. The maximum punishment that can be imposed includes confinement at hard labour for one month and forfeiture of two thirds of one month's pay. Despite the limited power to punish, a summary court martial can theoretically be used to try any offence except one punishable by death.[73]

Another type of summary disciplinary proceedings in the U.S. system is the Article 15 proceeding, referred to as non-judicial punishment, which is conducted by the commanding officer or his or her delegate. The possible punishments vary with the status of the officer trying the case and the accused. A major, for example, can impose correctional custody of 30 days on persons who are not officers, whereas an officer below the rank of major has a limit of 14 days.[74] There are no specific limits on the offences that can be tried under an Article 15 proceeding, but a trial for what the statute refers to as a "serious crime" does not preclude a subsequent court martial, although any sentence imposed will be taken into account in later proceedings.[75] Legal counsel do not take part in Article 15 proceedings, although the accused may consult with a military lawyer to decide whether to elect trial by court martial.[76] There is no judicial appeal from an Article 15 proceeding, but as in Canada there is a review by a judge advocate,[77] and the accused is entitled to make a redress of grievance application to a higher authority in the chain of command.[78]

The U.S. Army has divided Article 15 proceedings into two types: those referred to as "summarized proceedings", where there can be no

imprisonment (though there may be certain restrictions for 14 days), and "formal" proceedings where more severe punishments can be imposed.[79] Other differences between the two procedures include giving an accused in a "formal" proceeding 48 hours to decide whether to elect a court martial and the right to have a spokesperson, whereas only 24 hours is given in the case of summarized proceedings, and there is no right to a spokesperson at trial.[80] As in Canada, the vast majority of proceedings are under Article 15. Major Kenneth Watkin cites statistics showing that in 1989, 83,413 proceedings (more than 95 per cent of all disciplinary proceedings) were held under Article 15; of the 3,985 courts martial, 1,365 were summary courts martial.[81]

A BRIEF HISTORY OF MILITARY JUSTICE

How did we end up with the current system of military justice? Only a very brief summary will be attempted here. Much of the material that follows is drawn from Lieutenant-Colonel R.A. McDonald's very helpful 1985 article, "The Trail of Discipline: The Historical Roots of Canadian Military Law."[82]

Until the *National Defence Act* was enacted in 1950, the Canadian army and air force were governed by British military law. Parliament had enacted the *Naval Service Act* in 1944,[83] which included provisions on naval discipline, but as McDonald observed, "almost all of the provisions relating to discipline were merely the British provisions with a coating of Canadian terminology."[84] Each of the three Canadian services therefore had its own separate system of discipline before 1950, each adopting the British military law of that service.

The British army in Canada in the last century and earlier had, of course, followed British military law, and the Canadian militia, under the *Canadian Militia Act* of 1868, did the same. Like the present reserves, members of the militia were, in general, subject to military discipline while on duty or in uniform.[85] When a Canadian "permanent force"[86] replaced British troops in Canada, it was natural to continue using British military law. During the First World War, Canadian air force personnel flew with the British air force or navy. The British air force had adopted the army system of discipline with certain changes in terminology.[87] The RCAF was established in 1924 (although it was not given statutory status until 1940).[88] Like the Canadian army, it used British military law until the *National Defence Act* of 1950. The Canadian navy, established in 1910,[89] also adopted British naval law.[90]

The British navy — and therefore the Canadian navy — was governed by the British *Naval Discipline Act* of 1866.[91] It punished certain specified acts and "any other Criminal Offence punishable by the Laws of England."[92] A legislative code of discipline for the navy had been enacted much earlier, in 1661.[93] It applied initially to those on board ships but was later extended to crews on shore.[94] The 1661 act provided for courts martial involving five captains when death was a possible punishment, but a ship's captain also had considerable authority over "All other Faults, Misdemeanours and Disorders committed at Sea, not mentioned in this Act."[95]

Unlike the case of the navy, there was always considerable fear of having a standing army in England. In the seventeenth century, the civil war had established that there could be no standing army without the consent of Parliament.[96] The first *Mutiny Act*, passed in 1689,[97] provided for disciplining troops stationed in England; before this, troops could be punished only by the civilian courts. The act was made necessary by the mutiny of troops loyal to the deposed James II rather than to the new King, William of Orange.[98] Re-enacted every year until 1879, the law provided that "Soldiers who shall Mutiny or Stirr up Sedition, or shall desert Their Majesty's Service be brought to a more exemplary and speedy Punishment than the usual Forms of Law will allow."

After 1689, therefore, the ordinary criminal law was supplemented by military law, but only for mutiny, sedition, and desertion.[99] Troops abroad continued to be governed by Articles of War. In Canada, therefore, British troops and, later, the Canadian Militia were governed by a combination of Articles of War, the British *Mutiny Act*, and the British Queen's Regulations and Orders. Over the centuries, the jurisdiction of British courts martial kept expanding to cover all but a small number of very serious offences committed in England.[100]

Canada's *National Defence Act* of 1950 was designed, in part, to unify as much as possible the procedures for disciplining members of all three services.[101] Brigadier W. J. Lawson, then Judge Advocate General of the Canadian Forces, stated in an article in 1951: "The *National Defence Act* is an attempt to amalgamate in one statute all legislation relating to the Canadian Forces and to unify in so far as possible, having regard to differing conditions of service, the fundamental organization, discipline and administration of the three armed services."[102] In addition, it was part of a move, also undertaken in countries like the United States, to improve the system of military justice. As one commentator recently stated with respect to the United States:

Approximately two million courts-martial were convened during World War II — about one for every eight service members. Nearly everyone who served in World War II was exposed to the military justice system. This exposure resulted in a call for reform of the military justice system, which culminated in the enactment of the Uniform Code of Military Justice in 1950.[103]

The original drafts of the *National Defence Act* maintained many of the differences between the services, but the political process produced virtually one code of service discipline,[104] even though administration of the code was still handled by the individual service in which the member was enrolled.

One major change brought about by the 1950 act was to increase the authority of commanding officers to award more serious penalties to persons tried summarily. Before the 1950 act, a commanding officer in the army or air force could sentence a person to only 28 days' imprisonment.[105] A naval commanding officer, by contrast, could sentence a person to imprisonment for three calendar months. The new act adopted the naval approach, allowing the imposition of 90 days' detention by commanding officers in all three services. There was apparently a desire to increase the potential penalties because of the number of courts martial that had been required during the war.[106] The act said nothing, however, about giving the accused the right to elect trial by court martial, even though Britain's *Army Act* gave the member this right when a minor punishment was awarded.[107]

The Canadian act also provided, as the British law did, for a summary trial by a delegated officer, but this was only for punishments of a fine not exceeding $10, a reprimand, or minor punishment.[108] In 1952, the power of the delegated officer was increased to provide for up to 14 days' detention and a severe reprimand.[109] The 1950 Act also provided, for the first time, for a right of appeal by the accused to the civilian Court Martial Appeal Board, as it was then called.[110] "It was then thought," states Janet Walker, "that civilian appellate review was the key to ensuring standards of fairness in military courts commensurate with those of civilian tribunals."[111]

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The *Canadian Charter of Rights and Freedoms* has had a very significant impact on Canadian military justice — for the most part by forcing anticipatory changes by the military.

The 1960 Bill of Rights, by contrast, had virtually no impact on the military. The courts martial system in place at that time was upheld by the Supreme Court of Canada in *MacKay* in 1980 — the only military case involving the Bill of Rights to reach the Supreme Court.[112] Three other cases involving the Bill of Rights were dealt with by the Court Martial Appeal Court,[113] but, as with *MacKay*, none resulted in a change of law or practice.

Military justice is dealt with in only one section of the Charter.[114] Section 11(f), which provides for trial by jury when there is a possibility of imprisonment for five years or more, is preceded by the words "except in the case of an offence under military law tried before a military tribunal." In the recent Court Martial Appeal Court case, *Brown*, it was argued that paragraph 11(f) "must be narrowly construed so as to restrict [the exception] to cases which must, of necessity, be tried by a Court Martial, i.e., cases in which no civilian court in Canada has jurisdiction and the exigencies of military service require that the trial take place outside of Canada."[115] The Court Martial Appeal Court rejected the argument, and the Supreme Court of Canada refused leave to appeal.[116]

It seems that the military had sought a general exemption from the Charter, but this was resisted by the Department of Justice.[117] The Charter applies to military discipline, although not always in the same way as it applies to civilian criminal proceedings.[118] The military set up a Charter Working Group to examine what changes would be required to pass Charter scrutiny.[119]

The Charter Working Group introduced changes in the QR&Os in late 1982 and early 1983[120] and proposed amendments to the *National Defence Act* that were enacted in 1985[121] and came into effect, along with amended QR&Os, in 1986.[122] The 1982-83 amendments to the QR&Os dealt with a number of topics. An accused who was to be tried summarily by a commandingofficer would now have the right to elect a court martial in all cases where the CO was of the opinion that detention, reduction in rank, or a fine in excess of $200 would be appropriate.[123] In the 1950 *National Defence Act*, no such election was mentioned, even though 90 days' detention was permitted. In 1959, however, the act had been amended to confer the right of election when an accused was tried for a military offence that was also a *Criminal Code* offence. Apparently this was done in anticipation of the enactment of the Bill of Rights.[124]

A further change to the QR&Os was to remove the authority of the delegated officer to award detention.[125] In 1952, it will be recalled, the delegated officer had been given the power to award 14 days' detention.[126]

There were other changes to the summary trial procedure, such as providing for an adjournment to permit the accused to prepare a defence.[127] And there were changes in the pre-trial procedures, such as giving the accused a copy of the charge report specifying the alleged offence before trial.[128]

In 1985, a federal omnibus government bill was enacted dealing with potential Charter conflicts in a large number of areas, including the military.[129] The Minister of Justice, John Crosbie, stated in the House:

> It was the decision of our Liberal predecessors, with which I agree, that the statutes should be reviewed based on the assumption that it was preferable to change questionable legislation rather than leave it to individual litigants to assert their rights in court. That involves costs, delay and hardships. So where it is clear that legislation is questionable, we are now changing it so it does not have to be challenged in court.[130]

Changes were made in many areas to bring the military justice process closer to the ordinary criminal process. Amendments to the *National Defence Act* required that a warrant to search be based on reasonable, rather than suspicious grounds.[131] There were new provisions relating to arrest,[132] bail pending trial,[133] and appeal.[134] A section was introduced stating that "All rules and principles from time to time followed in the civil courts that would render any circumstance a justification or excuse for any act or omission or a defence to any charge are applicable in any proceedings under the Code of Service Discipline."[135] Further, a section of the *National Defence Act* permitting differential punishments for women was repealed.[136]

The QR&Os and CFAOs were changed to reflect the changes in the act, and at the same time some additional rights were given to the accused. For example, chapter 108 of the QR&Os relating to summary trials was amended to give the accused "the right to be represented at a summary trial by an assisting officer"[137] as well as the possibility, if the officer conducting the hearing so decided, to be represented by legal counsel.[138] "I am satisfied," wrote General P.D. Manson, Chief of Defence Staff, in 1986 in a Notice of Amendments to the QR&Os, "that the amendments...represent the best balance that could be achieved between the Charter rights of individuals and the need to maintain operational effectiveness of the CF."[139]

Double Jeopardy

Another important change in the 1985 amendments to the *National Defence Act* related to double jeopardy. This was brought about by section 11(h) of the Charter: "Any person charged with an offence has the right...if finally acquitted and punished for the offence, not to be tried or punished for it again." Whereas the previous double jeopardy provisions in the *National Defence Act* applied only to a subsequent trial by a service tribunal,[140] the new section provides that a person who has been found guilty "and has been punished" or found not guilty or who has had the charge dismissed by a service tribunal "may not be tried or tried again in respect of that offence or any other substantially similar offence arising out of the facts that give rise to the offence."[141]

The double jeopardy section is therefore very wide. Service tribunals include summary trials before a commanding officer or delegated officer,[142] and the double jeopardy bar operates after a dismissal by a commanding officer before a trial "where, after investigation, a commanding officer considers that a charge should not be proceeded with."[143] Unlike courts martial, there is no appeal by the prosecutor from a decision in a summary proceeding.[144] The section therefore goes further — too far, in my opinion — than the U.S. army's Article 15, which does not bar a further military proceeding for a "serious crime" (see discussion earlier in the chapter), although in other respects it is in line with the U.S. common law rule, enunciated by the U.S. Supreme Court in 1907 in *Grafton*,[145] that a military trial would bar a later prosecution at least in the federal courts.[146] It is arguable that a similar common law double jeopardy rule applied in Canada, even without the new legislation.[147]

Military personnel in Canada are still subject to civilian law. The *National Defence Act* has always stated that "nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court."[148] There is usually consultation between military and civilian police or prosecutors to determine who should try the accused. Kenneth Watkin writes:

> While theoretically such overlapping has the potential to create a problem, in practice, conflict is avoided by liaison between the civilian and military authorities. In addition, policies are in place that require certain offences, such as impaired driving, to be dealt with by the civilian criminal justice system... Similarly,

jurisdiction is often waived by civilian authorities in order to allow the military to commence disciplinary action.[149]

The interesting question is what happens when military and civil authorities both insist on trying the accused. Who should have primary jurisdiction? Should the race be to the swift? As stated in a recent Australian case, "a competition to be first to exercise jurisdiction would be unseemly, to say the least."[150] If there is a true conflict in the sense that both military and civilian authorities wish to try the accused, the civil authorities should have the power to proceed, whatever the military chooses to do. Civilian courts should have primary jurisdiction, if civilian authorities choose to exercise it, over criminal law offences committed in Canada, although not those committed abroad. A necessary result of asserting that the civilian authority is paramount is to disregard a prior military judgement if, but only if, military jurisdiction was assumed without the express or implied consent of civilian authorities.[151] A civilian tribunal in such a case would, of course, take into account any punishment already imposed. It is possible that civilian courts would construe the new section 66 in this manner and prevent the application of a double jeopardy bar where civilian authorities expressed a desire to try the accused for a criminal offence committed in Canada. In my opinion, the *National Defence Act* should be amended to state this clearly.

Independent Tribunals

As we saw earlier, the Supreme Court of Canada upheld the concept of a separate system of military justice in the 1992 case, *Généreux*. Although the Court allowed Généreux's appeal on the basis that the general court martial that had tried him was not an independent tribunal within the meaning of section 11(d) of the Charter, as interpreted in *Valente*,[152] the Court indicated that steps taken subsequently to make the tribunal more independent had "gone a considerable way towards addressing the concerns"[153] expressed by the Court.

The QR&Os had been changed after the 1990 Court Martial Appeal Court case, *Ingebrigtson*, in which the court held that the single-judge standing court martial was not an independent tribunal. The court stated that the QR&Os in effect at the time did not "expressly insulate presidents of Standing Courts Martial from the incidence of command influence or direction incompatible with their judicial independence."[154] The

court pointed to defects in security of tenure and financial security and went on to say:

> Given the present statutory framework which...could accommodate a truly independent Judge Advocate General, it may be that appropriate amendment of the QR&Os could achieve the measure of judicial independence constitutionally required to preserve a desirable judicial institution.[155]

The military decided to accept the *Ingebrigtson* decision, and the suggested changes to the QR&Os were made by the cabinet and the minister. This was done not only so that standing courts martial could continue to operate, but also because the *Généreux* case was about to be heard by the Supreme Court of Canada, and such changes would indicate to the Supreme Court that the military was willing to make adjustments to preserve a separate system of military justice.[156] The changes were also made, writes Janet Walker, because "the Legal Branch of the Canadian Forces wished to improve the procedural fairness of courts martial so they could be compared favourably with the ordinary courts."[157]

The general court martial's finding of guilt in *Généreux* had, in fact, been upheld by the Court Martial Appeal Court[158] before its decision in *Ingebrigtson*. The *Ingebrigtson* decision noted that general and disciplinary courts martial "are the traditional types of courts martial which evolved in the British Army over centuries", whereas standing courts martial were not introduced until 1944 and at first had very limited jurisdiction. The standing courts martial were thus accorded far less deference by the appeal court than general courts martial. Chief Justice Mahoney went so far as to state: "Whether they can, as a matter of fact, be characterized as integral to the otherwise 'long established tradition' of a separate system of military law and tribunals is, in my respectful opinion, most dubious."[159]

Amendments to the QR&Os following *Ingebrigtson* applied to all types of courts martial, not just standing courts martial.[160] The QR&OS, for example, provided for a fixed term for military trial judges of normally four but not less than two years. They also required that military judges not perform any other duties during that term, placed restrictions on terminating a judge's appointment, and provided that the chief military trial judge, not the judge advocate general, has formal authority to appoint a judge advocate at a court martial.[161] In relation to financial security, the QR&Os provided for the elimination of the consideration of judicial performance in deciding an advancement or pay.[162]

The Supreme Court held in *Généreux* that the regulations existing at the time of the court martial violated all three requirements of judicial independence set out in *Valente*. The Court noted that the amendments to the QR&Os had corrected the deficiencies with respect to security of tenure and financial security, but further changes were required in relation to "institutional independence", the third requirement set out in *Valente*. Chief Justice Lamer pointed to one specific area of concern:

> The convening authority appoints the president and other members of the General Court Martial and decides how many members there shall be in a particular case. The convening authority, or an officer designated by the convening authority, also appoints, with the concurrence of the Judge Advocate General, the prosecutor (s. 111.23, Q.R. & O.). This fact further undermines the institutional independence of the General Court Martial. It is not acceptable, in my opinion, that the convening authority, *i.e.*, the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as the triers of fact. At a minimum, I consider that where the same representative of the executive, the 'convening authority', appoints both the prosecutor and the triers of fact, the requirements of s. 11(*d*) will not be met.[163]

Following the *Généreux* decision, further changes were therefore made to the *National Defence Act* and the QR&Os. There was some urgency. On second reading of the act in May 1992, the government spokesperson stated: "Since the decision of the Supreme Court in mid-February it has been impossible to hold trials either by general or disciplinary court martial. The Canadian forces have therefore been deprived of the use of these essential tools in our disciplinary system, and not surprisingly a backlog of cases has built up and continues to build."[164] The Somalia Inquiry may wish to explore whether this gap in discipline six months before troops left for Somalia may have contributed in some small way to problems encountered later.

The amendments make it clear, as the Supreme Court required, that the person who convenes a court martial must not be the person who appoints its president and members.[165] QR&O 111.051 expands on the procedures by providing that it is the chief military trial judge who appoints the president and members of the court martial and does so "using random methodology."[166] Further, a CFAO now states that "The Chief Military Trial Judge is, by law, independent in the performance of his/her duty" and that legal officers who are "posted to military trial judge positions"

are not "directly responsible to the JAG for the performance of their duties."[167] The amendments to the *National Defence Act*, the QR&Os and the CFAOs have produced a much improved system of military justice.

The United Kingdom appears to have gone further in some respects and not as far in other respects in ensuring independence. The judge advocates at courts martial are appointed by a completely independent civilian judge advocate general, who is in turn appointed by the Lord Chancellor and holds office until age 70. As with other civilian judges, the judge advocate general is removable for only inability and misbehaviour. The various judge advocates are also civilian barristers or advocates and also hold office during good behaviour.[168]

On the other hand, the U.K. does not provide a random method of selection of members of courts martial, and it is the convening officer who selects the president and members of the tribunal.[169] Although there are restrictions on who can be a member of a court martial — for example, a person who investigated the charge or held an inquiry into the subject matter of the charge cannot sit[170] — the convening officer still has considerable influence in shaping the tribunal. One civilian lawyer with experience in courts martial work recently denounced the U.K. system in an article:

> The most glaring of this myriad of breaches [of human rights] is the failure to separate the prosecuting arm from the court itself so that the prosecution and the defence are on equal footing in compliance with the doctrine of 'equality of arms'. An army court martial is set up by the 'convening officer'. The convening officer is also the prosecuting authority. The convening officer selects the members of the court, commands them during the existence of the court, is even responsible for appointing part or all of the defence team.[171]

He referred to a 1992 Divisional Court case, *Ex parte Findlay*, in which "the five officers appointed by the convening officer to the board trying the case had been drawn from units within the convening officer's own command and were therefore the direct subordinates of the prosecuting authority." The appeal by the accused to the Divisional Court was dismissed, but the case was taken to the European Court of Human Rights.

In December 1995 the European Commission of Human Rights found that the U.K. procedures breached article 6(1) of the European Convention of Human Rights, which guarantees a "fair and public hearing before an independent and impartial tribunal."[172] The matter now goes before the full European Court of Human Rights, which is likely to hear the case

in the fall of 1996. The British government is expected to make a vigorous defence of the present system.[173] Previous decisions have held that the European Convention applies to military disciplinary tribunals,[174] and it appears likely that the court will agree with the unanimous 17-person view of the commission that the present U.K. procedures breach the convention. In the meantime, a number of changes are being proposed to the U.K. Armed Forces law as part of the regular five-year review of the act. Whether these changes will meet the requirements of the convention remains to be seen.

Command influence, as it is usually called in the United States, continues to be a major concern for the U.S. military. The U.S. Court of Military Appeals has referred to unlawful command influence as "the mortal enemy of military justice."[175] A leading writer on military justice states that "despite prohibitions in the Uniform Code of Military Justice and strong admonitions in case law, unlawful command influence has remained a perpetual problem." The author goes on to state:

> While most commanders are sensitive enough to the problem to avoid open attempts to influence a court-martial, it is more common for well-intended commanders, or members of their staff, to make passing comments on the merits of past or pending cases. Pragmatically, no matter how well intentioned or careful the commander or staff officers might be, such comments can be interpreted by subordinates as a 'command' or 'desire' for a particular result.[176]

As in the U.K., the convening officer selects the members of the court martial. Although there are some restrictions — for example, an investigating officer cannot be selected — the statute gives the convening officer the authority to select "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[177] There is no random selection of members, as is now required in Canada. There are, however, a number of appeal cases stating that selection of court members to secure a more favourable result to the prosecution amounts to unlawful and punishable command influence.[178] Article 37(a) of the Uniform Code of Military Justice states that no person "may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof."[179]

Another issue that has been widely debated in the United States is whether there should be fixed terms for military judges. Military judges are officers who are members of a bar who have been certified by the judge

advocate general of their branch to conduct courts martial and are assigned by the judge advocate general to specific hearings. There are about 75 judges certified for general courts martial. While serving as judges they may, with the permission of the judge advocate general, engage in other tasks unrelated to their judicial duties.[180] The U.S. Supreme Court recently rejected the fixed term as a constitutional requirement under the Fifth Amendment's due process clause. Chief Justice Rehnquist, giving the judgement for the Court in *Weiss*,[181] referred to the great judicial deference traditionally accorded by the courts to Congress with respect to military matters,[182] the fact that courts martial "have been conducted [in the United States] for over 200 years without the presence of a tenured judge, and for over 150 years without the presence of any judge at all,"[183] and the fact that "the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause."[184] The Court referred, *inter alia*, to Article 37, quoted above; Article 26, which places military judges under the authority of the appropriate judge advocate general, rather than under the authority of the convening officer,[185] and allows the accused to challenge both a court martial member and a court martial judge for cause; and the fact that the entire system "is overseen by the Court of Military Appeals, which is composed entirely of civilian judges who serve for fixed terms of 15 years."[186]

David Schlueter, author of *Military Criminal Justice*, believes that fixed terms for judges would be "both difficult to implement and largely unnecessary" and suggests that "perhaps the best answer rests not in drastically reforming the structure of the system, but in enforcing those rules and laws which currently proscribe command influence and in ensuring careful appellate review."[187]

F.A. Gilligan and F.I. Lederer, authors of another leading text, *Court-Martial Procedure*, take the position that "the sole solution is the creation of an independent full-time judiciary whose future is not subject to evaluation on traditional military lines." The "real problem," they state, "is command control of the judiciary. So long as the judge knows that his or her future is in the hands of those who have non-judicial interests, both the perception and the reality of possible tampering will exist."[188] They do not expand on the concept, but presumably the judges would be selected from military trial lawyers toward the end of their military careers.

The term "command influence" in Canada is usually reserved for pretrial proceedings.[189] The military brief to the Somalia Inquiry on military

justice states (p. 3): "Custom and practice, amplified by appellate court decisions, provide that in disciplinary matters the decision of a commanding officer to proceed or not to proceed with charges must be taken without interference or influence from any superior." Major G. Herfst expanded on the concept in the oral presentation, stating:

> While it would not be necessarily command influence, if a commanding officer were to seek advice from his superiors on how to deal with certain types of cases providing that he or she preserves to him or herself the prerogative of making the ultimate decision in a particular case, it would be command influence if the superior prevailed upon the commanding officer and the commanding officer felt compelled to act upon the wishes or instructions of that superior.
>
> As it was put in the leading case on command influence by Noël, the Acting Chief Justice, in *Nye* v. *The Queen*, a 1972 case from the Court Martial Appeal Court, at page 93 — and I quote, "a commanding officer must always be able to discharge his duties in the judicial process with quiet and impartial objectivity."[190]

In summary trials in Canada it is difficult, if not impossible, to avoid at least the appearance of command influence (using the term as the Americans use it) because it is the commander (or his or her delegate) who makes the decision. An attempt was made to cut down on extreme conflicts of interest in such cases by amending the *National Defence Act* in 1985:

> 163(1.1) Unless it is not practical, having regard to all the circumstances, for any other commanding officer to conduct the summary trial, a commanding officer may not preside at the summary trial of any person charged with an offence where
> (a) the commanding officer carried out or directly supervised the investigation of that offence; or
> (b) the summary trial relates to an offence in respect of which a warrant was issued pursuant to section 273.3 by the commanding officer.[191]

The real solution here is to make sure that the accused has a genuine, fully informed election — a matter examined in more detail later.

Military Nexus

One issue of continuing interest in Canada is whether there has to be a "military nexus" between an alleged offence and the need to exercise

military discipline. The requirement for a military nexus was first discussed in Canadian courts in the 1980 Supreme Court decision by Justice McIntyre (Justice Dickson concurring) in *MacKay*. Their judgement was a concurring one, not the judgement of the Court, which was delivered by Justice Ritchie (four other members of the court concurring) and did not mention the need for a service connection. Justice McIntyre stated:

> Section 2 of the *National Defence Act* defines a service offence as "an offence under this Act, the *Criminal Code*, or any other Act of the Parliament of Canada, committed by a person while subject to the *Code of Service Discipline*." The Act also provides that such offences will be tryable and punishable under military law. If we are to apply the definition of service offence literally, then all prosecutions of servicemen for any offence under any penal statute of Canada could be conducted in military courts... Our problem is one of defining the limits of their jurisdiction...
>
> The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. I do not consider it wise or possible to catalogue the offences which could fall into this category or try to describe them in their precise nature and detail. The question of jurisdiction to deal with such offences would have to be determined on a case-by-case basis.[192]

Justice McIntyre observed that "this approach has been taken in American courts where a possible conflict of jurisdiction had arisen between the military tribunals and the civil Courts."[193]

The U.S. Supreme Court had, over the years, been limiting the jurisdiction of military tribunals, rejecting the continuing exercise of military jurisdiction over honourably discharged servicemen for offences committed while in the military,[194] over families accompanying those serving abroad,[195] and over civilians serving abroad.[196] In 1969, in *O'Callahan* v. *Parker*, the court went much further and limited jurisdiction over active service personnel by requiring that to fall under military jurisdiction, the alleged offence "must be service connected." Justice Douglas wrote on behalf of the court that "history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." He did

not think much of military justice, stating that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law" and that "a military trial is marked by the age-old manifest destiny of retributive justice."[197] The *O'Callahan* approach required a case-by-case determination, guided by a list of 12 factors developed in a later Supreme Court case.[198]

This approach was eventually rejected, however, in the court's 1987 decision in *Solorio*, where the court held that the jurisdiction of a court martial depends solely on the accused's status as a member of the armed forces and not on the "service connection" of the offence charged. Chief Justice Rehnquist, writing for the majority of the court, referred to the "doubtful foundations" of the *O'Callahan* test, the "time and energy...expended in litigation", and "the confusion created by the complexity of the service connection requirement."[199] In addition, as we saw in the discussion of the *Weiss* case, the court is now prepared to give great judicial deference to Congress in the area of military justice.[200] One of the main reasons for this — the change in the composition of the court is, of course, another — is the improvement in military justice procedures since *O'Callahan* was decided in the late 1960s. As Janet Walker rightly observes, "When military justice was viewed as unduly harsh or objectionable, its jurisdiction was construed narrowly, and when it met current standards, civilian courts refrained from interference through a generous construction of court martial jurisdiction."[201]

The Canadian Court Martial Appeal Court has continued to follow the *O'Callahan* approach, however, which was adopted by Justice McIntyre in *MacKay*. Why the court chose Justice McIntyre's opinion, rather than Justice Ritchie's majority approach, which did not involve a service connection test, is not clear. Perhaps the compromise position between Justice Ritchie's permissive approach and the strong dissent of Chief Justice Laskin and Justice Estey, denying military jurisdiction for civilian offences, was attractive,[202] particularly considering that Justice McIntyre and Justice Dickson had both had distinguished military careers.

A number of Court Martial Appeal Court cases have required a service connection.[203] The court has not been reluctant, however, to find a service connection. In *Ionson* (1987), the accused seaman was convicted of possession of cocaine by a standing court martial, and the majority of the Court Martial Appeal Court held that there was a service connection, even though the accused was in civilian dress at the time of the offence, off duty, away from a military establishment, and not involved with any other military members.[204] Ionson's appeal to the Supreme Court of Canada

was dismissed on the grounds that the majority of the Court Martial Appeal Court had not erred.[205] The most recent decision was that of the Court Martial Appeal Court in *Brown*, arising out of the Somalia affair.[206] In rejecting the appeal, however, Justice Huggesen stated for the court that "It is now well settled that the exception to the guarantee of the right to a jury trial in paragraph 11(f) is triggered by the existence of a military nexus with the crime charged."[207] There was, of course, as the appellant conceded, a clear military nexus in the case.[208] The Supreme Court of Canada refused leave to appeal.[209]

Is the military nexus requirement still part of Canadian law? The military brief to the Somalia Inquiry mentions its continuing existence, referring to the

> common law rule known as the doctrine of "military nexus" [which] operates to limit jurisdiction in certain cases... The doctrine may be applied in cases of serving members where the commission of the offence bears little or no connection with military duties, such as where an accused commits a drinking and driving offence during off-duty hours without the presence of any indicia of military service.[210]

It is not clear, however, whether the brief is referring to cases where the military would not normally claim jurisdiction, or to cases where they could not constitutionally exercise jurisdiction. The oral presentation suggests the former. Major Herfst states:

> Thus, except in those cases involving what might be called purely military offences such as operational offences or offences like absence without leave, a determination is made regarding who will take jurisdiction in the case. The factors affecting such a decision and the test, if I might put it that way, applied in such circumstances is whether the accused's avoidance of punishment by a service tribunal will adversely affect the general standard of discipline and efficiency of the Canadian Forces.[211]

The *National Defence Act* does not mention a service connection requirement, and section 60(2) of the act provides that a person who commits an offence while subject to service discipline shall "continue to be liable to be charged" for a three-year period after the offence, notwithstanding that the person may have ceased to be subject to military discipline.[212] A note to QR&O 102.01 states, however,

Judicial interpretation of subsection 60(2) of the *National Defence Act*, taken with subsections 69(1), restricts the exercise of jurisdiction of service tribunals over a person who was subject to the Code of Service Discipline at the time of the alleged commission of a service offence to cases where it can be demonstrated that:
(i) trial by a service tribunal is dictated by disciplinary considerations essential to the maintenance of the morale and readiness of those remaining in the Service; and
(ii) not to exercise jurisdiction will adversely affect the general standard of discipline and efficiency of the service.

The *Généreux* decision did not deal with the issue, even though the question of jurisdiction was discussed in the factums and the charge of trafficking in narcotics off the base lent itself to a discussion of the issue.[213] One is tempted to agree with Janet Walker, who claims in a 1993 article that the military nexus doctrine is now a thing of the past.[214] While this is probably so for those tried while still members of the military, the doctrine may still have relevance with respect to persons who are no longer members of the military[215] and possibly to civilians working with the military abroad and to families accompanying members of the military overseas.[216] As for serving members, the better solution would be to give the military courts concurrent jurisdiction to proceed whenever the accused is still a member of the military and to let civil and military authorities work out who should prosecute.[217] As stated earlier, if they cannot resolve the issue of who should exercise jurisdiction, primary jurisdiction should be with civil authorities. We will have to see how the courts resolve the military nexus issue.

Summary Proceedings

The major issue facing military justice in Canada is whether summary proceedings can withstand a Charter challenge. As described earlier, there are three types of summary proceedings: those conducted by a commanding officer; those by a superior commander; and those by a delegated officer.

There is no question that summary proceedings are very important to the military. The military brief to the Somalia Inquiry states that the summary trial system "provides speedy, uncomplicated proceedings."[218] Major Kenneth Watkin presents a similar view in his LL.M. thesis, "Canadian Military Justice: Summary Proceedings and the Charter," stating: "summary trials represent a part of the military justice system where particular

emphasis is placed on an expeditious and uncomplicated disposal of disciplinary matters." "Summary proceedings," he notes, "are the overwhelmingly predominant and most important forum for the trial of disciplinary offences."[219] James Lockyer put the matter particularly strongly in a speech in 1993: "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."[220]

The summary procedure is so important to the military that some writers are willing to go a very long way in making changes to make it safe from a Charter challenge. James Lockyer suggests that "if the summary trial process were limited to non-criminal matters, its constitutionality and compatibility with the Charter would be confirmed."[221] He adds: "This proposed jurisdiction may be the only way to preserve the summary trial process."

Kenneth Watkin suggests a large number of changes because he believes that "challenges to the constitutionality of summary proceedings, based on the Charter, have a very good likelihood of success." His suggested changes include limiting the power of commanding officers to those civilian offences that can be dealt with summarily (including hybrid offences) under civilian law; limiting the jurisdiction of delegated officers to try service offences (they cannot now try criminal offences) to those carrying a penalty of less than two years; providing a more complete trial procedure, including rules on the admissibility of documentary evidence; giving all persons charged with a service offence, including those dealt with by a delegated officer, the right to elect court martial; making any detention ordered in a summary proceeding more remedial in nature, including "more drill and basic training associated with the development of collective discipline (recruit camp)"; and, if detention is maintained in its present form, giving persons sentenced to detention the right of appeal by way of trial *de novo* to a court martial.[222]

Steps are now being taken within the military to make changes that will help protect summary proceedings from a Charter challenge. The changes made by the military in anticipation of the Supreme Court decision in *Généreux* paid off. Similar pre-emptive action is being contemplated with respect to summary proceedings.[223]

No one can say with certainty what the Supreme Court is likely to do with respect to summary proceedings. Obviously, the more changes made in advance, the greater likelihood there is of withstanding a Charter challenge. In this writer's opinion, however, it is not advisable to go too far in

making a summary proceeding into a regular trial. The Supreme Court is unlikely to demand it. It is better to provide procedures that are desirable from a military perspective and at the same time respect the rights of soldiers than to devise procedures because of fear of how the Supreme Court might rule. The Court demonstrated in *Généreux* that it is prepared to uphold a reasonable system of military justice.

The danger in making summary disciplinary proceedings too complicated is that the summary procedure may then not be used to the extent required for proper discipline or, just as undesirable, alternative illegal punishments or "barrack-room justice" will be used instead.[224] Apparently, there was an almost 50-per cent reduction in the total number of summary trials after the first changes to the QR&Os were implemented in 1983.[225] Membership in the Canadian Forces remained steady, at about 80,000, throughout the early 1980s, yet between 1982 and 1984 the number of summary trials dropped from 10,058 to 6,349. There was no increase in the number of courts martial over the period; there were 157 in 1982 and 152 in 1984.[226] There are now said to be about 4,000 summary proceedings for about 65,000 personnel, so the relative charge rate today is about half what it was in 1982. Further, between 1986 and 1991 the use of detention dropped significantly. The reduction was particularly dramatic for the three regiments contributing personnel to the Airborne Regiment. In the Princess Patricia's Canadian Light Infantry, for example, from which 2 Commando was drawn, the number of detention days per 1,000 personnel dropped from 649 in 1986 to 85 in 1991. These decreases in charges and rates of detention were occurring at the same time they were rising in the civilian population.[227]

The Somalia Inquiry may wish to explore the pattern of summary proceedings at Petawawa over the years, and in particular for the Airborne Regiment, to see whether a reduction in summary proceedings and detention might have contributed to the discipline problems in that regiment. Both the Board of Inquiry and the Hewson Report suggest that a lack of summary discipline affected performance. The Board of Inquiry, for example, noted the importance of the master corporal level in discipline enforcement and the failure of the corporals to play their proper role in discipline.[228] Again, looking at the role of the corporal, the Hewson Report pointed out that a delegated officer could not confine a corporal to barracks as a method of discipline, which the delegated officer could do for a private.[229] This writer does not have the expertise to comment on these observations, except to say that jurisdiction for summary proceedings and the rules that they must follow will have an effect on discipline

and, ultimately, on success in operations. The 1985 Hewson Report recommended that "the principle of accountability be reinforced by visible disciplinary action when warranted."[230] The use of detention following the Hewson Report suggests that this view was not shared by commanding officers. The Somalia Inquiry will want to explore this issue carefully.

It is difficult to believe that the delegated officer procedure is vulnerable to Charter challenge. The delegated officer has very limited jurisdiction. As we saw earlier, the punishment that can be imposed is limited to reprimands, a fine of up to $200, stoppage of leave for 30 days, and, for privates, confinement to ship or barracks for 14 days and extra work and drill not exceeding two hours a day for 7 days. The hearing officer is precluded from hearing the case if the delegated officer considers his or her "powers of punishment to be inadequate having regard to the gravity of the alleged offence" and cannot try an accused for any of the offences for which an election would have been required if tried by a commanding officer, which includes a number of military offences and all *Criminal Code* and other civilian offences.[231]

Moreover, the procedures before a delegated officer are reasonable for the type of proceeding being conducted. The accused is entitled to the help of an assisting officer, is not obliged to make any admissions, and is to receive, 24 hours before the trial, "all documentary evidence and all statements made in relation to the incident...including any statement of the accused." Further, the case must be proved beyond a reasonable doubt and, while no appeal procedure is provided, various forms of review and redress of grievance are available.[232]

Proceedings by a delegated officer would not appear to come within section 11 of the Charter, which refers to a person charged with "an offence". It is unlikely (though always possible) that the Supreme Court will hold that a hearing by a delegated officer is either "by its very nature, criminal" or that the possible sanctions are "true penal consequences,"[233] within the meaning of the language of the two leading Supreme Court of Canada cases, *Shubley* and *Wigglesworth*.[234]

In *Wigglesworth*, an RCMP disciplinary hearing for an offence punishable by a year's imprisonment was, understandably, considered to involve "a true penal consequence", although the hearing itself was not considered "by its very nature, criminal."[235] *Shubley* involved a disciplinary hearing for an inmate in a provincial correctional institution. The Court held unanimously that the hearing was not "by its very nature, criminal", and a majority of the Court held that it did not involve "true penal consequences",

even though the penalty could have been close (solitary) confinement for 30 days and forfeiture of the inmate's remission.[236] The language used by Justice McLachlin suggests that the same result would follow with respect to delegated officers:

> Was the prison disciplinary proceeding to which the appellant was subject, by its very nature, criminal? I conclude it was not. The appellant was not being called to account to society for a crime violating the public interest in the preliminary proceedings. Rather, he was being called to account to the prison officials for breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules.[237]

On the second branch of the test, Justice McLachlin stated:

> I conclude that the sanctions conferred on the superintendent for prison misconduct do not constitute "true penal consequences" within the *Wigglesworth* test. Confined as they are to the manner in which the inmate serves his time, and involving neither punitive fines nor a sentence of imprisonment, they appear to be entirely commensurate with the goal of fostering internal prison discipline and are not of a magnitude or consequence that would be expected for redressing wrongs done to society at large.[238]

Thus, in my opinion, proceedings conducted by a delegated officer would not come within section 11 of the Charter. Indeed, the financial jurisdiction of the delegated officer could no doubt be raised to, say, a percentage of the accused's monthly pay, so long as it was not considered a "punitive fine". (One of the consequences of this approach is that there would be no *constitutional* bar to a second proceeding in the regular courts, although as we saw earlier, there is now a statutory bar.[239]) If the proceedings did come within section 11, it should surely be relatively easy to have them fit within section 1 of the Charter, which permits such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[240]

The process would also have to withstand a challenge under section 7 of the Charter (the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"). Justice McLachlin stated in *Shubley*: "I agree with [Justice Wilson's] conclusion that 'it is preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters

and to leave other 'offences' subject to the more flexible criteria of 'fundamental justice' in s. 7."[241]

Section 7 is so flexible and amorphous that it is particularly difficult to predict what a court might do under that section. In the 1976 case, *Middendorf* v. *Henry*, the U.S. Supreme Court held that the Fifth Amendment's due process clause, which is comparable to section 7 of the Charter, was not violated by the lack of counsel at a summary court martial by a commanding officer, a proceeding that is a step above Article 15 hearings and for which a penalty of confinement for one month and two thirds of one month's pay can be imposed.[242] Justice Rehnquist stated for the court that the "presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree...beyond what is warranted by the relative insignificance of the offenses being tried."[243]

Thus, I believe that the military can continue with the present delegated officer procedure without giving the accused an election for trial by court martial or providing legal counsel. (The accused is, however, given the help of an assisting officer, normally one selected by the accused.[244]) If an election were given, very few would take it,[245] but it would require delaying the proceedings to give time to consider whether to exercise the option and it can be argued that, at least in battle conditions, the quick and simple imposition of these very minor penalties by a delegated officer is desirable. Nevertheless, both Britain and the United States allow for the right to elect court martial in all cases, including non-punitive Article 15 proceedings.[246]

A commanding officer's authority is much greater than that of a delegated officer. Sergeants down to privates can be sentenced to 90 days' detention.[247] In *Généreux*, Chief Justice Lamer stated that "the appellant faced the possible penalty of imprisonment in this case...therefore, section 11 of the Charter would nonetheless apply by virtue of the potential imposition of true penal consequences."[248] Such a potential penalty would surely be considered true penal consequences within the meaning of *Shubley* and *Wigglesworth*,[249] even if it were possible to categorize the proceeding as not "by its very nature, criminal."[250] Thus, section 11 of the Charter is applicable, as is section 7.

The proceedings clearly breach the section 11(d) requirement that the person be tried by "an independent and impartial tribunal." The commanding officer is the person who authorized the charge and so can hardly

be considered independent. The CO does not have security of tenure, financial security, or institutional independence, all required by *Valente*.[251] It is also likely that the absence of the right to legal counsel would breach the "fair hearing" part of section 11(d).[252] This does not mean, however, that the Supreme Court will necessarily strike down the procedure as contrary to the Charter. There are two ways it can be saved.

The first is a section 1 justification of the procedure as a "reasonable limit prescribed by law" that can be "demonstrably justified in a free and democratic society." This would not be easy to do because of the possible 90-day detention period. The U.S. law upheld in *Middendorf* v. *Henry* provided for only a one-month period of confinement.[253] A commanding officer below field rank in the British army can summarily award detention for only 28 days.[254] (In the nineteenth century the British commanding officer could award only 14 days' imprisonment.[255]) Further, as stated earlier, it was the *National Defence Act* of 1950 that first introduced the 90-day detention period for summary trials.[256] Before that, an army or air force commanding officer could sentence an accused to only 28 days. The special circumstances in the navy had, however, permitted a sentence of three calendar months by a commanding officer.

Thus, it is hard to argue that a "free and democratic" society requires a 90-day detention period for summary trials. If the period were reduced to, say, 30 days, there is a reasonable possibility that the court would say that the proceedings did not even come within section 11 of the Charter or violate section 7, thus not requiring a section 1 justification.[257] In any event, such a reduction would seem to make sense in the absence of any constitutional requirement. A sentence of 90 days' detention should, in this writer's opinion, require a more formal and independent tribunal, giving the accused the right to retain legal counsel. (An exception might be warranted, however, for ships at sea on lengthy manoeuvres.) It is better to concentrate on a limit to the punishment that can be awarded by the tribunal than on the maximum penalty for the offence if tried by a court martial or a civilian court. If the jurisdiction of a summary trial were controlled by the potential penalty, then a commanding officer could not try a person for disobeying an officer, which has a potential penalty of life,[258] or a minor trafficking offence,[259] which also carries a potential life penalty. Many more charges would be brought and tried by the commanding officer as a result under the less specific label "conduct to the prejudice of good order and discipline."

Summary proceedings by a commanding officer might also be upheld, because a right to elect trial by court martial is given to the accused in all

cases where there are potentially serious consequences. In the case of trial by a commanding officer, the accused has the right of election when tried for a listed offence, which includes all criminal offences brought into the Code of Service Discipline under section 130 of the *National Defence Act*, or when "the commanding officer concludes that if the accused were found guilty a punishment of detention, reduction in rank or a fine in excess of $200 would be appropriate."[260] In cases where no election need be given, the analysis in the earlier discussion of the delegated officer would lead to the conclusion that the proceedings would not come within section 11 of the Charter.

If a decision by an accused not to elect trial by court martial is a genuine waiver of trial by court martial, with full knowledge of the consequences, then there is a good chance that the summary procedure would be upheld, in the same way that a waiver of trial by a guilty plea is not a violation of the Charter. Justice Lamer (as he then was) set out a test for waivers in the 1982 Supreme Court decision in *Korponey*,[261] a test that was later adopted by Justice Wilson in the 1986 decision in *Clarkson*.[262] Justice Lamer stated in *Korponey* that any 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 protect and of the effect the waiver will have on those rights in the process*."[263]

The U.S. Supreme Court relied on the concept of waiver in *Middendorf*, where Justice Rehnquist wrote that if the accused "feels that in order to properly air his views and vindicate his rights, a formal, counselled proceeding is necessary he may simply refuse trial by summary court-martial and proceed to trial by special court-martial at which he may have counsel." The Court referred to the waiver of trial by a guilty plea, stating:

> We have frequently approved the much more difficult decision, daily faced by civilian criminal defendants, to plead guilty to a lesser included offence... In such a case the defendant gives up not only his right to counsel but his right to any trial at all. Furthermore, if he elects to exercise his right to trial he stands to be convicted of a more serious offense which will likely bear increased penalties.[264]

But can there be a true waiver without the assistance of counsel? Possibly, but the military would be on safer ground by making objective legal advice available to the accused in such cases. Justice Lamer stated in *Korponey* that a major factor in deciding whether there was an effective waiver "will be the fact that the accused is or is not represented by

Counsel."[265] The rules now provide for a 24-hour delay before an election has to be made, so that the accused can consult with an assisting officer or, at the accused's own expense, with civilian legal counsel.[266] Military duty counsel are available only if the accused is arrested or detained.[267] Why should duty counsel not be available to any person faced with a waiver who requests legal assistance whenever it is reasonable and practicable to provide such communication? Even an accused at sea in most situations could contact counsel by phone. And why should the consequences of waiving trial by court martial not be clearly set out in a form to be signed by the accused, as is done in the United States?[268]

Reducing the period of possible detention to something like 30 days and providing an effective waiver of trial by court martial would, in my view, likely lead the Supreme Court of Canada to uphold summary proceedings by commanding officers, under a doctrine of waiver, under section 1 of the Charter, or under a combination of the two. A further change that could be considered is to give a member sentenced to a period of detention above a very minor amount the right to appeal by way of trial *de novo* to a court martial. Such a procedure, which would be resorted to rarely, would further strengthen the likelihood that the Supreme Court would uphold the constitutionality of summary proceedings by commanding officers.

CONCLUSION

The military justice system is a crucial part of the range of techniques available to control improper conduct in the military. The Somalia Inquiry will wish to explore whether the decline in the use of military justice in the ten years preceding the unfortunate events in Somalia may have contributed to the lack of discipline that was evident in the Canadian Airborne Regiment.

Data provided earlier in the chapter show that after the *Canadian Charter of Rights and Freedoms* was enacted in 1982, the number of summary disciplinary proceedings dropped significantly[269] and has remained relatively low compared to previous experience, even though the number of Canadian Forces members increased slightly in that period. Further, between 1986 and 1991, use of detention declined significantly. This trend is contrary to trends in the civilian criminal justice system.[270] Courts martial of Canadian Forces members in Canada and abroad were also low in 1993 compared to ten years earlier — 68 in 1993,[271] compared with 169 in 1983.[272]

It may well be that apprehension about the constitutionality of the military justice system after introduction of the Charter, together with new and more onerous regulations and statutory changes, were partly responsible for this decline in the use of the military justice system. As we saw in the discussion of the history of military justice, changes were made to the QR&Os in 1982 and 1983, extensive changes were made to the *National Defence Act* and the QR&OS in 1986, and further changes were made in 1991 and 1992, in anticipation and as a result of the *Généreux* decision. The court martial system is now reasonably secure constitutionally, following *Généreux*.

There is still considerable uncertainty, however, about the constitutional legitimacy of the summary justice system, and we are likely to see further amendments in anticipation of a possible challenge. It will certainly be good for the proper application of summary military justice to have the Supreme Court's stamp of approval on its procedures, whether in their present form or in a modified form.

The summary justice system is of great importance to the Canadian military, just as it is to all military forces. It provides a relatively quick, easily understood, non-legalistic, and reasonably fair system of imposing minor penalties on military personnel. Two changes in the system were recommended; if these were introduced, in this writer's opinion, the system would likely be upheld by the Supreme Court of Canada. Indeed, even without the changes, there is some reasonable chance that it would be found not to violate the Charter or would be upheld under section 1. The changes recommended are, first, that persons being tried summarily who must be asked whether they wish to elect trial by court martial be given the opportunity to consult with a military lawyer (or with a civilian lawyer at their own expense) before making the choice, and, second, that the authority of a commanding officer to award 90 days' detention be reduced to about 30 days. A person arrested or detained before trial now has the right to consult with military duty counsel, but a person subject to a summary trial that might result in a period of detention does not. This does not mean that counsel should take part in a summary proceeding, but rather that the accused be able to consult with counsel before the proceeding. A third change that could be considered is to permit a member sentenced to detention above a certain level by a commanding officer to have a new trial by court martial as of right. If these changes were made, it is very likely that the Supreme Court of Canada would uphold the procedures on the basis of waiver of rights, or because summary

proceedings did not come within section 11, or, if they did violate the Charter, that they are a reasonable limit on rights under section 1.

The chapter also discussed command influence, the "mortal enemy of military justice." Canada has brought in some significant improvements in this area. Members serving on courts martial are chosen randomly, and the judge advocate conducting the proceedings has a fixed term of office of from two to four years. One further possible change that the Somalia Inquiry may wish to explore is the U.K. system of using independent civilian judges or military judges recently retired or at the end of their careers to conduct the proceedings.