CANADIAN MILITARY JUSTICE: SUMMARY PROCEEDINGS AND THE CHARTER

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by

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In memory of my father (Sgt) George Watkin (RAF), 1922-1985, who helped instill in me the discipline necessary to complete this work.

ABSTRACT

The Canadian Charter of Rights and Freedoms has the potential to have considerable impact on the Canadian military justice system. That impact may be particularly significant in relation to the summary proceedings prescribed by the National Defence Act and its regulations. The summary trial system is the predominant forum for the trial of service offences. It provides expeditious and uncomplicated proceedings, administered by officers holding positions in the military chain of command who are directly responsible for maintenance of discipline in the Canadian Forces.

An historical review of the development of summary proceedings indicates that those proceedings have long been an essential tool in the hands of commanders for the maintenance of discipline. In addition, summary proceedings are uniquely designed to meet the disciplinary needs of an armed force. However, the nature of summary proceedings also leads to questions about whether the rights and freedoms of individual service personnel are adequately protected under the present legislation. The potential exists for a clash between the guaranteed individual rights and freedoms and the need for a disciplined and effective armed forces.

The Charter, as a constitutional document specifically designed to protect individual rights, could potentially be viewed as a weapon with which to champion individual rights at the expense of the operational effectiveness of the Canadian Forces. The main theme of this thesis is that the Charter, rather than being seen as a vehicle for an attack on the military justice system, should be viewed as providing an effective and pragmatic means of reconciling conflict between guaranteed rights and freedoms and the need for a disciplined armed force.

A review of the effect of ss. 7 and 11 of the Charter reveals that the rights and freedoms guaranteed by that document are largely defined in terms of procedural fairness. Section 11 of the Charter applies to summary proceedings by virtue of the criminal nature of those proceedings and the potential penal consequences which flows from a conviction by a summary trial. The "criminal" nature of those proceedings is enhanced by the equal constitutional status which the military justice system has with its civilian counterpart. The application of s. 7 of the Charter is directly related to the threat which summary proceedings pose to an accused's right to life, liberty and security of the person.

The assessment of the effect of the Charter on summary proceedings reveals that there are a number of actual and potential breaches. These concern the independence and impartiality of the trying officer, the right to counsel, notice, pre-trial disclosure, rules of evidence, an oral hearing, the right to a record of the trial or reasons for judgment and the requirements of a review/appeal process. There are strong arguments that the need for a flexible, portable and uncomplicated system of justice administered by officers of the armed forces demonstrably justifies these limits on the rights of service personnel. However, the summary trial system, as it is presently constituted, leaves too much discretion in the hands of the trying officers in comparison to the procedural protection that is available to an accused. As a result the present legislation does not appear to be saved under s. 1 of the Charter. In addition, the accused is not provided an adequate means of waiving those rights in deciding whether to exercise an option to elect trial by court martial rather than be tried by summary trial.

The ability of the summary trial system to withstand a Charter

analysis could be significantly enhanced by a greater sensitivity to the notion of procedural fairness. A modest increase in legislated procedures could reduce the number of Charter challenges; provide a more effective outline of the limits on the accused's rights; increase the likelihood that those limits will be considered to be reasonable; and most importantly increase the fairness of the summary trial system for the individual service member. Ultimately, a Charter analysis of the summary trial system should result in a proceeding which reasonably guarantees a fair proceeding for service personnel, while helping to maintain a disciplined and effective armed force.

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INTRODUCTION

'The Army is not like a limited liability company, to be reconstructed, remodelled, liquidated and refloated from week to week as the money market fluctuates. It is not an inanimate thing, like a house, to be pulled down or enlarged or structurally altered at the caprice of the tenant or owner; it is a living thing. If it is bullied, it sulks; if it is unhappy it pines; if it is harried it gets feverish; if it is sufficiently disturbed it will wither and dwindle and almost die; and when it comes to this last serious condition, it is only revived by lots of time and lots of money'

WINSTON CHURCHILL, Daily Mail, 17 December, 1904[1]

While Prime Minister Churchill was commenting on the effect of change on an army his remarks are equally applicable to all armed services (navy and the air force). Those comments have two underlying themes. First, as a strong supporter of military forces, Mr. Churchill's remarks reflect a traditional concern that the application of civilian principles and organizational concepts to military society may catastrophically, and perhaps irretrievably, harm the ability of the military to carry out its unique role in society.

The second theme arises from a recognition that the civilian segment of society inevitably brings about change (whether intentionally or otherwise) to its military counterpart. In a free and democratic society the civilian component of society has, and must have, a dominant and controlling position over the armed forces of that society. That dominant position often results in an imposition of civilian values on the military forces. The imposition of those values will not necessarily be harmful as long as there is a recognition that the military has a role to fulfil that places special constraints on that segment of society. When the unique role of the

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[1] H. Stanhope, The Soldiers: An Anatomy of the British Army (London: Hamish Hamilton Ltd., 1979).

military is down played or forgotten, particularly during periods of relative peace, the potential for damage to the effectiveness of the armed forces is heightened.

One area where these two themes could clash is in the view taken on the effect of the Canadian Charter of Rights and Freedoms[2] on the disciplinary system of the armed forces of Canada. In more conservative segments of military society the Charter could be seen as an attempt to impose inappropriate civilian standards on the armed forces, which could seriously harm the ability of those forces to protect Canadian society as a whole. An application of the Charter which might change the status quo is therefore something to be resisted at all costs. On the other hand, champions of individual rights could view the Charter as a weapon with which to alter a system of justice that may seem to unnecessarily subjugate the rights of individual Canadians in its desire to maintain discipline. With this viewpoint the goal of change carries with it a negative connotation of change at any price, even if the result is a less effective or even completely ineffective armed force.

There is, however, a more moderate and constructive view of the Charter, which has the positive role of assessing the rights of individual members of Canada's armed forces in relation to the disciplinary needs of an effective military body. Rather than provide a "weapon" with which to force change on the disciplinary system of the Canadian Forces, the Charter can be used as a vehicle to assess the relative strengths of the individual rights and freedoms verses the disciplinary requirements of an effective armed force. The enjoyment of individual rights and freedoms is the basic foundation

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[2] Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.

upon which a free and democratic society is based. It is the protection of Canada as a "free and democratic society" which is the very reason for the existence of the armed forces. Therefore, it should cause no surprise that such rights and freedoms are directly protected in the Charter. At the same time the Charter provides the avenue by which societal goals, such as the maintenance of a disciplined armed forces, can be justified as reasonable limits on the rights and freedoms of individual Canadians. It is the opportunity to weigh these two interests (individual rights and freedoms verses the need to maintain a disciplined armed force) that makes the Charter an especially useful and effective means to accommodate the often diverse themes which arise when civilian and military values interface with one another.

In this thesis it is the summary trial system of the Canadian Forces which will be placed under Charter scrutiny. An assessment of the summary trial system has been undertaken for two reasons. First, summary proceedings are the overwhelmingly predominant and most important forum for the trial of disciplinary offences. Secondly, as the title "summary" suggests, summary trials represent a part of the military justice system where particular emphasis is placed on an expeditious and uncomplicated disposal of disciplinary matters. It is at the summary trial where the conflict between individual rights and the unique requirements of maintaining a disciplined armed forces has the potential to be at its greatest.

Under the common law the protection of individual rights and freedoms has largely involved the question of whether the procedures which apply to a particular trial or tribunal provide the accused with a fair hearing. As a result this thesis deals largely with the issue of procedural fairness as it is guaranteed under the Charter.

However, in assessing the overall constitutionality of the summary trial system the fairness issue must be further analyzed in relation to the unique disciplinary needs of the armed forces of Canada.

The thesis is divided into eleven chapters. The first three chapters largely "set the scene" by outlining the structure of the summary trial system, the history of summary proceedings and the role of those proceedings in maintaining discipline. The first chapter sets out an outline of the summary trial system provided for under Canadian military law. Particular emphasis is placed on the structure of summary proceedings, the trial procedure and the post-trial review process.

Chapter two looks at the history of summary proceedings. Like the civilian criminal justice system, the Canadian military justice system developed from British roots. Therefore, this historical analysis concentrates on the development of British military law. Of particular note is the degree to which the origins of summary proceedings in the British forces were related to two concepts: fairness and administrative expediency.

The third chapter concentrates on the role of summary proceedings in maintaining discipline in the Canadian Forces. The analysis of that role explores the need for discipline in armed forces, the use of summary proceedings to enhance the socialization of members of the armed forces towards the institutional goals of the military, the personal responsibility of officers in enforcing discipline and the unique pressures which the many and varied roles assigned to the Canadian Forces places on the military justice system. In carrying out that analysis the structure of summary proceedings is assessed to determine the extent to which it meets the requirements of maintaining discipline in the Canadian Forces.

Chapter four deals primarily with the constitutional status of the military justice system in relation to its civilian counterpart. In developing the argument that each system of justice has equal constitutional status emphasis is placed on analyzing the validity of the "doctrine of paramountcy" of the civilian criminal justice system that has been developed by some civilian courts. Finally, the jurisdiction of summary proceedings is assessed to determine how it relates to both the civilian criminal courts and to the purpose of summary proceedings.

The fifth chapter begins the detailed assessment of the constitutionality of summary proceedings by determining the applicability of s. 11 of the Charter to those proceedings. The issue which is addressed is whether summary trials are criminal in nature or whether they lead to true penal consequences. Having determined that s. 11 of the Charter applies to summary proceedings prescribed by Canadian military law the independence and impartiality of those proceedings under s. 11(d) is reviewed.

Chapter six looks at the general question of the "fairness" of the summary trial system. While a number of sections of the Charter impact on the fairness of summary proceedings that question is assessed primarily with respect to s. 7. The procedural issues addressed are the right to counsel, notice, pre-trial disclosure, oral hearings, rules of evidence and the requirement for a record of the proceedings or reasons for judgment. Chapter seven also involves the question of procedural fairness, but assesses whether s. 7 of the Charter mandates specific review/appeal provisions that are presently not found under the legislation governing summary proceedings.

Having identified a number of potential Charter breaches in chapters five, six and seven, chapter eight begins the review of

whether there are justifiable limits on the individual rights and freedoms guaranteed under the Charter. This chapter outlines the proceedings employed in other free and democratic societies (Britain and the United States of America). Chapter nine provides an analysis of s. 1 of the Charter to determine whether the summary trial system, as it is presently constituted, justifiably limits the Charter rights of an accused. This chapter identifies a number of shortcomings in the legislation presently governing summary proceedings.

The tenth chapter looks at whether constitutional challenges to summary proceedings can be avoided altogether on the basis that some accused are provided an opportunity to waive their Charter rights by electing court martial.

Chapter eleven then sets out the recommendations and conclusions that flow from this thesis. The recommendations are designed to ensure that there is a proper balance struck between the rights and freedoms of individual service members guaranteed under the Charter and the recognition under the same document that societal interests can justify limits on those same rights and freedoms. Ultimately the goal is the attainment of "fair" proceedings which help maintain a disciplined and effective armed forces for the protection of Canada as a "free and democratic society".

CHAPTER 1

OUTLINE OF SUMMARY PROCEEDINGS

> Generally, management of the many is the same as management of the few. It is a matter of organization.
>
> Sun Tzu, 400-320 B.C., The Art of War[1]

1. INTRODUCTION

This outline of the summary trial system is designed to first inform the reader, in general terms, about the Canadian military justice system and then deal specifically with how summary proceedings fit within that system. The general information includes sources of military law[2], the organization of the Canadian Forces and the jurisdiction, punishments and service tribunals of the military justice system. The review of summary proceedings will set out the types of summary trials, the trial procedure and the post trial review process.

2. LEGAL SOURCES OF THE DISCIPLINARY SYSTEM

Discipline and the Canadian military justice system are governed by a variety of laws, orders and instructions. In light of the decision of the Federal Court of Appeal in Weatherall v. Can.

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis: United States Naval Institute, 1966) at 227.

[2] Canadian military law in its broadest sense consists of much more than law regulating discipline (eg. pensions, crown liability, law of armed conflict etc.) and is governed by a number of statutes (eg. National Defence Act R.S.C. 1985, c. N-5, Canadian Forces Superannuation Act R.S.C. 1985, c. C-17., Geneva Conventions Act R.S.C. 1985, c. G-3 etc.), however, for the purpose of this thesis the term "military law" will be solely in reference to the disciplinary system governing the Canadian Forces.

(A.G.)[3], where it was ruled that codified "law" for the purposes of s. 1 of the Charter only includes provisions which have been put through a "recognized legislative process"[4], it would appear that military "law", in written form, is that law set out by statute and regulation. However, an understanding of the military justice system also requires a knowledge of the orders and instructions that impact on that system. Therefore the outline of the military justice system will include references to statutes, regulations and the orders and instructions which define that system.

The disciplinary system of the Canadian Forces is prescribed in the Second Division of the National Defence Act[5], entitled the "Code of Service Discipline". That Code sets out the disciplinary jurisdiction of the services, service offences, punishments, arrest provisions, the jurisdiction and structure of service tribunals, post-trial appeal and review and release pending appeal.[6]

The regulations enacted under the authority of the National Defence Act,[7] The Queens Regulations and Orders for the Canadian

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[3] (1988), 65 C.R.(3d) 27 (F.C.A.) [hereinafter Weatherall].

[4] Ibid. at 40.

[5] R.S.C. 1985, c. N-5 [hereinafter National Defence Act].

[6] Part IX.1 of the National Defence Act, dealing with release pending appeal, is not included in the definition of the "Code of Service Discipline (National Defence Act, s. 2), however, this appears to have been a legislative oversight. Since the appeal provisions themselves are included in the Code the release pending appeal provisions are treated as part of the Code of Service Discipline.

[7] National Defence Act, s. 13.

Forces (hereinafter QR&O)[8], provide further detail on the structure and procedures of the disciplinary system.

The National Defence Act also authorizes the Chief of Defence Staff to issue "orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister".[9] One example of such orders is Canadian Forces Administration Orders (hereinafter CFAO). The Chief of Defence Staff is assisted in the preparation of these orders and instructions by officers and staff at National Defence Headquarters. Orders dealing with disciplinary matters may also be issued on behalf of commanders at different levels in the chain of command.[10] These orders can expand the direction given on the procedures applicable to the trial and post-trial process.

3. ORGANIZATION OF THE CANADIAN FORCES

The Canadian Forces consists of units or other elements organized by or under the authority of the Minister.[11] There are three basic components of the organizational structure: units, formations and commands. The unit is the basic organizational group within the Canadian Forces. A "unit" is the personnel and material which comprises "an individual body of the Canadian Forces".[12] A unit may be identified as a ship, battalion, regiment, squadron, etc.. In

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[8] The regulations involving the disciplinary process are found primarily in QR&O, Vol. 11, (Disciplinary).

[9] National Defence Act , s. 18(2).

[10] See QR&O, art. 4.12 (command orders) and 4.21 (standing orders).

[11] National Defence Act, s. 17.

[12] "Unit" is defined in National Defence Act, s. 2.

addition, there are "bases", which are units tasked to provide support services to other units in the Canadian Forces. The next level of organization is the "formation", which is comprised of two or more units grouped under a single commander. Examples of formations are the Special Service Force, Air Transport Group and the First Submarine Squadron. Most of the formations, bases and units are then allotted to "commands". Examples of these commands are Maritime Command (the navy), Mobile Command (the army) and Air Command (the air force).[13] Each of the commanders at the unit, formation and command level are involved in the military justice system, with summary proceedings being concentrated primarily at the unit level.

4. CANADIAN MILITARY JUSTICE SYSTEM

a. Jurisdiction

The Code of Service Discipline applies to a broad range of personnel, most of whom are serving in uniform. However, civilians do on occasion, such as when they accompany serving members of their families overseas, become subject to Canadian military law. For the most part, however, it is officers and non-commissioned members of the regular force and reserve force (under specified conditions, such as undergoing drill or training) who find themselves being dealt with by service tribunals.[14] Civilians cannot be tried by summary proceedings.

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[13] Canadian Forces Publication, A-PD-050-0D1/PG-002, Officer Professional Development Program, Student Study Guide for General Service Knowledge.

[14] For a complete list of persons subject to the Code of Service Discipline see the National Defence Act, ss. 60-65.

An officer is a person who holds Her Majesty's Commission in the Canadian Forces, a person who holds the rank of officer cadet (usually an officer trainee) and a person who pursuant to law is attached or seconded as an officer in the Canadian Forces. A non-commissioned member is a person other than an officer who is enroled in, or who pursuant to law is attached or seconded to the Canadian Forces. A listing of the ranks of members of the Canadian Forces is contained in Appendix I.

Service offences are set out in ss. 73 to 130, and s. 132 of the National Defence Act. Section 130 of the National Defence Act incorporates, as service offences, all offences "punishable under Part X of the Act (offences triable by civil courts), the Criminal Code or any other Act of the Parliament of Canada. Therefore, in addition to the Criminal Code[15], offences under the Narcotic Control Act[16] among others are included as service offences. Section 132 incorporates, as a service offence, all acts or omissions taking place outside Canada which would, under the law applicable in the place where the act or omission occurred be an offence if committed by a person subject to that law. This makes an offence under the criminal law of the Federal Republic of Germany, if committed by a person subject to the Code of Service Discipline, a service offence under Canadian military law. A list of service offences is contained in Appendix II.

The Code of Service discipline provides for a broad territorial jurisdiction. Subject to one exception, a person alleged to have committed a service offence may be charged, dealt with and tried,

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[15] Criminal Code, R.S.C. 1985, c. C-46 [hereinafter Criminal Code].

[16] Narcotic Control Act, R.S.C. 1985, c. N-1 [hereinafter Narcotic Control Act].

regardless of whether the offence was committed in or outside of Canada.[17] The only restriction on this broad jurisdiction is that a service tribunal shall not try any person charged with having committed murder, manslaughter, certain sexual offences and child abduction offences in Canada.[18] In recent years service tribunals have been held at numerous locations outside Canada, including, the Federal Republic of Germany, the United Kingdom, the United States, Cyprus and Syria. In addition, trials are regularly conducted on ships at sea outside the territorial waters of Canada.

b. Punishments

The scale of punishments that may be imposed in respect of service offences is set out in s. 139(1) as follows:

> **139.** (1) The following punishments may be imposed in respect of service offences:
>
> (a) death.
> (b) imprisonment for two years or more,
> (c) dismissal with disgrace from Her Majesty's service,
> (d) imprisonment for less than two years,
> (e) dismissal from Her Majesty's service,
> (f) detention,
> (g) reduction in rank,
> (h) forfeiture of seniority,
> (i) severe reprimand,
> (j) reprimand,
> (k) fine, and
> (l) minor punishments,
>
> and each of the punishments set out in paragraphs (b) to (l) shall be deemed to be a punishment less than every punishment preceding it.

The minor punishments under s. 139(1)(l) are defined in the regulations as confinement to ship or barracks, extra work and drill, stoppage of leave, extra work and drill not exceeding two hours per day and a caution.[19]

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[17] National Defence Act, s. 71.

[18] National Defence Act, s. 66.

[19] QR&O, art. 104.13.

The punishment imposed by service tribunals depends on three factors: the service offence charged, the type of service tribunal and the rank of the accused. First, each service offence has a maximum available punishment for that offence (eg. absence without leave- imprisonment for less than two years). Secondly, different types of service tribunals are restricted in the maximum punishment that those tribunals can award. Finally, the rank of the accused can determine the punishment awarded by the service tribunal. An officer cannot receive a punishment of detention. Instead an officer is only liable to the more serious punishment of imprisonment.[20] On the other hand, a non-commissioned member, above the rank of private who receives a punishment of imprisonment or detention is also subject to an included punishment of reduction in rank.[21] An officer receiving imprisonment does not receive that included punishment.

c. Service Tribunals

The disciplinary trial system is a two tiered structure consisting of summary trials and courts martial. Each tribunal ultimately has the same purpose of maintaining discipline in the armed forces. However, the two tribunals are different in many respects, including, their structure, trial procedures, post-trial review process and the frequency at which each type of tribunal is held.

In 1988, there were 4,245 summary trials and only 95 courts martial. Between 1986 and 1988, summary trials, on average, accounted for 98% of the disciplinary proceedings conducted in the Canadian Forces. The annual statistics for summary trials and courts martial

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20 National Defence Act, s. 142(b).

21 National Defence Act, s. 140(f).

held between 1986 and 1988 are contained at Appendices III and IV respectively.

There are three types of summary trials: trial by commanding officer, trial by delegated officer and trial by superior commander; and four types of courts martial: General Court Martial,[22] Disciplinary Court Martial,[23] Standing Court Martial[24] and Special General Court Martial.[25]

d. Courts Martial

Since this thesis is concerned with summary proceedings there will only be a brief overview provided on courts martial. Courts martial are considerably different from summary trials and are more easily identified with civilian criminal courts. While courts martial are different in structure from a civilian criminal court, the procedures governing the conduct of a court martial are very similar to civilian trials. That similarity is highlighted by the fact that civilian counsel appear regularly at courts martial with little need for familiarization with court martial procedure. The procedures followed at a court martial are well defined in QR&O.[26] An accused at a court martial has the right to be represented by legal counsel, and as a matter of practice military lawyers are offered as defending officers to all accused tried by that form of tribunal.[27] Codified

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[22] QR&O, Chap. 111, Sect. 3

[23] QR&O, Chap. 111, Sect. 4.

[24] QR&O, Chap. 113, Sect. 3.

[25] QR&O, Chap. 113, Sect. 4. This court martial may only try civilians who are subject to the Code of Service Discipline.

[26] QR&O, Chap. 112.

[27] QR&O, art. 111.60.

rules of evidence, known as the Military Rules of Evidence are applied at all courts martial.[28]

Courts martial have considerably greater powers of punishment than summary trials.[29] They also differ from summary proceedings in that a judge takes part in the proceedings. Both the General Court Martial and the Standing Court Martial require the involvement of a military judge (in a Standing Court Martial the military judge sits alone as the President of the court).[30] In a Disciplinary Court Martial the involvement of the military judge is not mandatory, although in practice a judge is always appointed.[31] The military judge attending at a General Court Martial and Disciplinary Court Martial is known as the Judge Advocate. The judge presiding at a Special General Court Martial can be either military or civilian, however, in practice it is a military judge who presides at that trial.[32]

There is a right of appeal from courts martial to the Court Martial Appeal Court.[33] Provision exists for a further appeal to the

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[28] QR&O, Appendix XVII, Rule 3.

[29] The maximum powers of punishment available to a General Court Martial is death, while Disciplinary Courts Martial, Standing Courts Martial and Special General Courts Martial each can award a maximum punishment of imprisonment for less than two years.

[30] QR&O, art. 111.22, 113.54.

[31] QR&O, art. 111.41.

[32] QR&O, art. 113.05.

[33] National Defence Act, s. 233. The Court Martial Appeal Court is only empowered to hear appeals against the legality of the findings or sentence. Appeals against the severity of sentence are forwarded to the Minister or such other person appointed by the Minister appointed pursuant to s. 212 of the National Defence Act.

Supreme Court of Canada.[34] In addition, there is an extensive non-judicial review process. Included in that review process is the convening authority for the court martial[35], the Judge Advocate General[36] and the Chief of Defence Staff.[37] A person who has been found guilty by a court martial also has the right to petition for a new trial on the grounds that new evidence has been discovered subsequent to the trial.[38] Finally, a person who is sentenced to a period of detention or imprisonment by a court martial has the right to apply to either that court, or the Court Martial Appeal Court for release pending appeal.[39]

5. SUMMARY PROCEEDINGS

a. Trying Officers: Commanding Officers, Delegated Officers and Superior Commanders

For the purposes of proceedings under the Code of Service Discipline a "commanding officer" is:

a) an officer in command of a base, unit or element;

b) an officer designated as a commanding officer by or under the authority of the Chief of Defence Staff;

c) an officer in command of a geographically separated portion of a unit; or

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[34] National Defence Act, s. 245.

[35] CFAO 111-1.

[36] National Defence Act, s. 246.

[37] National Defence Act, s. 247.

[38] National Defence Act, s. 248.

[39] National Defence Act, ss. 248.1,248.2.

> d) in the case of an accused who is a commanding officer the next superior officer to whom the accused is responsible to in matters of discipline.[40]

A "delegated officer" is an officer who receives a delegation of the commanding officer's powers of trial and punishment. A delegated officer cannot be below the rank of captain and must be serving under the command of the delegating commanding officer.[41] A "superior commander" is an officer commanding a command or formation, an officer of or above the rank of brigadier-general or any other officer appointed by the Minister for that purpose.[42]

It is the commanding officer who plays a particularly important role in the summary trial process. Not only are the majority of the summary trials held at the unit level (in 1988, 98% of all summary trials were held by the commanding officer, or by an officer exercising the delegated powers), but the commanding officer also has the power to issue search warrants[43] and determine if a service member will be retained in custody pending trial.[44]

b. <u>Preparation and Laying of Charges</u>

A charge is defined as a formal accusation that a person amenable to the Code of Service Discipline has committed a service offence. A charge is laid when it is reduced to writing on a charge report and signed by an officer or non-commissioned member authorized by the commanding officer to lay charges.[45] Every charge, regardless

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40 QR&O, art. 101.01.

41 QR&O, art. 108.10.

42 QR&O, art. 110.01.

43 QR&O, art. 107.07.

44 QR&O, art. 105.21.

45 QR&O, art. 106.01.

of whether it is ultimately dealt with by court martial or summary trial, must be initially recorded on a charge report (a copy of a charge report is enclosed at Appendix V). The charge report serves as the only written record of the procedures followed at a summary trial. Once the charge report is completed it is forwarded to a commanding officer or a delegated officer. All charges, in passing initially before the commanding officer or delegated officer, are reviewed to determine if they can first be dealt with by summary trial.

c. Investigation of Service Offences

Investigations into service offences can take place both before and after a charge is laid.[46] The regulations provide that an investigation shall be conducted as soon as practical after the alleged commission of an offence.[47] If a charge has been laid then the investigation becomes mandatory. It should be ordered by the delegated officer or commanding officer to whom the charge report is referred. When completed the results of the investigation are communicated to the delegated officer or commanding officer to whom the charge report was referred.[48] The pre-trial knowledge by the commanding officer of the results of an investigation of an alleged offence is not limited to such an investigation. The commanding officer also has access to military police reports, and may even have ordered an administrative investigation into the alleged incident in the form of a summary investigation or a board of inquiry.[49]

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[46] QR&O, art. 107.01.

[47] QR&O, art. 107.02.

[48] QR&O, art. 107.05.

[49] see QR&O, Vol. 1, art. 21.01, 21.07.

d. Preliminary Disposition of the Charge

When a delegated officer concludes, upon review of the investigation, that a charge is not warranted, the charge report must be forwarded to the commanding officer for dismissal of the charge. A delegated officer has no power to dismiss a charge. However, if the delegated officer has jurisdiction and the officer's powers of punishment are adequate the trial can proceed at that level. In any other case the delegated officer must refer the charge to another delegated officer having greater powers of punishment, or to a commanding officer. If the investigation is referred to the commanding officer that officer can order an additional investigation, cause the charges to be proceeded with or dismiss the charges.[50]

e. Assisting Officer

The accused does not have a right to representation by legal counsel at a summary trial. The participation of counsel rests solely in the discretion of the trying officer.[51] The accused does have a right to be represented by an assisting officer.[52] The assisting officer is an officer, or in exceptional circumstances a non-commissioned member above the rank of sergeant, who is appointed by or under the authority of the commanding officer. An accused may request a particular assisting officer. That request must be complied with if the exigencies of the service permit and the person requested is willing to serve in that capacity. The appointment of the assisting officer must be made as soon as possible after the charge is laid.[53]

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50 QR&O, art. 107.12.

51 QR&O, art. 108.03, note (C).

52 QR&O, art. 108.03.

53 Ibid.

In practice the assisting officer is usually an officer holding the rank of lieutenant or captain and most often is the officer immediately in command of the accused. The assisting officer is also usually, but not always, under the command of the trying officer.

The assisting officer assists the accused prior to, during and after the trial. The assistance provided is to the extent requested by the accused. Such assistance can include preparing the case, advising the accused regarding witnesses and other evidence, questioning witnesses and making representations on behalf of the accused.[54]

f. Types of Trial

i) Trial by Delegated Officer

A delegated officer has the jurisdiction to try non-commissioned members below the rank of warrant officer. The only service offences triable by delegated officer are those which can be termed as "minor" offences. Those minor offences are listed in Appendix VI. The powers of punishment available to a delegated officer are severe reprimand, reprimand, fine ($200), confinement to ship or barracks (14 days), extra work and drill (7 days), stoppage of leave (30 days), extra work and drill not exceeding two hours a day (7 days) and a caution. The applicability of each punishment depends on the rank of the accused. For example, only a private can receive the punishment of confinement to ship or barracks.[55]

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[54] Ibid.

[55] QR&O, art. 108.10, 108.11, Table to art. 108.11.

ii) Trial by Commanding Officer

The jurisdiction of a commanding officer is limited to subordinate officers (officer cadets) and non-commissioned members below the rank of warrant officer (sergeants and below). No commanding officer below the rank of major can try a subordinate officer. In addition, unless it is not practical for any other commanding officer to conduct the trial a commanding officer may not preside at a trial where that officer carried out or directly supervised the investigation, or issued a search warrant in relation to that case.[56]

A commanding officer has jurisdiction over all service offences except murder, manslaughter, sexual assault and child abduction cases, when those offences are committed in Canada.

The powers of punishment available to a commanding officer are detention (90 days), reduction in rank, forfeiture of seniority (3 months), severe reprimand, reprimand, fine (60% of monthly basic pay), confinement to ship or barracks (21 days), extra work and drill (14 days), stoppage of leave (30 days), extra work and drill not exceeding two hours per day (7 days) and a caution. As with the delegated officer the applicability of the punishment depends in part on the rank of the accused.[57]

iii) Trial by Superior Commander

A superior commander has the jurisdiction to try an officer below the rank of lieutenant-colonel or a non-commissioned member

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[56] QR&O, art. 108.25.

[57] QR&O, art 108.27, table to art. 108.27.

above the rank of sergeant.[58] The jurisdiction of a superior commander is further limited by CFAO 110-2 which recommends that majors only be tried by summary trial in cases involving minor traffic offences occurring outside Canada.

The superior commander has jurisdiction over the same offences as the commanding officer. The National Defence Act provides that a superior commander may impose a punishment of forfeiture of seniority, severe reprimand, reprimand and a fine.[59] However, QR&O limits the powers of punishment to a severe reprimand, reprimand and a fine.[60] Like the commanding officer the superior commander may also dismiss a charge.

g. Trial Procedure

i) Commencement of the Trial

Before the summary trial the trying officer must peruse the charge report to determine if that officer is precluded from trying the accused because of the accused's rank or status, the adequacy of the available powers of punishment or whether, in the opinion of the trying officer, it would be inappropriate for that officer to try the case having regard to the "interests of justice and discipline".[61]

All the trying officers have the power to refer the case to another trying officer at the same level or to pass the case further

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[58] National Defence Act, s. 164. That section provides that the jurisdiction of a superior commander can be extended to lieutenant-colonels, however, such authorization has not been provided by the Governor in Council at this time.

[59] National Defence Act, s. 164.

[60] QR&O, art. 110.03.

[61] QR&O, art. 108.12, 108.28, 110.04.

up the chain of command.[62] In referring the case to higher authority, the commanding officer can recommend trial by court martial for any accused, or trial by superior commander for an accused who is above the rank of sergeant, but below the rank of lieutenant-colonel.

Charges are forwarded to a superior authority in substantially in the same manner as they are referred to an authority having power to convene a court martial (a "convening authority"). Instead of a charge report all of the charges are placed on a charge sheet.[63] In addition a summary of the evidence of each witness to be called against the accused is placed on a "synopsis". Prior to the referral of the charges the accused is given a copy of the charge sheet and synopsis, and is given 24 hours to decide whether to make a statement. Accused amenable to trial by a superior authority is also asked if they want to have the synopsis read at the trial rather than have the witnesses called to testify.[64]

Should the accused agree to have the synopsis read at the trial then a unique situation is created where there is a written record available of the evidence upon which the trying officer bases the finding of the tribunal. At all other summary trials there is no requirement to prepare a record of the evidence heard at the trial.

ii) General Rules of Procedure

In comparison to the procedures followed at courts martial the procedures applicable to summary trials are neither detailed nor extensive. An outline of the procedures followed at summary trials is contained in QR&O, art. 108.29(1) which states as follows:

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62 QR&O, art. 108.12(3), 108.28(3), 109.05.

63 An example charge sheet can be found at QR&O, art. 106.15.

64 QR&O, Chap. 109.

108.29 - GENERAL RULES FOR TRIAL BY COMMANDING OFFICER

(1) When a commanding officer tries an accused summarily, he shall conduct the trial in the presence of the accused, the assisting officer and, subject to paragraph (4) of this article, those members of the public who wish to attend. The commanding officer shall:

(a) cause Part I of the charge report to be read to the accused;

(b) when required, comply with the procedure prescribed in article 108.31 (Election to be Tried by Court Martial);

(c) ask the accused whether he requires more time to prepare his case and grant any reasonable adjournment requested for that purpose;

(d) ask the accused if he wishes to admit any of the particulars of the charge or charges and advise the accused that he is not required to make any admissions but if he does so his admission may be accepted as proof of any particular so admitted without further evidence being presented;

e) either direct that the evidence be taken on oath or inform the accused that he has the right to require that the evidence be taken on oath;

(f) receive such evidence as he considers will assist him in determining whether to

(i) dismiss the charge,

(ii) find the accused not guilty,

(iii) find the accused guilty, or

(iv) remand the accused to a higher authority;

(g) in such order as the accused may request, hear the accused, if he desires to be heard, and call such witnesses as the accused may request to be called and whose attendance can, having regard to the exigencies of the service, reasonably be procured, but nothing in this subparagraph shall require the procurement of the attendance of any witnesses, the request of whose attendance is determined by the commanding officer to be frivolous or vexatious;

(h) receive any further facts that should be brought out in the interests of the accused and any relevant submission by or on behalf of the accused;

(j) unless he has dismissed the charge or referred the case to higher authority for disposal, make and pronounce a finding in accordance with articles 108.32 (Determination of Finding and Sentence By Commanding Officer) and 108.33 (Pronouncement of Finding and Sentence By Commanding Officer); and

(k) if he finds the accused guilty, determine and pronounce the sentence in accordance with articles 108.32 and 108.33.

These general rules are substantially the same for all types of summary trials, with the exception that a delegated officer does not have the power to offer the accused the right to elect court martial.

Even after the commencement of the summary trial all of the trying officers retain the power to refer the case to higher authority as long as that referral takes place prior to the pronouncement of a finding. The referral to higher authority can be made either because the trying officer considers it to be in the best interests of justice or because their powers of punishment are determined to be inadequate.[65]

iii) Right to Elect Court Martial

The right to elect court martial only occurs if the accused is being tried by a commanding officer or superior commander. The manner in which the right to elect court martial arises depends upon whether the accused is charged with a "minor" offence (Appendix VI) or a "major" offence (Appendix VII). The right to elect court martial is given primarily at the start of the summary trial. If the accused is charged with a "minor" service offence then the trying officer must give the accused the right to elect court martial if that officer concludes, that if the accused should be found guilty, a punishment of detention, reduction in rank or a fine in the amount of $200 would be appropriate. If the accused is charged with a "major" offence then the accused must be given the right to elect court martial regardless of the punishment the trying officer might consider appropriate should the accused be found guilty.[66] The accused is given at least 24 hours to decide whether the option will be exercised to be tried by court

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[65] QR&O, art. 108.13(2)(a), 108.14, 108.29(2)(b)(ii), 108.30, 110.05(2)(b)(ii) and 110.06. If the trying officer is a superior commander having the power to convene or direct a court martial such an order can be made by that officer.

[66] QR&O, art. 108.31, 110.055.

martial. If the election is made then the trial is adjourned and the case is forwarded to higher authority.

The right to elect court martial may also be extended to accused at any time prior to a finding, if the trying officer determines that as a result of having heard the evidence the available powers of punishment may not be sufficient.[67] It is the responsibility of the assisting officer to advise the accused of the differences between remaining with the summary trial or electing court martial.

iv) Admission of Evidence

There are no rules of evidence applied at summary trials. The evidence may be viva voce or documentary. All forms of hearsay evidence may be admitted at a summary trial. In situations where the witness is not present at the trial the testimony can be admitted in documentary form (not necessarily by means of an affidavit if the evidence is not under oath) or even by a conference telephone call. Except in the case of a trial before a superior commander, where the synopsis of the evidence can be used at the trial, the only record of the summary trial is found on the face of the charge report.

v) Findings and Sentence

The standard of proof at a summary trial is proof "beyond a reasonable doubt".[68] If the accused is found guilty the sentence generally must be passed as soon as is practical. The exceptions to this general rule occur when a commanding officer wants to award a punishment in excess of 30 days detention to a private, or a punishment of detention or reduction in rank to a non-commissioned member above the rank of private. In those cases the commanding

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[67] QR&O, art. 108.29(2)(b)(i), 110.05(2)(b)(i).

[68] QR&O, art. 108.15, 108.32, 110.07.

officer must first seek approval of the punishment from higher authority.[69]

h. Review

i) General Considerations

Unlike the court martial system there is no right to appeal from a summary trial to a judicial body. The supervision of summary proceedings is carried out entirely by means of non-judicial review. Such review includes the approval of punishment warrants, a redress of grievance system, a mandatory review by officers in the chain of command and an ad hoc review by legal officers

ii) Approval of Punishments

A commanding officer must under certain circumstances seek approval from higher authority prior to awarding the punishments of detention or reduction in rank. While this "review" occurs prior to the passing of a sentence, it is included in this section because it is a review of the commanding officer's discretion in awarding punishments. The "higher authority" from whom authority must be sought is an officer not below the rank of brigadier general or an officer of the rank of colonel who has been designated as an approving authority by the Minister.[70]

In the case of a private who a commanding officer considers should be sentenced to a period of detention greater than 30 days, the trying officer commits the accused for that term. However, service of the portion in excess of 30 days detention is subject to the approval of the approving authority. If the offender is a non-commissioned member above the rank of private then the commanding

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69 QR&O, art. 108.33.

70 National Defence Act, s. 163(3).

officer must seek approval from higher authority of any proposed punishment of detention or reduction in rank. Unlike the case of a private, approval of the punishment awarded to an offender above the rank of private must be sought prior to the sentence being passed.[71]

The approval is sought by means of a punishment warrant which sets out the date of trial, the charges, a summary of the evidence, circumstances affecting the severity of sentence, particulars of the offender and recommendations of the commanding officer. There is no provision for any input by, or on behalf, of the accused regarding the approval of the sentence. When the commanding officer considers it appropriate the approval can be sought by more expeditious means, such as by telephone or message. A punishment warrant is then prepared and forwarded for written confirmation of the approving authority.[72]

iii) Redress of Grievance

A service member dealt with by summary trial has the right to grieve the results of the trial by means of a "redress of grievance". A redress of grievance is a general grievance procedure provided for in s. 29 of the National Defence Act. Any officer or non-commission member may submit a grievance when it is considered "that he has suffered any personal oppression, injustice or other ill-treatment or that he has any cause for grievance".[73] The grievor may "as a matter of right seek redress" from superior authorities as prescribed in regulations. The complaint must be submitted in writing to the commanding officer. If the complainant requests, the commanding officer must detail an officer to assist in preparing the complaint.

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[71] QR&O, art. 108.33.

[72] QR&O, art. 108.40.

[73] National Defence Act, s. 29.

The grievance proceeds through each level of the chain of command with the final level of redress being the Governor in Council.[74]

iv) Mandatory Review

All charge reports and charge sheets from summary trials are forwarded for review purposes to the "next superior officer" of the trying officer. However, since the only record of trial that usually exists of a trial by delegated officer or commanding officer is the charge report this review is limited to errors on the face of the record (jurisdiction, wording of the charges, incorrect punishments and procedural errors).[75]

v) Review by Legal Officers

While not mandated by the National Defence Act, QR&O or CFAO a practice has developed where charge reports reviewed by superior officers and commanders of commands are referred to the legal officers who advise the applicable headquarters. However, this ad hoc system of review is limited to errors on the face of the charge report or charge sheet.

vi) Alteration of Punishments

Should a redress of grievance be granted or a review of the summary trial indicate an error in the proceedings there are a number of authorities who have the power to quash or substitute findings, and substitute, mitigate, commute, remit or suspend punishments. Those authorities include the Minister, the Chief of Defence Staff, the officer commanding a command and the commanding officer.[76]

vii) Release Pending Review

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[74] QR&O, art. 19.26.

[75] CFAO 114-2.

[76] QR&O, Chap. 114.

There is no provision under Canadian military law for an offender to be released from detention pending the outcome of a redress of grievance or review of a summary trial. As a general rule, a punishment commences from the time at which it is awarded by the trying officer. As the redress of grievance and other grievance procedures are usually time consuming it is not uncommon for an offender to finish serving the punishment of detention prior to the completion of the review process.

6. Judicial Review

In addition to the appeal (for courts martial) and non-judicial review procedures (for summary trials and courts martial) available under the National Defence Act a person subject to the Code of Service Discipline can, pursuant to s. 18 of the Federal Court Act[77], apply for prerogative relief (certiorari, mandamus, prohibition, quo warranto or declaratory relief) in relation to service tribunals.

These prerogative remedies have only recently been applied with any frequency in a Canadian military law context. Under the British common law, prerogative writs were rarely issued by civilian courts in cases arising out of military tribunals.[78] The law developed along similar lines in Canada, as was noted by Mr. Justice Dickson (as he then was) in Martineau v Matsqui Institution Disciplinary Board (No. 2)[79], where he referred to a traditional view of a "disciplinary

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[77] Federal Court Act R.S.C. 1985, c. F-7.

[78] P.J. Rowe, "Military Justice Within the British Army" (1981) 94 Mil. Law Rev. 99 at 105-112. The granting of judicial review in the United Kingdom in relation to service tribunals still remains a rare occurrence.

[79] (1979), 50 C.C.C. (2d) 353 (S.C.C.) [hereinafter Martineau].

exemption" that prevented the issuance of writs of certiorari in cases involving the armed forces, police and firemen.[80] However, Mr. Justice Dickson held, in a judgement concurring with the majority of the court, that there was no rule of law which exempted such disciplinary tribunals.[81]

A long history of the virtual exemption of service tribunals from judicial review by civilian tribunals by means of prerogative writs[82] was ended by Madame Justice Reed, of the Federal Court Trial Division, in Schick v. Canada (Attorney General) et al.[83]. She found that the Federal Court Trial Division could issue prerogative relief pursuant to s. 18 of the Federal Court Act. However, she noted that the power would probably be rarely exercised in relation to courts martial because of the existence of the Court Martial Appeal Court. While Madame Justice Reed did not mention summary proceedings, it is evident that the lack of another civilian court to supervise those service tribunals would result in the Federal Court Trial Division being the primary court from which a service member, being dealt with by summary trial, might seek relief. Since Schick[84] the Federal Court Trial Division has granted writs of prohibition in Glowczeski v. The Minister of National Defence et al.[85] and Fontaine v. The Minister of

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[80] Ibid. at 374-375.

[81] Ibid. at 377.

[82] See MacKay v Rippon, [1978] 1 F.C. 233 (F.C.T.D.), Gregoire v Lieutenant General Paradis, [1981] 1 F.C. 471 (F.C.T.D.), and Re Corporal Brydges, [1982] 1 F.C. 728 (F.C.T.D.)

[83] [1986] 5 F.T.R. 82 (F.C.T.D.) [hereinafter Schick].

[84] Ibid.

[85] (1989), 26 F.T.R. 112 (F.C.T.D.) [hereinafter Glowczeski].

National Defence et al.[86] in matters arising out of summary trials.

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[86] (29 June, 1990) Ottawa T-1756-90 (F.C.T.D.) [hereinafter Fontaine].

CHAPTER 2

HISTORY OF SUMMARY PROCEEDINGS

> The study of history lies at the foundation of all sound military conclusions and practice.
>
> Alfred Thayer Mahan, 1840-1914[1]

1. INTRODUCTION

The word "summary" is defined in the Concise Oxford Dictionary as "compendious, brief, dispensing with needless details or formality, done with dispatch...."[2] This definition indicates that there are two elements to summary proceedings. They are carried out with little delay and are informal proceedings. This historical review explores the development of disciplinary proceedings in order to determine how the summary trial developed, and to assess the extent to which "summary" proceedings have been a necessary part of military law.

Since, like much of Canadian law, the Canadian military justice system evolved from British roots, particular attention will be paid to the development of British military law. Emphasis will also be placed on the background to the creation of the National Defence Act and its subsequent development to the present day.

2. EARLY SUMMARY PROCEEDINGS

A form of military tribunal "for the trial of military offenders appears to have co-existed with the earliest history of armies".[3]

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations, (Annapolis: United States Naval Institute, 1966) at 148.

[2] Concise Oxford Dictionary 7th ed. (Oxford: Clarendon Press, 1982).

[3] W. Winthrop, Military Law and Precedents, 2 ed. (Washington: General Printing Office, 920) at 45.

Under Roman military law, which was largely customary, disciplinary jurisdiction was exercised at various levels of command. The commanding general (Consul, Praetor or Dictator), lieutenant-generals, military tribunes, centurions and principales all had the power to award punishments to subordinates. The scale of punishments included death, corporal punishment, dismissal with disgrace, reduction in rank and deprivation of pay.[4]

Among early Germanic tribes judicial proceedings were conducted by the Counts during peace and by the Duke or military chief, through delegation to priests, during times of war. Later there developed courts of regiments conducted by the Colonel or a delegated officer. The judicial authority of the delegated officer was demonstrated by a staff or mace called the regiment.[5]

The first written military codes of Europe appear to be the Salic Code (5th century) which was later revised by the Frankish Kings. Written military codes were also used by the Western Goths, Lombards, the Burgundians and the Bavarians. These codes were civil as well as military as the military commanders in war were also the civil leaders in peace.

3. OUR BRITISH ROOTS

a. General

Since Canadian policy, well into World War II, was to adopt British military law as its own, the history of British military law

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[4] C.E. Brand, Roman Military Law (Austin: University of Texas Press, 1965) at 103-107. While in camp the commanding general sat in a judgment seat known as the "tribunal".

[5] Winthrop, Military Law and Precedents, **supra**, note 3 at 20-21.

is, in effect, the early history of the Canadian military justice system. The military law applicable to the British land and air forces developed in a different manner than the law applied to its naval forces. Therefore, the naval law will be dealt with separately from the law governing land and air forces.

b. The Land and Air Forces

i) Middle Ages to Mutiny Act

During the Middle Ages there was often no clear distinction between civilian and military jurisdiction. The control of English feudal armies was exercised under courts of chivalry, curia militaris, which were brought to England by William the Conqueror in 1066. The commander of the royal armies , the Lord High Constable, sat as the superior judge. The court exercised both civil and military jurisdiction, however, during times of war the court followed the army dispensing summary punishment in accordance with military codes or articles of war promulgated by the Crown. Jurisdictional conflicts with common law courts resulted in restrictions being placed on the court of chivalry and by the 18th century it ceased to exist as a military court.[6]

Even before the use of courts of chivalry had declined there was an increased use of military courts authorized by the various articles of war. These "councils of war" eventually evolved into the modern court martial. Many of the English Articles of War were patterned after the military Code of Articles of Gustavus Adolpus (enacted in Sweden in 1621).[7] The English Military Code of 1666 provided for

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[6] D.A. Schlueter, "The Court Martial: An Historical Survey" (1980) 87 Mil. L. Rev. 129 at 136-138.

[7] Winthrop, Military Law and Precedents, **supra**, note 3 at 19-20.

three types of courts: a General Court Martial, a Regimental Court and a Detachment with the power of a Regimental Court. The Regimental Court set up for the trial of soldiers by their officers, but did not have jurisdiction over offences "punishable with life or limb".[8]

During the 17th century there was considerable conflict between the English monarchs and Parliament over the maintenance of armed forces in peace time. Commissions of Martial Law set up by Charles I were condemned by the Petition of Right (1628) and by the civil courts (1638).[9] In 1642, during the civil war both the Royal forces and parliamentary forces were governed by Articles of War. The struggle for control over the army intensified with the agreement by the Parliament of Restoration of 1660 for the establishment of a standing army for Charles II.[10] With the abdication of James II (successor to Charles II) the new monarch, William of Orange and his wife Mary, were required to sign the Bill of Rights which, among other things, outlawed the keeping of a standing army within the country in times of peace without the consent of Parliament. In 1689, the question of the disciplining of military forces was again brought to the forefront when troops mutinied to join the forces of James II in Scotland. As a result Parliament quickly passed the first Mutiny Act.[11]

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[8] C.M. Clode, The Administration of Justice Under Military and Martial Law, 2 ed.(London: John Murray, 1874) at 14.

[9] Ibid. at 4.

[10] Schlueter, "The Court Martial: An Historical Survey", **supra**, note 6 at 141.

[11] An Act for Punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service 1689, (U.K.) 1 Will. & Mary c. 5 [hereinafter the Mutiny Act]. See R.A. MacDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" (1985) 1 C. F. JAG J. 1 at 12.

The pre-amble to the Mutiny Act is particularly instructive in that it indicates an understanding by Parliament that military justice had to be summary in nature. That preamble stated in part:

> Whereas the raising or keeping a Standing Army within this Kingdome in time of Peace unlesse it be with Consent of Parlyament is against Law And whereas it is judged necessary by Their Majesties and this present Parlyament That durring this time of War severall of the Forces which are now on foote should be continued and others raised for the Safety of the Kingdom for the Common Defence of the Protestant Religion and for the Reduceing of Ireland And whereas noe man may be forejudged of Life and Limb or subjected to any kinde of Punishment by Martial Law or in any manner then by Judgement of his Peeres and according to the knowne and established Lawes of the Realm Yet nevertheless it being requisite for retaining such Forces as are or shall be Raised dureing this Exigence of Affaires in their Duty That an exact Discipline be observed and that Soldiers who shall Mutiny or Stirr up Sedition or shall Desert Their Majesties Service be brought to a more Exemplary and speedy Punishment then the usuall Formes of Law will allow...
> (emphasis added)

The Act recognized that discipline had to be exact, and military offenders needed to be brought to trial speedily and without formality.

ii) Mutiny Act to 1879

Throughout the 18th century and well into the 19th century the discipline of military forces was governed by a combination of the Mutiny Act and Articles of War. In 1803, the Articles of War were given a statutory basis.[12] The three main types of military courts were: the General Court Martial, the District Court Martial and the Regimental Court Martial. The Regimental Court Martial was the most summary of the courts as it did not have to be authorized by a Royal Warrant. Instead, it was convened by the Colonel (commanding officer) under the authority of Articles of War first issued in 1672. The

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[12] Clode, The Administration of Justice, **supra**, note 8 at 58-59.

Regimental Court consisted of five officers (three officers could be used) and could sentence a soldier to corporal punishment, imprisonment for a period of 42 days and to forfeiture of pay. The sentence had to be confirmed by the commanding officer.[13]

While the Regimental Court Martial was "summary" in nature it did not meet the operational needs of the army. In the early 19th century the Articles of War were amended to authorize a "Detachment General Court Martial" (to punish offences committed against inhabitants of a foreign country) and a "Drum Head" court to punish offences on the line of march. In addition, by custom, the Provost Marshal (forerunner to the military police) had the power to summarily execute offenders found at the scene of a crime.[14]

During the last half of the 19th century the summary powers of commanding officers were further increased as a result of concern over the conditions of service of the rank and file evidenced during the Crimean War, problems with recruiting and as a result of public pressure.[15] As R.A. Skelly wrote:

> In general the tendency for much of the second half of the century was to extend the army officer's authority to mete out punishments of this nature. A similar process extended the summary jurisdiction of civilian magistrates, and the reasons in both cases were similar. Summary powers were increased to ease the burden on military courts, to speed the process of justice, and to provide alternative methods of punishment to imprisonment.[16]

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[13] Mutiny Act, s. 10.

[14] Clode, The Administration of Justice, **supra**, note 8 at 59-60, 181.

[15] Skelly, The Victorian Army At Home (Montreal: McGill-Queen's University Press, 1977) at 17.

[16] Ibid. at 140.

The jurisdiction of the commanding officer was limited to cases of absence without leave and drunkenness.[17]

It was these military tribunals and summary proceedings that were in existence in 1868 when the Canadian Parliament passed the Militia Act[18] adopting the "Rules and Articles of War" under British military law to govern Canada's armed forces.

iii) The Army Discipline and Regulation Act, 1879 to End of World War II

a) Military Justice Reform

The period from 1879 to 1945 was marked by a steady growth of the summary powers of military commanders. The increased use of summary punishments and an expanded summary jurisdiction for commanding officers continued the swing away from the use of courts martial started in the mid-19th century. As Skelly indicates:

> In general punishment became milder. The military penal system made a transition between 1856 and 1899 from severe, even brutal punishments, towards those which were more lenient and humane. This move reflected an increasing sense of humanity and of concern for the individual soldier within the army, a response to public pressure and the exigencies of voluntary recruitment.[19]

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[17] Articles of War (1873), art. 32, 50, 77. See Clode, The Administration of Justice, **supra**, note 8, Appendix C at 262, 267-268, 273. The increase in summary jurisdiction did not necessarily mean that the punishments were still not harsh (eg. 7 days confinement to barracks for leaving a brush out on kit display). However, the punishments were considerably less severe than might be awarded by a court martial. See Skelly, The Victorian Army at Home, **supra**, note 15 at 139-140, 145-150.

[18] An Act Respecting the Militia and Defence of the Dominion of Canada, S.C. 1868, c. 40.

[19] Skelly, The Victorian Army at Home, **supra**, note 15 at 141.

In 1879, the Army Discipline and Regulation Act, 1879[20] was enacted to amalgamate the Mutiny Act and the Articles of War. Two years later that Act itself was to be repealed and replaced by the Army Act of 1881.[21] These new statutes retained the principle of Parliamentary control of the armed forces by requiring the annual passage of an Act to bring the Army Act into force. In addition, the jurisdiction of military law was expanded to include most civil offences committed by soldiers in England.[22]

The Army Discipline and Regulation Act, 1879 provided for four types of courts martial: the General Court Martial, the District Court Martial, the Regimental Court Martial and the Field General Court Martial. The Field General Court Martial appears to have replaced the "Detachment General" court. The Act also removed the "Drum Head" court and summary powers of the Provost Marshal . There was no right of appeal from a court martial. Instead, the results of a court were "confirmed" by a senior officer acting as a confirming authority. Eventually, under the Army Act, the offender was provided a right to petition to a confirming officer or other reviewing authority.[23]

More significantly, the Army Discipline and Regulation Act, 1879 gave the commanding officer broad powers to award summary punishments. The commanding officer had the power to "investigate" charges against

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[20] Army Discipline and Regulation Act, 1879 42 & 43 Vict. c.33.

[21] Army Act, 1881, (U.K.) 44 & 45 Vict., c. 58 [hereinafter The Army Act].

[22] M.L. Friedland, Double Jeopardy (Oxford: Clarendon Press, 1969) at 348.

[23] Manual of Military Law 1929 (London: H.M. Stationary Office, 1929) at 67.

officers or non-commissioned soldiers. Where the case involved a soldier it could be dealt with summarily by the commanding officer. That officer could award imprisonment, with or without hard labour, (7 days); for an offence of drunkenness a fine (10 shillings); deduction from ordinary pay and minor punishments.

The Act also provided for the right of a soldier to request to be tried by district court martial in any case where the punishment to be awarded would involve imprisonment, a fine or deduction from pay.[24] While the time for exercising the right to elect was not clearly set out in the original legislation the Army Act later provided that the election was to be given "after the hearing of the evidence".[25]

While the commanding officer had limited power to award summary punishment under the Articles of War, the provision of general summary powers for the commanding officer, in the legislation of 1879, marked the beginning of two levels of trial under British military law: summary proceedings and courts martial. From this point on the two service tribunals were to develop along considerably different lines. The court martial was to become a more formal, procedurally more complicated and less used process. It was used to try more serious

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[24] Army Discipline and Regulation Act, 1879, s. 46.

[25] Army Act of 1881, s. 46. The placing of the right to elect court martial after the hearing of the evidence in effect created a form of appeal. The accused would know that the trying officer had decided a finding of guilt was warranted and a punishment greater than a minor punishment was appropriate. As was set out in the Manual of Military Law, 1894 at 42:

> 35. There is no appeal from the award of the commanding officer, but, as has been already mentioned, the soldier may, in certain cases, instead of submitting to the jurisdiction of his commanding officer, claim to be tried by a district court martial.

offences and to offer a "safety valve" for soldiers who preferred not to be tried by their commanding officers. As James Stuart-Smith (now Judge Advocate General (United Kingdom)) indicated, in an article entitled "Without Partiality Favour or Affection"[26], courts martial had avoided allowing the involvement of counsel until the enactment of the reform legislation in the later 19th century.

> Now the courts martial were thrown open to the lawyers and the voice of the Judge Advocate was no longer the only legal voice in the court-room. From 1881 onwards the trend has been to a closer and closer assimilation to the rules and procedures of the civil criminal court.[27]

The summary trial remained an informal process and eventually became the primary service tribunal used to maintain discipline in the British and Canadian Army.

b) Expansion of Summary Powers

The expansion of the summary powers of commanding officers did not end with the legislative reforms of 1879 and 1881. There was particular dissatisfaction with the time and effort consumed with the Regimental Court Martial.[28] The Regimental Court Martial was to eventually fall into disuse and by 1921 it was abolished entirely.[29]

By 1894, the general power of the commanding officer to award imprisonment had been increased from 7 to 14 days.[30] In 1906 the punishment of detention was introduced. It was to be awarded, instead

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[26] (1963) 2 Mil. Law Rev. and Law of War Rev. 223 at 232.

[27] Ibid.

[28] Skelly, The Victorian Army at Home, **supra**, note 15 at 140-141.

[29] W.C. Rigby, "Military Justice in the British Commonwealth" (1942) Fed. Bar Rev. Journal 291 at 324-325.

[30] Manual of Military Law 1894, (London: H. M. Stationary Office, 1984) at 40.

of imprisonment, to those personnel who were to be retained in the Army. At the same time the power of the commanding officer to award imprisonment was changed to the power to award detention.[31] By 1910 the amount of detention which could be awarded by a commanding officer was increased from 14 days in ordinary cases (21 days for absence without leave) to 28 days for all cases.[32]

The summary jurisdiction of military commanders was further expanded by the provision for the delegation of the commanding officers powers to officers commanding troops, batteries or companies and the granting of the powers of a commanding officer to an officer commanding a detachment of part of a unit.[33] By 1929, general officers had been given summary powers over officers below the rank of field officer (captain and below) or a warrant officer. This summary proceeding was the forerunner of the present day trial by superior commander.[34] This type of summary proceeding was developed to allow for the trial of a junior officer or warrant officer who committed an offence "which is not serious but yet cannot be overlooked.[35]

It was the system of summary proceedings developed primarily by 1929 that were used by the British Army during World War II. By virtue of the various Militia Acts passed by the Parliament of Canada,

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[31] Manual of Military Law 1914, (London: H. M. Stationary Office, 1914), The Army (Annual)Act, 1913, s. 44, note 7, at 418.

[32] Ibid. at 424, note 6.

[33] Manual of Military Law 1929, **supra**, note 23 at 40.

[34] Ibid. at 472-473. (Army Act, s. 47).

[35] Ibid. at p 473, note 1. The use of summary proceedings avoided the stigma of being tried by court martial.

it was also those summary proceedings that applied to the Canadian army during that war.

iv) The Air Force

The history of military law relating to the air force is relatively brief in keeping with the recent origins of such military forces. During World War I, Canadian air force personnel flew with British units. The discipline of British air units was governed by the Air Force (Constitution)Act, 1917[36] which included the Air Force Act. The Air Force Act was basically a re-wording of the Army Act provisions to comply with air force terminology. Since that time the military law applicable to British air forces has remained virtually identical to the law governing the British Army.[37]

The Canadian air force did not come into being until April 1, 1924. The Royal Canadian Air Force was created pursuant to an Order in Council passed under the authority of the Air Board Act.[38] That Order in Council provided that discipline would be maintained in accordance with the British Air Force Act, except where it was inconsistent with the applicable Order in Council. In 1940, a separate Royal Canadian Air Force Act[39] was enacted. However, it also

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[36] The Air Force (Constitution)Act, 1917, (U.K.) 7 & 8 Geo. V, c. 51. The Air Force Act formed the Second Schedule to the Air Force (Constitution) Act, 1917 [hereinafter referred to as the Air Force Act].

[37] McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", **supra**, note 11 , at 19.

[38] The Air Board Act, S.C. 1919, c. 11.

[39] Royal Canadian Air Force Act, S.C. 1940, c. 5.

incorporated the disciplinary provisions of the British Air Force Act.[40]

c. Naval Law

i) General

British naval law developed in a pattern similar to the law applicable to the land forces with two main exceptions. First, there was not the same conflict with Parliament over the control of discipline in the Navy. This situation was, to a large extent, a result of the lack of threat which the navy posed to Parliament, since as a "blue water" navy it was primarily tasked with extending military power outward from Britain.[41] Secondly, the military commander was given considerably more power and independence in enforcing discipline than any army counterpart. The greater powers given to the naval commander were a direct result of the independent employment of naval forces away from Britain itself. This tradition of having greater independent powers available to naval commanders was to cause some problems when the amalgamation of Canada's military law was undertaken in 1950.

ii) Early Naval Law

In the early years of Britain's naval history the disciplinary system mirrored that of the land forces. The maintenance of discipline was governed by Articles of War. The trial of offenders was conducted under the authority of the Office of the Lord High

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[40] McDonald, "Trail of Discipline: Historical Roots of Canadian Military Law", **supra**, note 11 at 20.

[41] See C.G. Reynolds, Command of the Sea: The History and Strategy of Maritime Empires (New York: William Morrow & Co. Inc., 1974) at 12-13 for an explanation of the role of a "blue water" navy.

Admiral, then by "councils of war" and finally by courts martial.[42] Legislatively, the navy was governed by An Ordanance and Articles Concerning Martial Law for the Government of the Navy[43] enacted in 1645, and subsequently by an Ordinance known as "the Duke of York's fighting instructions".[44]

A number of consolidations and amendments took place over the next two centuries. The Regulations of 1731 provided for the manner of conducting courts martial and set out Articles of War to be read to the ship's company once per month. Included in those Articles of War was the power of the captain of the ship to summarily punish seamen (not officers). The limit of the captain's summary powers was "twelve lashes on the bare back...according to the ancient practice of the sea".[45]

By the nineteenth century the navy was feeling the same pressures as the army concerning the need to reform its disciplinary system. In 1860, Parliament passed the Naval Discipline Act, 1860[46] which, after repeated amendments, was replaced by a new Naval Discipline Act, 1866[47]. It was this Act which formed the basis of Canadian naval discipline until near the end of World War II. The commanding officer had jurisdiction over all offences except capital

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[42] McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", **supra**, note 11 at 3-4.

[43] Lord's Journal, vii, 255.

[44] Clode, The Administration of Justice, **supra**, note 8 at 42.

[45] Ibid. at 43, n. 2.

[46] Naval Discipline Act, 1860 (U.K.), 23 & 24 Vict., c. 124.

[47] Naval Discipline Act, 1866 (U.K.), 29 & 30 Vict., c. 109 [hereinafter Naval Discipline Act, 1866].

offences and those committed by officers. The punishments which could be awarded at summary proceedings included imprisonment for three months (for deserters), imprisonment for six weeks (all other offenders) and solitary confinement for up to 10 days.[48]

As was indicated by Clode, in The Administration of Justice under Military and Martial Law[49], the great distinction between naval and army courts in the 19th century was the broad power that the former possessed to order the immediate execution of sentences with little supervision from higher authority.

iii) The Twentieth Century

In 1910, as Canada began to develop its own navy, the Canadian Parliament passed the Naval Service Act[50], which incorporated British naval law. The Naval Discipline Act, 1866, as it was amended over the years, remained the basis of Canadian naval law until 1944, when Canada took a step towards independence by introducing its own naval disciplinary code. However, while the Naval Service Act 1944[51] finally placed a Canadian stamp on the legal affairs of the navy, the Act was really an outright adoption of the provisions of British Naval Discipline Act, 1866.

The Naval Service Act, 1944 provided for two types of court martial: the Court Martial and the Disciplinary Court; and a summary trial before the commanding officer. Unlike the Army Act, the Naval Service Act, 1944 did not provide for either the confirmation of

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48 McDonald, "The Trail of Discipline: The Historical Development of Canadian Military Law", **supra**, note 11 at 7.

49 **Supra**, note 8 at 48.

50 The Naval Service Act, S.C. 1909-10, c. 43.

51 Naval Service Act, 1944, S.C. 1944-45, c. 23 [hereinafter Naval Service Act, 1944].

martial proceedings or a right of petition from conviction. Instead, in cases where an offender received a punishment of imprisonment or detention an order of committal was required from the Minister, the Commander in Chief or the officer ordering the court martial.[52]

The commanding officer could only try non-capital offences. The jurisdiction extended to men, ratings (junior non-commissioned members), petty officers, chief petty officers and subordinate officers (midshipmen and officers undergoing training). The punishments which a commanding officer could award included imprisonment in a penitentiary or "elsewhere than in a penitentiary" (maximum of three months), detention (three months), dismissal, reduction, solitary confinement in a cell or under canvas, and more minor punishments.[53] The punishment imposed depended upon the rank of the accused. The commanding officer could also delegate the summary powers to another officer, however, the type and duration of the punishment awarded depended on the rank of the "designated" officer.[54]

There was no right to elect court martial. Instead, certain of the more serious punishments (including imprisonment, dismissal, detention, disrating etc.) required a punishment warrant to be approved by a senior officer.[55] The regulations also provided that

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[52] Naval Service Act, s. 114.

[53] King's Regulations Canadian Navy, art. 14.43, Table II [hereinafter K.R.C.N.].

[54] K.R.C.N., art. 14.09.

[55] K.R.C.N., art. 14.37.

an accused's Divisional Officer, or another officer be appointed to assist the accused before and during the trial.[56]

4. THE NATIONAL DEFENCE ACT- 1950 TO PRESENT

a. Post War Review

Dissatisfaction with the military justice system, caused largely by the influx of a large numbers of civilians into the armed forces during World War II, prompted a post war review of military law in the United Kingdom, the United States of America and Canada.[57] The Canadian approach to the post war review was described by Group Captain J.H. Hollies in an article entitled "Canadian Military Law":

> After the Second World War, the United Kingdom and the United States set up commissions to investigate and report upon the existing state of military law and its administration in the armed forces. Canada set up no such commission, but the Department of National Defence made a careful study of the existing legislation and watched with a great deal of interest and benefit the changes which were being proposed in the United Kingdom and the United States. As a result, new Canadian legislation was devised and enacted by the Parliament of Canada in 1950. This legislation is known as the "National Defence Act" and it brought within its ambit all three Canadian services. It provides for a single code of service discipline so that all three services are subject basically to the same law, terminates the application of the United Kingdom acts, extends the powers of summary punishment of commanding officers, and provides a right of appeal from the findings

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[56] K.R.C.N., art. 14.20.

[57] William T. Generous Jr., in his book Sword and Scales (Washington: National University Publications, 1973) at 15., indicates that the dissatisfaction centred on the harsh and inconsistent punishments that "grossly inexperienced" court members imposed on accused persons. He also indicates that "citizen-soldiers lawyers" were particularly concerned about improper command influence. See also D.A. Schlueter, "The Court Martial: An Historical Survey", **supra**, note 6 at 157-158, where it is indicated that American dissatisfaction with the military justice system started in World War I.

> and sentences of courts-martial--among many other changes not relevant to this article.[58]

The National Defence Act, as enacted in 1950, provided for three types of courts martial: the General Court Martial, the Disciplinary Court Martial and the Standing Court Martial. A fourth court martial, the Special General Court Martial, was added in 1969.[59] The major changes with respect to courts martial were the creation of a right of appeal to a civilian tribunal[60], and an automatic review of court martial proceedings by the Judge Advocate General.[61] The passage of the National Defence Act also marked the end of the largely "independent" status of naval law.

The most difficult task in preparing a unified Code of Service Discipline was resolving the different summary jurisdiction and powers of punishment available to military commanders. The final solution represented a compromise, which resulted in a reduction of the summary powers of naval commanding officers, but an increase in the summary jurisdiction of military commanders overall.

Despite initial attempts to introduce a separate naval summary trial system[62], the final legislation established three types of

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[58] J. H. Hollies, "Canadian Military Law" (1961) 13 Mil. Law Rev. 69 at 70.

[59] H.G. Oliver, "Canadian Military Law" (1975) 23 Chitty's L.J. 109 at 110.

[60] National Defence Act, S.C. 1950, c. 43, s.149. The right of appeal was originally to a tribunal known as the Court Martial Appeal Board. This board was replaced by the Court Martial Appeal Court in 1959 (see Oliver, "Canadian Military Law", **supra**, note 59 at 117).

[61] National Defence Act, S.C. 1950, c. 43, s. 197.

[62] See Special Committee on Bill No.133, An Act Respecting National Defence, "Minutes of Proceedings and Evidence", at 217-219.

summary trials: trial by commanding officer, trial by delegated officer and trial by superior commander. This trial system had elements of both the old navy (increased punishment-90 days detention, assisting officer, punishment warrants, trial of subordinate officers) and army (trial by superior commander, right to elect court martial) proceedings.

Naval commanding officers lost their power to summarily award a punishment of imprisonment. However, this loss was mitigated somewhat in 1959 by amendments to regulations governing service incarceration where the conditions of imprisonment and detention were made identical.[63] The considerable increase in the power of army and air force commanding officers to award detention (28 to 90 days) appears to have been largely a result of the need to reconcile powers of punishment of the various services. However, there is reference in background material to the Act that the increased summary powers were needed for the army because of the negative effect that holding courts martials had on operation effectiveness during World War II.[64]

b) 1950 to the Charter

During the first 30 years of the National Defence Act there were only two major changes to the summary trial system. In 1952, delegated officers were given the authority to award up to 14 days detention. As Lieutenant-Colonel McDonald states:

> ...COs were given authority to delegate powers of punishment of up to 14 days detention. Unfortunately, while committee debates on the NDA amendments in 1952 discuss the nature of the delegation authorized under the

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[63] See QR&O, Vol. II, Appendix XVI.

[64] National Defence Act: Explanatory Material, dated November 1, 1950, at 136 c).

> amendments they do not provide any insight into the requirement for the increased power.[65]

This increase in punishment power, up from a maximum punishment of a fine of $100,[66] continued the expansion of summary powers of military commanders.

The second change to the summary trial system involved the right to elect court martial. In 1959, in anticipation of the enactment of the Canadian Bill of Rights[67] the regulations were amended to expand the right to elect court martial to include any service member charged with a service offence that was also a criminal offence under civilian criminal law.[68] Previously, the right to elect court martial under the National Defence Act (but not under the Army Act) had only been available to non-commissioned officers (eg. not privates). The time at which the right to elect court martial was extended to the accused was changed from the end of the trial (after hearing the evidence) to the beginning of the hearing.[69] This made the right to elect court martial appear to be more of a form of waiver than a form of appeal.

c) Post Charter

In early 1982, in anticipation of the enactment of the Charter, a Canadian Forces Charter Working Group was formed at National Defence Headquarters to study the effect of the Charter on the Canadian Forces and to recommend any necessary changes to the Code of Service

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65 McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", **supra**, note 11 at 24.

66 King's Regulations (Army), art. 108.11, Table.

67 Canadian Bill of Rights, S.C., 1960, c. 44.

68 B. Starkman, "Canadian Military Law: The Citizen as Soldier" (1965) 18 Can. Bar Rev. 414 at 430-431.

69 Hollies, "Canadian Military Law", **supra**, note 58 at 77.

Discipline and the regulations. The study by the Charter Working Group resulted in two series of amendments to military law. These changes were made in order to achieve a balance between the "Charter rights of individuals and the need to maintain the operational effectiveness of the CF".[70]

The first group of amendments, occurring in December 1982 and January 1983, involved changes to QR&O. Those changes were primarily to pre-trial and summary trial procedures. Among the changes was a further expansion of the right to elect court martial to include any service offence where the trying officer considers that if the accused were found guilty a punishment of detention, reduction in rank or a fine in excess of $200 would be appropriate. In many respects this expansion of the right to elect court martial was a return to the election procedures previously available under the Army Act.

In addition, the power that a delegated officer had to award a punishment of 14 days detention was removed. The rationale behind that decision was explained by Lieutenant-Colonel McDonald as follows:

> One of the more controversial amendments has related to the powers of delegated officers. In 1982 a decision was taken, after consultation with representatives of the Commands, to remove the delegated officer's power to award detention. This was done in order to better comply with the provisions of the Charter by expanding access to a lawyer in cases where detention or a substantial fine might be awarded as punishment. The method of expanding access was to increase the right of the accused to elect court martial to include all cases where such punishments were possible. The delegated officers did not have the authority to offer the accused the right to elect trial by court martial. Therefore, the policy choice was between giving that power to the delegated officer or removing the delegated officer's authority to impose a sentence of

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[70] Statement by the Chief of Defence Staff contained in Canadian Forces Supplementary Orders announcing changes to QR&O. CFSO, 48/86 para 9.

> detention. From the operational commander's point of view, the latter option was preferable.[71]

As a result only the commanding officer retained the power to award detention.[72]

The summary trial procedure was also made more detailed by providing for an adjournment to allow the accused to prepare the defence and giving the accused an opportunity to admit to particulars of the offence.[73]

The second group of Charter driven amendments occurred in 1986 and involved amendments to both the National Defence Act and QR&O. In terms of summary trials there were two main changes. First, the power of a commanding officer to try cases where that officer had carried out or directly supervised the investigation, or had issued a search warrant, was restricted to situations where it was not practical for another commanding officer to hear the case (eg. a ship at sea).[74]

Secondly, the accused was expressly given the "right" to be represented by an assisting officer. The regulations were amended to specifically set out the duties of the assisting officer and provide for their involvement in the summary trial. However, the notes to QR&O indicated that the trying officer had the discretion to allow counsel to participate at a summary trial.[75]

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[71] McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", **supra**, note 11 at 26.

[72] In effect the disciplinary system returned the delegated officers to the status they held during World War II (under the Army Act) and immediately after the enactment of the National Defence Act (up to 1952).

[73] QR&O, art. 108.13, 108.29, 110.05.

[74] National Defence Act, s. 141 (1.1).

[75] QR&O, art. 108.03.

5. SUMMARY

The background to the Canadian military justice system is as rich and complex as that of its civilian counterpart. A common thread throughout its long history has been the requirement for a trial system which is more expeditious and less formal than the courts found in the civilian sphere.

An essential part of the military justice system has been the concentration of disciplinary power in the hands of military commanders. Regardless of whether the proceeding has been termed as a tribunal, council of war, Regimental Court Martial, summary investigation or summary trial, it has been the military commander, primarily at the level of the commanding officer, who has administered justice to the armed forces.

It is evident from the review of the birth of "modern" summary proceedings in the 19th century that summary trials were developed to fulfil a two fold purpose. First, they met the traditional need for a responsive and administratively simple means of dealing with disciplinary offences. Secondly, summary proceedings were designed to be a more "fair" proceeding than courts martials, particularly in terms of the level of punishments awarded to an offender.

The requirement for "summary" proceedings in the military was recognized by the British Parliament with the passage of the Mutiny Act in 1689. That requirement was confirmed by the Canadian Parliament, in 1950, with the passage of the National Defence Act. The enactment of the Charter has caused the Government to make changes to the summary trial process. What remains to be determined is if those changes were adequate, both in terms of scope and effect, to adequately protect the rights of individual service members, while maintaining the operational effectiveness of the Canadian Forces.

CHAPTER 3

ROLE OF SUMMARY PROCEEDINGS: THE MAINTENANCE OF DISCIPLINE

After the organization of troops, military discipline is the first matter that presents itself. It is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers. Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy....

Maurice de Saxe: Mes Reveries, xviii, 1732[1]

1. INTRODUCTION

In order to appreciate the effect which the Charter may have on summary proceedings in the Canadian Forces it is necessary to understand the role of those proceedings in maintaining discipline. A historical review of summary justice has demonstrated that the expeditious and uncomplicated adjudication of breaches of discipline has been an essential element of military justice since at least Roman times. In addition, the power to dispense summary justice has primarily been concentrated in the hands of the commanding officer. In this chapter the reasons for the continued reliance on summary proceedings in the Canadian Forces will be explored in detail. Special emphasis will be placed on outlining the requirement for discipline, the unique role which the summary trial plays in maintaining discipline and the particular flexibility which that service tribunal offers in supporting the operational commitments of the Canadian Forces.

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis: United States Naval Institute, 1966) at 91.

2. THE NEED FOR DISCIPLINE

The role of the military justice system is to assist in the maintenance of discipline in the Canadian Forces. In assessing that role it is essential that the need for discipline in the armed forces be understood.

The role of the armed forces is to apply force, or the threat of force, in the furtherance of the interests of the state. Many armed forces such as the Canadian Forces also perform a number of ancillary duties such as disaster relief and search and rescue operations. However, the use of the military forces in these non-combat roles is largely a result of the unique abilities and equipment these forces possess because of their preparation for combat. Canadian Forces naval ships can be used for fisheries patrols, but the vessels which civil agencies might use for such duties cannot be used for combat.

It is significant that the role of military forces is related to the application of violence, because it is the potential destructive power of these forces which requires that they be more closely controlled than other segments of society. In Canada, the use of this sanctioned violence is ultimately controlled by the Government of Canada, as empowered by Parliament. However, the actual training and on site deployment of the armed forces is in the hands of military officers. They control military forces by a variety of means including the application of military law as prescribed by the National Defence Act.

In order to fulfil the function of the armed forces, military commanders must be able to train and motivate personnel under their command to fight. This readiness to fight, whether willingly or otherwise, requires that the members of the armed forces often suppress their own interests including, ultimately, the preservation

of their own lives. In his book, Combat Motivation: The Behaviour of Soldiers in Battle[2], Anthony Kellett determined that the factors affecting the motivation of soldiers to fight were primary group allegiances (group cohesion and buddy loyalties), unit esprit, manpower allocation, socialization, training, discipline, leadership, ideology, rewards, pre-conceptions of combat, combat stress and combat behaviour (including self preservation).[3] However, Kellett concluded it was identification with being a member of a military force which ultimately caused soldiers to fight.

> Most of the soldiers in the armies examined in this study (armies that, in this century, usually combined regular troops with a larger proportion of short-service soldiers) fought when called upon to do so--usually without notable enthusiasm, but equally without widespread or persistent defection. They fought because they were in the firing line, where realistic alternatives were few and where the penalties of not fighting (personal and social as well as disciplinary) outweighed the uncertain risks of fighting. The very fact of belonging, for whatever reasons, to an organization that is based on combat and that (by its size, its functional interrelationships, its normative demands, and its regulatory constraints) places unusual restraints on the individual makes rejection of the combat role difficult. The Stouffer study drew the following conclusion:
>
> > We are forced to the conclusion that personal motives and relationships are not uniquely determinate for organization in combat...officers and men must be motivated to make the organization work, but not **all** of them have to be so motivated, nor must they all agree on details of social philosophy or be bound by ties of personal friendship in order for a functioning organization to exist. To put it another way, the best single predictor of combat behaviour is the simple fact of institutionalized role: knowing that a man is a soldier rather than a civilian. The soldier role is a vehicle for getting a man into the

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[2] A. Kellett, Combat Motivation: The Behaviour of Soldiers in Battle (The Hague: Kluwer Nijhoff Publishing, 1982).

[3] Ibid. at 319-332.

> position in which he has to fight or take the institutionally sanctioned consequences.[4]

This readiness and ability to withstand the stresses of combat is not limited to what might traditionally be called "front line" forces. As modern warfare has become more technological it has become popular to conceptually divide members of armed forces into two groups: those who fight and those who maintain the weapons systems. It is then somehow considered that the "maintainers" do not need the same disciplinary training as those personnel directly involved in a combat role. While the technological advances have increased the support to front line personnel (tail to teeth) ratio in modern armed forces and resulted, in part, in the myth of the push button war, they have also ensured that the combat support forces remain subject to considerable combat stress. The increased range of weapon systems, greater mobility of military forces (including the use of airborne forces) and the need to effect repairs at or near the site of combat all serve to extend combat or near combat conditions to support personnel. Therefore, all members of the armed forces must have the requisite institutional values to prepare them to fight.

The institutional factors which make the military different from the rest of society were set out by Charles C. Moskos in an article entitled "Institutional and Occupational Trends in Armed Forces":

> An **institution** is legitimated in terms of values and norms, that is, a purpose transcending individual self-interest in favour of a presumed higher good. We use **institution** here in the sense it usually possesses in everyday speech. Members of an institution are often seen as following a calling captured in words like **duty, honor, and country.** They are commonly viewed and regard themselves as being different or apart from the broader society. To the degree institutional membership is

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[4] Ibid. at 334.

congruent with notions of self-sacrifice and primary identification with one's institutional role, institution members ordinarily enjoy esteem from the larger society.

Military service traditionally has acquired many institutional features, for example, fixed terms of enlistment, liability for 24-hour service, frequent moves of self and family, subjection to military discipline and law, and inability to resign, strike, or negotiate working conditions. When grievances are felt, members of an institution do not as a rule organize themselves into interest groups. Rather, if redress is sought, it takes the form of personal recourse to superiors, with its implication that the organization will take care of its own. Above and beyond these conditions, of course, there are the physical dangers inherent in combat training and actual combat operations.[5]

These institutional factors are contrasted with the occupational factors which apply to most of civilian society. An occupation is defined in terms of the marketplace. Supply and demand governs the employee's interests. Employees are paid an equivalent amount based on similar skill levels and usually have a voice in determining salary levels and working conditions. Moskos concludes that the "occupational model implies the priority of self-interest rather than that of the employing organization"[6]. One of the factors which distinguishes the military "institution" for the civilian "occupation" is the subjection of the member of the armed forces to military discipline and law. It is the determination of what constitutes military discipline and how it is employed to enhance institutional values of the military which sets the stage for understanding the role of the summary trial.

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[5] C. Moskos & F. Wood, eds, The Military: More Than Just a Job (London: Pergamon-Brassey's International Defense Publishers Inc., 1988). at 16-17.

[6] Ibid. at 17.

Discipline has traditionally been considered to be the soul of the armed forces.[7] It is derived from the word "disciple" and is defined in the Concise Oxford Dictionary as:

> discipline 1. branch of instruction or learning; mental or moral training, adversity as effecting this; system of rules for conduct; behaviour according to established rules. 2. order maintained among school children, soldiers, prisoners, etc.; control exercised over members of a church or other organization....[8]

To discipline someone is to "bring under control, train to obedience and order, drill, punish, chastise".[9] It does not simply consist of the imposition of punitive sanctions as is reflected in the following introduction to the chapter on discipline in the Canadian Forces manual on leadership for officers:

> The military way of life demands full time dedication to the service and its requirements. It is necessary that a member of the services train himself to have the attitude or state of mind which will prepare him for the demands of combat. In this way, he directly associates and supports the aim of the Services which is to maintain a state of combat readiness at all times. This code of conduct demands that an officer or man must be prepared to so condition himself that he will immediately obey an order even if it may result in his injury or death; the ultimate test that officers and men in the Services must be prepared to face. This code of conduct is firmly based on the code of service discipline which has to some minds become synonymous with enforced control and corrective

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[7] The American general, General W.T. Sherman said "There is a soul to an army as well as to an individual man and no general can accomplish the full work of his army unless he commands the souls of his men as well as their bodies and their legs." R. Mummey, "A Brief History of Summary Punishment in the Armies of the World" (1954) The Federal Bar Journal 286. at 289.

[8] The Concise Oxford Dictionary 7th ed. (Oxford: Clarendon Press, 1982) at 273.

[9] Ibid. at 273.

> punishment. This is only one side of the coin; discipline also includes justice, training and morale.[10]

This trained habit of obedience is not required to guarantee a blind compliance with orders, but rather to ensure that in times of stress orders will be clearly understood and carried out without delay.

> The habit of obedience and self-discipline which results from sound training is not only essential in the execution of orders but it also often spells the difference between courage and cowardice. When faced with danger man is afraid, and often tends towards panic and clouded reasoning. "Habit is second nature" and in danger men must act in accordance with a pre-established drill.[11]

In addition to this primary purpose of ensuring that the member of the armed forces does not panic in the face of danger, but rather carries out the assigned orders, discipline has two other purposes which are set out by Kellett as follows:

> The second purpose is to maintain order within the army so that it may be easily moved and controlled and so it does not abuse its power. If an army is to fulfil its mission on the battlefield, it must be trained in aggression, however, its aggressive tendencies have to be damped down in peacetime, and the medium for this process is discipline. The third purpose of discipline...is the assimilation of the recruit and the differentiation of his new environment from his former one.[12]

While Kellett's work involved the land forces his observations concerning discipline are equally applicable to naval and air forces. Discipline is an essential element of the process which turns civilians into members of a military which is capable of fulfilling its combat function.

The two forms of discipline which are used to prepare an armed force to fulfil its function are formal or collective discipline and

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[10] Leadership for the Professional Officer, Canadian Forces Publication 131(2) at 7-1.

[11] Ibid.

[12] **Supra**, note 2 at 89.

self-discipline. Collective discipline is embodied in the traditional discipline of recruit camp. It relies heavily on drills and training to socialize the recruit to military life and to persuade that recruit by systematic effort to conform to the standards of military society. Included in that training is the requirement to conform to the code of service discipline and the customs and traditions of the service. Collective discipline was historically the prevailing form of discipline applied to the British and Canadian armed forces prior to World War II. However, in this century there has been less reliance on the coercive and rigid principles of collective discipline and greater reliance on the service member's willingness to perform the required duty.[13] The Canadian Forces manual of leadership for officers explains the operation of this "self-discipline", in part, as follows:

> The subordinates have the power to disobey but the broad penalties of the orders generally prove sufficient, along with the natural conscience of the man, to achieve obedience. It is well known that the restraints of conscience vary with the person but even the most restive, once he has accepted the legality of the situation, must feel the gnawing of his own conscience at the moment of decision. Because of the varying and possibly limiting definitions of "self" a more accurate description of this quality is "individual discipline".[14]

The shift from collective to individual or self-discipline came about for two reasons. First, the large influx of volunteers during World War 1 and World War 11 made it impossible to train them to the levels of discipline present in the pre-war volunteer armies. The

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[13] Ibid. at 133-134. Professor M. Janowitz, in Socalization and the Military Establishment (New York: Russel Sage Foundation, 1965) at 43-45, refers to this change as a switch from "domination" by military authorites to one of "manipulation". Manipulation involves emphasis on group goals rather than punitive action.

[14] Leadership Manual, **supra**, note 9. at 7-2.

backlash against those pre-war standards at the end of World War 11 resulted in some significant changes to military law. Secondly, the increased range and hitting power of weapons necessitated a dispersal of military forces.[15] Kellett comments that as "units became increasingly dependent on their own resources to press the fight, the enforcement of rigid discipline declined as a feature of combat experience".[16]

The maintenance of discipline in Canada's modern armed forces relies on a blend of both collective and self-discipline. Collective discipline is primarily used during recruit training. Once the service member leaves the recruit training environment the transition begins to a reliance on self-discipline. This transition is described in the leadership manual for officers as follows:

> 1. ...The leader must assist the man in his transition from an environment of imposed discipline to an environment of self discipline; that is, leaving basic training and joining his first active military unit. In his assistance the leader must ensure that he interprets the regulations consistently and fairly. When a man resists the progression from imposed to self-discipline the leader must find the reason for this resistance.
>
> 2. Initially, the leader must discipline and counsel; however, when resistance continues he must resort to the penalties prescribed by the orders. He must be aware that repeated offenses by a man indicate to some degree a failure in the leadership of his unit and therefore should concentrate on the preventive rather than the remedial....[17]

The use of punitive measures, such as the laying of charges and proceeding with a trial before a service tribunal, can therefore be seen to be just one of the disciplining tools available to the

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15 **Supra**, note 2 at 133-134.

16 Ibid. at 134.

17 **Supra**, note 10 at 7-3 to 7-4.

military commander. It is an important and essential means of maintaining discipline, but it is intended to be used only as a last resort.

An essential feature of the disciplinary process is that it is meant to be intrusive. As a means of socializing members of the armed forces, and particularly recruits, military control of the service member's life must be much more pervasive than the control exercised by civilian society on its members. That does not mean that members of the military are not subject to the rules which govern the conduct of their civilian counterparts. Military members must perform all of the obligations required of members of Canadian society. However, they also have additional responsibilities as members of the armed forces. In most cases compliance with the obligations of both Canadian civilian and military society requires a higher standard of conduct from service members than from their civilian counterparts.

The intrusiveness of the disciplinary process is reflected in the scope of military law. Military law includes not only offences which are also found in civilian criminal law, but also offences which would not be the subject of punitive action in civilian life. The reasoning behind the broad scope of military law was set out by Mr. Justice Ritchie in MacKay v. R[18]. He quoted with approval an earlier decision of Mr. Justice Cattanach of the Federal Court Trial Division:

> The same learned Judge later made the following comment (at p. 525 C.C.C., p. 657 D.L.R., p. 236 F.C.):
>
> > Many offences which are punishable under civil law take on a much more severe punishment. Examples of such are manifold such a theft from a comrade. In the service that is more reprehensible since it detracts from the essential **esprit de corps**, mutual respect and trust in comrades and the exigencies of the barrack room life-style. Again for a citizen

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[18] (1980), 54 C.C.C. (2d) 129 (S.C.C.) [hereinafter MacKay].

> to strike a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly, a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.
>
> It may be thought also that the offence of trafficking in narcotics takes on a special character when it is committed, as it was here, at an armed forces base where service personnel are equipped with firearms.[19]

The essential nature of trained obedience in the execution of orders is reflected in military offences such as absence without leave, desertion and insubordination. It is also present in the requirement to wear a uniform and to maintain that uniform in an appropriate manner. Since the habit of obedience requires a compliance with all but unlawful orders no breach of orders can be overlooked. Failure to comply with even minor orders and regulations involves a lack of respect for authority. If that respect cannot be ensured by wilful compliance then it must be enforced by corrective action. Minor breaches are dealt with primarily by the summary trial and usually result in the awarding of a minor punishment. It is by "correcting" the minor breaches that compliance with all lawful orders is ensured and discipline is maintained. Therefore the invoking of the disciplinary process is not simply a punitive action, although punishments do have a punitive component. The early and repeated (if necessary) attention to minor breaches of discipline is intended to solve the disciplinary problem and direct the service member towards

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[19] Ibid. at 153.

institutional goals before a major breach of discipline occurs. It is corrective in nature intending to encourage the service member to adopt a habit of obedience to orders. In becoming a disciplined member of the armed forces the individual conforms to the institutional requirements of the military thereby making it more likely that they will fight when required to do so.

There is also a need for breaches of discipline to be dealt with in an expeditious manner. In terms of discipline the old adage "justice delayed is justice denied" can be rephrased as "discipline delayed is discipline destroyed". An alleged breach of discipline creates uncertainty for both the person committing the act and the person attempting to enforce the prescribed conduct. This is an uncertainty which remains until such time as the matter is dealt with by a service tribunal. For the individual committing the act there is the uncertainty of not knowing if the alleged breach will in fact be determined to be unlawful. A delay in resolving this issue leaves open the question as to whether the individual has successfully shown disrespect for authority. While waiting for a resolution it will be open for the individual or another member of the armed forces to repeat the conduct which is the subject of the disciplinary action. At the same time, the delay creates an uncertainty for the person enforcing the code of service conduct as to whether that person is right in reporting other similar breaches pending the outcome of the first incident. While civilian criminal trials have similar uncertainties created by delays in proceeding with cases the stakes are much higher within the military.

In a system which exists to provide violent action or the threat of violent action the need to control the violence can never be forgotten or down played. Failure to effect control over the

potential for violence can result in a danger to both individuals (including death) and to society at large. For that reason control must be the paramount consideration in maintaining discipline. As control is exercised by the habitual obedience to orders any delay in enforcing the habit of obedience is harmful to discipline. Control must therefore be evidenced by means of an expeditious resolution of alleged breaches of discipline. While a finding of innocence or guilt resolves the question of whether the alleged action was proper the speed with which that resolution is carried out can be equally important in terms of maintaining control of the armed force.

3. THE SUMMARY TRIAL: UNIQUELY DESIGNED TO MAINTAIN DISCIPLINE

a. General Considerations

The hierarchial nature of military society is reflected in military law in terms of the offences for which a person may be tried[20], the form of service tribunal which may try a case and the type of punishment which may be imposed. While different treatment under military law is often based on rank that does not mean that a lower ranking accused is necessarily worse off than a person holding a higher rank. For example, an officer above the rank of captain is more likely (in most cases must be) tried by court martial and is potentially subject to more serious punishment. In addition there is a stigma attached to a court martial as it is considered to be a far more serious proceeding. On the other hand, lower ranking officers

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[20] For example the National Defence Act contains offences relating to commanders (eg. s. 73- Misconduct of Commanders in Presence of Enemy), officers (eg. s. 92- Disgraceful Conduct), superior officers (eg. s. 95- Abuse of Subordinates), and subordinates (eg. s. 84 Striking or Offering Violence to a Superior Officer).

and non-commissioned members (particularly those below the rank of warrant officer), while also subject to court martial, are liable to trial by summary trial. The summary trial is presided over by an officer within the chain of command, has fewer procedural safeguards and generally can impose a broader range of punishments (albeit more minor in nature). The reason for this different treatment, particularly where it relates to the susceptibility of an accused to be tried by summary trial is directly related to two factors. First, the summary trial is used to assist in the socialization of lower ranking personnel away from occupational goals towards ones which are institutional in nature. Secondly, the conduct of summary trials by officers serves to reinforce the habit of obedience which is the essential element of discipline.

b. A Vehicle for Socialization

In light of our British roots it is possible to theorize that the extensive summary jurisdiction found in Canadian military law, particularly in respect of non-commissioned members, is a direct result of class distinctions which were prevalent in British society in the 19th century. Officers by virtue of their social status should only be subject to court martial with all its procedural safeguards while the lower class enlisted personnel could be better dealt with by summary proceedings.

Such a theory ignores the historical underpinnings of the summary trial. As was set out in Chapter 2 the summary trial was instituted in the British forces in the late 19th century during a time of low recruitment, when desertion, in particular, was rampant among the lower ranks. The offences of desertion and absence without leave are classic examples of a failure of the person committing the offence to adjust to military life. The summary trial was seen as

offering a more humane way of dealing with "socialization" problems than could be provided by the traditional court martial. This problem of identifying with the military was not a problem traditionally found in the officer corps.[21]

However the enlisted personnel joined the armed forces (including the navy) because they could not find work elsewhere. Therefore, their motives were occupational in nature. The summary trial was developed to replace the court martial as a more humane method of dealing with offences related to the problems of socializing the personnel of the lower ranks.

This split between an officer corps which is primarily institutionally motivated and non-commissioned members who are more occupationally oriented still exists in the armed forces of Canada. In a study completed by Charles Cotton in 1979, senior combat and support officers and junior combat officers were found to have largely institutional values (or "vocational" as Cotton terms it). Junior support officers and senior combat and support non-commissioned members were largely ambivalent holding a position between the two extremes of institutional and occupational goals.[22] Finally, junior combat and support troops were strongly supportive of occupational goals. As Cotton stated:

> Again, we see the concentration of those supporting the vocational soldier model in the higher ranks and in the combat arms. On the other hand, the junior troops are much more likely to fall into the employee category, with only 5% supporting the vocational norms associated with the soldier role type. Mapping out the attitudinal composition of the volunteer force in this way makes it

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[21] Kellet, Combat Motivation **supra**, note 2 at 48.

[22] C.A. Cotton, "Institutional and Occupational Values in Canada's Army" (1981) 8 Armed Forces and Society 99 at 106. Table 2.

> easier to see the lines of cleavage within the military system. These data suggest, at least in Canada's case, that the most significant line of cleavage appears between those who lead and those who follow. This may well indicate a lack of cohesiveness in the land force, in that shared value assumptions can be seen as one indicator of morale and cohesion in military units.[23]

While this study was carried out in respect of army personnel the fact that the Canadian Forces has a unified recruiting and recruit training programme tends to indicate that similar results would occur in the air force and navy.

The identification with the military (the institution) is an essential factor in ensuring that members of the armed forces will fight. The summary trial system is uniquely targeted towards those personnel who identify the least with the institutional values of the military. The trying officers at the trial by commanding officer and the trial by delegated officer have jurisdiction over the most junior members of the armed forces and are provided a broad range of more minor punishments in order to discipline those who are the least institutional in outlook. The superior commander has jurisdiction over junior officers and senior non-commissioned members who occupy the medium range of the institutional/occupational scale. The range of punishments available to the superior commander is less broad than those available to the commanding officer and the delegated officer and ultimately can be linked to a lessened requirement to nudge wayward junior officers or senior non-commissioned members towards institutional values.

c. Trial by Officers

Under Canadian military law the presiding officers at courts martial and summary trials are officers. In the case of summary

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[23] Ibid. at 106.

trials the trying officer usually has no formal legal training and is not assisted by a legally trained judge advocate. This exclusive adjudicative role is directly related to the status of the officers as professionals and the responsibility that status carries with it. In War, Morality and the Military Profession [24], Samuel Huntington distinguishes between enlisted personnel as tradesmen and officers as professionals.[25] It is the professional responsibility of officers which distinguishes them from enlisted personnel. Huntington refers to this professional responsibility as follows:

> The expertise of the officer imposes upon him a special social responsibility. The employment of his expertise promiscuously for his own advantage would wreck the fabric of society. As with the practice of medicine, society insists that the management of violence be utilized only for socially approved purposes. Society has a direct, continuing, and general interest in the employment of this skill for the enhancement of its own military security. While all professions are to some extent regulated by the state, the military profession is monopolized by the state. The skill of the physician is diagnosis and treatment; his responsibility is to the health of his clients. The skill of the officer is the management of violence; his responsibility is the military security of his client, society. The discharge of the responsibility requires mastery of the skill; mastery of the skill entails acceptance of the responsibility. Both responsibility and skill distinguish the officer from other social types. All members of society have an interest in its security; the state has a direct concern for the achievement of this along with other social values; but the officer corps alone is responsible for military security to the exclusion of all other ends.[26]

It is the understanding by officers of the institutional requirements of the military and their responsibility which is derived from that professionalism which makes them the appropriate person to

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[24] M. Wakim, ed., War, Morality, and the Military Profession (Boulder, Colorado: Westview Press, 1979).

[25] Ibid. at 19.

[26] Ibid. at 17.

judge an offence under military law in order to determine if a breach of discipline has occurred. As the persons responsible for the readiness and capability of the armed forces it is officers who must ensure that the habit of obedience and therefore the discipline of subordinates is maintained at the proper level. At the same time subordinates look to the persons who they must obey in order to have disciplinary issues resolved. The habit of obedience is thereby reinforced.

d. Trial by the Military Commander

A significant difference between the summary trial and the court martial is the position which the trying officer holds in relation to the accused. In the case of the summary trial the trying officer gains that status by virtue of the positions they hold within the chain of command. At a General Court Martial and Disciplinary Court Martial the members of the court are selected by the convening authority and every effort is made to select officers not connected to the accused. Commanding officers are specifically prohibited from serving as members of either type of court martial.[27] In the case of a Standing Court Martial the trying officer is a military legal officer who is from outside the accused's chain of command. The different status of the officers who preside at each type of service tribunal reflects the different roles of these tribunals.

The goal of both service tribunals is the maintenance of discipline. However, the summary trial is designed as a "personal" forum for the trial of minor service offences. This personal nature of the summary trial reflects the responsibility which the trying officer has for the discipline and the operational capabilities of the

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[27] QR&O, art. 111.20 and 111.39.

personnel under the command of that officer. In contrast, a court martial is structured to try the more serious military offences and to act as a "safety valve" for those personnel who, because of the nature of the offence or the potential punishment, prefer to be tried by court martial. Therefore, the court martial offers an elevated level of independence while sacrificing a significant amount of the personal responsibility for the outcome of the trial. The summary trial is subordinate to the court martial in terms of judicial independence, but it must be stressed that the court martial does not have a supervisory capacity over the summary trial. It is not an appellate court and its decisions are not binding of trying officers at summary trials.

The court martial, due to its broader jurisdiction and greater powers of punishment is seen as the senior form of service tribunal. However, the summary trial remains the dominate and most important disciplinary tribunal for ensuring the maintenance of discipline in the Canadian Forces. It is the personal nature of the summary trial which gives it this status.

e. Personal Aspect of Leadership

The respect and obedience which an officer commands is not based solely on rank. Rank is simply a visible example of the professional status which an officer has gained within the military. The ability to command respect and to effectively control subordinates is based on the leadership ability of the officer. The importance of leadership to combat effectiveness was discussed by Kellett as follows:

> Decision and persuasion are central to leadership, and the formal military leader's control over the channels of information facilitates his ability to determine a course of action and to convince his followers of its validity. The ability of a man to extract from others certain forms

> of behaviour often inimical to their immediate self-interest cannot be comprehended without reference to the follower. Men, particularly in dangerous and high-stress situations, desire leadership so that their immediate needs (administrative, tactical, and so on) may be met and their anxieties allayed. Well-trained and experienced officers and senior non-commissioned officers confer a sense of protection on their subordinates by virtue of their military skills; wasteful leadership and high casualties erode the subordinate's sense of well being. Thus effective combat leadership has to temper accomplishment of the unit's mission with concern for the integrity and well-being of the group.[28]

The essence of leadership is persuasion. Often that persuasion is expressed in the form of personal example. The personal nature of leadership is also reflected in the mutual trust which develops between superior and subordinate. The leader's responsibility for the maintenance of discipline has always contained those personal characteristics.

Foremost among the characteristics which the officer must display in disciplining subordinates is fairness. In military justice systems such as those found in Canada, the United Kingdom and the United States, which provide for the right to elect court martial, the person subject to summary proceedings can indicate their doubts in the fairness of the trying officer by choosing to elect court martial. As indicated by Peter Rowe in "Military Justice Within the British Army":

> The need for the maintenance of discipline in any army is axiomatic but it is not advanced by injustice. A soldier must have confidence in the fairness of his commanding officer and that any errors will be corrected. Discipline will inevitably suffer if this confidence is lacking and one might expect a larger number of soldiers to elect trial by court-martial and thus frustrate the beneficial effects (from the army's point of view) of summary disposal. For there are distinct advantages to the army in transferring powers from a court-martial to a commanding officer. This is so, however, only until the point is reached that the punishments "become so severe that the rights of individuals outweigh the needs of the

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[28] **Supra**, note 2 at 326-327. See also Janowitz, Sociology and The Military Establishment, **supra**, note 13 at 43-45.

> services with respect to the maintenance of discipline." Individual cases are dealt with more expeditiously, and this avoids the disturbance to military routine that a court martial causes. Such evidence as there is suggests that this form of disposal is preferred by both soldiers and commanding officers.[29]

Of course, the use of punitive sanctions is only one small part of the disciplinary process. The military commander is responsible for all aspects of ensuring trained obedience to orders including drill, exercises and the supervision of operations. The removal of the power of trial and punishment from the very person who must ensure that discipline is maintained will severely weaken the commander's ability to persuade subordinates to comply with orders. The threat of punitive sanctions remains part, albeit the least desirable part, of the persuasion process. The removal of summary powers from the officer personally responsible for the conduct of military operations would also create the situation where the military commander could order the subordinate to perform an act which might cause the subordinate's death, but could not punish the subordinate for a breach of discipline. The responsibility of military commanders is an all encompassing one which includes powers over life and death. By necessity that responsibility must also include the power to fully instill discipline in the personnel who must carry out the orders.

f. Position of the Trying Officer

The decision as to which level the disciplinary power should be concentrated reflects a compromise between the level of responsibility and professional status of the military officer on one hand and the degree of personal identification and control over subordinates on the other hand. Among the factors identified by Kellet as factors

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[29] P. J. Rowe, "Military Justice Within the British Army" (1981) 94 Military Law Review 99. at 117-118.

affecting the ability of personnel to fight were primary group allegiances, unit esprit and leadership. Like leadership, primary group allegiances and unit esprit have a strong personal component. The primary group allegiances

> ...are founded on the basis of mutual attraction, tactical requirements and interdependence, and shared values and goals. To be cohesive, a group must have a mission or an objective. In combat the group sets standards of behaviour largely in terms of two primary goals: individual and group survival (frequently the dominant objective) and task accomplishment.[30]

The effectiveness of these primary group allegiances is further enhanced "where the loyalty to the group is supplemented by commitment to a wider entity...."[31] In the Canadian Forces this wider entity is embodied in the unit, examples of which are the ship, squadron and regiment. The enhancement of fighting effectiveness through primary group allegiance, unit esprit and leadership is most effective at the lower levels of the military structure where personal contact and allegiances are their strongest.

While the fighting effectiveness of military forces is often concentrated on facts existing at the lower levels of the military structure the level of responsibility and the professional status of military officers increases based on the rank and position held by that officer. As Huntington states:

> The larger and more complex the organizations of violence which an officer is capable of directing, and the greater the number of situations and conditions under which he can be employed, the higher is his professional competence. A man who is capable of directing only the activities of an infantry squad has such a low level of professional ability as to be almost on the border line.
> A man who can manage the operations of an airborne division or a carrier task force is a highly competent professional. The officer who can direct the complex

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30 Kellet, Combat Motivation, **supra**, note 2 at 320.

31 Ibid. at 321.

> activities of a combined operation involving large-scale sea, air, and land forces is at the top of his vocation.[32]

However, the further up the chain of command the responsibility for maintaining discipline is placed the greater the loss of the "personal" contact associated with fighting effectiveness. In order to maintain fighting effectiveness a compromise is reached between the level of professional expertise held by an officer and the need for personal contact by that officer with subordinates. In the Canadian Forces disciplinary powers are concentrated at the unit level. The commanding officer can directly exercise the summary jurisdiction or can delegate those powers to a delegated officer. The commanding officer (usually a lieutenant-colonel or a major) and the delegated officer (usually a major or a captain) provide an suitable level of professional expertise while maintaining personal contact with the personnel they command. The disciplinary powers of the superior commander (usually a general) reflects the increased professional expertise needed to deal with higher ranking non-commissioned members and lower ranking officers.

4. ROLE OF THE CANADIAN FORCES

The conditions under which the Canadian Forces operates have considerable impact on the structure of service tribunals and trial procedures. This impact is a result of the requirement that the service tribunals be capable of being held wherever and whenever Canada's military forces are operating. The following is an outline of the operational commitments of the Canadian Forces. It will provide considerable insight into the varying conditions under which discipline must be maintained.

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[32] **Supra**, note 24 at 17.

Canadian security policy is determined by three major elements: defence and collective security, arms control and disarmament, and the peaceful resolution of disputes. In support of this policy Canada's military forces are committed to operations involving strategic nuclear deterrence (eg. submarine hunting), conventional (non-nuclear) deterrence, protection of national sovereignty and peacekeeping.[33] In addition, the Canadian Forces provides unarmed assistance to other government departments, civil authorities and civilian organizations.[34]

Since the early 1950s the military operations of the Canadian Forces have had a particularly international flavour as is demonstrated by Canada's involvement in the North Atlantic Treaty Organization (NATO), North American Aerospace Defence (NORAD) and numerous peacekeeping operations. In support of NATO Canada has maintained forces in Europe and has earmarked Canadian based units in an augmentation role. The European based forces consist of 4 Canadian Mechanized Brigade Group, 1 Canadian Air Division, 4 Air Defence Regiment and the support units at two Canadian Forces bases in the Federal Republic of Germany. In Canada two tactical fighter squadrons are allocated for a flyover support role in the event of conflict. In addition, 5 Canadian Mechanized Brigade Group is tasked with deploying to Europe should the need arise.[35] The maritime commitment to NATO has been the continuous deployment of a destroyer with the Standing Naval Forces Atlantic. While recent events in the Eastern Block

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33 Defence 88, Catalogue No. D 3-6/ 1989 (Minister of Supply and Services, Canada, 1988). at 3-4.

34 Ibid. at 19-20

35 Ibid. at 63.

European nations have resulted in a lessening of tensions the military role for the Canadian Forces has not changed. Even if units are pulled out of Europe it is unlikely that Canada will withdraw from NATO. Continued involvement in NATO would include the commitment of Canadian military forces to the European theatre of operations.

Canada's NORAD commitments involve considerable liaison and integration with the United States armed forces. The defence of North America includes both the detection and interception of unauthorized aircraft all around the borders of Canada. Such operations entail the carrying out of operations from and over Canada's northern territories.

The involvement of Canada's armed forces in peacekeeping operations has been extensive. In 1988 there were as many as 1,453 members of the Canadian Forces serving in six peacekeeping areas. Those operations were: the United Nations Truce Supervisory Organization (Middle East), 20 observers; the United Nations Disengagement Observer Force (Middle East), 230 members; the United Nations Forces in Cyprus, 575 members; the United Nations Iran-Iraq Military Observer Group, 20 observers and 511 other members; the United Nations Good Offices Mission Afghanistan-Pakistan, 5 observers; and the Multi-national Force and Observers (Sinai, Egypt), 140 members.[36] While 511 of the Canadian Forces communications and support personnel deployed in Iran-Iraq repatriated to Canada in December, 1988, Canada took on a new commitment in 1989 by sending Canadian Forces personnel to Namibia. These deployments have been to areas of actual or potential conflict.

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[36] Ibid. at 20-21.

In addition to these international commitments the Canadian Forces is required to ensure that the sovereignty of the nation is maintained. Such operations have included surveillance of Canada's borders and the deployment of land forces personnel on exercise by air to remote areas of Canada's north. Finally, the Canadian Forces remains the force of last resort for internal security operations. Such operations can include traditional "aid of the civil power" operations as contemplated in Part XI of the National Defence Act (eg. riots, public demonstrations, etc., this power was recently exercised in relation to the native demonstration in Oka, Quebec), assistance to penitentiaries operations, operations in time of emergencies (eg. the "October Crisis", 1970) and armed assistance to other federal government agencies (eg. provision of security forces at the Montreal Olympics, 1976).

This review of the operational commitments of the Canadian Forces prompts two observations. First, if a military commander is to be able to promptly deal with breaches of discipline, service tribunals must be sufficiently transportable in make up and flexible in procedure to be able to be held anywhere that the Canadian Forces is deployed. This would include the most remote parts of Canada and literally anywhere in the world. Secondly, the type of operations demand the maintenance of a high level of discipline for all members of the Canadian Forces. There cannot be one level of discipline and with it one form of service tribunal in times of "peace" and another level of discipline and type of trial during times of "war".

With regard to the employability of service tribunals the requirement to maintain discipline continues regardless of where the units are deployed. This need to conduct trials outside of Canada (or in the Canadian wilderness) distinguishes the military justice system

from its civilian counterpart. However, even within the military justice system there is a difference between courts martial and summary trials regarding their employability. While courts martial are considerably more portable than civilian courts they do not provide the same flexibility as is provided by the summary trial. In order to hold a court martial the members of the court, the judge advocate (or in the case of the Standing Court Martial the military judge alone), the court reporter, the prosecutor and the defending officer must all be sent to the scene of the court. The resulting delays inherent with the administration of a court martial could be harmful to discipline in the unit where the alleged offence has occurred. It is also possible that the local operational situation, including the attitude of the host country or organization, could preclude a formal trial.

A decision to hold the trial in Canada or another safe location could adversely affect the operational effectiveness of the deployed unit. Apart from the delay in dealing with the case the trial would require the removal of the accused, witnesses and administrative personnel from the scene of operations thereby affecting the ability of the unit to complete its mission. Added to these problems is the complication that non-military witnesses may refuse to travel to another country or location to testify at a court martial. It simply would not be practical to pre-position a court martial in an area of operations waiting for a breach of discipline to occur. Deployments of Canadian Forces personnel, particularly on peacekeeping operations, could be very small in number with the result that actual breaches of discipline requiring resolution by trial may be sporadic. The pre-positioning of court martial personnel would be wasteful in terms of personnel and other resources.

The use of courts martial to maintain discipline would be particularly difficult in the case of naval units which are at sea for long periods of time. An advantage which the summary trial offers over the court martial is that it is conducted by personnel already present at the place where the alleged breach occurred. Charges can be dealt with promptly thereby limiting the uncertainty and resulting harm to discipline which can result from delay.

In a foreign jurisdiction prompt resolution of an incident may also be essential in reducing any tensions which may have arisen with the local population. Of course, the conduct of the trial by the military commander present at the scene of the incident further enhances the personal aspects and habit of obedience which is essential to the maintenance of discipline. This does not mean that courts martial are never held in isolated or foreign locations. However, the disruption to discipline and operational effectiveness through the administrative burden of a court martial, the inherent delay in setting up the court and the loss of personal involvement on the part of the immediate commander is kept to a minimum by limiting courts martial to the trial of serious offences or where the accused has elected court martial.

In terms of the level of discipline which must be maintained in order to ensure operational effectiveness there can be no distinction between times of peace and war. The role of the Canadian Forces, when not actually deployed on operations, is to train for those operations. As discipline is the trained obedience to orders it is not something which can be suddenly acquired when a unit is sent into an operational setting. Good discipline is the result of habit. The attainment of the appropriate level of discipline is a gradual process. Once the proper discipline is attained it must be constantly reinforced. A

system of discipline based on whether Canada is at peace or war is all the more problematic since the concept of peace and war is itself outdated. The last declared war was in 1948.[37] Since that time, however, there have been numerous armed conflicts in which Canada has been involved, primarily in a peacekeeping role. Apart from the training criteria, a distinction cannot be made as to the necessary level of discipline based on whether military units are deployed outside of Canada. While Canada maintains European based forces a large number of units are earmarked to be sent to the European theatre in time of conflict. In terms of operation commitment the only difference between 409 Tactical Fighter Squadron in Lahr, the Federal Republic of Germany, and 433 Tactical Fighter Squadron, in Bagotville, Quebec, is the location of their present deployment. Both units require the same level of discipline. This same principle holds true for peacekeeping operations. For example, while members of the Canadian Forces may be deployed in Namibia a great deal of their support is provided by personnel based in Canada. The failure to receive adequate support from Canada because of a lapse in the discipline of the supporting personnel could have a disastrous effect of the operational effectiveness of members of the Canadian Forces deployed on peacekeeping operations overseas. Finally, with regard to operations in Canada the role of the Canadian Forces in internal security operations cannot be forgotten. The Montreal Police strike, 1968; the October Crisis, 1970; the Montreal Olympics, 1976; and the numerous penitentiary riots during the past 20 years all resulted in the deployment of Canadian Forces personnel because the normal police and other civilian agencies could not provide adequate resources.

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[37] Arab-Israeli War, 1948-1949.

Military personnel are used for internal security operations as a force of last resort when civilian agencies cannot control the situation. The standard of discipline of troops deployed on internal security operations must be extremely high, particularly because of the political fallout which can result if those personnel act contrary to orders. In order to maintain this high level of discipline the military justice system must be able to function even when the civilian justice system has broken down. As has been evidenced in the past 20 years the need for internal security operations can arise with little warning. Canadian Forces personnel must be trained at all times, including training to the appropriate level of discipline, in order to handle all the varied and often difficult roles which it has been assigned.

The roles which the Canadian Forces perform in Canadian society are unique. As a result the Canadian Forces as a military organization requires service tribunals which are uniquely suited to maintaining the level of discipline necessary to successfully complete the tasks assigned to it by the Government of Canada regardless of the place or conditions of employment. The summary trial provides the requisite flexibility to enable the military commander to maintain discipline wherever and whenever the Canadian Forces is deployed.

5. SUMMARY

The unique structure and considerable flexibility of summary proceedings is particularly well suited to the disciplinary and operational needs of the Canadian Forces. The summary trial emphasizes personal control by military commanders of their subordinates. It reinforces the trained habit of obedience which is essential to the maintenance of discipline. Summary proceedings, by

virtue of their integration within the unit structure, offer an extremely "portable" trial process which can be readily employed any where that Canadian Forces personnel are serving.

At the same time, however, the development of a disciplined armed force requires individual members of that force to suppress their individual desires in order to obtain the group goal. It is the degree to which the suppression of those individual desires also involves breeches of individual Charter rights which lies at the heart of the assessment of the constitutionality of the summary trial process.

CHAPTER 4

SUMMARY PROCEEDINGS: CONSTITUTIONAL STATUS AND JURISDICTION

In its proper manifestation the jealousy between civil and military spirits is a healthy symptom.

Mahan: Naval Administration and Warfare, 1903[1]

1. INTRODUCTION

An assessment of the constitutional challenges to the summary trial system cannot be undertaken without an understanding of the constitutional status of service tribunals. Many of the courts and legal scholars who have dealt with military law issues have demonstrated (often subconsciously) a preference for the procedures and structure of the civilian justice system. This preference is a direct result of the supervisory role of civilian courts, such as the Court Martial Appeal Court, the Federal Court of Canada and the Supreme Court of Canada.

In carrying out this supervisory role civilian judges and lawyers, by virtue of their training and experience, are drawn to make comparisons between the less familiar military justice system and the more familiar civilian justice system. While such comparisons are useful for the purpose of ensuring that the basic principles of Canadian law are applied equally to both the military and civilian justice systems, the trend has been for civilian legal authorities to elevate the civilian justice system to a higher constitutional status. This elevation of status will be referred to as a "doctrine of paramountcy". This trend has been particularly evident concerning

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[1] R. D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis: United States Naval Institute, 1966) at 51.

questions of jurisdiction where preference has been given to civilian criminal courts in trying incidents which are both service offences and offences under criminal law. The problem with this elevated status for the civilian justice system is that it has been developed without a detailed assessment of the effect which such a status has on the ability of military commanders to maintain discipline in the armed forces.

This chapter will review the constitutional status of service tribunals (such as the summary trial) in order to demonstrate that the military justice system has, and must have, an equal constitutional status to that of the civilian justice system. The origins and scope to the paramountcy doctrine will be reviewed, particularly in relation to the Supreme Court of Canada decision in MacKay v. R[2]. The concept of a paramount civilian justice system will be exposed as an artificial and misdirected method of supervising the military justice system. In its place changes such as altering the scope of the jurisdiction of summary trials, with a resulting transfer of that jurisdiction to courts martial, will be proposed as offering a more realistic and effective method of protecting the rights of an accused person subject to the Code of Service Discipline.

2. CONSTITUTIONAL STATUS OF MILITARY LAW

The constitutional basis for the military justice system is found in section 91(7) of the Constitution Act, 1867[3] which provides as follows:

> 91. ...the exclusive Legislative Authority of the Parliament of Canada extends to...
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> 7. Militia, Military and Naval Service, and Defence

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[2] (1980), 54 C.C.C. (2d) 129 (S.C.C.) [hereinafter MacKay].

[3] Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3.

While section 91(7) of the Constitution Act, 1867 is silent concerning the provision of a separate court system for the military, Mr Justice Ritchie in MacKay [4], in a judgment concurred in by three other justices, held that the legislative authority of Parliament included the power to set up a court system to enforce military law. Mr Justice Ritchie stated as follows:

> This authority must, in my opinion, include the authority to enact legislation for regulation and control of the behaviour and discipline of members of the services and this in turn includes the making of the provision for the establishment of Courts to enforce such legislation.[5]

Similarly, Mr. Justice McIntyre in writing a separate judgment agreeing with the result reached by Mr. Justice Ritchie accepted that the creation of a body of military law and the tribunals necessary for its administration were within the legislative authority of Parliament[6]. Mr. Justice McIntyre's judgment was concurred in by Mr. Justice Dickson. Chief Justice Laskin in the lone dissenting judgment was only prepared to say "that the establishment of a special code of law governing the armed forces...is not challenged in this case"[7].

While Mr. Justice Ritchie only referred to the "establishment of Courts", MacKay [8] involved an appeal from the decision of a Standing Court Martial. The legislative authority of Parliament to enact provisions necessary for the administration of military law is broad enough to include the creation of summary trials. Such authority is evident from a historical review of military law. The constitutional

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4 **Supra**, note 2.

5 Ibid. at 146.

6 Ibid. at 156.

7 Ibid. at 134.

8 Ibid.

basis for summary trials can also be found in s. 11(f) of the Charter which refers to military tribunals. The term military tribunal is broader than court martial. Military or "service" tribunals as defined in the National Defence Act, and as they have existed since the mid-19th century, have included both courts martial and summary trials.

This legislative authority for military law is to be contrasted with that regarding the enactment of criminal law and the provision for the establishment of civilian criminal courts. The federal power found in s. 91(27) (criminal law), the provincial powers found in s. 92(14) (administration of justice and provincial courts) and the provision for the appointment of judges in ss. 96 to 104 results in a completely separate system of civilian criminal courts. Both the military justice system and the civilian justice system have a separate but equal constitutional basis. There is nothing in the constitution which indicates that one justice system is paramount to the other.

In fact, whenever an issue of paramountcy has arisen to date it has been in relation to the division of powers between Parliament and the provincial legislatures.[9] However, at least one author has suggested that there is a constitutional rule of paramountcy of civilian criminal law over military law.[10] In addition, while not directly addressing the issue of paramountcy a number of courts and legal scholars have interpreted the law in such a way as to result in a de facto paramountcy of the civilian criminal justice system.

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[9] P.W. Hogg, Constitutional Law of Canada, 2 ed. (Toronto: Carswell, 1985) Chap. 16.

[10] M.L. Friedland, Double Jeopardy (Oxford: Clarendon Press, 1969) at 336.

3. PARAMOUNTCY

The doctrine of paramountcy arises from the overlapping jurisdictions of the military and civilian justice systems. To date the paramountcy of the civilian justice system has only been claimed when the alleged offence is committed in Canada. In addition, it has only been considered where criminal offences under the "ordinary" law are incorporated as offences under military law (s. 130 of the National Defence Act). The issue of paramountcy has not arisen where a military offence is similar in nature to a civilian criminal offence, for example, in the case of driving a vehicle of the Canadian Forces while impaired contrary to s. 111 (b) of the National Defence Act.

The paramountcy argument has an historical basis. As was noted in Chapter 2 the jurisdiction over offences, which are also offences against civilian criminal law was not given to military tribunals until 1879. Until that time those offences which occurred in the United Kingdom were tried exclusively by civilian courts. In 1879, while the jurisdiction over most offences committed under ordinary law by soldiers was extended to military tribunals, civilian courts retained the sole jurisdiction to try certain offences such as murder, when those offences were committed in the United Kingdom. This limited statutory exclusion of military jurisdiction is retained in s. 70 of the National Defence Act which bars the trial by a service tribunal of the offences of murder and manslaughter as well as certain sexual assault and child abduction offences when those offences are committed in Canada.

The concept of a constitutional doctrine that civilian criminal courts are paramount was suggested by Martin L. Friedland in his book,

Double Jeopardy[11]. In arguing that there was no constitutional principle that the conviction by a service tribunal could not act as a bar to subsequent prosecution by civil authorities Friedland stated:

> The opinion will be cautiously ventured here that there is probably no such common-law rule, the true rule being simply that the civilian courts have primary jurisdiction over civilian offences committed in England. A necessary result of asserting that the civilian authority is paramount is to disregard a prior military judgment if, but only if, military jurisdiction was assumed without the express or implied consent of the civilian authorities.[12]

In support of this position Friedland refers to an acknowledgment of the principle of paramountcy being made by Dicey in The Law of the Constitution[13] and Maitland in The Constitutional History of England[14]. However, a close review of those works indicates that they do not support such a principle. For example, in Dicey, The Law of the Constitution[15] reference is made to a doctrine of English law that "a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen"[16]. Then it is indicated that the soldier "may" be put on trial before a competent civil court for an offence against ordinary civilian law and "must" be tried by a civilian tribunal for certain

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[11] **Supra**, note 10 at 349-350.

[12] Ibid. at 336.

[13] A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10 ed. (New York: St. Martin's Press, 1967).

[14] F.W. Maitland, The Constitutional Law of England, (Cambridge: The University Press, 1961). This work is a reprint of the 1908 edition referred to by Friedland.

[15] **Supra**, note 12.

[16] Ibid. at 300.

offences such as murder.[17] This recital of the obligations of the British soldier and the outline of the jurisdiction of civilian and military tribunals does not support a doctrine of paramountcy as espoused by Friedland.

What Friedland does correctly indicate is that the argument in favour of a restriction of the jurisdiction of military tribunals is based on three basic fears which have survived from the 17th century: "fear of a standing army, fear of martial law and fear that the military courts would oust the jurisdiction of the civil courts".[18] Friedland, himself, in suggesting a constitutional principle of paramountcy appears to have fallen prey to those fears. It is those fears which plague much of the past and current legal thinking with regard to military law.

The depth of these fears is interesting in light of the fact that both the political stability of the United Kingdom and the control

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[17] Ibid. at 301. Friedland also refers to Pritchard, "The Army Act and Murder Abroad" (1954) Camb. L.J. 232 in support of the constitutional doctrine of civilian paramountcy. However, Pritchard does not indicate that such a doctrine exists. He discusses civilian/military jurisdiction as follows:

> Under section 41 the jurisdiction of courts martial is much wider, and depends very largely on a discretionary element. As a result the section applies within the United Kingdom as well as overseas, but this should not conceal its true function of extending the English criminal law to any part of the globe in which British troops are serving. The whole section has an extra-territorial character, which is emphasized by the fact that the section has no application to five very grave crimes unless they are committed abroad.

This alleged extra-territorial character of s. 41 of the Army Act does not provide a sufficient base upon which to build a doctrine of civilian paramountcy.

[18] **Supra**, note 10 at 345.

effected by Parliament over British military forces has changed considerably since the 17th century. The transferral of these fears to modern Canadian legal thinking is all the more remarkable in light of the fact that the existence of the Canadian Parliament and the control which it exercises has never been challenged by its military forces. While there is always a need in a democracy for the civilian government to maintain control over the military forces of the state it will be shown that the solution arrived at in Canada of giving civilian criminal courts paramount jurisdiction over military offences, which also happen to be offences under ordinary criminal law, neither adequately addresses the underlying fears nor meets the needs of the armed forces.

4. THE SUPREME COURT OF CANADA AND PARAMOUNTCY

Perhaps the best example of how a doctrine of paramountcy has crept into the analysis of the jurisdiction of service tribunals can be found in the pre-Charter case, MacKay[19]. MacKay had been convicted by a Standing Court Martial held at Esquimalt, British Columbia, of four charges of trafficking in a narcotic contrary to s. 4(1) of the Narcotic Control Act and one offence of possession of a narcotic contrary to s. 3 of that Act. All of the offences were laid under s. 120 (now s. 130) of the National Defence Act. Only one of the offences had been committed off of the base. It was argued on appeal that the provisions of the National Defence Act which allowed for the trial of the appellant on offences under the Narcotic Control Act were contrary to the Canadian Bill of Rights in that they deprived MacKay

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[19] **Supra**, note 2.

of the right to be tried by an independent and impartial tribunal and denied him equality before the law.

As has been noted, there were three separate judgments. The majority judgement by Mr. Justice Ritchie was concurred in by Justices Beetz, Pigeon and Martland. A separate judgment agreeing in the result was written by Mr. Justice McIntyre, concurred in by Mr. Justice Dickson, as he then was. Both of these judgments held that MacKay was neither denied a trial by an independent tribunal nor equality before the law. The lone dissenting judgment was written by Chief Justice Laskin. The importance of MacKay[20] has diminished considerably in terms of the equality issues which were raised on appeal, particularly in light of the broad scope of s. 15 of the Charter and the more recent Supreme Court of Canada decision in Andrews v. R[21]. However, MacKay[22] remains instructive in terms of the approach which the Supreme Court of Canada took in respect to the overlapping jurisdictions of the military and civilian justice systems. The three judgments will be termed as the equality (Ritchie), the nexus (McIntyre) and the exclusionary (Laskin) approaches. It was the latter two judgments which relied heavily, but indirectly, on a doctrine of paramountcy.

The equality approach placed emphasis on the equal status of the military and civilian justice systems. Mr. Justice Ritchie stated:

> The position of the two systems of law was described by Cattanach, J., in a well-considered judgment rendered on an application for prohibition brought before him during the early stages of the present case. The learned Judge there said ...:

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20 **Supra**, note 2.

21 [1989] 1 S.C.R. 143 (S.C.C.).

22 **Supra**, note 2.

The military law, which stands side by side with the general law of the land, is equally part of the law of the land but it is limited to members of the armed services and other persons who are subject to that law. The degree to which Parliament has provided for the two systems of law to operate concurrently is demonstrated by the provisions of s. 129 of the National Defence Act which read:

> 129. All rules and principles from time to time followed in the civil courts in proceedings under the Criminal Code that would render any circumstances a justification or excuse for any act or omission or a defence to any charge, are applicable to any defence to a charge under the Code of Service Discipline, except in so far as such rules and principles are altered by or are inconsistent with this Act.[23]

This equality approach explains why Mr. Justice Ritchie could readily conclude that a member of the armed forces suffered no inequality before the law when tried by a service tribunal for an offence which was also a civilian criminal offence. The accused was being tried in an equally valid justice system which had the same status and stature as the civilian justice system. The policy decision as to which justice system was to be used was in the discretion of the Minister of National Defence or the appropriate Attorney General.

The nexus judgment reflected a greater uneasiness on the part of Mr. Justice McIntyre towards the procedural safeguards offered by the military justice system. He stated:

> The all embracing reach of the questioned provisions of the National Defence Act go far beyond any reasonable or required limit. The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code which differs in some particulars from the civil law, to differing rules of evidence, and to a different and more limited appellate procedure. His right to rely upon the special pleas of autrefois convict or autrefois acquit is altered for, while if convicted of an offence in a civil Court he may not be tried again for the same offence in a military court, his conviction in a military court does not bar a second prosecution in a

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[23] **Supra**, note 2. at 147.

> civil Court. His right to apply for bail is virtually eliminated. While such differences may be acceptable on the basis of military need in some cases, they cannot be permitted universal effect in respect of the criminal law of Canada as far as it relates to members of the armed services serving in Canada.[24]

This concern over procedural safeguards is similar to what Friedland describes as the general objections to military courts. Those objections have stressed the severity of punishment awarded by military tribunals and the absence of procedural safeguards for the accused.[25] Mr. Justice McIntyre was only prepared to accept that military jurisdiction, with its more limited procedural safeguards, could only be exercised in Canada over a service offence, which was also a civilian criminal offence, "if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service"[26]. While setting out this basis for the "nexus" test Mr. Justice McIntyre failed to provide any guidance on how its should be applied. The question of jurisdiction over such offenses was left to be determined on a case by case basis. This test was not in fact a new approach. It was borrowed from the "service connection" test adopted by the United States Supreme Court in O'Callahan v. Parker[27] and subsequently refined in Relford v. Commandant, U.S. Disciplinary Barracks[28].

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24 Ibid. at 161.

25 Friedland, Double Jeopardy, **supra**, note 10 at 162.

26 **Supra**, note 2 at 162.

27 395 U.S. 258 (1969).

28 401 U.S. 355 (1971).

The exclusionary approach taken by Chief Justice Laskin was based on the opinion that the Standing Court Martial was not the "equivalent of an independently appointed judicial officer".[29] Therefore, Chief Justice Laskin could not accept that the service tribunal could try any offence which was also an offence under the civilian criminal law. He stated:

> In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a Court of justice, separate from the prosecution and free from any suspicion of influence of or dependency on others. There is nothing in such a case, where the person charged is in the armed forces, that calls for any special knowledge or special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved.... In short, I regard the provisions of the National Defence Act as inoperative in so far as they provide for the trial of offenses against the ordinary law by service tribunals.[30]

At the heart of this opinion is a belief that the civilian courts are superior to military tribunals and therefore should be given a paramount status.

In de facto adopting the doctrine of paramountcy both the nexus and exclusionary approaches endorse a very limited and artificial method of dealing with the overlapping jurisdictions of military and civilian law. It only applies in regard to offences which are specifically found in civilian criminal statutes occurring inside Canada. When those offences occur outside of Canada the military courts retain jurisdiction. Such a doctrine of paramountcy would accept a double standard of justice. If the offence occurs in Canada the accused is tried in the civilian justice system with its

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[29] **Supra**, note 2 at 137.

[30] **Supra**, note 2 at 137-138.

"preferred" procedural safeguards. If the offence occurs outside of the country then the accused is exposed to a "less preferred" standard of procedural safeguards. This different treatment, based on the geographical location of the offence, could not have been intended by the drafters of the constitution.

Neither Mr. Justice McIntyre or Chief Justice Laskin attempt to deal with a service offence such as stealing (s. 114 of the National Defence Act) which is virtually identical to the offence of theft under the Criminal Code (s. 322). In effect, the supporters of the "paramountcy" approach became "hung up" on the incorporation of civilian criminal statutes into military law. Had Parliament simply enacted each criminal offence as a separate offence under the National Defence Act, which is all that incorporation effectively does, the paramountcy argument would have an even more limited theoretical basis. Chief Justice Laskin also refers to a "strictly service or discipline offence"[31]as opposed to "offences against the ordinary law"[32]. In fact, there is no difference between those service offences which are incorporated into the National Defence Act pursuant to s. 130 and those offenses which are set out in the other sections of that Act. They are all proven in the same way at a trial before a service tribunal (eg. the requirement of an actus reus and a mens rea). In addition all of the offences under the National Defence Act carry with them penal consequences.

The nexus and exclusionary approaches also fail to adequately address the requirements of discipline in the military. In particular, the nexus approach appears to be based on a concept that

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31 Ibid.

32 Ibid.

jurisdiction is dependant on whether the service member is on duty (the service connection). Such a notion of an "escape" from the requirements of "service" by leaving work is civilian (or occupational) in nature. It fails to appreciate the institutional requirements of the military for 24 hour service, seven days a week. Again the element of control at all times is essential in maintaining discipline.

The weakness in the nexus approach is further highlighted by the lack of guidance provided by Mr. Justice McIntyre on how the test was to be applied. The same problem plagued the United States Supreme Court with respect to the service connection test. That test was the very one upon which the nexus test was based. It simply is not possible to separate a member of the armed forces from their connection with the service. The result in the United States, in Solorio v. The United States,[33] was the abandonment of the service connection test in favour of one based on status. If the accused has the status of being a member of the armed forces then the military has jurisdiction. It cannot be a coincidence that identification with being a member of the armed forces (status) is what makes a person prepared to fight.[34] If the connection with that status is weakened then the usefulness of that person for the protection of the nation is considerably lessened.

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[33] 483 U.S. 435 (1987).

[34] See above, chap. 3 at 58-60.

5. "UNDERSTANDING" MILITARY/CIVILIAN JURISDICTION

Despite the weaknesses and artificiality of the nexus approach and the fact that a majority of four judges in MacKay[35] supported the equality approach, most Canadian courts and legal scholars have embraced the nexus approach without serious reference to the judgment of Mr. Justice Ritchie.[36] However, none of the post MacKay[37] legal analysis has addressed the effect of the nexus approach on military discipline. Instead courts and legal writers have chosen to adopt an approach based on fears rooted in the 17th century. Assuming that those fears are still relevant in 20th century Canada the paramountcy approach does nothing to address their underlying cause.

Neither the military nor military law can be properly supervised by means of a preference for the civilian criminal court system. The removal of military jurisdiction over service offences which are also

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[35] **Supra**, note 2.

[36] The Court Martial Appeal Court has adopted the nexus approach in R v. MacDonald (1983) 6 C.C.C. (3d) 551, R v. Catudal 18 C.C.C. (3d) 189, R v. MacEachern 24 C.C.C. (3d) 439, Ionson v. R (10 March, 1987), (C.M.A.C.). Ionson v. R was subsequently heard by the Supreme Court of Canada, however, the appeal was dismissed with a rather curt judgment that the C.M.A.C. had not erred in the result (Ionson v. R, [1989] 2 S.C.R. 1073 (S.C.C.)). Similarly, in P. W. Hogg, Constitutional Law of Canada 2 ed. (Toronto: Carswell, 1985), at 792-794, N. Finkelstein ed.,Laskin's Canadian Constitutional Law 5 ed. (Toronto: Carswell, 1986) at 1247-1248, 1264-1265. The sole exception to this adoption of the nexus approach can be found in R v. Ryan (30 June 1987) C.M.A.C. 267 (C.M.A.C.) where it was held that nexus did not apply to offences occurring outside of Canada. See also Généreux v. R (1989), 59 D.L.R. (4th) 644 (F.C.T.D.) where Mr. Justice Dubé adopted the judgment of Mr. Justice Ritchie in MacKay, **supra**, note 2, in determining that a trial by a General Court Martial did not breach an accused's rights under s. 15(1) of the Charter.

[37] **Supra**, note 2.

offences under the civilian criminal law can only operate to weaken discipline and lessen control which both the military and ultimately Parliament must have over the members of the armed forces. Further, the doctrine of paramountcy is based on an inherent mistrust of the military. Such mistrust can only serve to isolate the military from the rest of Canadian society. In that isolation lies the roots of perhaps the greatest threat which a military force can pose to a democracy: a military which is disenchanted and unfamiliar with the rights which should be available to all Canadians.

The military justice system should not be supervised by being placed in an artificially subordinate position to the civilian justice system. Rather, it should be controlled, and the rights of its members protected, by means of Parliament's power to amend the National Defence Act and enact regulations pursuant to that Act. An example of how effective this approach can be is found in the post-MacKay[38] amendments to the National Defence Act which provided for release pending appeal (Part IX.I) and protection from double jeopardy (s. 66). Such control exercised by Parliament will ensure that the military justice system keeps in step with the evolution of individual rights in Canada. Such an approach has three advantages. First, it strengthens the notion of Parliamentary control of the military. Secondly, by ensuring that the rights of members of the military are kept current with those offered to the rest of Canadian society, members of the armed forces will be able to better identify with that society. Finally, the problems encountered during World War 11 which resulted in the backlash towards the military justice system will be avoided. The military will therefore be better able to discipline its

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38 **Supra**, note 2.

members, particularly in times when there is a large intake of "short-service" personnel through conscription.

The supervision of military law by Parliament does not negate the role played by civilian courts in protecting the individual rights of service members. The law governing the armed forces of Canada will continue to be interpreted and ruled on by those courts. However, ruling on the constitutionality of military law does not require the usurping of the jurisdiction of service tribunals. If the military justice system does not adequately protect the constitutional rights of the individual service members then that system should be changed, rather than replaced by civilian criminal courts.

The closer identification between the two justice systems does not mean that they will be the same. The roles of each system are too different to allow exact conformity. A difference in structure or procedure, however, does not mean that the accused will have any fewer rights. It is not clear why, in Mackay[39], that Mr. Justice McIntyre felt that the different rules of evidence, procedures or appeal process offered an accused any less protection than those found in the civilian justice system. Just because it is different does not mean that it is worse. The basic rights of persons subject to the Code of Service Discipline should be protected in the same manner as those who are only subject to civilian criminal law. However, the protection can and should be provided from within the military justice system.

This acknowledgment that the military and civilian justice systems are equal in status requires courts to recognize that a difference in structure or role does not necessarily mean an inferior system of justice. Where the military justice system does not, in its

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[39] **Supra**, note 2.

own way, adequately protect the rights of persons subject to military law then that law should be changed. At the same time military authorities must be prepared to accept changes to the military justice system which ensure that the legal rights of persons subject to military law keep in step with those available to the rest of Canadian society. The following comments by Charles Cotton in discussing the need for "understanding" in developing a strong military in a modern society are equally applicable to resolving the differences in the military and civilian justice systems.

> I do not agree with those who focus solely on internal cohesion and traditional martial values, in which the military is treated in isolation from society. Many of the staffing and attitudinal problems of volunteer militaries are linked to qualitative trends in recruitment, as the middle class shuns service and marginal citizens become problematic service members. At the same time, however, there are enormous risks in concentrating solely on building links with society and adapting to social trends without considering the related issues of operational effectiveness and individual commitment. Somehow we must pursue the middle road, reconciling apparent opposites with a higher order of understanding.[40]

The military and civilian justice systems therefore have an equal constitutional status. There is some overlapping of jurisdictions. While theoretically such overlapping has the potential to create a problem, in practice, conflict is avoided by liaison between the civilian and military authorities. In addition, policies are in place that require certain offences, such as impaired driving, to be dealt with by the civilian criminal justice system. These policies are followed even in cases where the nexus approach would result in a clear military jurisdiction. Similarly, jurisdiction is often waived by civilian authorities in order to allow the military

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[40] C. Moskos & F. Wood, ed., The Military: More Than Just a Job,(London: Pergamon-Brassey's, 1988) at 47.

to commence disciplinary action. These waivers do not mean that the jurisdiction of either justice system should be restricted. For the Canadian Forces in particular the circumstances under which the military justice system must be utilized are too varied to allow an artificial limitation on the jurisdiction of service tribunals.

6. SUMMARY TRIAL JURISDICTION

Many of the concerns which have most often been expressed regarding proceedings in military courts still remain valid outside the context of the paramountcy myth. In particular, concern over the absence of procedural safeguards in the summary trial system should cause both military and civilian legal scholars to look closely at the rights offered to an accused tried by that form of service tribunal. Unlike the court martial and the civilian criminal court, the summary trial has no rules of evidence, no detailed procedure, no right to representation by a lawyer and no formal appeal process. There are mitigating features in the summary trial process such as the right to elect court martial, an assisting officer for the accused and a grievance procedure which will be reviewed later in detail. At this point, however, attention will be focused on the jurisdiction of summary trials to try service offences. Particular emphasis will be placed on determining the extent to which the jurisdiction of summary trials matches the role of those proceedings in military society. In this endeavour little guidance can be obtained from the case law as the issue has not been dealt with in respect of summary trials. Even in MacKay[41] all of the justices were careful to avoid addressing the issue of summary proceedings under the National Defence Act.

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[41] **Supra**, note 2.

The trying officers at summary trials have a broad jurisdiction to deal with service offences. Commanding officers and superior commanders can try all service offences while the delegated officer is restricted to a less extensive but still significant list of service offences (see Appendix VI). While the jurisdiction is broad it is evident from the limited powers of punishment available to those trying officers that summary proceedings are intended to deal with less serious cases. The summary trial is meant to be "corrective" with a goal of socializing members of the Canadian Forces to a habit of obedience. That service tribunal is not meant to try the more serious military offences.

This raises the question of how to determine the seriousness of an offence. In terms of summary proceedings, as they are presently constituted, the seriousness of a particular offence is determined in three ways. First, by whether the trying officer concludes, prior to trial, that the powers of punishment available to that officer would be insufficient having regard to the gravity of the offence.[42] Secondly, if during the trial the trying officer determines that on conviction the available powers of punishment would prove inadequate.[43] Finally, if the offence is one of a "criminal" or "quasi-criminal" nature the accused must be given the right to elect court martial.

This approach to determining the seriousness of a service offence completely ignores the method by which Parliament normally identifies the seriousness of an offence: by setting the maximum penalty. Under the civilian criminal law a further distinction on the

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[42] QR&O, art. 108.12 (1)(a)(iii), 108.28 (1)(a)(ii) and 110.04 (1)(a)(ii).

[43] QR&O, art. 108.14, 108.30, 110.06.

seriousness of the offence is made in terms of whether the offence can be proceeded with by indictment or by summary conviction.

Under the National Defence Act the offence of Misconduct of any Person in Presence of Enemy (s. 74), which provides for the maximum penalty of death, is a much more serious offence than Absence Without Leave (s. 90), which has a maximum penalty of imprisonment for less than two years. For two offences charged under s. 130 of the National Defence Act the indictable offence of Kidnapping (s. 279 of the Criminal Code), which has a maximum penalty of life imprisonment, is a more serious offence than the summary conviction offence of Possession of a Weapon at a Public Meeting (s. 88 of the Criminal Code). However, there is nothing in the National Defence Act or QR&O which would require the trying officer to take the seriousness of the various maximum penalties into consideration in deciding if an offence should be tried by summary trial.

In addition, the basing of a right to elect court martial (and by implication indicating the seriousness of the offence) on whether an offence is "criminal" or "quasi-criminal" in nature not only plays into the hands of the supporters of the paramountcy myth, but is also wrong at law. As was determined by Madame Justice Wilson in Wigglesworth v. R[44] it is not only criminal or quasi-criminal matters which are to enjoy the strongest constitutional protection, but also any offence which "may lead to a true penal consequence".[45] Since all military offences have potential penal consequences no distinction as to the seriousness of the offence should be made on the basis of whether that offence is the same or similar to a civilian criminal

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[44] (1987), 37 C.C.C. (3d) 385 (S.C.C.).

[45] Ibid. at 400.

offence. Rather the seriousness of the offence should be based on the magnitude of the punishment which can be awarded under the statute for that offence.

The problem with allowing a minor tribunal to retain jurisdiction over the most serious offences is that it leaves open a possibility of abuse. Even where no such abuse may occur the perception that such abuses could happen can be very damaging. Both commanding officers and superior commanders have jurisdiction over all service offences including those offences which carry a maximum penalty of death or imprisonment for life. However, it is difficult to conceive of a situation where a commanding officer or superior commander, with their relatively low powers of punishment (90 days detention and a severe reprimand respectively) would try a charge alleging Spying (s. 78 of the National Defence Act) which carries a maximum penalty of death. Offences which have a maximum penalty of death or life imprisonment should result in an "automatic" referral to court martial. By allowing the commanding officer or superior commander to retain jurisdiction over such offences the potential exists for the most serious service offences to be dealt with by a relatively informal trial process conceived and designed to deal with less serious matters.

When the most serious offences are dealt with by summary trial, with its more limited procedural safeguards and powers of punishment, there is the potential for harm to both the accused and to discipline within the Canadian Forces. For example, an accused charged with Mutiny With Violence (s. 80 of the National Defence Act) when brought before a commanding officer who has decided to try the case must be given the right to elect court martial. The accused may elect the more informal summary trial out of a fear (a somewhat unrealistic

notion in modern Canadian society) of receiving the maximum penalty of death should the matter be referred to a General Court Martial. In making that decision the accused would be giving up a number of procedural safeguards which would be available at a court martial. In terms of maintaining discipline a problem could be created by having a commanding officer who, while acting in good faith, but in an overly protective manner towards the accused, offer that accused the right to elect court martial rather than refer the case directly to summary trial. In such a scenario the accused might elect summary trial and if found guilty receive a significantly less serious punishment than the incident might warrant. The conviction of the accused by summary trial would act as a bar to any attempt by military authorities to have the case dealt with by court martial.

While the potential for such abuse is small, there is no need for it to exist at all. It is difficult to justify why summary jurisdiction needs to extend to the most serious service offences. Military commanders must maintain a broad control over the personnel under their command. However, offences which carry the penalties of death and life imprisonment are not the types of offences for which the "corrective" action of the summary trial is intended or designed.

The restriction of the jurisdiction of summary proceedings to offences which carry penalties lower in the scale of punishment than imprisonment for life would still leave the military commanders with a broad power to maintain discipline. The trying officers at summary trials would retain the discretion as to whether to refer the majority of service offences to higher authority or to deal with the case by summary trial. There is nothing necessarily objectionable with leaving such a discretion with military commanders. A similar exercise of discretion is an integral part of the civilian criminal

justice system. Civilian prosecutors have a discretion as to whether to proceed by indictment or by summary conviction in respect of hybrid offences. That discretion was upheld by the Supreme Court of Canada in a pre-Charter case, R v. Smythe.[46] While there is provision in the Criminal Code for the exercise of that discretion the Act also provides for the most serious offences to only be dealt with by indictment. In addition, s. 469 of the Criminal Code provides that certain serious indictable offences can only be tried by the highest level of criminal trial courts, the superior courts of criminal jurisdiction. A similar restriction under military law limiting the jurisdiction of summary trials to the "less" serious service offences would bring the military justice system in line with the civilian court system without significantly affecting the maintenance of discipline in the Canadian Forces. The most serious service offences would then be guaranteed to be dealt with by court martial.

The limiting of the jurisdiction of summary proceedings is particularly important with respect to offences under s. 130 of the National Defence Act. As was demonstrated in MacKay[47], and in the cases and legal analysis which flowed from that decision, civilian courts and legal scholars are particularly sensitive about how the military justice system deals with service offences which are also offences under civilian criminal law. Even if the courts acknowledge that the paramountcy doctrine is a myth they will remain extremely sceptical of a trial system where a non-legally trained trying officer

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[46] (1971), 3 C.C.C. (3d) 366 (S.C.C.). In R v. Beare (1988), 66 C.R. (3d) 97 (S.C.C.) at 117, La Forest J. held that prosecutorial discretion by itself did not violate s. 7 of the Charter.

[47] **Supra**, note 2.

has the jurisdiction to hear charges which are indictable offences carrying a maximum punishment of life imprisonment under civilian criminal law. It is anticipated that judicial concern about the summary jurisdiction of military commanders could extend to all service offences which are indictable offences under the "ordinary" law. It might therefore be prudent to restrict the jurisdiction of commanding officers and superior commanders over offences charged pursuant to s. 130 of the National Defence Act to those offences which are summary conviction or hybrid offences under the criminal law[48]. This approach has two distinct advantages. First, it identifies the more informal summary trial with the least serious criminal proceeding (eg. trial before a provincial court judge). It might be argued that such a comparison would align the summary trial (with its unique role in maintaining discipline) too closely with the civilian court system. However, in light of the approach taken by courts in the past such a comparison will be made in any event. It is better for the purposes of defending the summary trial process that such proceedings are identified with the provincial court level than with the superior courts of criminal jurisdiction.

The second advantage to this approach is that it can be used to forestall an argument that all offences charged pursuant to s. 130 of the National Defence Act should be removed from the jurisdiction of the commanding officer or the superior commander. An important

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[48] There have been recommendations for the reform of civilian criminal law. The classification of hybrid offences would be deleted. Criminal offences would be divided into two categories: crimes punishable by two years imprisonment and crimes punishable by two years or less imprisonment. If those amendments are eventually enacted then appropriate changes could be made to the jurisdiction of summary trials. See, Working Paper 54, Classification of Offences (Ottawa: Law Reform Commission of Canada, 1986)

indicator of the seriousness of an offence under the Criminal Code would also be seen to apply to service offences under the National Defence Act.

At the same time as the jurisdiction of summary proceedings is restricted the limitations with respect to military jurisdiction over murder, manslaughter, sexual assault and child abduction offences found in s. 70 of the National Defence Act should be repealed. That section remains an historical anomaly which serves no reasonable purpose in modern Canadian society. There is no reason why a court martial should not try those enumerated offences when they occur in Canada. A member of the Canadian Forces is not subject to a lesser form of justice by default because a civilian court is not available to try a case beyond the borders of Canada. Courts martial are at least as sophisticated as civilian criminal courts and in practical terms often offer greater protection for an accused than is provided in the civilian justice system.

The limitation of the jurisdiction of commanding officers and superior commanders to service offences which are also summary conviction offences or hybrid offences under civilian criminal law will result in some significant changes to the jurisdiction of summary proceedings. For example, Trafficking in a Narcotic pursuant to s. 4 of the Narcotic Control Act is an indictable offence which has a maximum penalty of imprisonment for life. The suggested restriction to the jurisdiction of commanding officers and superior commanders would mean that offence would have to be tried by court martial. However, it is Parliament which determined the seriousness of the offence of trafficking. As long as a conviction for trafficking in a narcotic carries with it the negative connotations inherent with

indictable offences the jurisdiction over that offence should be limited to courts martial.

The jurisdiction of delegated officers could also be altered. Since the jurisdiction of those officers has traditionally been limited to the least serious offences (see Appendix VI) the list of offences over which they have jurisdiction could be limited to offences carrying a maximum penalty of imprisonment for less than two years.[49]

7. SUMMARY

The doctrine of a paramount status for the civilian justice system is a concept which has plagued much of the assessment of the military justice system carried out by civilian courts and legal writers. It is based on an historical fear of standing armies directly connected to our British roots. However, the doctrine of paramountcy is not justifiable at law, and due to its artificial nature, fails to fulfil its purpose. Rather than allowing for the supervision of the military justice system the resulting usurping of jurisdiction encourages the isolation of the disciplinary process from the mainstream of Canadian judicial thinking. The supervision of the military justice system is better carried out by allowing the retention of military jurisdiction over all service offences. The civilian courts should then turn their attention to ensuring that the

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[49] Such a restriction would mean that amendments to the maximum punishment of many offences would be necessary in order to keep those offences within the jurisdiction of delegated officers. For example the maximum penalty provided for s. 129 of the National Defence Act is presently dismissal with disgrace from Her Majesty's service. That punishment is higher in the scale of punishments than imprisonment for less than two years.

basic principles of Canadian law are applied to the military justice system. This application of the "mainstream" of legal principles will require an understanding on the part of both the civilian court system and military authorities that changes to the military justice system can both protect the rights of the accused and maintain the level of discipline necessary to control an armed force.

The recommended changes to the jurisdiction of summary trials are an example of how subtle changes to the military justice system can enhance the protection of an accused's rights (guaranteeing trial by court martial for the most serious service offences) while maintaining the ability of military commanders to maintain discipline. This limited restriction on the jurisdiction of summary trials serves to identify that service tribunal with the least serious proceedings found in the civilian criminal justice system. Such a connection can only serve to strengthen the ability of the summary trial system to withstand a constitutional challenge.

CHAPTER 5

INDEPENDENCE AND IMPARTIALITY

> The commander must be the prime mover of the battle and the troops must always have to reckon with his appearance in personal control.
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> Erwin Rommel: The Rommel Papers, ix, 1953[1]

1. INTRODUCTION

This chapter marks the beginning of the Charter analysis of summary proceedings. It will involve an assessment of whether summary trials breach an accused's right to a hearing by an "independent and impartial tribunal" under s. 11(d) of the Charter.

A requirement that summary proceedings be independent and impartial could have a dramatic effect on the military justice system. As was explained in the first three chapters the maintenance of discipline by personnel within the chain of command has long been an essential part of military disciplinary proceedings.

The analysis of the independence and impartiality of summary proceedings will explore the general applicability of the Charter to summary trials; explain how service offences are also "offences" under s. 11 of the Charter; and determine if the summary trial is an independent and impartial tribunal under s. 11(d) of the Charter.

2. APPLICATION OF THE CHARTER

Section 32(1) of the Charter declares that the Charter applies to "the Parliament and government of Canada in respect of all matters

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[1] R. D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis: United States Naval Institute, 1966) at 61.

within the authority of Parliament". Since the National Defence Act, with its provision for the trial of service offences by service tribunals, falls within the legislative authority of Parliament it is clear that the Charter applies to the disciplinary system of the Canadian Forces. The application of the Charter is not only limited to the provisions of the National Defence Act, but must also extend to the subordinate legislation arising from that Act (QR&O), the procedures of the service tribunals, and the acts of those persons empowered to enforce discipline in the Canadian Forces (trying officers, assisting officers, etc.). This broad application of the Charter is consistent with both the wording of s. 32(1) of the Charter, which states that it applies "in respect of all matters within the authority of Parliament" (emphasis added) and with the "purposive" approach to interpreting the Charter.[2]

Since the enactment of the Charter a variety of Charter challenges based on its provisions have been raised regularly at courts martial. Charter issues have also been regularly raised on appeal before the Court Martial Appeal Court, and in applications for prerogative relief from the Federal Court of Canada and a number of provincial superior courts. To date the Supreme Court of Canada has

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[2] Hunter v. Southam Inc. 1984 2 S.C.R. 145 at 155. For further analysis of the scope of the Charter see R. Tasse,"Application of the Canadian Charter of Rights and Freedoms", G. A. Beaudoin & E. Ratushny ed., The Canadian Charter of Rights and Freedoms 2 ed. (Toronto: Carswell, 1989) at 72 and P.W. Hogg, Constitutional Law of Canada, 2 ed. (Toronto: Carswell, 1985) at 671. The scope of the Charter should not be confused with the determination of what constitutes "law" under s. 1 of the Charter (see Weatherall v. Can. (A.G.) (1988), 65 C.R. (3d) 27 (F.C.A.). The scope of the Charter is be much broader than the potential limitations found under s. 1.

not ruled on a Charter issue involving Canadian Forces disciplinary proceedings.

In contrast to the regular invocation of the Charter in relation to courts martial there have only been two such cases arising from summary trials: Glowczeski v. The Minister of National Defence et. al.[3] and Fontaine v. The Minister of National Defence et. al..[4] In both cases the Federal Court Trial Division granted a Writ of Prohibition directing that the applicant be prohibited from serving a punishment of detention pending the determination of the constitutionality of the summary trial system. The charges in Glowczeski[5] were subsequently quashed on review by service authorities, however, Fontaine[6] has yet to be resolved.

The lack of Charter adjudication arising from summary proceedings, particularly in comparison to the regular adjudication of Charter issues arising in courts martial, can be linked to a number of factors. First, while there is no provision barring the participation of lawyers at summary trials, the reality is that lawyers rarely participate. If an accused indicates that legal counsel will appear at a summary trial a common course of action is for the trying officer to refer the case to higher authority.[7]

Secondly, the lack of a legislated route of appeal from a summary trial means that an offender must step outside of the military

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[3] (1989), 26 F.T.R. 112 (F.C.T.D.) [hereinafter Glowczeski].

[4] (29 June, 1990) Ottawa T-1756-90 (F.C.T.D.) [hereinafter Fontaine].

[5] **Supra**, note 3.

[6] **Supra**, note 4.

[7] QR&O art. 108.03, Note C.

justice system (usually for prerogative relief) in order to have the decision of a summary trial adjudicated on by a court. Thirdly, the lack of a right not to be denied reasonable bail pending the disposition of a review of the case (redress of grievance) can operate as a powerful disincentive to commencing a constitutional challenge to the summary trial system. Finally, the relatively minor nature of many punishments awarded by summary trials ultimately means that many accused will not go to the expense of hiring counsel to commence a court action challenging the constitutionality of the summary trial system.

Supporters on the summary trial system might argue that the lack of constitutional challenges reflects a general approval of those proceedings. A preference for summary proceedings is reflected to a certain extent in the small percentage of accused, who, when given the opportunity, elect court martial. However, since relatively few accused are given the right to elect court martial it is difficult to conclude that the remainder of the accused would not want to challenge the constitutionality of summary proceedings.[8]

Whatever the reasons for the paucity of constitutional challenges to the summary trial system the fact remains that the Charter applies to summary proceedings under the National Defence Act. The willingness of Glowczeski and Fontaine to step outside of the military justice system to seek prerogative relief against the decision of a commanding officer is an indication of the growing awareness of the members of the Canadian Forces of their rights under

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[8] In 1988, out of 674 accused who were given the right to elect court martial only 32 (5%) exercised that option. However, only 674 accused out of a total of 4245 service members tried by summary trial (or 15%) were offered the right to elect court martial (see Appendix III).

the Charter. The orders of the courts in those cases also serves as a warning of the powerful effect the Charter can have on the military justice system.

2. APPLICABILITY OF SECTION 11 TO SUMMARY PROCEEDINGS

a. Wigglesworth Test

While the Charter applies to the military justice system that does not mean that all sections of the Charter will automatically impact on service tribunals. The availability of the numerous rights found in s. 11 of the Charter depends upon whether a service offence under the National Defence Act can be interpreted to be an "offence" within the meaning of that section. The test for making that determination, as set out in Wigglesworth v. R[9] and subsequently confirmed in Shubley v. R[10], is whether the offence is criminal in nature ("by nature" test) or is private, domestic or disciplinary, or where a conviction could lead to true penal consequences ("true penal consequences" test). If the offence passed either the "by nature" test or the "true penal consequences" test then the accused charged could claim the protection of the rights under s. 11 of the Charter. Thus if this approach in relation to summary proceedings under the National Defence Act is that if the summary trial of a service offence was interpreted to be a disciplinary proceeding which did not result in penal consequences an argument could be made that section 11 of the Charter would not apply to such a tribunal.

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[9] (1987), 37 C.C.C. (3d) 385 (S.C.C.) [hereinafter Wigglesworth]

[10] (1990), 74 C.R. (3d) 1 (S.C.C.) [hereinafter Shubley].

The main question to be determined in Wigglesworth [11] was whether the conviction of an R.C.M.P. officer for a major service offence under the Royal Canadian Mounted Police Act[12] relating to an assault precluded subsequent charges of assault under the Criminal Code. The argument was raised on appeal that such proceedings would violate the accused's rights under s. 11(h) of the Charter not to be tried and punished for the same offence. Madame Justice Wilson in writing for the majority (Mr. Justice Estey in dissent) determined that the scope of s. 11 of the Charter was a relatively narrow one:

> It is my view that the narrower interpretation of s. 11 favoured by the majority of authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s. 11 of the Charter are available to persons prosecuted by the state for public offenses involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted.[13]

This conclusion was based on a number of factors including the observation that a number of the terms found in s. 11 of the Charter, such as "tried", "presumed innocent until proven guilty", "reasonable bail", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence", had a criminal connotation.[14] After indicating that a matter could fall within s. 11 of the Charter because of its "nature" or because it had "true penal consequences" Madame Justice Wilson asserted the criteria for each of those tests. A matter fell within the nature of a criminal or quasi-criminal proceeding if it is "of a public nature, intended to promote public

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11 **Supra**, note 9.

12 Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9.

13 **Supra**, note 9 at 397.

14 Ibid.

order and welfare within a public sphere of activity...."[15] As a way of contrasting the public aspect of criminal proceedings, private, domestic and disciplinary matters were outlined as:

> ...regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity.[16]

There was a fundamental difference between the public nature of criminal proceedings and those proceedings undertaken to determine fitness or maintain a licence. Where such "disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable".[17] Neither were proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute.[18]

With respect to the "true penal consequences" test Madame Justice Wilson acknowledged that, in general terms, disciplinary measures, such as fines, were indistinguishable from criminal punishments. There were, however, two caveats placed on this general rule. First, the imposition of a small fine could be consistent with the maintenance of discipline and order within a limited private sphere of activity. An indicium of the private purpose of the fine in that case was that payment went to the benefit of the force (private use) rather than to the Consolidated Revenue Fund (public use). The second caveat raised by Madame Justice Wilson was that she had

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15 Ibid. at 400.

16 Ibid.

17 Ibid.

18 Ibid.

difficulty conceiving of a proceeding which would fail the "by nature" test but pass the "true penal consequences" test. She concluded "I have grave doubts whether any body or official which exists in order to achieve some administrative purpose or private disciplinary purpose can ever imprison an individual".[19]

Despite having expressed her grave doubts, Madame Justice Wilson was forced to acknowledge that Wigglesworth[20] was a case where the disciplinary proceedings of the R.C.M.P. failed the "by nature" test, but passed the "true penal consequences" test. Therefore, s. 11 of the Charter was held to apply to proceedings involving a major service offence under the Royal Canadian Mounted Police Act. The appellant was ultimately unsuccessful because it was held that s. 11(h) of the Charter did not apply as he was not being tried and punished for the same offence.

Shubley v. The Queen[21] determined whether prison disciplinary proceedings were criminal in nature. In that case an inmate had been tried by the internal prison disciplinary system on charges relating to an assault and was subsequently facing a prosecution under the Criminal Code on a similar charge. In writing the judgment for the majority Madame Justice McLachlin stressed that the "by nature" test is concerned:

> ...not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves. Section 11(h) provides protection against duplication in proceedings of a criminal nature. It does not preclude

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19 Ibid. at 402.

20 Ibid.

21 **Supra**, note 10.

> two different proceedings, one criminal and the other not criminal, flowing from the same act.[22]

Madame Justice McLachlin also concentrated on the "essential characteristics" of the internal disciplinary hearings:

> The internal disciplinary proceedings to which the appellant was subject lack the essential characteristics of a proceeding on a public criminal offence. Their purpose is not to mete out criminal punishment, but to maintain order in the prison. In keeping with that purpose, the proceedings are conducted informally, swiftly and in private. No courts are involved. They are not to borrow the words of Wilson J. in Wigglesworth, at p 560: "of a public nature, intended to promote public order and welfare within a public sphere of activity". The answer to the first branch of the Wigglesworth test must be that the prison disciplinary proceedings are not by their nature, criminal proceedings. They are internal disciplinary proceedings, even though they arise from the same act as gives rise to criminal proceedings.[23]

Having concluded that the prison disciplinary system failed the "by nature" test Madame Justice McLachlin went on, somewhat surprisingly, to find that solitary confinement did not constitute a penal consequence. Therefore there was no breach of section 11(h) of the Charter. The dissenting judgment written by Mr. Justice Cory differed with the majority on the issue of whether solitary confinement was a penal consequence. Mr. Justice Cory concentrated on the punitive effect which solitary confinement would have on the inmate.

b. The "Nature" of Summary Proceedings

In light of the decision in Shubley[24] it would appear that the summary trial, as an informal disciplinary hearing, would fail the "by nature" test. Such a result would be difficult to justify for two reasons. While a "nature" test as conceived by Madame Justice Wilson

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22 Ibid. at 13.

23 Ibid. at 14-15.

24 Ibid.

in Wigglesworth[25] seems necessary to distinguish between criminal and disciplinary proceedings its application in that case and in Shubley[26] seems too narrow. The Supreme Court of Canada has failed to acknowledge the public aspect to disciplinary proceedings in a police, prison and military setting. In any event, in applying the the Supreme Court's narrow "by nature" test to summary proceedings prescribed by the National Defence Act there are unique features pertaining to military law which makes such proceedings "criminal" in nature.

The grouping together of military, police and prison disciplinary systems should only be done with considerable caution. The purposes of those disciplinary systems are different particularly in relation to military and police forces on one hand and the prison system on the other hand. The disciplinary systems of the military and police forces have a more positive goal of motivating and correcting its wayward members to perform a public duty, while prison disciplinary proceedings are targeted at keeping the "lid" on potential prison violence. Even between the military and police forces there are significant differences in the professional ethics of those forces which impact on the role of the proceedings which are used to maintain discipline. The uniqueness of the military ethic was described by Lieutenant-General R.J. Evraire in a paper entitled "General and Senior Officers and Professional Development in the Canadian Forces". After referring to "duty" as one of the basic tenets of the professional military ethic he stated:

> In most cases, these tenets do have equivalents in the codes of ethics of other professions. One notable

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[25] **Supra**, note 9.

[26] **Supra**, note 7.

exception exists, however, and it is this tenet that truly sets the military professional apart from all other professionals. I refer to the obligation of unlimited personal liability. The commissioned officer must accept the subordination of his personal interests and wellbeing to the efficient performance of his duty, even in the face of death.

Members of law enforcement bodies, fire brigades and certain other civil emergency organizations have every reason to claim they too often perform their professional duty under stressful and life-threatening circumstances. In my view, however, these conditions prevail for relatively short periods of time, involve few people, allow for a return to family on a daily basis, and do not entail duty the inadequate performance of which might place the security of the country at risk. I would therefore not characterize their obligation of personal liability as unlimited.[27]

It may be that the distinctions between the different types of disciplinary systems are most relevant when carrying out a s. 1 analysis. There has, however, been a trend among courts and legal scholars to automatically group military, police and prison systems together when assessing how the law impacts on disciplinary proceedings. Such a grouping together should not be undertaken in a general way, but rather only in terms of common themes which are unrelated to their often divergent purposes.

One such common theme for the three disciplinary systems is that the prosecution of alleged offenders is carried out either by the state or by agents of the state. It is the involvement of the state in the military, police and prison disciplinary systems which sets them apart from the private disciplinary systems of lawyers, doctors, nurses or engineers. It is the former proceedings, particularly in relation to military and police forces, which are "undertaken to promote public order and welfare within a public sphere of

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[27] R.J. Evraire, "General and Senior Officers and Professional Development in the Canadian Forces".

activity"[28], while the latter proceedings are "undertaken to determine fitness to obtain or maintain a licence"[29]. This distinction between the public nature of military and police disciplinary proceedings and the private professional disciplinary proceedings was recognized by Mr. Justice Rand in Regina and Archer v.White.[30]

> What the expression "disciplinary powers" means includes at least sanctions wielded within a group executing a function of a public or quasi-public nature where obedience to orders and dependability in carrying them out are, for the safety and security of the public, essential in their maintenance of standards the immediate duty of every member. This distinguishes the case from such bodies as legal or medical societies of which members carry on their profession independently of the governing body which, in this respect, is concerned only with the investigation of complaints placed before it.[31]

The military and police disciplinary tribunals are as "public" as proceedings under the various traffic statutes in Canada. Traffic offences were referred to by Madame Justice Wilson in Wigglesworth[32] as an example of offences which are criminal in nature even though a conviction often leads to a very minor punishment. Traffic offences were considered to be public in nature even though they do not apply

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[28] Wigglesworth, **supra**, note 9 at 401.

[29] Ibid.

[30] (1955), 114 C.C.C. 77 (S.C.C.)

[31] Ibid. See also Re Pollard and Young (1980), 26 Nfld. and P.E.I.R. 410, at 425, where Mr. Justice Goodridge of the Newfoundland Supreme Court Trial Division held that a prison tribunal was a statutory tibunal created by the legislature to perform a public function. It was to be distinguished from a "domestic tribunal to whose jurisdiction the parties appearing before it have submitted by being members of the association creating it...."

[32] **Supra**, note 9.

to all Canadians. Disciplinary proceedings, like traffic court, have the maintenance of public safety as their main goal. In addition, the public aspect of military disciplinary proceedings is enhanced because of the possibility that many Canadians could be conscripted into the armed forces in times of national emergency.

An acknowledgment of the public aspect of some disciplinary proceedings by the Supreme Court of Canada in Wigglesworth[33] would have negated any need for the two caveats on the "true penal consequences" test. The reference of the payment of fines to the Consolidated Revenue Fund as an indication of a penal consequence is an acknowledgment that if the state receives the fine there is a public or criminal aspect to the penal consequences. The public nature of police disciplinary proceedings also explains why Wigglesworth[34] was that unusual case where proceedings failed the "by nature" test but passed the "true penal consequences" test. Disciplinary bodies, such as the military, police forces and prisons, are given the power to award penal sanctions such as imprisonment (or its equivalent) because of the public nature of their role in society. A recognition of the public nature of those proceedings would have justified Madame Justice Wilson's grave doubts over whether private disciplinary bodies could imprison an individual.[35]

Even if the Supreme Court of Canada has failed to recognize the public nature of police and prison disciplinary proceedings there are unique aspects to the Canadian Forces disciplinary system which puts it in the public sphere. In s. 11(h) of the Charter reference is made

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33 Ibid.

34 Ibid.

35 Ibid. at 402.

to an "offence under military law". This reference is made as an exception to the right to a jury trial where the maximum punishment of "the offence" is imprisonment for five years or more. In this exception the "offence under military law" (or service offence) is equated to every other offence to which s. 11 of the Charter applies. This equal status is further evidenced in the definition of "service offence" found in s. 2 of the National Defence Act.

> "service offence" means an offence under this Act, the Criminal Code or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline.

A service offence, or as it is referred to in the Charter, an offence under military law, is a criminal offence in the broadest definition of that term.

The similar nature of service offences and other criminal offences can also be seen in s. 66 of the National Defence Act which provides for a plea in bar of trial for a person who is tried in respect of an offence or any substantially similar offence for which they have already dealt with by a service tribunal, civil court or court of a foreign state. This protection against double jeopardy is an indication of the equal (criminal) status at which Parliament has placed all service tribunals (including summary trials) and civilian criminal courts. The "criminal" status of service offences is a direct result of the equal constitutional status of the military and civilian justice systems.

The criminal nature of service tribunals can also be seen in the terms which are used to describe the trial process. Terms such as "trial", "prove beyond a reasonable doubt", "punishment", "find the accused guilty", "find the accused not guilty", etc. are also found in the criminal system. While an accused does not plead guilty at a

summary trial the ultimate finding of guilty or not guilty maintains the "criminal" nature of the proceedings. In addition, the technical and rather confusing (for non-legally trained personnel) procedure of admitting to the particulars of the charge allows the accused to virtually plead guilty in any event. These terms are the same or similar to the ones used in s. 11 of the Charter to describe the rights which are being protected by that section. Such similarity enhances the argument that s. 11 applies to summary trials.

Unlike the R.C.M.P. Service Court or prison disciplinary proceedings, summary trials are not "cut off" from the courts (courts martial). In Shubley[36] Madame Justice McLachlin made a point of stating "No courts are involved"[37] when determining that the prison disciplinary system was not criminal in nature. The same cannot be said for summary trials. Those proceedings have jurisdiction over the same list of offences as courts martial (the jurisdiction of both the Standing Court Martial and Trial by Delegated Officer is limited to certain offences). A conviction by a summary trial bars a subsequent trial by a court martial. In addition, in all three types of summary trials, the trying officer retains the power to refer the matter to higher authority at any time prior to reaching a finding in the case.[38] Finally, the right to elect court martial provides a direct link with courts martial. Unlike the prison disciplinary tribunals the summary trial system is directly connected to the more formal military court system.

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[36] **Supra**, note 10.

[37] Ibid. at 14.

[38] QR&O, art. 108.13(2)(a), 108.14, 108.29(2)(b)(ii), 108.30, 110.05(2)(b)(ii), 110.06.

Summary trials do have the informal procedure which Madame Justice McLachlin referred to in Shubley[39] as an indication of non-criminal proceedings. However, she could not have meant that the informality of procedure alone was an indication of the non-public nature of the proceeding. To accept that argument would be to condone the removal of procedural safeguards from the criminal law process in order to avoid the operation of the Charter. Summary proceedings should not be considered to be privately disciplinary just because the procedures used at trial are informal in nature.

As a result of the proceeding analysis a strong argument can be made that the summary proceedings prescribed by the National Defence Act pass the "by nature" test. Therefore the provisions of section 11 of the Charter would apply to those proceedings. However, in the event that summary trials are not accepted as being "public" in nature the analysis will now be directed to whether those proceedings pass the "true penal consequences" test.

c. The "True Penal Consequences" Test

Even if it is determined that the summary trial system fails the "by nature" test that service tribunal still passes the "true penal consequences" test. The punishments which are awarded at a summary trial are not administrative in nature. The punitive aspect of summary trials is reflected in the fact that there are separate administrative procedures for dealing with personnel who do not adequately perform their duties. Those procedures include the awarding of a recorded warning, counselling and probation, report of shortcoming (for officers) and release. Similarly, the existence of

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39 **Supra**, note 10 at 14.

an administrative sanction known as a "reproof"[40] which is awarded when the alleged action does not warrant disciplinary action highlights the punitive nature of summary proceedings.

An analysis of the punishments which can be awarded by summary trials further reveals the "true penal consequences" associated with those proceedings. The punishment of detention, which was first instituted to alleviate the harshness of the punishment of imprisonment is still penal in nature as it involves a loss of liberty. In addition, while persons undergoing detention at one time were treated differently than those undergoing the punishment of imprisonment the regulations governing the execution of those two punishments[41] now make no distinction between how service detainees and service prisoners are to be treated. Therefore, the punishment of detention has a true penal consequence.

The question of whether the punishment of a fine (which can be awarded by all three types of summary trial) is a "true penal consequence" is somewhat more problematic. In the case of a commanding officer and a superior commander the maximum punishment which can be awarded is 60% of the accused's basic pay while a delegated officer is limited to a maximum fine in the amount of $200. In two cases, Spicer v. Association of Professional Engineers,

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[40] QR&O, art. 101.11. A reproof may be given to an officer or non-commissioned member "for conduct although reprehensible is not of a sufficiently serious nature in the opinion of the officer administering a reproof to warrant being made the subject of a charge and brought to trial.

[41] Regulations for Service Prisons and Detention Barracks, QR&O, Vol. II., Appendix XVI. As late as 1950 persons receiving a punishment of imprisonment pursuant to the military law served that punishment in civilian prisons while detention was served in a separate detention barracks.

Geologists and Geophysicists (Alta)[42] and Belhumeur v. Savard et al.[43] courts have held that a power to award a significant fine did not lead to true penal consequences. In the first case the legislation provided for a maximum fine of $10,000, while the second case involved a provision for a minimum fine of $200. In both cases the courts held that the size of the fine was minor compared to the other consequences which could result from the disciplinary hearings. For example the "accused" could be suspended or removed from the professional organizations. Either result could have far greater financial consequences than were associated with the possible fine.

In deciding that the private disciplinary proceedings did not have "true penal consequences" the Alberta Court of Queens Bench in Spicer[44], and the Quebec Court of Appeal, Belhumeur[45], have missed the crux of the "true penal consequences" test. It is not that the fine may be less serious in magnitude than other disciplinary sanctions, but rather that the fine itself is so large so as to be seen as punitive. As Professor D. Stuart states:

> Section 11(h) provides protection only against double punishment. It might well be that some job-related disciplinary measures such as loss of work privileges, or even loss of qualification or job, should escape the net of s. 11(h).... However, other punitive forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(h).[46]

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[42] (1989) 95 A.R. 132 (Alta Q.B.) [hereinafter Spicer].

[43] (1988) 54 D.L.R. (4th) 105 (Que C.A.) [hereinafter Belhumeur].

[44] **Supra**, note 42.

[45] **Supra**, note 43.

[46] R. v. Wigglesworth (1984), 38 C.R. (3d) 388, Annotation-D. Stuart at 389.

Madame Justice Wilson in Wigglesworth[47] saw a similar difference between disqualification from the profession and the imposition of a punitive fine.

The fines which can be awarded by a commanding officer and a superior commander represent significant amounts which are designed to redress the harm done to society at large. Therefore , those fines are "true penal consequences". Similarly, while the $200 limit on the fine which can be awarded by the delegated officer makes such a punishment less serious than that which can be awarded by the other trying officers the nature of the fine is the same. In any event, all fines awarded by service tribunals (courts martial and summary trials) are paid into the Consolidated Revenue Fund. As a result those fines meet one of the indicium set out by the Supreme Court of Canada to show that a punishment has a penal purpose.

Other punishments available at summary trial such as reduction in rank, confinement to barracks, stoppage of leave, reprimands and severe reprimands all have the potential to be considered as "true penal consequences", although the determination in Shubley[48] that solitary confinement in a prison setting was not a "true penal consequence" provides considerable support for the contrary position. However, this may be one area where prison and military disciplinary hearings should be distinguished. The imposition of a punishment on "free" service members is arguably much different than placing a convicted prisoner in solitary confinement. The penal nature of confinement to barracks and stoppage of leave arises from the restrictions which those punishments place on the liberty of the

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47 **Supra**, note 9.

48 **Supra**, note 10.

offender. The existence of the administrative sanction, the reproof, makes the punishments of a reprimand and severe reprimand appear to be penal in nature.

In addition, while punishments such as reduction in rank could be seen as a "professional" sanction, the imposition of that sanction by the state gives it a "penal" connotation.

Therefore, summary proceedings fail the "true penal consequences" test and s. 11 of the Charter applies to all types of summary trials prescribed by the National Defence Act.

4. INDEPENDENCE AND IMPARTIALITY

a. Background

The independence and impartiality of service tribunals is an issue which has been of primary concern to critics of the military justice system. Most often expressed in terms of freedom from "command influence" the question of whether a service tribunal could remain sufficiently isolated from the influence of senior officers or stated military policy to provide an independent and unbiased adjudication of a case existed long before the advent of the Charter. As was indicated in Chapter 2 this concern over command influence, particularly in the United States, was at the heart of many of the post-World War II reforms in Canada, the United States and Great Britain.

Allegations of command influence played a part in the quashing of the findings of two courts martial: Nye v. R[49] and Braun v. R[50]. The independence of a Standing Court Martial was also in issue in Viel

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[49] (1972), 3 C.M.A.R. 85 (C.M.A.C.) [hereinafter Nye].

[50] (1976), 4 C.M.A.R. 115 (C.M.A.C.) [hereinafter Braun].

v. R[51] where the Court Martial Appeal Court ruled that a regulation which provided a convening authority the power to terminate the proceedings of a court martial was ultra vires because it was not based on a specific provision of the National Defence Act. Of course, the independence and impartiality of the Standing Court Martial was one of the primary issues dealt with by the Supreme Court of Canada in MacKay v. R.[52]

The enactment of the Charter has increased interest in whether service tribunals are independent and impartial.[53] In terms of court challenges, however, the adjudication of this issue has been restricted to the independence and impartiality of courts martial. Most notably in Généreux v. Canada (General Court Martial)[54]the Federal Court of Canada Trial Division ruled that the General Court Martial was an independent and impartial tribunal within the meaning of ss. 7 and 11(d) of the Charter, while the Court Martial Appeal Court came to a similar conclusion in Schick v. R[55] with respect to the independence and impartiality of the Disciplinary Court Martial under s. 11(d) of the Charter. The independence and impartiality of the Standing Court Martial has been raised at trial, but that issue

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[51] (1979), 4 C.M.A.R. 178 (C.M.A.C.).

[52] MacKay v. R (1980), 54 C.C.C. (2d) 129 (S.C.C.) [hereinafter Mackay].

[53] A.D. Heard, "Military Law and the Charter of Rights" (1988) 11 Dalhousie L. J. 514 at 525-526, and D.J. Corry, "Military Law Under the Charter", (1986) 24 Osgoode Hall L. J. 67 at 88-89. The Heard article offers a particularly insightful and accurate review of the issues facing Canadian military law as a result of the enactment of the Charter.

[54] (1989) 59 D.L.R. (4th) 644 (F.C.T.D.).

[55] [1986] 5 F.T.R. 82 (F.C.T.D.).

has not been dealt with in any detailed way by an appellate court.[56] There has been no judicial determination to date on the independence and impartiality of summary proceedings.

b. The "Valente" Test

The independence and impartiality of summary proceedings will be assessed in terms of the accused's right to be tried by an "independent and impartial tribunal" under s. 11(d) of the Charter. Section 11(d) of the Charter provides as follows:

> 11. Any person charged with an offence has the right
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Section 11(d) applies specifically to the trial of an offence[57], which in terms of summary proceedings commences when the accused is brought before the trying officer to have the charges read to the accused.[58]

In Valente v. R[59] the Supreme Court of Canada was confronted with the question of whether provincial court judges in Ontario were "independent" within the meaning of s. 11(d) of the Charter. When the issue arose at trial the Ontario legislation provided for "two kinds of tenure- one under which a judge may be removed from office only for cause and the other under which a judge of the same court holds office during pleasure...."[60] Mr. Justice Le Dain, delivering the judgment for the Supreme Court, determined that the tenure involving removal for cause did not violate s. 11(d) of the Charter, while the provision

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56 See Aldred v. R (25 May 1987), C.M.A.C. 265 (C.M.A.C.).

57 R v. Beare (1988) 45 C.C.C. (3d) 57. at 79 (S.C.C.).

58 QR&O, art. 108.13, 108.29, 110.05.

59 (1986), 23 C.C.C.(3d) 193 (S.C.C.) [hereinafter Valente].

60 Ibid. at 215.

for removal at pleasure did not provide adequate independence for those judges to whom it applied.

In his judgment, Mr. Justice Le Dain, determined the meaning of "independent and impartial" and set out the essential conditions required to be met before a tribunal could be said to be independent:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial", as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees.[61]

Mr. Justice Le Dain went on to indicate that independence under s. 11(d) of the Charter included both individual and institutional relationships. It was not enough that the individual judge enjoyed the essential conditions of independence. If the court or tribunal over which that judge presided was not "independent of other branches of the government in what was essential to its function, he or she cannot be said to be an independent tribunal."[62]

Mr. Justice Le Dain also indicated that the test for independence for the purposes of s. 11(d) of the Charter should be "as for impartiality, whether the tribunal may be reasonably perceived as independent."[63] That test regarding perception was to be based on

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61 Ibid. at 201-202.

62 Ibid. at 203.

63 Ibid. at 204.

whether the tribunal enjoyed the essential objective conditions or guarantees of independence, and not a perception of how it will in fact act regardless of those conditions or guarantees.[64] In dealing with the question of perception Mr. Justice Le Dain reconciled his test for independence with that taken earlier by the Supreme Court of Canada in MacKay[65] because Mr. Justice Howland of the Ontario Court of Appeal had relied on MacKay[66] in reaching a different test for independence. After briefly reviewing the background to MacKay[67] Mr. Justice Le Dain stated:

> While the emphasis in these observations would appear to be on how the tribunal acted, it is my impression that both Ritchie J. and McIntyre J., who wrote separate reasons concurring in the result, and with whom Dickson J. (as he then was) concurred, looked at the status or relationship to the armed forces of the president of the Standing Court Martial Appeal as an objective matter to be considered in determining whether the tribunal could be regarded as independent. Both emphasized the long-established tradition of a separate system of military law applied by tribunals presided over by military officers. Both also emphasized the status of the Court Martial Appeal Court and its independence of the armed forces as ensuring that the person charged would be presumed innocent until proved guilty by an independent tribunal. I am, therefore, of the respectful opinion that the reasoning of this court in MacKay does not preclude the view that the word "independent" in s. 11(d) of the Charter is to be understood as referring to the status or relationship of judicial independence as well as to the state of mind or attitude of the tribunal in the actual exercise of its judicial function.[68]

In Genereux[69] this reference by Mr. Justice Le Dain to MacKay[70]

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64 Ibid. at 204-205.

65 **Supra**, note 52.

66 Ibid.

67 Ibid.

68 **Supra**, note 59 at 206-207.

69 **Supra**, note 54 at 652.

was used in support of an argument that MacKay[71] was still good law after the Charter. Whatever the merits of such an argument its applicability to the less formal summary trial system is somewhat more problematic, particularly since the Supreme Court of Canada placed considerable emphasis on the existence of a civilian appellate court to help guarantee the independence of the service tribunal.[72]

In Valente[73] the Supreme Court of Canada determined that the three essential conditions of judicial independence are security of tenure, financial security and institutional independence. However, significantly for service tribunals (in particular summary trials) Mr. Justice Le Dain rejected the notion that there should be a uniform standard of judicial independence under s. 11(d) of the Charter such as the one embodied in ss. 99 and 100 of the Constitution Act, 1867. After noting that the Charter had resulted in renewed concern over the issue of judicial independence he stated:

> These efforts, particularly by the legal profession and the judiciary, to strengthen the conditions of judicial independence in Canada may be expected to continue as a movement towards the ideal. It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals.

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[70] **Supra**, note 52.

[71] Ibid.

[72] In Mohammad v. Canada (Minister of Employment and Immigration (1988), 50 D.L.R. (4th) 394 the Federal Court of Canada Trial Division relied on MacKay, **supra**, note 52, to determine that a right of appeal to an independent appellate tribunal could help guarantee an independent and impartial hearing under s. 11(d). The Federal Court of Appeal, in upholding the lower court decision, did not address that issue (see Mohammad v. Canada (Minister of Employment and Immigration (1988), 55 D.L.R. 321).

[73] **Supra**, note 59.

> The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of section 11(d) must bear some reasonable relationship to that variety.[74]

Valente[75] itself was a case where a lesser standard of judicial independence was applied to provincial court judges than would be required of judges of the superior courts of Ontario.

c. Applicability to Summary Proceedings

The applicability of the standards of independence and impartiality as set out in Valente[76] depend upon the tribunal having a judicial function. While, it might be argued that summary trials, as disciplinary tribunals, are administrative in character a review of the role of a trying officer inevitably leads to the conclusion that the officer acts in a judicial capacity. A hearing is required by statute before a decision is made. The decision of the summary trial also directly affects the rights and obligations of the accused. While there is no prosecutor the right to an assisting officer and the discretion to allow the participation of counsel indicates the existence of an adversarial process. In determining guilt the trying officer ascertains facts through the presentation of evidence and determines questions of law in respect of the National Defence Act. The final decision is rendered on the facts in accordance with the

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74 Ibid. at 207.

75 Ibid.

76 Ibid.

law. These factors are the hallmark of a "judicial" proceeding.[77] Therefore summary proceedings prescribed by the National Defence Act must meet the standards of independence and impartiality as is set out in Valente[78]. The question of the independence of summary trials will be dealt with first followed by an assessment of their status as impartial tribunals.

d. Independence

The independence of summary trials will be assessed in terms of the three essential conditions of judicial independence: security of tenure, financial independence and institutional independence. The essence of security of tenure:

> ...for purposes of s. 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.[79]

In Valente[80] one of the factors which was seen to be of primary importance in ensuring the independence of provincial court judges was that removal only be for cause combined "with a provision for a judicial inquiry at which the judge affected is given a full

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[77] For a recent outline of the test used in assessing if a tribunal acts in a judicial capacity see Syndicat des Employés de production, du Québec et de l'Acadie v. Commission Canadienne des droits et la personne (1989), 100 N.R. 241 at 270-274 (S.C.C.). The summary trial has the formal characteristics of a judicial hearing, can affect the liberty of the accused and in a statutory context performs the identical function of a court martial (the adjudication of service offences).

[78] **Supra**, note 59.

[79] Ibid. at 211-212.

[80] Ibid.

opportunity to be heard".[81] The ability to remove a judge "at pleasure" was seen as being fatal to the independence of one class of provincial court judge. The existence of a tradition of non-interference in the affairs of judges was seen to be supportive of the independence of judges, but not determinative.[82] Similarly, in other cases[83] the requirement that judicial officers take a judicial oath has been seen as supportive, but not necessarily determinative, of the independent status of that officer.

A trying officer at a summary trial cannot point to any of the safeguards outlined in Valente[84] nor to any unique provisions under the National Defence Act or regulations which would provide similar protection. All trying officers hold their positions "at pleasure". There is no independent body to assess the conduct of those officers in their judicial role. It might be argued that the redress of grievance procedure offers protection from interference in that the trying officer can always complain if such interference is encountered. However, such a grievance procedure only offers a method to redress a wrong, it does not prevent that wrong in the first place.

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[81] Ibid. at 211.

[82] Ibid. at 214.

[83] See the lower court decision in R v. Valente (No. 2) (1983), 2 C.C.C. (3d) 417 (Ont. C.A.) and the decision dealing with Justices of the Peace in Ontario, R v. Currie and Niagara Escarpment Commission (1984), 16 C.C.C. (3d) 193 (Ont. C.A.). The Supreme Court of Canada in Valente, **supra**, note 59, did not address the issue of the oath, however, a number of courts have relied on the existence of an oath as one factor in assessing judicial independence. See R v. Magee 1988 3 W.W.R. 169 (Alta. Q.B.), Re Valois and Universal Spa Ltée (1986), 33 C.C.C.(3d) 535 (Que. C.A.), Généreux, **supra**, note 54, and Schick, **supra**, note 55.

[84] **Supra**, note 59.

Trying officers are employed exclusively within the executive branch of the military. Their very status as trying officers is dependent on their position in the chain of command. In Mohammad v. Canada (Minister of Employment and Immigration[85] the Federal Court of Appeal determined that adjudicators at immigration inquiries were independent and impartial in part because they formed a group within the Canada Employment and Immigration Commission separate from the case-presenting officers.[86] Trying officers at summary trials are not in the same situation. The maintenance of discipline and adjudication at summary proceedings is just one part of their military responsibilities.

The annual performance evaluation reports (PER) of trying officers are written by their immediate superiors and are used for purposes of promotion, pay and access to courses. Discretionary benefits such as leave are under the control of those superiors as well. Trying officers are not required to take a judicial oath and there are no provisions in the National Defence Act of QR&O which prohibit a superior officer from interfering in the conduct of a trial. It could be argued that there is a tradition of non-interference. However, cases such as Nye[87] and Braun[88] could be relied on to indicate otherwise. In any event, a tradition of non-interference is not in itself a sufficient guarantee of independence. Therefore it must be concluded that trying officers at summary trials

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85 **Supra**, note 72.

86 Ibid. at 347.

87 **Supra**, note 48.

88 **Supra**, note 49.

lack the security of tenure necessary to be considered to be independent.

With respect to the second essential condition of judicial independence, financial security, the essence of such security:

> ...is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner which could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace of favour of the executive.[89]

Trying officers at summary trials are paid in the same manner as any other commissioned officer. Payment is made either as a basic rate of pay plus annual incremental incentive (incentive pay) or as a basic rate, set within a salary range, plus an annually calculated performance award (merit pay). Most commanding officers and delegated officers receive incentive pay, while all superior commanders are paid under the merit pay system. In the case of incentive pay the receipt of the annual incentive is dependent upon the officer adequately performing assigned duties.[90] Similarly, for merit pay the annual performance award is based on "merit" which is determined by the Chief of Defence Staff.[91]

The maintenance of the same method of payment for all commissioned officers regardless of whether they preside at summary trials is a reflection of the trying officer's integration within the chain of command. It is their position within the "executive" which empowers them to act in their judicial capacity. Performance awards and annual incentives granted for satisfactory completion of duties

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89 **Supra**, note 59 at 216.

90 QR&O, art. 204.015, and CFAO 204-2.

91 QR&O, art. 204.205 and 204.218.

can be effective tools for encouraging commissioned officers to meet or exceed established levels of performance. However, a negative assessment of a trying officer by that officer's superior could affect the trying officer's incentive or merit pay (as applicable). The possibility of such interference can create a perception that at least a portion of the trying officer's salary can be affected by a superior officer's assessment of the judicial role carried out by the trying officer. Therefore a trying officer may feel compelled to act or decide cases in a certain manner out of concern over the effect unpopular decisions may have on that officer's salary.

A similar problem also arises with respect to pensions. While the entitlement to a pension is set out in the Canadian Forces Superannuation Act[92] the amount of the annuity is based in part on the "average annual pay received by the contributor during any six year period".[93] Any action which would adversely affect the level of pay of a commissioned officer would ultimately impact of the amount of pension payable to that officer. Therefore, in respect of both salary and pension the trying officers at summary trials do not enjoy a level of financial security which guarantees their independence while performing their judicial role.

The third essential condition of judicial independence for the purposes of s. 11(d) is "the institutional independence of the tribunal with respect to matters of administration bearing directly on its judicial function."[94] As most summary trials are conducted in the trying officer's office and the administrative personnel involved

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92 Canadian Forces Superannuation Act R.S.C. 1985, c. C-17.

93 Ibid. s. 9.

94 **Supra**, note 59 at 219.

(eg. the unit adjutant or administrative officer) usually work for that officer it would not appear, prima facie at least, that "institutional independence" is an issue. However, the fact that the presiding officer is an integral member of the chain of command leaves open the potential for abuse. For example, a trying officer could conceivably be directed to hold trial proceedings in a location other than the officer's office or an order could be given to delay a trial. The potential for such interference can create a perception that the summary trial lacks institutional independence.

In summary, the summary trial fails to meet any of the essential guarantees of judicial independence set out in Valente[95]. That failure is largely a result of the position of the trying officer in the military chain of command.[96]

e. Impartiality

While Valente[97] dealt primarily with the issue of independence Mr. Justice Le Dain also considered the requirements of "impartiality" in s. 11(d). He indicated that impartiality refers to "a state of mind or attitude of the tribunal in relation to the issues and the

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[95] **Supra**, note 59.

[96] Similarly in R v. Magee 1988 3 W.W.R. 169 (Alta. Q.B.) it was held that a justice of the peace who was an employee of the Attorney General's department and who held office a pleasure did not have the required degree of independence and impartiality to issue search warrants. In R v. Baylis (1988) 65 C.R. (3d) 62 (Sask C.A.) a justice of the peace who was appointed at pleasure and who as a member of the Corps of Commissionaires, was subject to the direct control of the special constable of the R.C.M.P. in charge of the airport was also not sufficiently independent to issue search warrants.

[97] **Supra**, note 59.

parties in a particular case".[98] Mr. Justice Le Dain included the following quote from Fawcett, The Application of the European Convention on Human Rights:

> ...impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice (emphasis added).[99]

As with independence the tribunal must be perceived as being impartial. The very nature of summary proceedings points towards a lack of impartiality on the part of the trying officer.

This lack of impartiality, however, does not stem from the fact that the trying officer is a commissioned officer. As was noted by Mr. Justice McIntyre in MacKay[100]:

> From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason. It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline--which includes the welfare of their men--are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.[101]

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98 Ibid. at 201.

99 **Supra**, note 59 at 202.

100 **Supra**, note 52.

101 Ibid. at 156.

Rather than because of membership in the military, trying officers fail to meet the requirement of impartiality because of the "personal" nature of their role. As was indicated in Chapter 3 the power to conduct summary trials is concentrated at the superior commander, commanding officer and delegated officer levels because of the personal interest which officers in those positions have in the outcome of the trial. Such personal interest has a positive connotation in terms of the trying officer's ability to identify with and enhance primary group and unit loyalties. However, since the orders to be obeyed emanate from within the chain of command it is inevitable that the trying officer will be called upon to adjudicate on orders or directions which originate with that officer, a superior officer or a subordinate. In addition, the personal responsibility which the trying officer has for maintaining discipline in the unit makes that officer a party who has a greater interest in the proceedings than the simple guilt or innocence of the accused.

The impartiality of a commanding officer can also be challenged because of the supervisory capacity which that officer has over pre-trial investigations (disciplinary, summary investigations, boards of inquiry etc. and the power of that officer to issue search warrants).

In conclusion, the summary proceedings prescribed in the National Defence Act fail to meet the standard of judicial impartiality and independence required by s. 11(d) of the Charter. In light of the unique role of the summary trial in maintaining discipline in the Canadian Forces and the position which trying officers hold in the chain of command this conclusion should not be surprising. What is of particular note, however, is the degree to which the summary trial system fails to provide any protection from interference or command influence. This situation can be contrasted

with the General Court Martial and Disciplinary Court Martial. In Généreux)[102] and Schick[103] safeguards such as the requirement of an oath, provisions in QR&O prohibiting interference and the appointment of members of the court martial for specific adjudicative tasks were found to be sufficient to ensure the independence of those service tribunals.

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102 **Supra**, note 54.

103 **Supra**, note 55.