

TABLE OF CONTENTS

ABSTRACT	i.
ACKNOWLEDGMENTS	iv
TABLE OF CONTENTS	vi
INTRODUCTION	1
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

viii

4. The National Defence Act- 1950 to the Present	49
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	 56
1. Introduction	56
2. The Need for Discipline	57
3. The Summary Trial: Uniquely Designed to Maintain Discipline	68
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	 87
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	115
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
a. Procedural Fairness: Common Law v The Charter	167
b. A Fair Proceeding?	169
i) Right to Counsel	169

X

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

Lessons Learned From Foreign Legislation	237
CHAPTER 9: JUSTIFICATION: THE CONFLICT BETWEEN INDIVIDUAL RIGHTS AND THE REQUIREMENTS OF DISCIPLINE	241
Introduction	241
1. The Test	242
2. Prescribed by Law	245
3. a. Tests	245
b. Application	249
c. Conclusions	253
Applying the "Oakes" Test	254
4. a. Stage One: The Legislative Objective	254
b. Stage Two: Proportionality	259
i) "Rationally Connected"	259
ii) Impair as Little as Reasonably Necessary	262
a. Background	262
b. Independent and Impartial Tribunal	263
c. Right to Counsel	265
d. Pre-Trial Disclosure	267
e. Rules of Evidence	268
f. Right to Record or Reasons	269
g. Review	270
h. Right to Appeal	272
i. Summary	274
iii) Proportionality Between "Effect" and "Objective"	274
5. Summary	275
CHAPTER 10: CONSTITUTIONAL WAIVER AND THE RIGHT TO ELECT COURT MARTIAL	277
1. Charter Waiver	277

2. The Right to Elect Court Martial	279
CHAPTER 11: RECOMMENDATIONS AND CONCLUSIONS	285
1. Recommendations	285
2. Conclusions	291

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