

**GRADUATE STUDIES:  
MAJOR RESEARCH PAPER**

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# Military Intervention in Law Enforcement Related Activities in Canada: A Critical Legal Review of Its Use in Peacetime

The reason for the existence of the militia in this country is well understood. The principle object is perhaps the upholding of the Civil power in the different parts of the Dominion.

—Sir Frederick Borden, Minister of the Militia and Defence  
*House of Commons Debates*, 2 (March 9, 1909) at 2244

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## Introduction

To date, there has been limited commentary in Canada on the important use of armed military assistance by government to restore and maintain public order in peacetime.

With the approach of the mandated quinquennial review<sup>1</sup> of the 1998 legislative changes made to the *National Defence Act*, there is perhaps no better time to undertake a critical analysis of the trend in internal security roles and the sources of authority that have led to the current state of the law governing the subject matter. With a view to stimulating discussion, the goal remains to offer specific suggestions for a modified framework

<sup>1</sup> *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35, ss. 96(2) ("The Minister shall cause the report on a review conducted under subsection (1) to be laid before each House of Parliament within five years after the day on which this Act is assented to, and within every five year period following the tabling of a report under this subsection.").

governing military interventions. The paper will however eschew the examination of the use of the military during declared states of emergency—a topic, the ambit of which far exceeds the scope of the current discussion. While the concept of necessity plays a central role in shaping the law in this area, the focus on military intervention remains limited to those extra-ordinary situations in which military assistance is provided to civil authority as an adjunct to civil law enforcement efforts.

Both in terms of constitutional and public law issues, the law governing permissible military intervention for both domestic law enforcement and public security activities raises a myriad of questions with respect to its legal foundation. The current legislative and regulatory constraints on the use of these types of extraordinary activities in support of the civil authority will be examined. In considering the present state of the law, it is, of course, tempting to take a textual approach to interpretation by examining exclusively the provisions of the current legislation. However, to do so would be to lose sight of the historical events and beliefs that have influenced the political debates surrounding the adoption of legislation.

To develop an understanding of how and why the military has come to be employed in law enforcement related activities, Part I will review the historical background of military aid of the civil power by following the evolution of the law from its common law origins to its current codification as an important tool for upholding civil authority in times of civil unrest. Turning to a second source of authority for deployment of the military on internal security duties, Part II will provide an analytical framework in terms of the



public and constitutional law constraints that have served to shape the current use of federal executive authority to direct military support of law enforcement activities. Part III will highlight the impact of legislative changes made in 1998. It will also illustrate the limitations and restrictions imposed judicially on the grant of "peace officer" status to members of the armed forces engaged in internal security operations and the implications for an expanded scope of potential duties provided in the legislative changes of 1998. Some of the current inadequacies of the law not previously discussed in Parts I & II will form a basis for considering possible reforms. Drawing on the conclusions and observations made earlier in the paper, Part IV will outline a proposed framework for amendments to incorporate the governing principles discerned in the earlier analysis.

## **I. Historical Background to the Use of the Military for Aid of the Civil Power**

### *A. Development of the Soldier Citizen Model—Its Common Law Origins*

In pre-confederation Canada, there is one undeniable premise concerning the permissible use of the military—the militia was historically available for quelling civil disturbances. While the origins of the present day militia can be traced back to the Middle Ages in England, the exact ambit of all its uses changed with the passage of time. Nonetheless, it is instructive to briefly consider its origins and role in the maintenance of the 'king's peace' as a basis for establishing an understanding of the legal foundation for such use before undertaking a more in depth examination of the law governing its present use in law enforcement related efforts of today.

Prior to the Norman conquest of England in 1066, the Anglo Saxon *fyrd*, the forerunner of the militia, constituted in times of emergency a military force available for levy in the defence of the kingdom during times of insurrection, rebellion or foreign attack.<sup>2</sup> Not being a standing force, the untrained *fyrd* was suitable only for local defence and, except in the case of invasion, the duty to serve in the *fyrd* was limited to service within the county of its raising.<sup>3</sup> As a form of public duty imposed on the collectivity, all able-bodied men were required to render military service upon summons<sup>4</sup> but the distinction to be made between military and law enforcement service was initially very rudimentary.

"When the county levies were required for the suppression of internal disorder the Sheriff naturally took command; and as for this purpose alone military force might often be required, it is in vain that we attempt to draw a sharp line between the *posse comitatus* summoned to maintain good order and headed by the Sheriff in person and the county levies mustered by him for service in the King's army."<sup>5</sup>

In England, the concept of an organized police force would not take shape in its infancy until the late eighteenth century and its acceptance as a policing model was not assured until the first half of the nineteenth century.<sup>6</sup> Until that time, the primary responsibility for the maintenance of the public peace rested with local authorities who could command

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<sup>2</sup> See generally Michael Powicke, *Military Obligation in Medieval England: A Study in Liberty and Duty* (Oxford: Clarendon Press, 1962); see also David Dawson, "Posse Comitatus" in Martin Anderson, ed., *The Military Draft: Selected Readings on Conscription* (Stanford: Hoover Institution Press, 1987) at 3. Dawson argues that the Roman institutions of *patrocinium* and *percarium* gradually evolved into a system of collective obligation which subsequently shaped the German barbarian tradition that came to be known as the *posse comitatus*.

<sup>3</sup> *Manuel of Military Law*, (London: Harrison and Sons, 1907) at 147.

<sup>4</sup> *Ibid.* at 146.

<sup>5</sup> H.B. Simpson, "Compulsory Military Service in England" in Martin Anderson, ed., *The Military Draft: Selected Readings on Conscription* (Stanford: Hoover Institution Press, 1987) 465 at 467.



the armed assistance of subjects when required.<sup>7</sup> Nonetheless, the doctrine of *posse comitatus* was considered by some to have fallen into disuse by the sixteenth century.<sup>8</sup> Legislation was eventually introduced to provide special measures to deal with riots. In particular, the *Riot Act, 1715*<sup>9</sup> established a universal duty for citizens to render aid in the event of a call for armed assistance from local authorities charged with the duty of suppressing riots. The *Act* also imposed positive duties on the local magistrates. Magistrates, including justices of the peace, were required to proceed to the place of a riot and empowered to "... command all his Majesty's subjects of age and ability to be assisting to them..."<sup>10</sup> in quelling the riot. Indemnification for acts against resisting rioters, even if rioters might be killed, was granted to all those who heeded the call to assist in the quelling of riots.<sup>11</sup>

Whether the justices of the peace could extend their authority to requisition military personnel remained unclear from a reading of the *Act*.<sup>12</sup> However, in *R. v. Kennett*<sup>13</sup>, the

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<sup>6</sup> T.A. Critchley, *A History of Police in England and Wales: 900-1966* (London: Constable & Co., 1967) at 29 to 51.

<sup>7</sup> *Ibid.* at 2.

<sup>8</sup> S. C. Greer, "Military Intervention in Civil Disturbances: The Legal Basis Reconsidered" [1983] P.L. 573 at 581.

<sup>9</sup> *Riot Act, 1715*, 1 Geo I, stat 2, c. 5; S.L., XIII, 142 as reprinted in E. Neville Williams, ed., *The Eighteenth-Century Constitution 1688-1815: Documents and Commentary* (Cambridge: Cambridge University Press, 1970) at 414.

<sup>10</sup> *Riot Act, 1715, ibid.*, s. 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Supra* note 8 at 583 where the author suggests that the drafters of the *Riot Act, 1715* were only considering citizens other than the military as duty bound to render assistance.

<sup>13</sup> *R. v. Kennett* (1781), 5 Car. & P. 282; 172 E.R. 976 [*Kennett* cited to E.R.] (The Lord Major of London was convicted for dereliction of his duty including his failure to call upon the military to quell the Gordon Riots but he died before the passing of his sentence.); see also *Burdett v. Abbott* (1812) 4 Taunt. 398; 128 E.R. 384 at 404 ("In 1780 this mistake [during the Gordon Riots] extended to an alarming degree; soldiers with arms in their hands stood by and saw felonies committed, houses burnt, and pulled down before their eyes, by persons whom they might lawfully have put to death, if they could not otherwise prevent them, without interfering; some because they had no commanding officer to give them command, and some because there was no justice of the peace with them. It is the more extraordinary because formerly the *posse comitatus*, which was the strength to prevent felonies, must in great proportion have consisted of

issue was addressed during the trial of the Lord Mayor of London in 1781. Suspected of having been in sympathy with the rioters, the Lord Mayor was charged for his failure to make use of the military to quell the state of lawlessness during the Gordon Riots of 1780. In his charge to the jury, the great jurist, Lord Mansfield, articulated the application of the law and its rationale when he stated:

The common law and several statutes have invested justices of the peace with great powers to quell riots, because, if not suppressed, they tend to endanger the constitution of the country; and, as they may assemble all the King's subjects, it is clear they may call in the soldiers, who are subjects, and may act as such; but this should be done with caution. It is well understood that magistrates may call in the military.<sup>14</sup>

The 1822 case of *Redford v. Birley*<sup>15</sup> reaffirmed the military duty to respond to any call from the local civil authority to put down riots. In his remarks to the jury, Holroyd J. stated: "And upon that, it is clear, in point of law, ... that the military do not lose the rights, and are not exempt from the duties of subjects, by entering into that condition; and that the magistrates may, upon occasion, call them in aid."<sup>16</sup> Keeping in mind that magistrates, including justices of the peace, were subject to criminal prosecution for dereliction of duty as in the *Kennett* case, their actions in calling the military were always subject to review. In the course of his remarks in *Redford*, Holroyd J. established a clear distinction to be made for the consequences of commandeering military intervention. In as much as a decision to call upon the military might be unjustified by the circumstances,

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military tenants, who held lands by the tenure of military service. If it is necessary for the purpose of the preventing mischief, or for the execution of law, it is not only the right of soldiers, but it is their duty to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed.")

<sup>14</sup> *Kennett, ibid.* at 983-984.

<sup>15</sup> (1822), 3 Stark 76, 171 E.R. 773 at 775 [*Redford* cited to E.R.].



he found that the magistrates alone remained accountable as the military duty to obey was uncontested.<sup>17</sup> However, once the military were engaged in dispersing the crowd, they alone became responsible for the consequences of any excess use of force.<sup>18</sup> In this sense, the responsibility for riot control was very compartmentalized between civil law enforcement authorities and the military.

In the 1832 case of *R. v. Penny*, the mayor of Bristol was tried for negligence in the performance of his duty to assemble sufficient force to prevent rioting. He was eventually acquitted but Littledale J. had the following to say in his charge to the jury about the intent of the accused: "... and I will remark here that, however honourable and honest the intentions of a man may be, he is still liable to be found guilty; the mere intention and desire to do what is right cannot protect him."<sup>19</sup> One can conclude that in an era absent of trained or professional police forces, the weight of responsibility bearing on the local magistrates was enormous.

Certainly a practice had developed whereby a magistrate would deputize special constables in anticipation of a need to quell a disturbance or a riot.<sup>20</sup> That the mayor of Bristol had appointed some three hundred constables prior to the eruption of the riots may have contributed in no small part to his jury acquittal in *Penny*. However, in default of sufficient force, the authority of the magistrates remained to call upon the citizenry

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<sup>16</sup> *Ibid.* at 782.

<sup>17</sup> *Ibid.* at 782.

<sup>18</sup> *Ibid.* at 782-783.

<sup>19</sup> *R. v. Pinney* (1832), 3 State TR NS 17 at 513 [*Pinney*] (trial of the mayor of Bristol for failing to call out the *posse comitatus*).

<sup>20</sup> *Bristol Riots case* (1832) 5 C. & P. 254, 3 State TR NS 1 at 6 (charge of Tindal, C.J to the grand jury).



including soldiers when required. As stated by Tindal C.J. in his charge to the grand jury in the *Bristol Riots* case: "And, whilst I am stating the obligation imposed on every subject of the realm, I wish to observe that the law acknowledges no distinction in this respect between the soldier and the private individual."<sup>21</sup> The distinction to be drawn between the duty of the soldier and that of a citizen was nugatory. Every person was duty bound to assist in the suppression of riots.

*B. The Citizen Soldier Model—Its Adoption and Codification in Canada*

By 1868, the spirit of the citizen soldier model was well in ascendancy in Canada. The country's first militia legislation<sup>22</sup> codified the military duty to obey instructions of a magistrate when called upon in time of riot. In light of the division of powers between the provincial and federal governments at the time of Confederation, it has been suggested that the statutory provisions were necessitated in order to facilitate provincial access to the militia.<sup>23</sup> As the provinces had forgone any control of a provincial militia under the terms of the federation, the statute established the procedural steps necessary to provide an adequate means in the event of exigent circumstances for the use of the military in fulfilling the provincial responsibility for the administration of justice within the province.

While the militia legislation certainly bridged any possible jurisdictional gap for enabling access to the militia in a federalist state, aid of the civil power provisions had already

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<sup>21</sup> *Ibid.*

<sup>22</sup> *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868 (31 Vict.), c. 40, s. 27.

<sup>23</sup> H.A. McLearn, "Canadian Arrangements for Aid of the Civil Power" (1971) 1:1 *Canadian Defence Quarterly* 26 at 27.

been reflected in legislation for the Province of Canada as early as 1855<sup>24</sup> with changes made in 1859<sup>25</sup> and again in 1863<sup>26</sup>. A comparison with the earlier statutes reveals that the 1868 legislation was in substance the adoption of the earlier Province of Canada legislation. This codification effectively enshrined the spirit of the principles enunciated in the English common law decisions. Local militia commanders had a duty to call out the militia when requested in writing by the mayor, warden, head of the municipality or any other two magistrates.<sup>27</sup>

The legislation did add one other substantive provision not contained in the common law or any other statute of the time; soldiers were deemed to be "special constables" in the performance of their tasks.<sup>28</sup> Although eventually given a statutory basis, the office of constables was initially a common law function whose holders were responsible for the maintenance of the public peace.<sup>29</sup> It is clear that the legislation presumed that the responsibility for law enforcement remained in the hands of local officials by virtue of the statutory delegation of authority in the magistrates. Certainly at the time, constables formed the basis of the policing model<sup>30</sup> and the adoption of special constable status for soldiers created in essence a functional constabulary force complementary to existing police forces.

<sup>24</sup> *An Act to regulate the Militia of this Province, and, to repeal the Acts now in force for that purpose*, S.Prov.C. 1855 (18 Vict), c. 77, ss. 38-39 (only the active militia could be called out for aid of the civil power, not the sedentary militia).

<sup>25</sup> *An Act respecting the Militia*, S.Prov.C. 1859 (22 Vict.), c. 34, ss. 44-45.

<sup>26</sup> *An Act respecting the Volunteer Militia Force*, S.Prov.C. 1863 (27 Vict.), c. 3, ss. 18-19.

<sup>27</sup> *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868 (31 Vict.), c. 40, s. 27.

<sup>28</sup> *Ibid*; the expression "special constable" would continue to be used until changed to "constable" by the *National Defence Act*, S.C. 1950, c. 42, s. 225.

<sup>29</sup> P. Stenning, *Legal Status of Police* (Ottawa: Law Reform Commission of Canada, 1981) at 18-34 (a study paper prepared for the Law Reform Commission).

<sup>30</sup> *Ibid*. at 35-39.



In much the same manner that the municipalities would need to pay citizens sworn in temporarily as special constables, whether by measure of precaution or not, municipalities were also required to pay for any call out of the military that they requested. To safeguard the interests of the soldiers, express provision was made for militia commanders to sue municipalities to recover outstanding wages as soldiers were not paid by the federal Crown for their service in aid of the civil power.<sup>31</sup> It was not until 1879 that legislative amendments afforded a partial reprieve to soldiers when the federal government consented to advance sums for military pay but only upon Governor-in-Council approval pending receipt of payment from the municipality. In essence though, the legislation represented a revitalization of the time-honoured collective duty of the *fyrð* of long ago to respond to the call of arms when required by the urgent need of the community. In doing so, the statute focused on the most readily available source of disciplined manpower easily mobilized for the demands at hand—the militia.

It is the ability to muster and manoeuvre a large group of armed and well-disciplined individuals under a central authority that renders the true advantage of military intervention in a civil disturbance. In a skilful formulation designed to balance the need of local authorities to utilize the military with the Crown's control of the military, the common law never granted magistrates command of the military forces: it only imposed

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<sup>31</sup> *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868 (31 Vict.), c. 40, s. 27 (“... and the said sums, and the value of such lodging, if not furnished by the Municipality, may be recovered from it by the Officer Commanding the Corps, in his own name, and when received or recovered shall be paid over to the Officers and men entitled thereto.”); in some provinces to this day, there is provincial legislation that provides for the reimbursement of expenses for the costs associated with the use of the Canadian Forces; see *Police Services Act*, R.S.O. 1990, c. P-15, ss. 55(4).

an obligation on military authorities to muster its forces to respond to the call of the local civil authority in extra-ordinary events such as riots. The law assumed consequently that the magistrate's general instructions would be given to the commander in charge at the site of the riot. This concept was codified by establishing the duty of military commanders "... to obey such instructions as may be lawfully given him by any Magistrates in regard to such riot"<sup>32</sup>.

The federal responsibility over defence matters and its residual power of peace, order and good government ensures a firm basis for the federal control over the military in response to calls for assistance. In as much as such demands from magistrates involved the movement and engagement of formed bodies of armed men unified under central authority, such duties are easily recognizable as military in nature. Not seen in earlier pre-Confederation legislation, the 1868 legislation incorporated an unequivocal direction that military contingents were to "act only as a military body"<sup>33</sup> and established that each and every soldier was individually liable to obey his military superior only.<sup>34</sup> Although soldiers were empowered with police powers in their capacity as special constables at law, they operated within the legal constraints imposed by military law.

Pragmatically, this arrangement ensured unity of command under the stressful conditions of dealing with a tumultuous riot. Soldiers were required to obey military orders but the statute enjoined the senior militia officer at the scene to obey the "instructions"<sup>35</sup> of the

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<sup>32</sup> *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868 (31 Vict.), c. 40, s. 27.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*



magistrate thus fulfilling the spirit of the common law duty of obedience to the magistrate. While this distinction between 'instructions' and 'military orders' may appear somewhat academic, the concept also served to demarcate the separation to be drawn between local civil authority responsibility for invoking the use of the military in riot control and the liabilities that accrue to soldiers for the manner in which they fulfilled their mandate to quell the riot. This separation of responsibilities encapsulated the common law as laid down earlier in the *Redford*<sup>36</sup> case.

From the outset, there was an implicit understanding that the senior military officer located in the locality of the riot would be the authority to determine what parts of the militia to mobilize in order to deal with the unrest. With changes introduced in 1873, the militia commander was given an explicit and uncontested discretion to determine the extent of the assistance to provide<sup>37</sup> while the responsibility for determining the existence of a riot and the inability of civil authorities to deal with the disturbance rested absolutely with the local civil authority<sup>38</sup>. The result was not necessarily a balancing of military and civilian responsibilities or the creation of a joint decision-making model. Rather, the change clarified that the approval process was double keyed and signaled the first of many changes that would eventually erode the authority of the local magistrates.

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<sup>36</sup> *Supra* note 14.

<sup>37</sup> *An Act to amend "An Act Respecting the Militia and Defence of the Dominion of Canada", 1873 (36 Vict.), c. 46, s. 1 ("... and it shall be the duty of the Senior Officer of the Active Militia present at any locality to call out the same or any portion thereof as he considers necessary for the purpose of preventing or suppressing ...).*

<sup>38</sup> *Ibid.*, (The Active Militia, or any corps thereof, shall be liable to be called out of the civil power in any case in which a riot, disturbance or the peace or other emergency requiring such service occurs, or is, in the opinion of the civil authorities thereafter mentioned, anticipated as likely to occur ...).

Early legislation governing aid of the civil power was not an attempt to legislate the soldier's common law duty to respond to the call of the *posse comitatus*. For while the legislation borrowed in large part precepts from the common law in shaping the nature of the duty and thus codified the military requirement to respond in times of urgency, the scope of the duty imposed had become institutional in nature with a soldier's individual duty of obedience to his superior taking paramountcy over any instruction from a magistrate.

Thus conceptually, the use of aid of the civil power did not equate to an abandonment of federal jurisdiction over the maintenance of peace, order and good government but simply a legislated conscription of military manpower, temporary in time of need as it might be, for the policing efforts of the local magistrates. That similar aid to the civil power provisions prevailed in the united Province of Canada prior to Confederation attests to the political philosophy that law enforcement was considered a local affair but for which the federal Government would consent to make military assets temporarily available. It followed that the military expenses incurred were to be rightly underwritten by the municipality.

### *C. The Subsequent Erosion of the Citizen Soldier Model*

Most case law dealing with the provisions governing aid of the civil power occurred in the last quarter of the nineteenth century. Not surprisingly, many of the amendments to the legislation made over this time period reflect changes made in consequence of the difficulties encountered in pursuing lawsuits. Invariably, lawsuits were brought by military officers to seek recovery of expenses incurred including pay owed to their



soldiers. In defence against the lawsuits, the municipalities often raised technical issues that were not expressly addressed by the legislation. As the municipalities had already received military assistance provided in response to their requests, one can conclude that the lawsuits were necessitated by the desire of the municipalities to escape the significant financial burden placed on them. Nonetheless, the cases serve both to illustrate some of the problems encountered with the legislation in the early years after Confederation and to clarify the ambit of the legal authority permitting aid to the civil power.

Arising out of an incident occurring in 1871, the case of *McKay v. The Mayor of Montreal et al.*<sup>39</sup> involved the preventive use of the military during an election campaign in Montreal. With the military present in great numbers, no disruption took place. In its subsequent refusal to pay the associated costs of the call out, the city raised the issue of whether sufficient authority existed to bind the city if in fact the disturbance of the peace failed to materialize after city authorities had called out the militia in anticipation of a riot. The militia legislation of 1868 made no explicit provision for the possibility of an 'anticipated' emergency. Nonetheless, the Court summarily dismissed the defence.

Relying on *dicta* from the *Penny* case to find against the city, the Court pointed out the common law authority to call upon the military permitted justices of the peace to make arrangements by "way of precaution"<sup>40</sup>.

By the time that the *McKay* case was decided in 1876, legislative changes had already been made to incorporate a clarification concerning the uncertainty of contingencies by

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<sup>39</sup> (1876), 20 L.C. Jur. 221 (S.C. Que.) [McKay].

<sup>40</sup> *Ibid.* at 222.

adding the words "anticipated or likely to occur"<sup>41</sup> to the enabling provision. The amendment completely divorced military leadership from the ardours of any need to assess the merits of the call out other than to determine the size of the force to be assigned to the call out. This principle was further reinforced only a few years later in *McEachern v. The City of Montreal*<sup>42</sup>. On the facts of the case, the militia had again been called out but this time to prevent sectarian outbreaks of violence in anticipation of an Orange parade slated for July 12, 1878. Six English-speaking aldermen on the city's council had called upon the militia to muster while the Mayor, Jean-Louis Beaudry, had opposed any involvement from the militia.

Placed on the horns of a dilemma by the rift on city council, the commander of the militia nonetheless responded by mobilizing almost three thousand militiamen. Fortunately, the Mayor was able to de-escalate the tension and to prevent any outbreak of violence by use of the police reinforced with special constables sworn in for the event.<sup>43</sup> Despite the fact that the militia was not required, the city was nonetheless saddled with the cost of the call out. Regardless of the conflict within city council over the necessity of the call out, the Court concluded that the requisition had been in conformity with the statute. Although the magistrates were required to act in good faith, once the authority was invoked, the military was obliged to assist and the municipality was liable for the costs incurred.

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<sup>41</sup> *An Act to amend "An Act Respecting the Militia and Defence of the Dominion of Canada", 1873 (36 Vict.), c. 46, s. 1.*

<sup>42</sup> (1879), 2 L.N. 49 (S.C. Que.) [*McEachern*].

<sup>43</sup> The facts of the event are drawn from the historical account of the incident found in Desmond Morton, "Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867-1914" (1970) 50 *Canadian Historical Review* 407 at 414.



The first Supreme Court of Canada case on the matter involved a consideration of whether magistrates were required to have a personal knowledge of the disturbance of the peace in order to lawfully call out the militia. The outcome of the case was to reinforce lower court decisions concerning the military obligation to obey a call out and to eliminate responsibility for the military authorities to weigh the sufficiency of the written request for aid. In *Crewe-Read v. The Municipality of Cape Breton*<sup>44</sup>, the municipality challenged the sufficiency of the form of the written request since the warden and the three justices of the peace who had made the requisition had no personal knowledge of an actual or anticipated riot during a coal strike at Lingan, Cape Breton. Ritchie C.J. flatly rejected the municipality's argument that the militia intervention was illegal by virtue of a "mere technical informality"<sup>45</sup> as long as the justices were in fact satisfied of the existence of a civil disturbance. In a succinctly worded decision, he determined that the fundamental issue underlying the Court's deference to the unquestioning acceptance of the validity of a summons for aid of the civil power in times of emergency was the need to ensure a protection of the greater societal interest in maintaining public security. He stated:

Could it ever have been contemplated by the legislature that the officer to whom the order was transmitted was to obey or disobey as he might think it technically right, or the men to obey or disobey if, in the their opinion, the requisition was not strictly right, and in the meantime was the riot to go on, and the civil force be overpowered, while the commanding officer and his men were either disobeying the order or settling this technical objection? I think not, ...

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<sup>44</sup> [1888] 14 S.C.R. 8.

<sup>45</sup> *Ibid.* at 13.

The next most significant legislative change occurred in 1924 following the recommendations made by the Royal Commission<sup>46</sup> called to examine the use of the militia during a long and bitter industrial steel strike in Cape Breton in 1923. Named after its Chairman, the Robertson Report proposed a new model of civil authority to be exercised when calling out the military. In particular, it recommended that authority would be vested jointly between a judge and the attorney-general of the province. Astonishingly, the Report provided no reasons justifying its recommendations. In response, the Government's legislative amendment modified in part the recommendation; the new paradigm endorsed the attorney-general of each province as the sole authority. Although a call out could also be initiated on the motion of a county, district or superior judge, it would henceforth require the concurrence of the attorney-general.<sup>47</sup>

As stated by the then Minister of National Defence during the course of the debate over the 1924 amendments: "The theory on which the legislation is put forward is that the duty of preserving order in any particular province in the administration of the law rests in the hands of the attorney-general."<sup>48</sup> This shift away from a strict reliance on local magistrates and justices of the peace had been discernable as early as the 1904 legislative changes when the authority had been given to the county and district court judges to requisition whenever the mayor was unable or unwilling to act.<sup>49</sup> Admittedly, the administration of law and order had always been assumed to be a provincial affair, but

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<sup>46</sup> Canada, *Royal Commission to Inquire into Industrial Unrest among Steel Workers at Sydney, Nova Scotia*, (Ottawa: Government Printing Bureau, 1924) [Robertson Report] (appointed under Order-in-Council of September 22, 1924; copy of the report may be found at the University of Ottawa Library MRT Microfiche Ca1 Z1 24C 255A).

<sup>47</sup> *An Act to amend the Militia Act*, S.C. 1924, c. 57, s. 1.

<sup>48</sup> *House of Commons Debates*, 5 (July 16, 1924) at 4622 (Hon. E.M. MacDonald, Minister of National Defence).



until the amendments in 1924, the statute had, in the words of the Supreme Court of Canada in the 1914 case of *Canada (Attorney-General) v. Sydney*, always conferred, "... a power upon local authorities responsible for the maintenance of peace which they exercise at their discretion in view of the necessities of the situation ..."<sup>50</sup>. This discretionary power, which had been a central part of the citizen soldier model, was henceforth effectively removed.

Earlier changes in 1904 had already removed any reference to the military duty of commanders to take instructions from magistrates as to the mode of quelling the riot.<sup>51</sup> This elimination of the statutory role of the magistrates represented one more step away from the original common law model of the individual serving not as soldier but rather as citizen. With the advent of authority to call upon the military firmly vested in the provincial executive government by virtue of the 1924 amendments, the provincial jurisdiction over policing and administration of justice remained unimpeded and uncontested, but the specific authority of local magistrates was effectively vanquished.

Not surprisingly, the 1924 changes correspondingly transferred the costs of call outs to the provincial treasury and consequentially improved the opportunities for debt collection on the part of the federal government. For the previous fifty-six years prior to 1924, the municipalities had been held financially liable for the use of the militia with some very

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<sup>49</sup> See *An Act Respecting the Militia and Defence of Canada*, S.C. 1904 (4 Edw. VII), c. 23, ss. 82(1)(a).

<sup>50</sup> *Canada (Attorney-General) v. Sydney* (1914), 49 S.C.R. 148 at 151, 16 D.L.R. 726; rev'g (1913) 9 D.L.R. 282 (N.S.S.C.).

<sup>51</sup> The requirement to continue to do so remained a part of the *Queen's Regulations and Orders* until 1970; for an account of the changes occasioned at that time see H.A. McLearn, *supra* note 23 at 29.

limited exceptions.<sup>52</sup> The Supreme Court of Canada had determined that the federal legislation holding so to be *intra vires* in 1903.<sup>53</sup> Nonetheless, the federal government had had little success in collecting debt. Between 1876 and 1904, there had been fifty-nine events involving aid of the civil power for a cumulative cost of \$556,291.20. Of this sum only \$40,291.65 had been successfully collected by 1924.<sup>54</sup> Although the financial obligations were never the focus of debate in Parliament at the time of their adoption, the new amendments created a foundation for more effective recovery, first by requiring that an attorney-general's requisition include averments undertaking to reimburse all military expenses, and second, by establishing a mechanism of recovery in the case of default by allowing a set-off from any annual grant payable by Canada.<sup>55</sup>

Adopted in 1940, the *Royal Canadian Air Force Act*<sup>56</sup> introduced aid of civil power provisions applicable to air force personnel but in doing so the *Act* established a limitation that precluded any direct requisition from local civil authorities. In its place, the army District Commander was permitted to request air force units whenever he considered it necessary to augment army units called out on aid of the civil power.<sup>57</sup> This

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<sup>52</sup> Legislative changes made in 1877 permitted the discretionary assumption of certain expenses upon approval by the Governor in Council when the disturbances involved railways passing through the municipality; see *An Act to make further provision for the payment of the Active Militia when called out in certain cases in aid of the civil power*, S.C. 1877 (40 Vict.), c. 40, s. 2.

<sup>53</sup> *Gordon v. The City of Montreal* (1903) 24 R.J.Q. 465 (S.C.); aff'd (1905) CarswellQue 6, (1905) Cout. S.C. 343#1 (S.C.C.) (eC) (The *Militia Act* provision that imposed a civil liability on the municipality as a consequence of its use of the militia in aid of the civil power was determined to be *intra vires*).

<sup>54</sup> *House of Commons Debates*, 3 (June 6, 1924) at 2863 (Hon. E.M. MacDonald, Minister of National Defence).

<sup>55</sup> *An Act to Amend the Militia Act*, S.C. 1924 (14-15 Geo V), c. 57, s. 1 ("(1) All expenses and costs incurred by His Majesty by reason of any of the militia being so called out in aid of the civil power, shall be paid to His Majesty by the province ... His Majesty may retain from any annual grant payable by Canada to such province and under the control of the Parliament of Canada").

<sup>56</sup> *Royal Canadian Air Force Act*, S.C. 1940, c. 15, s. 9 (s. 9 also granted the powers of a peace officer to members called out on aid of the civil power).

<sup>57</sup> *Ibid.*, s. 9 (the request required approval from the Minister).



expansion of the availability of non-army personnel would continued with the consolidation of legislation for the tri-services in 1950 which finally permitted the use of naval personnel for such duties on terms similar to those for the air force.<sup>58</sup>

The next significant change occurred in 1972; henceforth the Chief of the Defence Staff was the officer designated with the authority to assign soldiers for aid of the civil power duty.<sup>59</sup> It was the last in a series of variations that had progressively removed the obligation of local military commanders, then later district and regional commanders to comply with requisitions without a statutory requirement to seek the approval of superior authorities. In essence, the change simply centralized the designated military authority within the military. Certainly, it facilitated the coordination of efforts to mobilize additional resources to meet demands whenever local military resources were considered insufficient for the task at hand. Nonetheless, an anomaly remains; it cannot be suggested the position of the Chief of the Defence Staff is commensurate with that of a provincial attorney-general in terms of the political accountability to which a decision to intervene militarily in civil unrest may give rise.

Lastly, the abolition of the statutory requirement to pay expenses associated with call outs occurred in 1988.<sup>60</sup> This change, in combination with the earlier transfer of decision-making to higher levels, for both military and civilian authorities, would have the effect of eliminating the last vestiges of the citizen soldier model upon which the initial 1868

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<sup>58</sup> *National Defence Act*, S.C. 1950, c. 43, s. 221(3).

<sup>59</sup> *Canadian Forces Reorganization Act*, S.C. 1966-67, c. 89, s. 53.

legislation had been modeled. Certainly, given the express statutory authority vested in the provincial executive and the absence of any asserted authority for the magistrates, no doubt remains concerning the demise of the common law authority of magistrates to call out the military.

However, one central feature of the aid of the civil power remains unchanged to this day. Procedurally, it cannot be initiated by federal authority, making its use contingent on the willingness of a provincial attorney-general to invoke. However, once invoked, a military response is mandatory regardless of the merits of the requisition. These points along with the demise of the legal fictions associated with the citizen soldier model were to necessitate a consideration of a new model of authorization to better provide for the need to initiate military intervention under the authority of the federal executive. As will be discussed, these key shortcomings were to be addressed by other means that eventually culminated in legislative changes in 1998.

## II. Use of Federal Executive Authority—Law Enforcement Matters

### A. *How the Executive Authority is Exercised*

In England, the *Militia Act, 1661*<sup>61</sup> vested command of the military in the Crown, but the ill-trained and poorly equipped militia was not considered by the English Parliament as threatening to liberties as the impact and influence of the Crown's standing army in the

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<sup>60</sup> Consequential changes to the *National Defence Act* were made by the *Emergencies Act*, S.C. 1988, c. 29, s. 75-77 (changes were affected by the repeal of the old provision leaving the requirement as to who would pay unspecified).

<sup>61</sup> (U.K.), 13 Charles II, c. 6.



seventeenth century.<sup>62</sup> It was the fear of the standing army as an instrument of internal oppression during the previous struggle between the Stuart kings and Parliament that led, following the Glorious Revolution, to the passage of the *Bill of Rights* in 1688.<sup>63</sup> The *Bill of Rights* declared that "the raising or keeping of a standing army within the Kingdom in time of peace, unless it be with the consent of Parliament, is against the law."<sup>64</sup>

By controlling the existence of the army, constitutional subordination of the military to civilian control was assured. Parliamentary supremacy was further reinforced over the military by legislating the army's code of discipline and approving the annual funding for its maintenance.<sup>65</sup> Nonetheless, the disposition and governance of the army initially resided with the sovereign. With the evolution towards responsible and representative government in the eighteenth and nineteenth centuries in England, the sovereign by convention came to govern only upon the advice and counsel of his ministers to the point where state matters requiring the exercise of the prerogative were eventually assumed by governmental ministers.

Control of the army in England was one of the last of the royal prerogatives to be surrendered to the government.<sup>66</sup> In Canada, the control of the military was defined

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<sup>62</sup> *Supra* note 8 at 579; see also E.C.S. Wade & G. Godfrey Phillips, 9th ed. by A.W. Bradley, *Constitutional and Administrative Law*, (London: Longman Group, 1977) at 379.

<sup>63</sup> Wade, *ibid.* at 379.

<sup>64</sup> I Will. & Mary, sess. 2, c. 2: S.L., IX, 67 reprinted in E. Neville Williams, *The Eighteenth-Century Constitution 1688-1815: Documents and Commentary* (Cambridge: Cambridge University Press, 1970) at 26.

<sup>65</sup> Wade, *supra* note 62 at 379-380.

<sup>66</sup> *Halsburg's Laws of England*, 4<sup>th</sup> ed., vol. 8(2) (London: Butterworths, 1996) at 510, para 886 (personal command of the army was relinquished by the king in 1793); *contra* W.E. Hodgins, "The Law Applicable to the Militia of Canada" (1901) 21 C.L.T. 169 at 173 (personal command was not relinquished by George III until 1806).

constitutionally at the time of confederation. Section 15 of the *Constitution Act, 1867*<sup>67</sup> entrenched control of the military in Canada as a federal responsibility and established command of the armed forces as follows:

The command in chief of the land and naval militia and of all naval and military forces of and in Canada is vested in the Queen, and shall be exercised and administered by Her Majesty personally or by the Governor as her representative.

While the words of section 15 were faithfully incorporated into section 1 of the first act governing the militia in 1868,<sup>68</sup> the appointment of a military commander in section 28(3) and of a minister of militia in section 2 of the same legislation rendered the military authority of the sovereign and the Governor General as merely nominal. Since that time, the management and control of the military has always solidly rested in the hands of Cabinet with the Cabinet minister in charge of the defence portfolio able to delegate certain administrative and managerial functions to designated departmental authorities. That the Department of National Defence and the Canadian Forces remain separate legal entities<sup>69</sup> does not mitigate the political control exercised by the Minister. Shaping the method of carrying out governmental control over the military, sub-section 18(2) of the current *National Defence Act*<sup>70</sup> provides that all governmental direction shall be communicated to the Chief of the Defence Staff by the Minister. This unbroken and defined line of authority thus ensures at all times the military subordination to executive government authority. Equally important, the means of exercising executive

<sup>67</sup> (U.K.), 30 & 31 Vict., c. 3, s. 15 reprinted in R.S.C. 1985, App II, No. 5 (previously known as the *British North American Act, 1867*).

<sup>68</sup> *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868 (31 Vict.), c. 40.

<sup>69</sup> *National Defence Act*, R.S.C. 1985, c. N-5, s. 14 (establishes the constitution of the Canadian Forces); s. 18 (provides for the appointment of the Chief of the Defence Staff under direction of the Minister); s. 3 (establishes the Department of National Defence).



authority whether based on prerogative or on delegated statutory authority remains unaffected.

*B. Legislative Authority for the Use of the Military*

There is little doubt that the armed forces are intended for use in the defence and in the maintenance of national security of the country. Without question, the disposition of the armed force in wartime belongs to the Crown<sup>71</sup> but in peacetime, the nature of the limitations on the use of the armed forces remains complex, particularly for activities that may not necessarily be regarded as uniquely military.

Prior to Confederation, there was great latitude to direct the use of the military in Upper Canada for purposes of upholding the civil power. Admittedly, the legislative authority to employ the military on domestic security duties was initially implicit but with amendments, the authority became more expansive and explicit. For example, Upper Canadian legislation in 1808 permitted the militia to be called out but only "in time of war, rebellion, or any other pressing exigency"<sup>72</sup>. This limitation was qualified in 1839 when the Governor was permitted to embody the militia additionally "for any purpose

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<sup>70</sup> R.S.C. 1985, N-5.

<sup>71</sup> *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142 (H.L.), [1964] A.C. 763 ("It is my opinion clear that the deposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised." at 791): see also *China Navigation Company, Limited v. Attorney-General*, [1932] 2 K.B. 197 (C.A.) ("It is unnecessary to specify the various powers relating to the army which Parliament has thus tacitly left to the unfettered control of the Crown: it is sufficient to state that they undoubtedly include the organization, armament, maintenance, disposition and use of the standing army in time of peace." at 228 *per* Lawrence L.J.).

<sup>72</sup> *An act to explain, amend, and reduce to one act of parliament, the several law now in being for the raising and training militia of this province*, Statutes of Upper Canada 1808 (48 Geo. III), c. 1, s. 8.

connected with preservation of the public peace"<sup>73</sup>. Similar wording was again used in 1846 for the Province of Canada but the ambit of the Crown's authority to call out the militia was further augmented by adding the words "for the safety of the Province"<sup>74</sup>.

The 1855 militia legislation for the Province of Canada marked a bifurcation in the source of authority for calling out the military; while aid to the civil power provisions made their first appearance, the statutory authority of Crown authorities to independently call out the militia in the absence of a request from the local civil authorities was restricted to circumstances of "war, invasion, or insurrection, or imminent danger of any of them."<sup>75</sup> The ability to deploy soldiers on duties to quell riots remained exclusively within the terms of the aid of civil power provisions. This distinction in call outs between those initiated by the Crown's authority and those statutorily required in response to local law enforcement authority was to be repeated in the first Canadian legislation in 1868.<sup>76</sup>

Imbued in the minds of legislators, the feared consequences of using the military other than under the direction of a magistrate remained an undeniable concern in the immediate post-Confederation era. The influence of the belief perhaps reached its apogee in 1877 when its impact on political rhetoric was aptly reflected during the debate leading to the adoption of amendments to the aid of civil power provisions in that year. Suggestions

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<sup>73</sup> *An Act to repeal, alter and amend, the Militia Laws of the Province*, Statutes of Upper Canada 1839 (2 Vict.), c. 9, s. 6.

<sup>74</sup> *An Act to repeal certain Laws therein mentioned, to provide for the better defence of this Province, and to regulate the Militia thereof*, S.Prov.C. 1846 (9 Vict.), c. 28, s. 19.

<sup>75</sup> *An Act to regulate the Militia of this Province, and to repeal the Acts now in force for that purpose*, 1855 S.Prov.C. (18 Vict.), c. 77, s. 52.



were made by the opposition in Parliament that further amendments were needed to provide a means of engaging the militia whenever incidents arose which were not entirely local in nature or whenever the local magistrates might be in sympathy with the rioters. Upon the opposition's proposal that the local commander would be entrusted with the responsibility under direction from the central government, the Justice Minister, Mr. Blake, rejected the proposal in words summarized in the *Hansard* as follows:

It was the essence of British liberty that the forces could not be taken out in aid of the civil power except under the orders of civil authorities; and once grant the commander the authority in the manner suggested, we destroy every essence of British liberty, for it would be establishing martial law.<sup>77</sup>

His comments encapsulated many of the apprehensions of English parliamentarians in the eighteenth century who feared that military intervention under the guise of prerogative (controlled by the king at that time in history) might precipitate a breach in the doctrine of parliamentary supremacy and consequentially lead to a state of martial law.<sup>78</sup> With the establishment of responsible government and the acceptance of military subordination to civil authority as seen in Canada, such concerns were ill-founded. Whether initiated by the local magistrates or not, the need for military compliance with the law and for military obedience to executive civil authority within the constraints of the law remain unchanged.

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<sup>76</sup> See *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868 (31 Vict.), c. 40, ss. 27, 60 & 61.

<sup>77</sup> *House of Commons Debates*, Session 1877 (April 4, 1877) at 1154 (Mr. Blake, Minister of Justice).

<sup>78</sup> See the comments of Lord Mansfield before the House of Lords in 1780 following the Gordon Riots in London at 21 *Parliamentary History* at 694 reprinted in E. Neville Williams, *The Eighteenth-Century Constitution 1688-1815: Documents and commentary* (Cambridge: Cambridge University Press, 1970) at 417-419.

The reassertion of the central government's inherent authority to intervene militarily to restore and maintain the peace waited no other than Sir John A. MacDonald in 1879 during the course of debate over other amendments on the subject. Resting its case upon the premise that law enforcement was exclusively a provincial matter, the opposition now asserted that while the federal government could lend its militia and equipment for aid of the civil power, provincial legislation would be required to constitutionally validate the militia's function and acts. Summarily dismissing the assertion, Sir John stated in reply before the House of Commons:

No government was worthy of the name unless strong enough, if necessary, to maintain the peace. It was true, a parish constable or beadle, in the case of a fight between individuals, was the person to call upon first. Everyone knew that; but it [if] an insurrection or riot broke out the central Government had power to suppress it. Have as in England, central power had full right, if it thought the public safety in danger to interfere.<sup>79</sup>

While Sir John's assertion did not represent a new power in light of the federal residual responsibility for peace, order and good government, it remained without dispute that there was no statutorily endorsed means for federal authorities to unilaterally direct a mobilization of the military in response to a civil disturbances for another twenty-five years. This was in large measure no doubt due to the unfailing belief that the suppression of civil disturbances remained the primary responsibility of local and provincial authorities. The statutory framework of limitations continued to impose restrictions on call outs of the militia to periods of war, insurrection, or when dangers of either existed. The extent of these restrictions must be considered in light of the organizational structure of the militia at the time.



The Canadian militia acts of the nineteenth century established a system of universal compulsory military service for all able-bodied men between the ages of eighteen and sixty in times of need.<sup>80</sup> In principle, the selection process was undertaken by ballot whenever the number of volunteers was determined to be insufficient to meet the quota.<sup>81</sup> It must be recognized that militia soldiers, other than those serving voluntarily, were not required to serve unless called out on prescribed grounds. However, despite the legislative basis for a draft system, recruitment in the Province of Canada had come to be based in practice on a system of volunteers by the mid-nineteenth century.<sup>82</sup>

Notwithstanding voluntary enrollment, militia units could be called out on continuous full-time service in the event of a requisition for aid of the civil power. In doing so, members of the militia served on compulsory military duty for the duration of the call out.

It was not until 1904 that legislation created a dichotomy between soldiers placed "on active service" for mobilization and those placed "on service"<sup>83</sup> primarily for training or

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<sup>79</sup> *House of Commons Debates*, 2 (May 2, 1879) at 1700 (Sir John A. MacDonald).

<sup>80</sup> *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868 (31 Vict.), c. 40, s. 4; *An Act consolidating and amending the several Acts relating to the Militia and Defence of the Dominion of Canada*, S.C. 1883 (46 Vict.), c. 11, s. 4; *An Act Respecting the Militia and Defence of Canada*, S.C. 1904 (4 Edw. VII), c. 23, s. 11 (this feature of the militia legislation would remain on the statute book until repealed in 1950).

<sup>81</sup> *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868 (31 Vict.), c. 40, s. 22-23; *An Act consolidating and amending the several Acts relating to the Militia and Defence of the Dominion of Canada*, S.C. 1883 (46 Vict.), c. 11, s. 22-23; *An Act Respecting the Militia and Defence of Canada*, S.C. 1904 (4 Edw. VII), c. 23, s. 27-28.

<sup>82</sup> G.F. Stanley, *Nos Soldats: L'Histoire Militaire du Canada de 1604 à Nos Jours*, trans. by Serge Bernier (Montréal: Les Éditions de l'Homme, 1980) at 291. The legislative basis for universal compulsory military service would remain in legislation until 1950. A separate selective military draft system was introduced by special legislation in World War I and II but its implementation was limited to the wartime periods.

<sup>83</sup> *An Act Respecting the Militia and Defence of Canada*, S.C. 1904 (4 Edw. VII), c. 23, s. 2 (definitions).

other military related duties. "Active service" was prescribed to apply to a soldier who was "enrolled, enlisted, drafted or warned for service or duty during an emergency or has been warned for duty in aid of the civil power"<sup>84</sup>. As to be all-inclusive, "emergency" was defined to include "war, invasion, *riot* (emphasis added) or insurrection, real or apprehended."<sup>85</sup> Other than in the event of a requisition for aid of the civil power, only the Governor in Council was empowered to place the militia on active service.<sup>86</sup> The change was to serve as a central turning point in the expansion of a federal discretion to exercise its executive authority to deal with civil disturbances because it accorded an authority to the Governor in Council to initiate a call out for internal security duties independent of any request for aid of the civil power from local authorities. It consequentially reflected the first acknowledged overlap between war and internal security duties in the military defence mandate since the 1868 legislation.

Henceforth, the Governor in Council was undeniably granted the powers to direct intervention of the military in civil disturbances. While the Governor-in-Council was authorized to do so and presumable would have done so if an internal crisis had erupted that reached national importance, it never exercised such power. Of course, there would have been consequences flowing from an executive decision to call out the militia for active service that were not occasioned by the aid to the civil power provisions. In particular, section 71 of the *Militia Act* of 1904 required the recall of Parliament whenever the militia was placed on active service by the Governor in Council.<sup>87</sup>

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<sup>84</sup> *Ibid.*, (definition of "on active service").

<sup>85</sup> *Ibid.*, (definition of "emergency").

<sup>86</sup> *Ibid.*, s. 70.

<sup>87</sup> *Ibid.*, s. 71.



Needless to say, the exception to this rule was the use of the aid to the civil power provisions which placed the militia "on active service" by operation of law without the necessity of a recall of Parliament.<sup>88</sup>

While a small cadre of full time soldiers was raised in response to the gradual withdrawal of British regular forces starting in the 1870s,<sup>89</sup> the amendments of 1904 were also to show a growing distinction between part time members of the militia who represented the majority of soldiers and a small but growing contingent of full time soldiers who were embodied in a new standing force called the Permanent Force.<sup>90</sup> The Permanent Force was the forerunner of Canada's present day regular force and by statute, members of the Permanent Force were available at all times for general duties.<sup>91</sup> The 1904 amendments were also to impose one other special condition when the military were called upon for aid of the civil power. Upon availability of the Permanent Force in sufficient numbers, the Permanent Force was to be deployed before any other militia corps was permitted.<sup>92</sup> As will be examined in the next section, the growing availability of soldiers from the Permanent Force was to also play a central role for later uses of the prerogative.

### *C. Prerogative to Authorize Military Use for Domestic Law Enforcement*

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<sup>88</sup> *Ibid.*, s. 81.

<sup>89</sup> *Ibid.* at 327-328.

<sup>90</sup> *Ibid.*, s. 24 (The Permanent Force was initially authorized a strength of 2000; the ceiling was subsequently amended to 5000 the next year.)

<sup>91</sup> *Ibid.*, s. 25 (The caveat creating a reliance on full time soldiers was not removed until 1950.)

<sup>92</sup> *Ibid.*, s. 81.

Dicey's comment defining the prerogative as "the residue of discretionary or arbitrary authority which at any time is legally left in the hands of the Crown"<sup>93</sup> has been cited with approval by the Supreme Court of Canada in *Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings*<sup>94</sup> and by the House of Lords in *Attorney General v. De Keyser's Royal Hotel*<sup>95</sup>. Discussing the scope of the prerogative in time of war, Lord Reid in *Burmah Oil Ltd. Co. v. Lord Advocate* stated: "The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute. So I would think the proper approach is a historical one: how was it used in former times and how has it been used in modern times?"<sup>96</sup> These words serve as the basis for the current examination of the use of the prerogative with respect to the maintenance of internal security.

### 1. Conscription Riots of 1918

The adoption of selective military conscription in World War I was a very divisive issue that would threaten the political stability and national unity of the nation over the course of the war; nowhere was the opposition more apparent than in the Province of Quebec in the spring of 1918 when tensions eventually broke out in street violence at Quebec City. Starting on March 28 and continuing over a period of several days, riots raged. No request for military aid from local or provincial civil authorities was ever made during the

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<sup>93</sup> A.V. Dicey, *Introduction to the Study of the Constitution*, 10<sup>th</sup> ed., (London: Macmillan & Co., 1965) at 424; see also P.W. Hogg, *Constitutional Law of Canada*, 2<sup>n</sup> ed. (Toronto: Carswell, 1985) at 10 for his proposition that the royal prerogative is a component of the common law because its scope has been determined by the courts but his comments fail to acknowledge other than implicitly that the scope of the royal prerogative may be limited by statute.

<sup>94</sup> [1933] S.C.R. 269 at 272-73, 59 C.C.C. 301.

<sup>95</sup> [1920] A.C. 508 at p. 526, [1920] All E.R. Rep. 80 (H.L.) *per* Lord Dunedin.

<sup>96</sup> *Burmah Oil Co. Ltd. v. Lord Advocate* [1964] A.C. 75 at 101 (H.L.).



incident.<sup>97</sup> Finally, under the direction of the Minister of Militia and Defence, military personnel were brought into the city to contain the unrest. There was considerable property damage and four people were killed.<sup>98</sup>

Using its powers under the *War Measures Act, 1914*<sup>99</sup>, the federal Government hastily approved an order-in-council on April 4 to provide retroactive indemnification for the military actions that had taken place and to establish a subsequent procedure for future military intervention elsewhere in Canada if justified by the need to restore peace and security.<sup>100</sup> The order-in-council invoked a concept of necessity on the legal premise that "... at common law it is the duty of a military officer with the troops under his command to interfere, when such interference is necessary, to put down riot, insurrection, or civil disturbance."<sup>101</sup>

One of the fundamental premises underlying the doctrine of aid of the civil power was the necessity of a demand for assistance emanating from local authorities entrusted with keeping the peace. As had been seen earlier in the *McEachern* case, differences of opinion between the various local authorities as to the existence of a state of necessity had threaten to undermine the ability to recover expenses but it had never shaken the recognized duty of the military to respond and to do so in each case without scrupulously

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<sup>97</sup> See prefatory comments contained in Order-in-Council P.C. 834, 51(4) C. Gaz. 3552 (April 4, 1918). A copy was tabled before Parliament by the Prime Minister, Sir Robert Borden; see *House of Commons Debates*, 1 (April 5, 1918) at 378.

<sup>98</sup> See J.L. Granatstein and J.M. Hitsman, *Broken Promises: A History of Conscription in Canada* (Toronto: Oxford University Press, 1977) for an account of the events surrounding the riots; see also A.B. Keith, *Responsible Government in the Dominions*, vol. 2, (Oxford: Clarendon, 1928) at 982.

<sup>99</sup> S.C. 1914 (2 sess.), c. 2.

<sup>100</sup> Order-in-council, *supra* note 101.

<sup>101</sup> *Ibid.*

weighing the merits and validity of the requisition. Certainly, the legislative amendments enacted through the course of the years in concert with the judicial deference accorded to the decisions of local civil authorities had served to meet the exigencies of unforeseen events. Unfortunately, aid of the civil power legislation provided no measure of accommodation for the absence of local authorities willing or able to act—the exact situation faced during the conscription riots. Henceforth for the duration of the war, the Officer Commanding of any district was duly authorized to unilaterally intervene in any disturbance justified by the circumstances.<sup>102</sup> Whether the order-in-council can best be categorized as legitimizing the military intervention under the protective umbrella of the *War Measures Act, 1914* or simply as representing a reaffirmation of the Crown's prerogative, it came to represent the first of many developments of similar import for the remainder of the century.

## 2. Orders-in-Council Directions (1934 to 1996)

Responsibility for the maintenance and security at federal penitentiaries falls squarely within federal jurisdiction<sup>103</sup> and on occasion prison riots have necessitated additional security measures to be taken. Contained in the findings of a 1938 royal commission report known as the Archambault Report, reference is made of the use of soldiers to assist in quelling a prison riot at the Kingston penitentiary as early as 1932 although no commentary was ever made in the Report questioning the legality of its use.<sup>104</sup>

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<sup>102</sup> *Ibid.* at s.1 (the order-in-council also established a framework for the invocation of military law to deal with offenders but the provisions were never used during the remainder of the war.)

<sup>103</sup> (U.K.), 30 & 31 Vict., c. 3, s. 91(28), reprinted in R.S.C. 1985, App II, No. 5 (previously known as the *British North American Act, 1867*).



To provide directions for the deployment of military personnel at penitentiaries, the first order-in-council was approved in 1934.<sup>105</sup> It established procedures somewhat analogous to those codified in the aid of civil power provisions. By its terms, requests for assistance were premised on the existence of an emergency being beyond the powers of the penitentiary staff to deal with. Under such conditions, the local district commander was granted the authority to call out personnel to respond upon request from penitentiary authorities.<sup>106</sup> Soldiers were deemed on military duty and required "to act as a military body in conformity with such directions as their proper officers may receive from the warden or other officer in charge of the penitentiary."<sup>107</sup>

Notwithstanding the apparent similarities of the terms of the order-in-council to those of the aid of the civil power provisions, no mention was made of a grant of peace officer or constable status. Of particular note, contained in the prefatory comments of the order-in-council, is an explicit reliance on the government's "exercise of inherent executive authority" as the basis of the penitentiary directions. The 1934 order-in-council was revoked in 1948 when replaced with updated provisions that were substantially the same as those replaced.<sup>108</sup> In turn, new directions were issued in 1975 that for the first time established a dichotomy between performing perimeter security duties including the pre-positioning of forces and those duties that would involve direct contact with inmates

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<sup>104</sup> Canada, *Royal Commission to Investigate the Penal System of Canada, Report*, (Ottawa: Queen's Printer, 1938) at pp. 75 & 79 [Archambault Report].

<sup>105</sup> Order-in-Council P.C. 1941, dated August 22, 1934. The order-in-council direction is untitled and never gazetted. The reference in "Permanent Force" in the 1934 order-in-council was changed to "Active Force" in the 1948 order-in-council. No other substantive provision was changed.

<sup>106</sup> *Ibid.* at para 3.

<sup>107</sup> *Ibid.* at para 4.

<sup>108</sup> Order-in-Council P.C. 2304, dated June 1, 1948 (the order-in-council direction is untitled and not gazetted).

whenever an intervention was required to protect lives.<sup>109</sup> As had been done in 1972 with the aid to civil power provisions, the 1975 order-in-council direction established the Chief of the Defence Staff as the sole authority permitted to assign military forces to such duties.

The new emphasis on the use of the regular standing army for aid of the civil power situations that had begun in 1904 was to be paralleled in the 1934 order-in-council direction governing assistance to penitentiary authorities; only the Permanent force could be deployed on such duties. While the terms of the 1934 order-in-council direction invoke the federal government's inherent authority, it is evident that the expanded use for penitentiary duties was dependent on the increased availability of full time soldiers for such duties without the necessity of resorting to the procedural complexities and political uncertainties of placing the militia on active duty. The subsequent amendments made to the directions in 1948 and 1975 continued to restrict such duty to regular army units. One caveat was added in the 1975 directions to permit the use of reservists (militia members) upon their consent; thus, the participation of a member of the militia was not dependent on a mandatory call out by the Governor in Council.

The scope of the prerogative model would substantially expand in the 1990s. Concerning requests for armed assistance from the R.C.M.P, further directions, known as the *Canadian Forces Armed Assistance Directions*<sup>110</sup> (CFAAD) were adopted in 1993.

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<sup>109</sup> Order-in-Council P.C. 1975-131, dated January 23, 1975 (the order-in-council is untitled and not gazetted).

<sup>110</sup> *Canadian Forces Armed Assistance Directions*, Order-in-Council P.C. 1993-624, March 30, 1993 (not gazetted).



Although never used to date, the CFAAD still remains in effect. In the aftermath of the 1995 Gustafson Lake incident that involved military technical and logistical support to policing authorities in British Columbia, a final order-in-council was introduced in 1996 to enable assistance to provincial police forces. Known as the *Canadian Forces Assistance to Provincial Police Forces Directions*<sup>111</sup> (CFAPPF), the order-in-council provides an alternate procedural mechanism to that already provided under the aid of the civil power provisions. The reliance on regular full-time soldiers continues implicitly for both the CFAAD and the CFAPPF although no express distinction was made in their terms. While this fact would have been influenced by the higher level of training and professionalism of the regular force, the creation of a sizeable regular full time force was to radically alter the availability of soldiers on short notice and remove the legal burdens associated with authorizing the militia's use in times of civil unrest.

While the CFAAD retains the authority of the Chief of the Defence Staff to determine military issues such as the exact size and nature of forces assigned and the pre-positioning of troops as contained in the earlier penitentiary directions, both the CFAAD and the CFAPPF represent a shift in the approval authority to the federal executive by establishing the Minister of National Defence as the final approval authority. In lieu of the traditional requirement for a civil disturbance to be beyond the powers of law enforcement authorities to cope with, the two latest directions only require a disturbance affecting a nation interest that cannot be dealt with effectively without the intervention of the Canadian Forces. Arguably, this change has lowered the threshold of the factual

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<sup>111</sup> *Canadian Forces Assistance to Provincial Police Forces Directions*, Order-in-Council P.C. 1996-833, June 10, 1996 (not gazetted).

situation needed to justify military intervention and provides the basis of expanding the available uses for which the military might be called upon, especially for needs involving special military equipment or skills not otherwise readily available to civil law enforcement authorities.

Nonetheless, statutory constraints still stood in the way with respect to certain types of domestic deployments prior to 1998. Reminiscent of an earlier era when the legality of using the military for public service duties of a non-military nature was questioned, section 34<sup>112</sup> of the *National Defence Act* was adopted in 1950. The provision required approval of the Governor in Council to call out reservists for non-military duty in the event of an emergency involving a disaster of national importance. While the Minister could direct regular force members to perform such duties, he could only do so if the Governor in Council had incidentally declared a disaster. Certainly in the aftermath of the immediate crisis of a disaster, such duties could always incidentally give rise to the need for policing functions such as property protection, traffic control and site security or the prevention of looting and the maintenance of security in the disaster area. But in much the same fashion as the later 1998 amendment were introduced to remedy uncertainties concerning the legality of public service duties in general, section 34 established an unequivocal basis for such assistance in times of natural disaster.

Thus, prior to the 1998 legislative changes, the constraints imposed on the use of the military by the legislative framework may be thought of arising from two factors: 1. the



legal uncertainties of using the military as a special force to deal with policing matters or to perform public service duties outside the limits of express statutory provisions; and, 2. the inability to direct members of the militia to perform such types of duty without their consent unless called to duty by the Governor in Council.

### 3. Peace Officer Status

All three order-in-council directions have one other aspect in common that substantially differs from the aid of the civil power provisions. None of the prerogative directions provide for the granting of constable or peace officer status. The significance of this point must be examined in light of changes made to the *Criminal Code* in 1972 concerning the definition of peace officer. Prior to the change, members of the military were not recognized as peace officers unless they were acting as constables in aid of the civil power. Since the enactment of the *Criminal Code* in 1892, the definition of peace officer has encompassed different classes of law enforcement officials including constables.<sup>113</sup> Thus, with the deeming provision for constable status incorporated into the aid of the civil power provisions, soldiers were granted by operation of law the privileges, duties and protections accorded to peace officers.

The changes introduced to section 2 of the *Criminal Code* in 1972<sup>114</sup> modified the definition of "peace officer" to encompass two separate categories of military personnel:

1. military police appointed under section 156 the *National Defence Act*; and 2. other

<sup>112</sup> First enacted in 1950 as *National Defence Act*, s. 1950, c. 43, s. 35; repealed and replaced as section 34 by *National Defence Act*, R.S.C. 1970, c. N-4, s. 34; repealed by *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35, s. 9.

<sup>113</sup> See *Criminal Code*, 1892, S.C. 1892 (55-56 Vict.), c. 29, s. 3(5).

<sup>114</sup> *Criminal Law Amendment Act*, 1972, S.C. 1972, c. 13, s. 2.

service members assigned duties in special circumstances defined by regulations. The current version of the definition in section 2 reads in part as follows:

- (g) 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 men performing them have the powers of peace officers;

Amended several times since its adoption in 1973<sup>115</sup>, the Governor in Council regulation is promulgated as Queen's Regulations and Orders (QR&O) article 22.01(2) & (3) and creates a broad category of activities falling within the ambit of the *Criminal Code* definition. Largely delimiting the class by the types of duty to be performed, the present regulations provide an expansive description of qualifying activity established in the following terms:

(2) For the purposes of subparagraph (g)(ii) of the definition of "peace officer" in section 2 of the *Criminal 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 officers and men performing them have the powers of peace 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;

<sup>115</sup> See K.W. Watkin, "Legal Aspects of Internal Security: A Soldier's Protections and Obligations Part I" (1985) 1 CF JAG J. 51 at 59 for details of the purpose of the first enactment. The author describes the revisions to the *Criminal Code* and the QR&O as a recognition of the expansion of internal security roles for the military beyond that of the statutory aid of the civil power situations.



(3) Without limiting the generality of paragraph (2), it is hereby prescribed that, for the purposes of subparagraph (g)(ii) of the definition of "peace officer" in section 2 of the *Criminal Code*, duties related to the enforcement of the laws of Canada that are performed as a result of a request from the Solicitor General of Canada, the Commissioner of the Royal Canadian Mounted Police or the Commissioner of Corrections, pursuant to an Act, a regulation, a statutory instrument, or a Memorandum of Understanding between the Solicitor General of Canada and the Minister of National Defence, are duties of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers.

While clear reference is made in the regulations to the necessity of peace officer status as a requirement to carry out the enumerated functions, there is no parallel concept of any necessity that such functions be performed by military personnel because of circumstances beyond the control of civil law enforcement authorities. This observation is of particular interest from a legal perspective in light of the historical use of the military in times of riots. Likewise, as provided in the orders-in-councils, there are no exigencies requiring intervention only after it is considered to be in the national interest to do so and the circumstances of the disturbance cannot be dealt with effectively without the Canadian Forces. In short, the regulations incorporate no dominant theme or condition that would inherently restrict peace officer status to temporary situations. By inference, the wording of the regulations suggests as much an application to duties involving general policing and investigative activities as to the more traditional uses of the military as a reactive force in response to civil unrest. In the regulations, the generality of duties and the absence of limits on policing functions establish the possibility of concurrent jurisdiction with other policing forces—as will be seen, this was a matter that was to become a point of concern for the Supreme Court of Canada.

### III. Impact of the 1998 Legislative Changes—Section 273.6

Finally, in 1998, amendments were made to the *National Defence Act*<sup>116</sup> to provide a statutory basis for employment of military forces in areas of activity not traditionally considered as purely military in nature and to regularize practices established by the use of the prerogative. The newly created sub-section 273.6(2) establishes 'public service' duty as a form of lawful duty of which assistance to law enforcement matters forms a part. In particular, subsections 273.6(1), (2) and (3) read as follows:

(1) Subject to subsection (2), the Governor in Council or the Minister may authorize the Canadian Forces to perform any duty involving public service.

(2) The Governor in Council, or the Minister on the request of the Solicitor General of Canada or any other Minister, may issue directions authorizing the Canadian Forces to provide assistance in respect of any law enforcement matter if the Governor in Council or the Minister, as the case may be, consider that:

- (a) the assistance is in the nation interest; and
- (b) the matter cannot be effectively dealt with except with the assistance of the Canadian Forces

(3) Subsection (2) does not apply in respect of assistance that is of a minor nature and limited to logistical, technical or administrative support.

While the authority to use military resources in law enforcement is now statutorily recognized under sub-section 273.6 of the *National Defence Act*, the scope of the authority granted to the Governor in Council and the Minister remains largely undefined. Within the limits of the law governing the armed forces, the federal Cabinet exercises an executive control over the direction and management of the Canadian Forces that is



delegated to the Minister of National Defence.<sup>117</sup> The source of authority governing the manner of exercising that control over the Canadian Forces can be presumed to fall into two broad categories: 1. the use of the prerogative, and, 2. the discretion of authority bestowed by statute upon various authorities.<sup>118</sup>

Based on the doctrine of legislative supremacy, the scope and the ambit of the prerogative may be diminished or completely eliminated by statute.<sup>119</sup> In reviewing the question of the impact of legislation on a subject matter previously governed by prerogative, Russell L.J. had the following comments in *Sabally and N'Jie v. Attorney-*

*General:*

The mere fact that a statute, in conferring powers on the Crown which it previously lacked, uses language which embraces also powers which already exist under prerogative, does not in my view necessarily suspend the prerogative of those matters. If, in conferring expressly on the Crown powers within its prerogative, a statute imposes restrictions, limitations, conditions or a required modus operandi, then the prerogative is superceded and the powers cannot be exercised otherwise than subject to such restrictions, limitations, or conditions or in accordance with the modus operandi.<sup>120</sup>

The latest legislative amendment makes no reference to changes in the prerogative; this uncertainty concerning the impact on the prerogative raises concerns as to the validity of the order-in-council directions. "Problems can thus arise when Parliament confers powers upon the Crown in areas hitherto occupied only by prerogative but fails to state

<sup>116</sup> *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35, s. 87.

<sup>117</sup> *National Defence Act*, R.S.C. 1985, c. N-5, s. 4 (duties of the Minister).

<sup>118</sup> W.E.D. Halliday, "The Executive of the Government of Canada" (1959) 2 *Can. Pub. Admin.* 229 at 230.

<sup>119</sup> B.S. Markesinis, "The Royal Prerogative Revisited" (1973) 32 *Cambridge L.J.* 287 at 299.

expressly the fate of the prerogative powers."<sup>121</sup> Nonetheless, existing prerogative not otherwise abrogated or placed in abeyance by the amendment should be taken into account in determining the limits and powers that may be exercised in accordance with the procedural steps for authorization established by section 273.6. While section 273.6 establishes the executive authority to direct military intervention, it provides no direction on two essential aspects: 1. the ways and means to seek military assistance for specified purposes; and, 2. the manner of use of the military and the exercise of control over military personnel while so deployed. Both aspects are central features of the aid of the civil power provisions and their conspicuous absence from section 273.6 suggest the continuing validity of the current orders-in-council directions and the desirability of enacting them as regulations for greater certainty.

A. *Section 273.6—Its Purpose*

The 1998 changes facilitate the ability to call members of the reserves<sup>122</sup> to duty for assistance in respect of any law enforcement matter.<sup>123</sup> These changes were accomplished by deeming "public service", (of which law enforcement duties are a subset), to be lawful duties for which reservist could be called out and permitting the Minister to make such a call out in an emergency without the need to seek Governor in

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<sup>120</sup> [1965] 1 Q.B. 273 at 299 (C.A.); compare with the comments of Denning M.R. who at 295 concluded that the statutory provisions in the case had in fact "covered all, and more than all, covered by prerogative.")

<sup>121</sup> *Supra* note 119.

<sup>122</sup> Ss. 14(3) of the current *National Defence Act* defines the reserve force as members of the Canadian Forces who are not on full-time military service other than when placed on active service.

<sup>123</sup> See *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, s. 35, ss. 8 & 87.



Council approval.<sup>124</sup> Thus, not only was the legal uncertainty resolved for using reservists for such types of duty outside the statutory limits of the aid of the civil power provisions but the Minister's prerogative alone may be use to direct such duty.

With respect to the regular force, the impact was less dramatic and confirms the philosophy that the scope of duties for the regular force has always been much broader and comprehensive than that of reservists. The nature of full time continuous service makes all duties assigned to the regular force lawful duties unless those duties are otherwise unlawful. The codification of this concept of "lawful duty" and its application to the regular forces is contained in sub-section 33(1) of the *National Defence Act* which states: "The regular force, all units and other elements thereof are at all times liable to perform any lawful duty." In turn QR&O article 19.015 establishes: "Every officer and non-commissioned officer shall obey lawful commands and orders of a superior officer."

While section 273.6 confers new executive powers of a general nature governing the disposition of the reserves, it does not create any new constabulary force. Its purpose is primarily as an enabling provision for public service duty and, subject to the procedural constraints placed on the executive as to the means of authorization, for law enforcement duty. Missing from the provision is a clarification on jurisdictional issues of police powers that service members might avail themselves of in the execution of their duties.

On this point, attention must be drawn again to section 2 of the *Criminal Code* as the

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<sup>124</sup> Changes were also made to QR&O article 9.04 (3) which provides: "In an emergency, the Minister may call out on service to perform any lawful duty other than training, such members of the Reserve Force, except members of the Supplementary Reserve, and such units and elements thereof as the Minister considers necessary."

need for peace officer status may serve an important role in effectively carrying out such duties. Providing a clarification on the source that might be derived from the section, Dickson C.J. had the following succinct comments in the 1987 Supreme Court of Canada case of *R. v. Nolan*: "I would therefore conclude that the definition of "peace officer" in s. 2 of the Criminal Code serves only to grant additional powers to enforce the criminal law to persons who must otherwise operate within the limits of their statutory or common law sources of authority."<sup>125</sup> Clearly it will be important to examine the limits of statutory and common law sources of authority to enforce the law in order to evaluate the impact of section 273.6.

*B. The Judicial Limits on the Status of "Peace Officers"*

The *Nolan* case provides significant guidance concerning the interpretation on the limits of peace officer status permitted for soldiers. The case involved the arrest and subsequent conviction of a civilian for drinking and driving. The accused was spotted driving off a military base at an excessive speed. He was pursued by military police and eventually stopped on a public highway in close proximity to the base. Taken into custody, he was transported to the local police station where he refused a request for a breathalyzer made upon him by a military policeman. On the facts of the case, the decision dealt with the authority of military police to exercise the powers of a peace officer but in formulating its conclusions, the Court relied on the provisions of QR&O article 22.01(2) that apply to all members of the Canadian Forces not just military police. As a result, its reasoning has equal application for all members of the armed forces assigned duties necessitating peace officer status.

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<sup>125</sup> *R. v. Nolan* [1987] 1 S.C.R. 1212 at 1225, 34 C.C.C. (3d) 289 (S.C.C.) [*Nolan* cited to S.C.R.].



The issue on appeal was the extent of jurisdiction exercised over civilians by military police in their capacity as peace officers. The Court concluded that the *Criminal Code* definition that recognizes and empowers military police as a "peace officer" did not serve to extend and enlarge the jurisdiction of military police officers exercised under section 156 of the *National Defence Act*. Section 156 empowers military police to arrest and detain but their authority is limited to the exercise of their functions over those individuals subject to the military Code of Service Discipline<sup>126</sup>. Imposing a restrictive interpretation, the Court's decision explicitly rejected the proposition that the *Criminal Code* definition of "peace officer" enlarges the jurisdiction of the military police for all purposes.

As a consequence of the restrictive interpretation, the Court in *Nolan* remained focused on defining the limits and restrictions that govern the ambit of military police duties so as to ensure no "confusing overlap in jurisdiction"<sup>127</sup>. Speaking for the Court, Dickson C.J. stated:

On the level of principle, it is important to remember that the definition of "peace officer" in s. 2 of the *Criminal Code* is not designed to create a police force. It simply provides that certain persons who derive their authority from other sources will be treated as "peace officers" as well, enabling them to enforce the *Criminal Code* within the scope of their pre-existing authority and to benefit from certain protections granted only to "peace officers".<sup>128</sup>

<sup>126</sup> *National Defence Act*, R.S.C. 1985, C. N-5, Part III as am.

<sup>127</sup> *Supra* note 126 at 1215.

<sup>128</sup> *Supra* note 126 at 1225.

Having concluded that part (f)(i) [now (g)(i)] of the definition of "peace officer" in section 2 of the *Criminal Code* could not extend the scope of military police powers other than with respect to their jurisdiction over other armed services personnel, a consideration of the significance of part (g)(ii) was undertaken. The regulations promulgated pursuant to (g)(ii), that is to say, QR&O article 22.01(2), establish a qualifying test for peace officer status enumerated in broad categories of activities such as the maintenance or restoration of law and order, protection of property and persons, and the arrest or custody of persons. Arguably, the regulations create a protective umbrella for actions taken in the course of law enforcement related activities.

In his analysis, the Chief Justice established a framework for interpreting the interrelationship to be garnered from the definition of "peace officer" in the *Criminal Code* and the broad and sweeping generalizations of duties encompassed in QR&O article 22.01(2). Perhaps reflecting the historical aversion to the possible use of martial law, the Court sought to curtail any suggestion that QR&O article 22.01(2) would result in an unconditional grant of peace officer status to military personnel solely on the basis of the functions to be performed. In the absence of an independent source of policing authority, whether at common law or by statute, duties assigned to military personnel would not entitle them to the special protection of the law as of right. The Court suggested that any broader interpretation of the provision could precipitate constitutional problems given that the provinces under section 92(14) of the *Constitution Act, 1867*<sup>129</sup> exercise jurisdiction over the administration of justice and law enforcement within the province. This somewhat remarkable conclusion overlooks the acceptance of concurrent



federal function exercised over the policing of criminal law established in earlier cases.<sup>130</sup>

In summary, the Court concluded that section 2 of the *Criminal Code* could only serve to broaden the authority to enforce the *Criminal Code* for those who already exercise either a statutory or common law authority for law enforcement.<sup>131</sup>

*Nolan* was to determine that the military police did in fact have sufficient authority under the *Defence Establishment Trespass Regulations*<sup>132</sup> to stop the accused who was speeding off the military base.<sup>133</sup> The *Regulations* applied only to civilians and made specific reference to military police for its enforcement measures including the power to arrest in certain circumstances. While the Court was prepared to recognize that military police were cloaked with peace officer status vis-à-vis a civilian, it did so only after concluding that military police had a clear statutory authority based on the *Regulations* to enforce the law in the course of a routine patrol.

That it would be necessary to resort to regulatory provisions limited in application to defence establishments in order to crystallize a peace officer status demonstrates the Court's reluctance to extend military law enforcement authority over a domain generally

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<sup>129</sup> (U.K.), 30 & 31 Vict., c. 3 as am. (previously known as the *British North American Act, 1867*).

<sup>130</sup> P.W. Hogg, *Constitutional Law of Canada*, 2<sup>nd</sup> ed., (Toronto: Carswell, 1985) at 429 where he states: "The constitutional authority for the federal policing of offences created by the *Criminal Code* and other statutes enacted under the criminal law power is now established."

<sup>131</sup> *Supra* note 126 at 1225.

<sup>132</sup> C.R.C. 1978, c. 1047 [*Regulations*] (These regulations were subsequently repealed in 1986 and replaced by the *Defence Controlled Access Control Regulations*, S.O.R./86-957 as am. S.O.R./90-686. They should not be confused with the *Inspection and Search Defence Regulations* which only govern members of the Canadian Forces.)

<sup>133</sup> The Court also determined that the military police had sufficient authority under the *Government Property Traffic Regulations*, C.R.C. 1978, c. 887, to stop the accused. However, the *Government Property Traffic Regulations* only grant certain powers for constables, which by definition did not include military police, to stop motorists on government property but this fact is overshadowed by the second

regarded as exclusively civilian in nature. What flows from the decision is the recognition of a basic three-part test for establishing military peace officer status over civilians: 1. the performance of lawful duties carried out within the limits of statutory or common law sources of authority; 2. those lawful duties are carried out as a result of specific order or established military custom or practice; and 3. the existence of a military nexus to the performance of the duty<sup>134</sup>. The Court was not prepared to recognize a general law enforcement jurisdiction even when the first two criteria had been established. Any expansion of policing authority over civilians without express statutory power would appear to be severely restricted.

In limited circumstances, certain members of the military are already empowered with law enforcement authority under specific federal and provincial legislation for the performance of specific law enforcement duties.<sup>135</sup> However, such legislation does not provide any basis for military personnel to act as peace officers outside the narrow ambit of the legislation for which they are empowered to enforce. While the use of the common law may also serve as another source of authority, its limitations would appear to be circumscribed by the common law duties of constables. As expounded by Lord Simonds in the 1947 House of Lords case of *Christie v. Leachinshy* and cited with

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relevant regulation that the Court relied upon in making its decision that the military police were adequately empowered for their actions—the *Defence Establishment Trespass Regulations*.

<sup>134</sup> *Supra* note 126 at 1231. While Dickson J. did require a military nexus as an explicit condition for the recognition of peace officer status exercised by military police, he accepted that such a nexus did in fact exist in the instant case without providing a detailed formulation of what the substantive requirements might be to establish a nexus.

<sup>135</sup> All officers and non-commissioned officers of the Canadian Forces are designated as fishery officers while serving on ships and submarines for those periods of time when, in accordance with operational orders, they are performing functions under the *Fisheries Act* and the *Coastal Fisheries Act*; see fishery officer designation made by William Rowat, Deputy Minister, Fisheries & Oceans, dated July 6, 1994. In at least one province, Alberta, military police have also been appointed under the provincial *Police Act* as



approval in the recent Supreme Court of Canada decision in *R. v. Asante-Mensah*<sup>136</sup>: "It is to be remembered that the right of the constable in or out of uniform is [at common law], except for a circumstance irrelevant to the present discussion, the same as that of every other citizen."<sup>137</sup>

In terms of the executive authority enshrined in section 273.6 of the *National Defence Act*, the case consequentially limits any reliance on the use of executive directions as the sole basis for the grant of peace officer status to enforce the criminal law. Section 273.6 did not expressly attribute peace officer status to those rendering assistance to law enforcement authorities. This leads to the conclusion that a provision should be added to section 273.6 to explicitly grant peace officer status whenever an individual is deployed on designated duties assigned in conformity with regulations. In addition to establishing peace officer status for the purposes of carrying out duties assigned, such a change would permit military personnel and those who assist them to avail themselves of the limited immunity provided by section 25 of the *Criminal Code*<sup>138</sup> for the protection persons acting under legal authority.

### C. Other Powers & Protections Afforded by the Criminal Code

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special constables for the enforcement of a limited number of provincial laws in proximity of defense establishments.

<sup>136</sup> [2003] S.C.J. No. 38, 2003 SCC 38 at para 40 (QL) (*per* Binnie J. speaking for the Court).

<sup>137</sup> [1947] A.C. 573 at 591.

<sup>138</sup> *Criminal Code*, R.S. 1985, c. C-34, s. 25, as am. by S.C. 1994, c. 12, s. 1; ss. 25(1) reads: "

Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable ground, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

All citizens (at least in England) were under a positive duty to assist in the maintenance of law and individual soldiers were, in their capacity as citizens, equally bound to respond to the state's efforts to restore order.<sup>139</sup> Citizens as well as soldiers are accountable for their actions but the measure of their responsibility is arguably conditioned by the circumstances surrounding the state of necessity as reflected in the following passage from Dicey:

"Now the error into which an uninstructed reader is likely to fall and into which magistrates and officers have from time to time (and notably during the Gordon riots of 1780) in fact fallen, is to suppose that the effect of the Riot Act is negative as well as positive, and that, therefore, *the military cannot be employed without the fulfillment of the conditions imposed by the statute*. This notion is now known to be erroneous; the occasion on which force can be employed, and the kind and degree of force which is lawful to use in order to put down a riot, is determined by nothing else than the necessity of the case."<sup>140</sup>

From this perspective, it is perhaps more appropriate to regard the necessary use of force as a justification for actions taken as opposed to a defence *per se* to an accusation of criminal liability for unauthorized use of force. The introduction of the *Criminal Code* in 1892 heralded a change that codified the protections to be afforded to those who were involved in quelling riots. The *Criminal Code* established a dichotomy between those who were legally mandated to quell a riot and those who were called upon to assist. A magistrate was justified in using as much force as was "necessary to suppress a riot" and yet "not disproportioned to the danger".<sup>141</sup> Those who were called upon to render

<sup>139</sup> Dicey, *supra* note 93 at 284-285.

<sup>140</sup> Dicey, *supra* note 93 at 290.

<sup>141</sup> *Criminal Code, 1892*, S.C. 1892 (55-56 Vict.), c. 29, s. 40.



assistance were subject to indictment for failing to do so.<sup>142</sup> Whether subject to military command or not, those who obeyed the order of a magistrate were relieved of criminal liability if the orders they carried out are not "manifestly unlawful"<sup>143</sup> and the force used was thought reasonably "to be necessary for carrying into effect such orders."<sup>144</sup> Although limited to crowd control situations, the current section 32 of the *Criminal Code*<sup>145</sup> maintains these same protections to this day.

While the benefit of the definition of "peace officer" contained in the *Criminal Code* may have been largely effaced by the decision in *Nolan*, the protections accorded by section 32 remain unchanged and independent of other statutory duties or protections that may apply. As said by the then Judge Advocate General in 1971 concerning criticism that the presence of the military could aggravate an already tense riot scheme:

... its validity disappears where aid of the civil power is involved as an essential step because of the inadequacy of police forces to deal with riots or disturbances of the peace. In such situations there is no other choice, and the military would have to be involved even if no statutory or other

<sup>142</sup> *Ibid.*, s. 141.

<sup>143</sup> *Ibid.*, s. 41.

<sup>144</sup> *Ibid.*, s. 42.

<sup>145</sup> *Criminal Code*, R.C.S. 1985, c. C-34, s. 32 which reads:

32. (1) Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds,
  - (a) is necessary to suppress a riot; and
  - (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.
- (2) Every one who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot unless the order is manifestly unlawful.
- (3) Every one is justified in obeying an order of a peace officer to use force to suppress a riot if
  - (a) he acts in good faith; and
  - (b) the order is not manifestly unlawful.
- (4) Every one who, in good faith and on reasonable grounds, believes that serious mischief will result from a riot before it is possible to secure the attendance of a peace officer is justified in using as much force as he believes in good faith and on reasonable grounds,
  - (a) is necessary to suppress the riot; and
  - (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.
- (5) For the purposes of this section, the question whether an order is manifestly unlawful or not is a question of law.

provisions existed prescribing the procedures for seeking their assistance and the manner in which they are to be so employed.<sup>146</sup>

From this assertion can be drawn the conclusion that the protections afforded to military personnel are separate from the issue of the authority relied upon to engage military personnel in such activities. Reflective of the few remaining vestiges of the citizen soldier model in the *Criminal Code*, section 32 illustrates the acceptance that the military may be employed in riot control regardless of the basis of the legislative measures permitting such uses as a *de facto* constabulary force. Such military personnel enjoy the qualified immunities for their actions pursuant to section 32 regardless of the authority permitting their engagement in riot duties.

Of course, there are other sources of authority for the use of force found in the *Criminal Code*. In addition to the right of self-defence, other provisions of the *Criminal Code* provide limited authority and protection for citizens to protect property and safeguard life but such provisions establish no positive duty to take action in response to the unlawful aggression of others. In these circumstances, reliance upon a citizen's right to arrest is a precarious basis to seek authority for anyone acting under military orders. It would be disingenuous to suggest that individual soldiers act in their citizen's capacity when in fact they are operating as part of a governmental action in a formed military body. To argue otherwise is to ignore the political ramifications of using the military to quell civil unrest and to dismiss the nature of the executive civilian control over the military apparatus. As discussed earlier, there was little debate that historically the militia was available to magistrates in time of need but with the demise of the citizen soldier model, it is a legal

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<sup>146</sup> *Supra* note 23 at 27.



fiction to suggest that soldiers continue to truly act as individual citizens in such circumstances. Any proposal for the use of the military in law enforcement efforts other than emergencies involving civil unrest would prove to be less than adequate in terms of the protections afforded by criminal law unless such activities are sanctioned by specific legislation.

*D. Changing Demands for the Use of the Military*

It is important to also consider the practical limitations involved in the use of the military for law enforcement purposes such as crowd control. By training and by the nature of their armament, soldiers have few means at their disposal to adjust the level of force used in any situation that escalates into violence. The inability of the military to do so was recognized early. In the 1887 annual Militia Report tabled before Parliament, Major General Selby Smith had the following to say concerning a less than stellar performance of the militia at Brockville, Ontario during a labour strike involving the Grand Truck Railway:

... had he [the Mayor] even sworn in special constables, provided the police were insufficient, it might have been preferable to calling out the military,—the last resource in support of the law. A military force armed with rifles and bayonets, and encumbered with belts and accoutrements is unsuited to quell a disturbance among a disorderly crowd of unarmed men. ... Rifles and bayonets are not the weapons for such a service, where one if not both hands of the civil force should be free.<sup>147</sup>

In the turbulent times of the nineteenth century, the impetus in Canada to find alternative techniques to deal with civil disturbances had started in 1845 with an enactment designed

to curtail and prevent riots at public works.<sup>148</sup> That legislation was in turn amended in 1851<sup>149</sup>—it in fact created a special constabulary with powers to confiscate weapons for the purpose of the legislation. Commensurate with the slow development of statutorily constituted police forces in the nineteenth century and the availability of greater resources for dealing with civil disturbances placed at the disposal of larger police forces in the latter half of the twentieth century, the need of the provinces to call for aid of the civil power has substantially declined.<sup>150</sup>

In the context of the growing capability of civilian police forces to respond to civil disturbance incidents, there remain innumerable indicia to suggest that the use of the military for anti-riot duties has been substantially modified and curtailed in its operation by the dictates of public policy. General service troops employed in units are not now considered as an optimum riot control force to address the demands of law enforcement in the event of a large-scale disturbance. It has been suggested that situations giving rise to the possibility of direct confrontation ought to be avoided. Except where the exigencies of extra-ordinary events involving armed assailants dictate otherwise, one

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<sup>147</sup> Canada, Parliament, "Annual Militia Report" by Major General Selby Smith in *Sessional Papers*, No. 7, (1877) at xvii.

<sup>148</sup> *An Act for the better preservation of the peace, and the prevention of Riots and violent outrages at and near Public Works while in progress of construction*, S.Prov.C. 1845 (8 Vict.), c. 6.

<sup>149</sup> *An Act to continue an Act passed in the eighth year of the Reign of her Majesty, entitled An Act for the better preservation of the peace, and the prevention of Riots and violent outrages at and near Public Works while in progress of construction*, S.Prov.C. 1851 (14 & 15 Vict.), c. 76.

<sup>150</sup> Since the Second World War, there have only been two incidents involving the aid of the civil power provisions: 1. the Montreal Police strike of 1969; and 2. Oka, Quebec in 1990. While Premier R. Bourassa requested aid of the civil power on October 16, 1970, the following day the federal government responded by invoking the *War Measures Act*. Soldiers have also been used on occasion to respond to prison riots but not within the statutory authority of the aid of the civil power provision.



would expect the deployment of soldiers would be confined to a supportive role or as a static security element in protection of vital property or sites.<sup>151</sup>

Law enforcement related duties exercised by the military will never likely be controversial as long as there is no intention or risk of the military exercising prescriptive or statutory powers of a coercive nature over civilians or their property other than those exercised by peace officers. When this has occurred historically in wartime or in times of emergency, Parliament has legislated the requisite powers or established a framework for delegated regulations under emergency measures legislation. As no enabling provision for the regulations to grant special powers has been created, it must be concluded that soldiers are to operate with no additional powers other than those specified by law for peace officers.

#### *E. Implications For A Broader Mandate*

Section 273.6 does not purport to have changed the government's prerogative to intervene in cases of threat or apprehended threat to the peace. It remains implicit that the federal executive continues to exercise its authority over the disposition of the armed forces subject to the substantive requirements of section 273.6. The section does provide a general affirmation of a category of permissible deployments for soldiers. By doing so, the section alleviates previous concerns over the legality of using the armed forces for a domestic policing function and regularizes current practices using the prerogative. Other than the procedural issues specifying the process within Cabinet for initiating the

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<sup>151</sup> See generally G. Davidson-Smith, "The Military in Aid of the Civil Power: Limits in a Democratic Society" (1984) 13(4) Canadian Defence Quarterly 27 at 28.

approval, there are no specific new powers conferred by the provision. This fact raises the question as to whether the new provision serves as a sufficient basis to empower military personnel as peace officers. It is suggested that the restrictive interpretation of the *Nolan* case could limit any such meaning.

Nonetheless, it is said that no legislative provision is enacted without a purpose.<sup>152</sup> There are substantive constraints on deployments: the decision to deploy must be in the national interest and provide a means to address matters that cannot otherwise be dealt with effectively without the Canadian Forces. The threshold of these condition precedents for intervention is quantifiably lower than those conditions applying to aid of the civil power requisitions. When aid of the civil power is requested the attorney-general of a province must certify in writing that the disturbance is beyond the capabilities of the civil authorities to handle.<sup>153</sup> The state of necessity mandated in the aid of the civil power provision contrasts to some degree with the nation interest test. Absent from the condition precedents of the new section is any limiting criteria of a temporal nature that would preclude long-term involvement in policing matters. Thus, the scope of permissible uses has likely expanded from the conventional riot control duties to other more passive forms of policing such as preventive and investigative types of police functions including ancillary roles to provide administrative, logistical and technical support as an adjunct to civil policing efforts. This last point is implicit in the wording of section 273.6(3) that expressly excludes such assistance if of a minor nature.

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<sup>152</sup> *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 at 561 *per* Lord Sumner; see also *Interpretation Act*, R.S.C. 1985, C. I-21, s. 12 which reads: "Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation, as to best ensures the attainment of its objects."



By using the word "may", the new provision necessarily encompasses a power of executive refusal as the language used is permissive in nature.<sup>154</sup> Its exercise ought to be subject to weighing multiple factors relevant to the suitability of using military personnel in a given situation. Arguably, in the absence of an emergency beyond the power of local law enforcement authorities to contain, the balancing of political considerations should be subject to the desire to avoid any long-term engagement that would impair the overriding importance of ensuring that demands for assistance would not denigrate military capabilities in support of the defence mandate. In principle, military intervention is no longer a question of necessity but rather one determined by selecting the most efficient means of dealing with an incident or problem within the resources assigned to the Minister of National Defence.

In comparison with the aid of the civil power provisions, the most striking feature of section 273.6 is the creation of a complementary procedural scheme for the federal exercise of inherent executive authority over matters of federal jurisdiction. While the statutory aid of the civil power provisions are available exclusively to the provincial executive, section 273.6 confirms the discretionary authority of the federal government to unilaterally dispatch troops. The CFAAPF Directions do provide a mechanism for the provincial attorneys-general to request assistance but there is no parallel legal duty obligating a federal response to the request. Admittedly from a moral and political perspective, there could be no refusal for any demand in time of real necessity. In section

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<sup>153</sup> *National Defence Act*, R.S.C. 1985, c. N-5, ss. 275 & 280.

273.6, the power of refusal points to the essence of the political nature of any decision to approve armed intervention. That the provincial executive can still invoke a mandatory use of the aid of the civil power in the event of any dispute over the propriety of a decision not to deploy soldiers reflects an undesirable inconsistency in the current *National Defence Act*. With the demise of the citizen soldier model and the reassertion of federal control over the military for internal security roles, the aid of the civil power provisions have outlived their purpose. Consequentially, the aid of the civil power provisions should be revoked.

Any proposal to remove the provincial authority to invoke the use of the military may cause political controversy in view of the historical reasons for its initial introduction at the time of Confederation. With the advent of a comprehensive legislative framework governing the deployment of military personnel on internal security duties, the continuing existence of the aid of the civil power legislation adds a second dimension to the political decision to invoke military intervention. Authority over the military is undeniably a federal responsibility. With its inherent limitations for use by the federal executive, the current aid of the civil power provisions no longer represent an optimal tool to authorize military intervention when required.

#### **IV. Concluding Comments+**

With respect to extraordinary interventions of the military to contain civil unrest, Canada has witnessed an evolution in the use of its military from that of an armed force of last

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<sup>154</sup> *Interpretation Act*, R.S. 1985, c. I-21, s. 11 which reads: "The expression "shall" is to be construed as imperative and the expression "may" as permissive."



resort for quelling internal disorders to that which permits an expanded support function for civil law enforcement agencies. Historically, there have been two separate and distinct sources of authority relied upon to direct the use of the military in maintaining peace and good order: they are the legislative aid of civil power provisions and the inherent authority of the executive exercised through the prerogative. Slowly but steadily changes to legislation brought about the effective elimination of the citizen soldier model along with the reassertion of control over the soldiers assigned to internal security duties. To address those circumstances where local civilian authorities were unable or unwilling to act and to ensure an adequate means to respond to those matters involving the inherent authority to protect federal interests, the federal executive has relied on its prerogative powers over the disposition of the armed forces.

The 1998 legislative changes conferred general powers of intervention and served to clarify the legality of using armed forces personnel for the reestablishment of civil order other than by reliance on the aid of the civil power provisions. They also served to facilitate an expansion of the scope of permissible duties by relaxing the threshold requirements to invoke military assistance on law enforcement matters beyond the traditional uses as an emergency response to restore and maintain local peace and good order. The nature of the power that may now be exercised by the federal executive in its response to law enforcement needs defines the uniqueness of the special status of military personnel engaged in this form of assistance. The application of a discretionary power calls for more explicit guidance.

The most compelling argument in support of a more explicit legislative foundation remains the uncertainty of the extent of peace officer powers that may be exercised. In much the same manner as police powers and duties have been needed to be regulated with the passage of time, so do those of soldiers who may be called upon to provide auxiliary forces for purposes of maintaining public order and internal security. There is a need to discard fragmentary remedies in favour of a more comprehensive reform for this purpose. The legislative changes introduced in 1998 have enormously facilitated that process by consolidating measures in a single framework. Building on the framework, the following changes should be incorporated into section 273.6:

- 1.) the introduction of an enabling provision for regulations to establish:
  - a.) the procedures for law enforcement authorities to initiate a request for military assistance, and,
  - b.) the uses for the military and the exercise of control exercised over military personnel while engaged in such duties,
 in order to develop a comprehensive scheme governing the permissible uses of the military in rendering assistance in respect of law enforcement matters;
- 2.) the adoption of the current order-in-council directions as regulations pursuant to the enabling provision mentioned above, thus providing a statutory basis for the current measures exercised under the prerogative;
- 3.) the codification of an explicit grant of peace officer status for military personnel performing duties pursuant to regulations in order to clarify the extent of police powers, immunities and protections in response to the



restrictive interpretation applied to provisions of QR&O article 22.01 in the  
*Nolan* case;

- 4.) the establishment of a non-preemption clause governing the prerogative to resolve the uncertainty of the continuing existence of the prerogative and to ensure an uncontested federal executive authority to address future unforeseen exigencies in a timely fashion; and,
- 5.) the repeal of the aid of the civil power provisions for the reasons discussed section III (E).

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