TABLE OF CONTENTS

ABSTRACT

ACKNOWLEDGMENTS

TABLE OF CONTENTS vi

INTRODUCTION i

CHAPTER 1: OUTLINE OF SUMMARY PROCEEDINGS 7

1. Introduction 7

2. Legal Sources of Disciplinary System 7

3. Organization of the Canadian Forces 9

4. Canadian Military Justice System 10
   a. Jurisdiction 10
   b. Punishments 12
   c. Service Tribunals 13
   d. Courts Martial 14

5. Summary Proceedings 16
   a. Trying Officers 16
   b. Preparation and Laying of Charges 17
   c. Investigation of Service Offences 18
   d. Preliminary Disposition of the Charge 19
   e. Assisting Officer 19
   f. Types of Charges 20
      i) Trial by Delegated Officer 20
      ii) Trial by Commanding Officer 21
      iii) Trial by Superior Commander 21
   g. Trial Procedure 22
      i) Commencement of the Trial 22
      ii) General Rules of Procedure 22
      iii) Right to Elect Court Martial 25
vii

iv) Admission of Evidence 26
v) Findings and Sentence 26

h. Review 27
i) General Considerations 27
ii) Approval of Punishments 27
iii) Redress of Grievance 28
iv) Mandatory Review 29
v) Review by Legal Officers 29
vi) Alteration of Punishments 29
vii) Release Pending Review 30

6. Judicial Review 30

CHAPTER 2: HISTORY OF SUMMARY PROCEEDINGS 33

1. Introduction 33

2. Early Summary Proceedings 33

3. Our British Roots 34
   a. General 34
   b. Land and Air Forces 35
      i) Middle Ages to Mutiny Act 35
      ii) Mutiny Act to 1879 37
      iii) The Army Discipline and Regulation Act to End of World War II 39
         a) Military Justice Reform 39
         b) Expansion of Summary Powers 42
      iv) The Air Force 44
   c. Naval Law 45
      i) General 45
      ii) Early Naval Law 45
      iii) The Twentieth Century 47
4. The National Defence Act- 1950 to the Present
   a. Post-War Review 49
   b. 1950 to the Charter 51
   c. Post-Charter 52

5. Summary 55

CHAPTER 3: ROLE OF SUMMARY PROCEEDINGS: THE MAINTENANCE OF DISCIPLINE

1. Introduction 56
2. The Need for Discipline 57
3. The Summary Trial: Uniquely Designed to Maintain Discipline
   a. General Considerations 68
   b. A Vehicle for Socialization 69
   c. Trial by Officers 71
   d. Trial by the Military Commander 73
   e. Personal Aspects of Leadership 74
   f. Position of the Trying Officer 76

4. Role of the Canadian Forces 78
5. Summary 85

CHAPTER 4: SUMMARY PROCEEDINGS: CONSTITUTIONAL STATUS AND JURISDICTION

1. Introduction 87
2. Constitutional Status of Military Law 88
3. Paramountcy 91
4. The Supreme Court of Canada and Paramountcy 94
5. "Understanding" Military/Civilian Jurisdiction 101
6. Summary Trial Jurisdiction 105
7. Summary 113
CHAPTER 5: INDEPENDENCE AND IMPARTIALITY

1. Introduction 115
2. Application of the Charter 115
3. Applicability of Section 11 to Summary Proceedings 119
   a. Wigglesworth Test 119
   b. The "Nature" of Summary Proceedings 123
   c. The "True Penal Consequences" Test 130
4. Independence and Impartiality 134
   a. Background 134
   b. The "Valente" Test 136
   c. Applicability to Summary Proceedings 140
   d. Independence 141
e. Impartiality 146

CHAPTER 6: FAIRNESS 150

1. Introduction 150
2. Application of Section 7 152
   a. Two Part Test 152
   b. Right to Life, Liberty and Security of the Person 152
      i) General Principles 152
      ii) Right to Liberty 153
      iii) Security of the Person 160
      iv) Right to Life 162
c. Principles of Fundamental Justice 163
3. Summary Trial and Fairness 167
   b. A Fair Proceeding? 169
      i) Right to Counsel 169
ii) Notice 179
iii) Pre-trial Disclosure 180
iv) Oral or Written Submissions 184
v) Rules of Evidence 184
vi) Requirement for Reasons or a Record of the Trial 190

4. Summary 194

CHAPTER 7: REVIEW/APPEAL 196
1. Introduction 196
2. The Right to Appeal 197
3. Review Procedures 202
   a. General Considerations 202
   b. Independence and Impartiality in the Review Process 203
   c. The Right to be Heard 205

CHAPTER 8: OTHER FREE AND DEMOCRATIC SOCIETIES 210
1. Introduction 210
2. American Summary Proceedings 211
   a. Background 211
   b. Non-Judicial Punishment 212
   c. Summary Court Martial 217
   d. Review and Appeal 218
   e. General Considerations 219
   f. Judicial Support for Summary Proceedings 220
3. British Summary Proceedings 223
   a. Legislative Basis 223
   b. Army Summary Proceedings 223
   c. Naval Summary Proceedings 230
   d. General Considerations 232
CHAPTER 9: JUSTIFICATION: THE CONFLICT BETWEEN INDIVIDUAL RIGHTS AND THE REQUIREMENTS OF DISCIPLINE

Introduction

The Test

prescribed by Law

a. Tests
b. Application
c. Conclusions

Applying the "Oakes" Test

a. Stage One: The Legislative Objective
b. Stage Two: Proportionality
   i) "Rationally Connected"
   ii) Impair as Little as Reasonably Necessary
      a. Background
      b. Independent and Impartial Tribunal
      c. Right to Counsel
      d. Pre-Trial Disclosure
      e. Rules of Evidence
      f. Right to Record or Reasons
      g. Review
      h. Right to Appeal
      i. Summary
   iii) Proportionality Between "Effect" and "Objective"

5. Summary

CHAPTER 10: CONSTITUTIONAL WAIVER AND THE RIGHT TO ELECT COURT MARTIAL

1. Charter Waiver
2. The Right to Elect Court Martial

CHAPTER 11: RECOMMENDATIONS AND CONCLUSIONS

1. Recommendations
2. Conclusions

APPENDICIES

APPENDIX

I  RANK STRUCTURE
II LIST OF SERVICE OFFENCES
III SUMMARY TRIAL/ELECTION TO COURT MARTIAL STATISTICS
IV COURT MARTIAL STATISTICS
V CHARGE REPORT
VI "MINOR" SERVICE OFFENCES
VII "MAJOR" SERVICE OFFENCES

BIBLIOGRAPHY

VITA