

The Trail of Discipline: The Historical Roots of Canadian Military Law

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INTRODUCTION

Know all men that we, with the aid of upright counsellors have laid down these ordinances; whoever shall commit murder aboard ship shall be tied to the corpse and thrown into the sea; if a murder be committed on land, the murderer shall be tied to the corpse and buried alive; if any man be convicted of drawing a knife for the purpose of stabbing another or shall have stabbed another so that blood shall flow, he shall lose a hand; if a man strike another with his hand, he shall be ducked three times in the sea; if any man defame, vilify, or swear at his fellow, he shall pay him as many ounces of silver as times that he has reviled him. If a robber be convicted of theft, boiling pitch shall be poured over his head, and a shower of feathers shaken over to mark him, and he shall be cast ashore on the first land at which the fleet shall touch. And all the crews were sworn to observe these constitutions, and to obey the commands of the justiciaries.¹

The above quote is from the instructions issued by Richard I concerning naval discipline on the ships taking his forces to the Crusade in the Holy Lands. It is from harsh beginnings such as these that the current Canadian procedures for maintaining military discipline have evolved. Initially, the relevance of studying the history of military discipline may not be apparent. However, the procedures for disciplining the military forces of a nation are a direct reflection of the society that the forces were created to defend. The review of the historical development of military law not only puts the law into the context of the particular society but also explains the rationale for the creation of the law. Unless this rationale is understood, those involved in the application and development of military discipline may blindly continue to maintain laws long past their useful lives or else may

¹Naval ordonnances of Richard I, A.D. 1190 as quoted per Stephens, Gifford and Smith, *Manual of Naval Law and Court Martial Procedure*, 1901, Stevens and Son Ltd., London.

change laws which are based upon a solid and reasonable foundation only because the basis for the law is not obvious.

There are far too many factors which have influenced the development of Canadian Forces military law to provide anything like an exhaustive analysis in an article of this nature. This article merely attempts to identify the major turning points in the development of military law that have brought Canadian Forces disciplinary procedures to their present point. In addition to providing limited general historical background, the article focuses on the various military tribunals, their jurisdiction and the punishments available to those tribunals.

Because Canadian Forces military law relied initially upon the customs, traditions and legislative developments concerning the British military forces, any meaningful discussion of Canadian Forces military law requires a review of its British roots. In Britain, military law developed along two distinct pathways: one relating to the naval forces and the other to the land (or military) and air forces. Therefore, this article will first address the history of British naval law then review British military and air force law and, finally, review the law applicable to the Canadian Forces from the passage of the *National Defence Act*² in 1950.

DISCIPLINE OF THE NAVY

When one thinks of past British naval might, the first things that spring to mind are the great battles and voyages of British mariners: Drake's voyage around the world, the defeat of the Spanish Armada, Nelson at Trafalgar, the sinking of the Bismark, etc. The beginnings of this naval superiority were, however, quite modest. At the time of William I (William the Conqueror) and for centuries afterwards there was no such thing as a professional naval service in England. Naval vessels were merely armed troop transports designed to carry the English kings and their followers to the English domains in France. The ships themselves were fishing boats or commercial vessels that would be requisitioned by the King for a particular purpose. The crew of the ship was, for the most part, its normal crew and the fighting power of the ship was provided by its passengers: the archers, men-at-arms and knights of the King. The naval tactics of the day relied mainly upon grappling any opposing vessels and boarding them. Once the ships had served their purpose in transporting the troops, both ships and sailors would return to their normal occupations.

Because of the limited purpose of naval vessels in the 11th to 15th centuries there was no need for a permanent force of professional naval

²*National Defence Act*, S.C. 1950, c.43 (hereinafter NDA).

men. Instead, when the King required vessels to conduct his wars he would issue Articles of War similar to those of Richard I to control the discipline of the men on the vessels while they were carrying out his objectives. The society of the times dictated the harshness of the penalties and the offences reflected the major concerns of the day. The captains of the vessels were expected to be able to handle any minor infractions in accordance with the law determined by Maritime courts established by the coastal towns that provided the ships. The laws of those towns were anything but uniform. In addition, many "customs of the sea" had been developed over the centuries by the great naval powers of the ages. Each major seafaring nation accepted and added to the customs of the sea and virtually all maritime powers, including England, recognized these customs as being applicable to their naval forces.

In keeping with the times, the customs of the sea with respect to maintaining discipline on naval vessels were severe and mostly physical in nature. For instance, keel hauling, which involved dragging a man by a rope under the ship from one side to the other, was relatively popular. Flogging was in fashion and continued to be a normal punishment well into the 19th century. In some cases, for his first three offences a person sleeping on watch would have three buckets of water poured over his head and down his sleeves. While this was uncomfortable it did not match the consequences of a fourth offence which resulted in a basket being hung from the bowsprit of the vessel, the individual being given a quantity of beer, a loaf of bread and a knife and then being placed in the basket to starve or drown depending upon his personal choice.³ Considering the nature of the seamen of the times as well as the psychology concerning discipline, it is not surprising that discipline was maintained with an iron fist seldom covered by the proverbial velvet glove. In essence, at sea the captain of the ship was God — and he was expected to be a severe God.

While the constitutional foundation of the nation was being developed in this time period through such significant events as the signing of the Magna Carta,⁴ the creation of Parliament to provide funding for the King, and the gradual evolution of the civil service, certain changes were also taking place with respect to naval matters. Over the years the King acquired or built ships of his own which slowly developed into the royal navy. (It wasn't until the reign of Charles II that the name "Royal Navy" was granted to the naval forces of the

³See comments by BGen Snedeker as quoted — Byrne, *Military Law*, 3d ed., 1981, Naval Institute Press, Annapolis at p.3.

⁴*Magna Carta*, first signed in 1215 by King John and later re-issued in modified form by Henry III and Edward I. For the Edward I version of 1297 see Halsbury's Statutes of England, 2nd ed., vol. 4, p.20 *et seq.*

Crown.) In particular, under Henry IV the Office of Lord High Admiral was created and the individual in that office was made responsible for all civil causes and criminal offences arising among seamen, whether belonging to the royal navy or the merchant navy. He, or those delegated by him, would issue instructions to subordinate commanders concerning the procedures and punishments for the maintenance of discipline in the fleet.

Increased trade in the late 15th and early 16th centuries required fighting ships both to protect the merchant vessels belonging to England and to harass the shipping of other nations that were at war with England. Henry VII, who was well noted for his love of trade and commerce, understood the requirement for more naval vessels belonging to the Crown on a fulltime basis. He therefore proceeded to increase the size of the navy considerably. His son, the notorious Henry VIII, continued this trend and initiated a dramatic improvement in the capabilities of the navy by encouraging design changes in the ships which enabled them to carry heavy cannon capable of sinking other vessels. The construction of the ships was changed so that the cannon could be fired through openings in the side of the vessel.⁶

Despite the increases in the size and fighting abilities of the navy, the vast majority of ships which formed the fighting strength of the country were still privately owned. The captains of many of them were given "letters of marque" as privateers which letters were recognized by all maritime nations. Most of the renowned naval captains of the time, such as Sir Francis Drake, fell within this free-enterprise portion of the naval forces. Besides a certain amount of patriotism, the most significant reason to fight the enemies of the nation was to acquire wealth by capturing ships and cargo.

After the buildup of the fleet during the reigns of Henry VII and Henry VIII the naval forces went into a period of decline. Even at the time of the defeat of the Spanish Armada the English navy was in trouble. The vessels of the Crown were both decreasing in numbers and increasing in age. During the reign of James I, his dislike of war and the significant amount of money required from his personal funds in order to maintain the navy resulted in a neglect that almost led to ruin. Furthermore, he refused to issue letters of marque to protect privateers. As a result, former privateers were now subject to the summary (and fatal) justice awarded pirates if captured. Piracy in the

⁵Cf. Lewis, *The History of the British Navy*, 1959, Ruskin House, George Allen & Unwin Ltd., London.

⁶Cf. 12 *Encyclopedia Britannica Macropaedia*, Title — Naval Ships and Craft at p. 888. See also *supra*, note 5 at p.39.

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English Channel increased and few, if any, naval vessels were available to put down this pestilence.

In 1619, Lord Buckingham's ability to carry out his functions as Lord Admiral came into question. Therefore, the King provided him assistance by appointing a council that evolved into the Board of Admiralty.⁷ In 1632, the office of Lord High Admiral was put into commission with all the great officers of State being named as Commissioners and the Board of Admiralty effectively took over the operation of the navy on behalf of the King.⁸ The Admiral in command of each fleet, however, still issued orders respecting discipline in the fleet. One example of these orders, those of the Earl of Lindsay in 1635, read as follows:

1st. In your own particular, you are to have special care that you perform your duty faithfully and with diligence; and if any seaman, or other in your ship shall raise faction, tumult, or conspiracy, or commit manslaughter, or murder, or shall quarrel, or fight, or draw blood, or weapon to that end, or commit theft, or other heinous capital offence, you shall cause precise information to be brought to me thereof, that I may inflict condign punishment upon each offender.

2ndly. If any under your command in that ship shall be a common swearer, blasphemmer, railer, drunkard, pilferer, or sleep at his watch, or make a noise, and not betake himself to his place of rest after the watch is set, or shall not keep his cabin cleanly, or be discontented with his proportion of victuals, or shall spoil or waste them, or any other necessary provisions for the ship, or shall commit any insolency or disorder, fitting by you to be corrected, you are to punish them according to the order and custom of the sea.⁹

Some of the customs of the sea applicable at that time with respect to the summary jurisdiction of a ship's captain read as follows:

A captain may punish according to the offence committed (viz.), putting one in the billbows during pleasure; keep them fasting; duck them at the yard-arm, or haul them from yard-arm to yard-arm under the ship's keel; or make them fast to the capstan, and whip them there; or at the capstan or mainmast hang weights about their necks till their heart

⁷See the *Manual of Law and Court Martial Procedure*, *supra*, note 1 at p.13.

⁸*Id.*, p.14. The office was to alternate between royal appointment and commission for the next two centuries.

⁹As quoted *supra*, note 7, at p.15.

and back be ready to break. This will tame the most rude and savage people in the world.¹⁰

James' successor, Charles I, eventually appreciated the need for a stronger navy. However, except in times of emergency the King was expected to live on his own resources. The navy was maintained from those resources. When an emergency did arise, Parliament was summoned to provide the King with extra money for his forces. Frequently in the past if the King required money from Parliament, Parliament would grant it in exchange for concessions from the King resulting in an increase in the powers of Parliament. Charles' belief in the Divine Right of Kings was in direct conflict with the increasing power of Parliament. Therefore, Charles attempted to get money for his ships without calling Parliament by requiring the payment of "ship-money." The English land shires that normally did not pay for the maintenance of the ships objected but the King's authority to require payment was upheld in a highly controversial court decision.¹¹ It was a hollow victory, however, as Parliament rebelled in 1642 and Charles eventually lost his head. It is during the period of the resulting Commonwealth that profound changes in the discipline of the navy commenced.

Despite the differences with the King concerning ship money, Parliament was well aware of the need for a strong navy. With the defeat of the King's forces the process of establishing such a navy on a proper organizational foundation was commenced. In 1645 an act entitled *An Ordinance and Articles Concerning Martial Law for the Government of the Navy*¹² was passed. Through this Act, and later acts in 1648 and 1653, some standardization of discipline other than a mere repetition of precedents from previous articles of war became possible. The Council of War, the naval predecessor of the court martial, was created but the power of such a tribunal was restricted where sentence of loss of life or limb was involved. The admirals and generals of the fleet who issued the instructions under these Acts reserved for themselves the power to determine whether such severe sentences should be carried out. In addition, the record keeping of discipline was improved by requiring that the record of such Councils of War, including the depositions against and the defences made by the defender as well as all the circumstances surrounding the incident, be delivered to the Judge Advocate of the Fleet for registration.

In 1660 came the Restoration. Charles II became King of England. Although the Acts of the Commonwealth, including those applicable

¹⁰*Id.*, pp.15-16.

¹¹*Hampden's Case*, Hollam, Const. Hist. ii 23 as cited per note 7, p.17.

¹²*Lords' Journ.* vii 255 as cited per note 7, p.18.

to naval discipline, were abrogated, the lesson had been learned. A legislative code for the navy was drafted in 1661.¹³ The code limited the jurisdiction of courts martial both as to place and as to persons who could be tried and set out the types of offences that were triable by court martial. Court martial jurisdiction only extended to offences done "upon the main Sea, or in Ships or Vessells being and hovering in the maine Streame of great Rivers, onely beneath the Bridges of the same Rivers nigh to the Sea within the Jurisdiction of the Admiralty."¹⁴ Only those who were in actual service in pay of His Majesty's Fleet or ships of war were subject to this jurisdiction. Many of the offences were similar to those that are still in force today.

The Act of 1661 was the first to refer to the naval tribunals as courts martial. The court martial would be assembled by order of particular Vice Admirals or Commanders in Chief who had been given such authority by the Lord High Admiral. In any case where death was a possible punishment, the court martial had to be composed of at least five captains and even then the Lord High Admiral had to approve the punishment if the offence had been committed within the "narrow seas" or by the Commander in Chief of the Fleet or Squadron if the offence was committed beyond that area.

The types of punishments available to the court martial ranged from death for most of the more serious offences to fines and imprisonment for more minor offences such as cursing, drunkenness, and "scandalous actions in derogation of God's honour, and corruption of good manners."¹⁵ As an alternative to death, for several offences the Act stated that a court martial could award "such other punishment as the Court marshall shall thinke fitt"¹⁶ or variations on that wording. The ships' captains still maintained their jurisdiction over "All other Faults Misdemeanours and Disorders committed at Sea not mentioned in this Act."¹⁷ The punishments available to the captain were those applicable according to the laws and customs of the sea.

In 1749, during the reign of George II, the legislation relating to discipline in the navy was consolidated.¹⁸ The new Act included some

¹³*An Act for the Establishing Articles and Orders for the regulateing and better Government of His Majesties Navies Ships of Warr & Forces by Sea*, 1661, 13 Car.II, c.9(U.K.).

¹⁴*Id.*, Part II.

¹⁵*Id.*, s.2.

¹⁶*Id.*, s.30.

¹⁷*Id.*, s.33.

¹⁸*An Act for amending, explaining, and reducing into one Act of Parliament, the Laws relating to the Government of his Majesty's Ships, Vessels, and Forces by Sea*, 1749, 22 George II, c.33 (U.K.).

changes from the 1661 Act such as extending the jurisdiction of the court martial to the crews of ships of war on shore and any place out of His Majesty's dominions and to the crews of His Majesty's ships that had been wrecked, lost or taken. An oath of secrecy was prescribed for members of courts martial. The size of a court martial was set at not less than five captains and not more than 13. In addition, the directions as to who could initiate a court martial were spelled out with clarity to cover virtually all situations at sea. For the most part, the offences and punishments were the same as those specified in the 1661 Act. The punishment of imprisonment, however, was limited to two years. The summary jurisdiction of a ship's captain was not altered to any significant extent by this consolidation.

It was in the 19th century that the modern era of both naval warfare and naval discipline began. At the beginning of the 19th century naval battles were still being fought by wooden-hulled sailing ships firing broadsides. However, the development of steam engines and the increasing use of iron in building ships during the first half of the century had their impact on the navy. In 1860 H.M.S. Warrior was launched as the first capital ship built completely of iron having a steam engine and screw propulsion rather than paddle wheels. Even so, tradition died hard and she was still fully rigged as a sailing ship.¹⁹

Besides the technological developments during this time significant changes were also taking place in the society as a whole. Due to the industrial revolution the population was becoming more urbanized and, to a certain extent, better educated. In addition, the rather draconian tendencies of the society were softening. Both of these factors were reflected in changes in naval discipline. In 1860 Parliament passed the *Naval Discipline Act*.²⁰

The *Naval Discipline Act* started out with 37 disciplinary offence sections still called Articles of War. A new part was added, however, dealing with offences punishable by ordinary law. Naval authorities were authorized to punish such acts as either acts prejudicial to good order and discipline or in the same manner as a criminal tribunal would punish them. Although certain types of offences were specified, such as murder and theft, the jurisdiction was left wide open by adding "any other Criminal Offence punishable by the Laws of England."²¹ As a result, within their territorial jurisdiction naval tribunals had the power to deal with any type of offence that could be committed by a member of the navy.

¹⁹Cf. *supra*, note 5.

²⁰*Naval Discipline Act*, 1860, 23 & 24 Vict., c. 124 (U.K.).

²¹*Id.*, s.38.

Over the next six years the *Naval Discipline Act* was amended practically every year. The Act stabilized in 1866 and, with few changes, the 1866 Act formed the basis for Canadian naval discipline until 1944.

The punishments provided for in the Act of 1866 did differ somewhat from modern punishments. For instance, there was a provision for penal servitude as the second highest punishment.²² An alternative to imprisonment was corporal punishment.²³ This punishment was restricted to 48 lashes in the statute.²⁴ Around the turn of the century, the Admiralty suspended the authority to inflict corporal punishment except with respect to the birching and caning of ships boys. There was no punishment of a fine in the Act but financial consequences were provided for through a punishment of forfeiture of pay and bonuses.²⁵

The powers of the ships captain were still considerable. He could try all offences except those committed by officers or those for which death was a possible punishment. The restrictions on his powers were set out as follows:

- (1) The Commanding Officer shall not have Power to award the Punishment of Penal Servitude.
- (2) The Commanding Officer shall not have Power to sentence a Deserter to Imprisonment for a longer Period than Three Calendar Months, or to sentence any other Offender to Imprisonment for a longer Period than Six Weeks, or to award Solitary Confinement for more than Ten Days at a Time, with Intervals of not less than Seven Days between Two successive Periods of Solitary Confinement.
- (3) Except in the case of Mutiny, no Man shall be sentenced by the Commanding Officer to Corporal Punishment until his Offence has been inquired into by One or more Officers appointed by such Commanding Officer, and his or their Opinion as to the Guilt or Innocence of the Prisoner reported to such Commanding Officer, and the Commanding Officer shall thereupon act as according to his Judgment may seem right.²⁶

²²*Naval Discipline Act*, 1866, 29 & 30 Vict., c.109, subs.52(2) (U.K.).

²³*Id.*, subs. 52(4).

²⁴*Id.*, subs. 52(11).

²⁵*Id.*, subs. 52(10).

²⁶*Id.*, s.56.

At the beginning of the 20th century Canada slowly started to develop a navy of its own. The provisions of the *Naval Discipline Act, 1866* were incorporated by reference into Canadian legislation under the original *Naval Service Act*²⁷ passed in 1910. With only a few minor Canadian adaptations the *Naval Discipline Act, 1866* and its amendments formed the disciplinary foundation for the Canadian navy for the next 34 years.

During the Second World War Canada finally decided to assert its independent status with respect to naval discipline by creating its own code of discipline in a Canadian statute. *The Naval Service Act, 1944*²⁸ was the vehicle to accomplish this change. The Act itself covered a wide variety of matters relating to naval service, only one of which was naval discipline. It can hardly be said that the Act placed Canada's stamp on disciplinary matters; almost all of the provisions relating to discipline were merely the British provisions with a coating of Canadian terminology. It was, however, a start in developing distinctive Canadian law in this area which culminated in the passage of the *National Defence Act*²⁹ in 1950.

DISCIPLINE OF LAND AND AIR FORCES

While it might seem logical that the development of discipline for the land forces would closely parallel the development of naval discipline, such was not the case. The navy was considered the protector of the nation. It was the "wooden wall" that kept invaders off England's shores and ensured the success of maritime commerce. Land forces, on the other hand, were frequently as much of a burden and danger to the English citizenry as they were to any foreign enemy. Therefore there was much greater reluctance to grant extensive disciplinary powers to those controlling the land forces than was the case with the navy as such powers might reduce the authority of the common law courts to deal with soldiers within the country.

The government of the military forces during the early years of English nationhood (i.e. the 11th to 15th centuries) rested solely in the hands of the King. In times of war the King, or his chief military officer, would issue instructions for the maintenance of discipline within the land forces in the same manner as he would for the naval forces. Except for the militia, (which existed strictly for defence of the nation and assisting local civil authorities) there were no permanent land forces during this period. The concept of a standing army

²⁷*The Naval Service Act*, S.C. 1909-10, c.43.

²⁸*Naval Service Act, 1944*, S.C. 1944-45, c.23.

²⁹*Supra*, note 2.

did not develop until many centuries later. Armies would be created for the purposes of specific campaigns and then disbanded when the campaign was over. As a result, there was little in the way of independent military law concerning soldiers in England in peacetime. There was, however, a court set up under the King's Commander in Chief, the Lord High Constable, to consider matters of honour and other matters such as contracts made outside the country. This was known as the Court of Chivalry. The court also had a disciplinary function with respect to the military in that it would try offences committed outside the country by members of the military as these offences were outside the jurisdiction of the common law courts.

Besides the Lord High Constable, the Court of Chivalry also had as a judge the Earl Marshal. The Earl Marshal was the second-ranking officer to the Lord High Constable in the King's forces. With changes in the administrative structure of the King's forces (and more specifically with the beheading of the Lord High Constable Edward, Duke of Buckingham by Henry VIII in 1521) the office of Lord High Constable became permanently vacant for all practical purposes and the duties with respect to determining military cases fell upon the Earl Marshal. It is from the Marshal's court that the term "court martial" eventually developed.

The Court of Chivalry fell into decline starting with the rule of Richard II when its jurisdiction was limited to matters touching deeds of arms or war. In peacetime in England, the common law courts would try offences involving soldiers in the same manner as they would try any other offence. Striking a superior officer, for instance, would be tried as an assault. While such a system kept the jurisdiction of the military in check within the nation and therefore provided some measure of civilian control over the military, it did little to aid military discipline. Until the development of the standing army in Britain in the 17th century, however, the system was sufficiently satisfactory that no major changes were made.

Discontent arose during the 16th and early 17th centuries as English monarchs attempted to enforce martial law in times of peace. By 1627, Parliament could no longer tolerate this state of affairs due to the tremendous hardships placed upon the civilian population, particularly when billeting soldiers. As a result, the *Petition of Right*³⁰ was passed declaring that the application of military (i.e., martial) law in times of peace was illegal. As was mentioned earlier when discussing naval discipline, this was the period when a power struggle was under way between the King (with his Divine Right of Kings philosophy)

³⁰The *Petition of Right*, 1627, 3 Car.I, c.1 (U.K.). (According to Halsbury's Statutes of England, 2nd ed., Vol 4, this short title arises from popular usage as it was not provided for in the *Short Titles Act* of 1896.)

and Parliament. Finally, in 1642 civil war broke out between the Royal Forces and those of Parliament.

During the period of the civil war, both armies were governed by Articles of War. The Articles of War for the Royal forces were issued under the authority of the King. The Parliamentary forces, however, had their Articles of War passed by both Houses of Parliament, thereby establishing a precedent for future control of the army.

With the restoration of Charles II in 1660, a standing army was created even though the concept was still unpopular with the civilian population. Considerable concern was expressed about the means to control such an army and to protect the civilian population from the whims of the King. In particular there was concern during the reign of Charles II's successor, James II, that the King might use the army to enforce his views, which were Roman Catholic in nature. The nation, however, was firmly Protestant and James II was forced to abdicate. Parliament was determined that it would not be subject to the dangers of such a standing army without some measure of control.

When James II abdicated, Parliament offered the Crown of England to William of Orange and his wife Mary as Mary had hereditary links to the English monarchy and both individuals were firmly Protestant. As a condition of accepting the Crown, however, William and Mary were required to sign the *Bill of Rights*³¹ which, amongst other things, outlawed the raising or keeping of a standing army within the country in times of peace except with the consent of Parliament. Thus Parliament gained control over the establishment and maintenance of any standing armies that might be proposed. The old system of using the civil courts to try members of the armed forces in England continued, however, and discipline understandably was lax.

Within a year of the accession of William and Mary, matters took a dramatic turn. The 800 English and Scottish dragoons of Lord Dumbarton's regiment who had been ordered to embark for service abroad mutinied and declared for the deposed James II. Although this mutiny was put down, it frightened Parliament to the extent that the need to maintain military discipline for land forces in the country, even during times of peace, was realized. As a result, Parliament passed the first *Mutiny Act*³² in 1689.

The preamble to the first *Mutiny Act* indicated both the concerns of Parliament with respect to maintaining civil jurisdiction within the

³¹*The Bill of Rights*, 1688, 1 Will. & Mar., sess. 2, c.2 (U.K.).

³²*An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service*, 1689, 1 Will & Mar., c.5 (U.K.).

country and with respect to maintaining discipline within the army. It stated:

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 or Limb or subjected to any kinde of Punishment by Martial Law or in any other manner then by Judgement of his Peeres and according to the knowne and established Lawes of this Realm Yet neverthesse 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. . .³³

England was at war with France and was trying to subdue Ireland at the time that this statute was passed yet the statute managed to strike a balance between the requirements of discipline and the necessity of maintaining civilian control over the forces. The body of the Act specifically provided that nothing in the Act exempted any officer or soldier from the ordinary process of law.³⁴

The main offences of concern in the first *Mutiny Act* were mutiny, sedition and desertion. The court martial authorized to enforce this Act could consist of no fewer than 13 commissioned officers of at least captain rank.

The punishments available to the court included "death or such other punishment as by a court martial shall be inflicted." Where the punishment was to be death, at least nine of the 13 officers present had to concur in the punishment. For some reason, the trials themselves as well as the execution of any punishment could only take place between the hours of eight in the morning and one in the afternoon.

When the *Mutiny Act* of 1689 was drafted, it was only to be in force seven months. Later that year a second Act was passed to remain in

³³*Id.*

³⁴*Id.*, s.6.

force for a year. Except for a few periods of peace when no Act was passed, a new *Mutiny Act* was passed every year until 1879 containing the same terms as the Act of the preceding year with any amendments that might be considered desirable.

Besides the authority provided by the *Mutiny Act*, the Crown still had the prerogative of issuing Articles of War to govern the discipline of forces operating outside the country in time of war. It is by a combination of the annual *Mutiny Acts* and the Articles of War that the military forces were controlled over the course of the next 190 years.

At first the *Mutiny Acts* did not extend to the Dominions abroad. As the country was at war most of the time, Articles of War were felt sufficient to deal with discipline in those Dominions. Gradually Parliamentary jurisdiction was expanded to cover troops abroad, first by giving the Crown a statutory authority to issue Articles of War in time of peace for maintaining discipline in the colonies and extending the application of the *Mutiny Act* and later, in 1803, by extending the *Mutiny Act* and the statutory Articles of War to the army serving inside or outside the dominions of the Crown.³⁵ After that time the *Mutiny Acts* and statutory Articles of War were also applied to troops engaged in war in foreign countries and the Crown prerogative of issuing Articles of War in time of war finally gave way to purely statutory authority.³⁶

The actions of Parliament in the U.K. had a direct impact on Canada prior to Confederation as the regular forces in Canada at that time were British. In addition to the regular forces, each province had its own militia for local defence. After Confederation, the British regular forces were gradually withdrawn and Canada was required to provide her own forces to carry out the defence duties. This was done by setting up the Active and Reserve Militia in the *Militia Act*³⁷ of 1868. The Militia consisted of all male inhabitants of Canada between the ages of 18 and 60 who were not specifically exempted or disqualified by law and who were British subjects by birth or naturalization. In

³⁵*An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters*, 1803, 43 Geo. III, c. 20 (U.K.).

³⁶See *Manual of Military Law*, 1899, issued by the War Office, London at p. 18.

³⁷*An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868, c.40.

³⁸This figure is quoted in a research paper entitled *The Defence Forces of Canada* prepared by the Directorate of History of the Department of National Defence. It is not necessarily indicative of the actual fighting force readily available to the government as the majority of these individuals received little, if any, training and equipment.

certain circumstances, Her Majesty could require all male inhabitants of the country to serve if they were capable of bearing arms. The combined strength of the Active and Reserve Militia by 1869 was approximately 656,000.³⁸

To maintain discipline the men of the Active Militia (which consisted of the voluntary militia, the regular militia and the marine militia) were subject to all of the Queen's Regulations and Orders for the British Army as well as the Rules and Articles of War and the *Mutiny Acts* then in force.³⁹ The member was subject to this jurisdiction whenever he was on actual service, was training on a period of annual drill or training under the Act, during any drill or parade of his Corps at which he was present in the ranks or as a spectator and also while wearing the uniform of his Corps.⁴⁰ The jurisdiction of courts martial to try individuals extended for six months past the discharge of the individual from the militia or after the Corps to which he belonged was relieved from actual service.⁴¹ The one exception was desertion which, as is the case today, did not have a time limit for prosecution.⁴²

As a result of the withdrawal of the Imperial regular troops there was a need to find Canadian forces to man certain establishments such as forts, magazines, schools of instruction, etc. on a full-time basis. The *Militia Act* was amended to provide for certain members of the militia to be enlisted for continuous service and the Act provided that these individuals would be deemed to be called out on active service and be subject to the laws and regulations with respect to discipline that were applicable to persons on active service.⁴³ This small force of persons on continuous service was later termed the "Permanent Force" under a subsequent amendment to the *Militia Act*⁴⁴ and provided the basis for the current land forces of the Regular Force.

By 1879 the British government wished to consolidate the law relating to the military forces much as it had done for the navy in the period 1861 to 1866. A comprehensive Act entitled *The Army Discipline and Regulation Act, 1879*⁴⁵ was passed. It consisted of five parts the first

³⁹*Supra*, note 37, s. 64.

⁴⁰*Id.*, s. 64.

⁴¹*Id.*, s. 64.

⁴²*Id.*, s. 64.

⁴³*An Act consolidating and amending the several Acts relating to Militia and Defence of the Dominion of Canada*, S.C. 1883, c. 11, s. 21.

⁴⁴*The Militia Act*, S.C. 1904, c. 23, ss. 24, 25.

⁴⁵*Army Discipline and Regulation Act, 1879*, 42 & 43 Vict., c.33 (U.K.).

of which spelled out the offences and procedures respecting discipline in the army. While some of the offences, such as duelling, no longer exist as specific offences in Canadian military law, others, such as conduct to the prejudice of good order and military discipline, remain with little change. The jurisdiction of military tribunals was limited in the British Act in that a court martial could not try the offences of treason, murder, manslaughter, treason — felony, or rape committed in the United Kingdom nor could those offences be tried any place else, except Gibraltar, unless the accused was on active service at the time of the offence or the place of the offence was "more than one hundred miles as measured in a straight line from any city or town in which the offender can be tried for such an offence by a competent civil court."⁴⁶ The Act still maintained the jurisdiction of the civil courts in the country over the soldier for any offences for which he would be triable if he were not subject to military law.⁴⁷

In keeping with the class structure of the time, the Act provided separate scales of punishment for officers and soldiers. Officers could receive:

- a) Death;
- b) Penal servitude for term not less than 5 years;
- c) Imprisonment with or without hard labour for a term not exceeding 2 years;
- d) Cashiering;
- e) Dismissal from Her Majesty's Service;
- f) Forfeiture in the prescribed manner of seniority of rank, either in the army or in the court which the offender belongs, or in both;
- g) Reprimand, or severe reprimand.⁴⁸

Soldiers on the other hand could receive:

- h) Death, or corporal punishment as in this Act mentioned;
- j) Penal servitude for a term of not less than 5 years;
- k) Imprisonment, with or without hard labour, for a term not exceeding 2 years;
- l) Discharge with ignominy from Her Majesty's Service;
- m) Dismissal, if a volunteer, from Her Majesty's Service;
- n) Reduction in the case of a non-commissioned officer to a lower grade, or the rank of a private soldier;
- o) Forfeitures, fines and stoppages.⁴⁹

⁴⁶*Id.*, subs. 41(a).

⁴⁷*Id.*, subs. 41(b).

⁴⁸*Id.*, s. 44.

⁴⁹*Id.*

Corporal punishment was restricted to 25 lashes and could not be inflicted on a non-commissioned officer.⁵⁰ For soldiers who were subject to corporal punishment, the sentence could be commuted to imprisonment with or without hard labour for a period not exceeding 42 days.⁵¹

In the case of a soldier the Commanding Officer could deal with the case summarily if he wished. He could order up to 7 days imprisonment for any offence, and, in the case of drunkenness, could order the offender to pay a fine not exceeding 10 shillings.⁵² Furthermore, the Commanding Officer could order a deduction from the soldier's ordinary pay.⁵³ In contrast to today's procedures, a Commanding Officer was required to deal summarily with a soldier charged with drunkenness when not on duty unless he had been warned for duty or he had been guilty of drunkenness on not less than four occasions in the preceding 12 months.⁵⁴ The one situation in which the Commanding Officer could exceed his 7 day imprisonment limit was with respect to absence without leave in which case the punishment could go up to 21 days imprisonment.⁵⁵ The 1879 Act also provided that a soldier ordered by his Commanding Officer to suffer imprisonment, to pay a fine or to suffer any deduction from his ordinary pay had the right to be tried by a district court martial instead of submitting to the punishment awarded by the Commanding Officer.⁵⁶

The 1879 Act was superceded in 1881 by the *Army Act*.⁵⁷ In matters relating to discipline, the *Army Act* was for the most part a repetition of the 1879 Act. One area in which it did make a change was with respect to punishments — corporal punishment was abolished.⁵⁸ The *Army Act* required a separate enabling statute to be passed in order to remain law.⁵⁹ Such a statute was passed every

⁵⁰*Id.*, subs. 44(5).

⁵¹*Id.*, subs. 44(6).

⁵²*Id.*, subs. 46(b).

⁵³*Id.*, subs. 46(c).

⁵⁴*Id.*, s. 46.

⁵⁵*Id.*, s. 46.

⁵⁶*Id.*, s. 46.

⁵⁷*Army Act, 1881*, 44 & 45 Vict., c. 58 (U.K.).

⁵⁸*Id.*, s. 44.

⁵⁹*Id.*, s. 2.

year by the British Parliament until after the Act ceased to be applicable to the Canadian Army.

The court martial system under the *Army Act* had four separate levels. At the highest level was the General Court Martial. It could try any offence provided for in the Act and could impose all punishments.⁶⁰ In the UK, India, Malta and Gibraltar a General Court Martial could have no less than nine officers.⁶¹ Outside those areas the minimum number was five.⁶²

The District Court Martial was the next level of trial below the General Court Martial. The District Court Martial could not try an officer nor could it award the punishments of death or penal servitude.⁶³ Within the United Kingdom, India, Malta and Gibraltar the District Court Martial was required to have not less than five officers while outside these areas only three officers were required to form such a court.⁶⁴

The bottom rung in the usual court martial hierarchy was the Regimental Court Martial. A Commanding Officer of captain rank or higher (or of any rank if onboard ship) could convene a Regimental Court Martial for the trial of offences committed by soldiers under his command.⁶⁵ Such a court could not try an officer nor could it award the punishments of death, penal servitude, imprisonment in excess of 42 days, or discharge with ignominy.⁶⁶ At this level of court martial only three officers were required to form the court.⁶⁷ The Regimental Court Martial was abolished as a type of service tribunal in 1920.⁶⁸

The final type of court martial was known as the Field General Court Martial. This was a rather unique type of court in that it could only

⁶⁰The jurisdiction of the different types of court martial specified in the *Army Act, 1881* was determined by the restrictions specified in the Act rather than a general statement of jurisdiction. No restrictions on jurisdiction were placed on a General Court Martial with respect to any offence triable by military law.

⁶¹*Supra*, note 57, subs. 48(3).

⁶²*Id.*, subs. 48(3).

⁶³*Id.*, subs. 48(6).

⁶⁴*Id.*, subs. 48(4).

⁶⁵*Id.*, subs. 47(1).

⁶⁶*Id.*, subs. 47(5).

⁶⁷*Id.*, subs. 47(2).

⁶⁸*Army and Air Force (Annual) Act, 1920*, 10 Geo. V, c.7, s.5 (U.K.).

be convened where an offence as alleged to have been committed by a person subject to military law against the property or person of an inhabitant or resident of a country "beyond the seas" in which a detachment or portion of troops was present.⁶⁹ If these conditions were met and it was not practicable to have the case tried by an ordinary General Court Martial, then an officer in command of such troops could authorize a Field General Court Martial even if he would ordinarily not have the authority to convene a General Court Martial.⁷⁰ The Field General Court Martial consisted of not less than three officers and could impose all punishments specified in the *Army Act*.⁷¹ The sentence of death, however, could only be passed with the unanimous concurrence of all members of the court.⁷²

Because the *Militia Act* incorporated the British law relating to discipline into the laws of Canada so that they applied to her armed forces, both the *Army Discipline and Regulations Act, 1879* and later the *Army Act, 1881* governed the discipline of Canadian land forces to the extent that they were not inconsistent with the *Militia Act*. In fact, the *Army Act, 1881*, with its subsequent amendments, formed the basis for military discipline within the Canadian Army until the passage of the *National Defence Act* in 1950.

Disciplinary developments with respect to air forces are of relatively recent origin for the obvious reason that air forces only came into being early in this century. During the First World War Canadian airmen flew with the British Royal Flying Corps and Royal Naval Air Service. In 1917 the British Parliament provided for a permanent air force by passing the *Air Force (Constitution) Act, 1917*⁷³ with its accompanying *Air Force Act*.⁷⁴ Discipline was a relatively simple matter as the *Air Force Act* provisions in that respect were basically a re-wording of the *Army Act* provisions to comply with air force terminology.⁷⁵ Therefore, the procedures, powers etc. of the army formed the foundation for British and Canadian air force law.

⁶⁹*Supra*, note 57, subs. 49(1).

⁷⁰*Id.*, subs. 49(1).

⁷¹*Id.*, sub-subs. 49(1) (a).

⁷²*Id.*, subs. 49(2).

⁷³*Air Force (Constitution) Act, 1917*, 7 & 8 Geo. V, c.51 (U.K.).

⁷⁴The *Air Force Act* formed the Second Schedule to the *Air Force (Constitution) Act, 1917* and was brought into force by an annual Act of Parliament after that time.

⁷⁵It was specifically provided in Part III, s.12 of the *Air Force (Constitution) Act, 1917* that the *Army Act* in force immediately before this Act came into force was to be re-enacted as the *Air Force Act* with certain changes in terminology.

A truly Canadian air force was not created until the birth of the Royal Canadian Air Force (RCAF) on the 1st of April 1924. Prior to that time military flying had fallen under the jurisdiction of the Air Board and later the Canadian Air Force. However, due to the involvement of these two bodies in both civilian and military flying it would be difficult to classify either one as a truly military air force. The RCAF was born in 1924 pursuant to an Order in Council passed under *The Air Board Act*.⁷⁶ Its existence remained on a regulatory foundation until the *Royal Canadian Air Force Act*⁷⁷ was passed in 1940.

In keeping with the close British ties that existed during the early years of the RCAF, the Order in Council governing that organization specified that discipline would be in accordance with the British *Air Force Act* except where it was inconsistent with the provisions of any applicable Canadian Orders in Council. Even with the passage of the *Royal Canadian Air Force Act* in 1940, the disciplinary authority of the *Air Force Act* was retained.

The inconsistencies between the *Air Force Act* and the Canadian Orders in Council implementing it within the RCAF were relatively minor. The obvious differences relating to terminology and national authorities were present. The other differences tended to exist for similar national reasons, such as the use of dollars when referring to fines in Canada as opposed to pounds for fines under the *Air Force Act*. In general, however, the *Air Force Act* formed the basis for discipline in the RCAF until 1950 and the passage of the *National Defence Act*.

CURRENT CANADIAN MILITARY LAW

At the end of the Second World War the number of authorities governing discipline in the three Services was becoming unmanageable. Prior to the passage of the *Naval Service Act, 1944*⁷⁸ there were 11 different sources, both Canadian and British, containing information applicable to the navy. The army and the RCAF still had the confusion of authorities at war's end. Therefore, in 1947 work was commenced on preparing a new act that would contain, amongst other

⁷⁶*The Air Board Act*, S.C. 1919, c. 11 which later evolved into the *Aeronautics Act*, R.S.C. 1927, c.3.

⁷⁷*The Royal Canadian Air Force Act*, S.C. 1940, c.15.

⁷⁸*Supra*, note 28.

⁷⁹For a list of these sources and comments on the problems of so many authorities, see the statement by the Hon. Angus L. MacDonald, Minister of National Defence for Naval Services when moving second reading of the bill which was to become the *Naval Service Act, 1944* in the Debates of the House of Commons, 1944, Vol IV, p.3655.

things, a Code of Service Discipline applicable to all three Services. That work resulted in the passage in 1950 of the *National Defence Act*.⁸⁰

Where the *Statute of Westminster*⁸¹ can be viewed as a watershed in the development of Canadian political independence, the passage of the NDA stands in the same perspective in relation to Canadian military independence. From the time of the First World War, British control over the actual administration of military discipline in the Canadian Forces had been gradually eroded to the point where *de facto* control rested solely with Canadian authorities by the end of the Second World War. The NDA strengthened the *de facto* control by adding purely Canadian legislative authority thereby eliminating the final vestiges of British influence in the disciplinary process.

The most significant feature of the NDA was probably the provision for a single Code of Service Discipline applicable to all three Services. The creation of the single Code was not a straightforward matter. Because of the different historical development and public and military perceptions of the Services prior to the passage of the NDA, the powers of a ship's captain had been considerably greater than those of the army or air force commanding officer. So ingrained was the view that different powers of punishment were required for the differing Services in order to maintain discipline that the original drafts of the NDA still retained many of these differences. Even the legal advisers for the three Services concurred with the point of view that differences should be retained and expressed their opinions to that effect to the Parliamentary Committee considering the new Act.⁸²

The new Act attempted to resolve many of the procedural difficulties with previous legislation as well as to correct some of the substantive injustices. With respect to jurisdiction, the NDA brought spies within the ambit of the Code of Service Discipline, effectively increasing the jurisdiction of the army and air force.⁸³ Only the navy had jurisdiction over persons having the status of a spy prior to this time. The new Act also increased the length of time during which the Code of Service Discipline would apply to persons who had committed offences against the Code but were subsequently released. Prior to the NDA, jurisdiction had existed only for six months after release

⁸⁰*Supra*, note 2.

⁸¹*Statute of Westminster, 1931, 22 Geo. V, c.4 (U.K.).*

⁸²E.g. see the testimony of Cdr P.H. Hurcomb, Judge Advocate of the Fleet, before the Special Committee on Bill 133, *An Act Respecting National Defence*, in the Minutes of Proceedings of 24 May, 1950 at p. 105 *et seq.*

⁸³*Supra*, note 2, sub-subs. 56(1) (h) and *infra*, note 100 at p. 56D.

in some cases, while persons who remained in the Forces and who had committed the same offence would be subject to trial for up to three years or, in certain cases, longer.⁸⁴ The three year limitation period was now made applicable to all except for certain specified offences such as desertion.⁸⁵

Despite the apparently unified nature of the Code of Service Discipline, the Code maintained the control of the separate Services over their own forces by only permitting an officer or man alleged to have committed a service offence to be charged, dealt with and tried within the service of the Canadian Forces in which he was enrolled.⁸⁶ Exceptions were made in the case where he was attached or seconded to another service or was embarked on a vessel or aircraft of another service.⁸⁷

Jurisdiction as to the place of the offence was also broadened as far as the navy was concerned. Prior to the NDA both the army and the air force had jurisdiction over the offence no matter where it was committed. The navy, however, only had such jurisdiction for specific service offences and not with respect to the civil offences specified in section 89 of the *Naval Service Act, 1944*.⁸⁸ For civil offences the naval jurisdiction had existed only where the offence was committed outside Canada or within Canada

- (i) in any harbour, haven, or creek or on any lake or river; or
- (ii) in or on any property of the Naval Service, including naval establishments, ships and other vessels, aircraft and vehicles; or
- (iii) on any premises held by or on behalf of the Crown in right of Canada for naval or military or air force purposes; or
- (iv) in a canteen or sailor's home or any place of recreation placed at the disposal of or used by officers or men of the Naval Forces which is prescribed by the Minister . . .⁸⁹

It is interesting to note that it wasn't until the passage of the NDA that legislative authority was given to limit the application of the Code

⁸⁴*Supra*, note 41.

⁸⁵*Supra*, note 2, s. 60.

⁸⁶*Id.*, subs. 56(4).

⁸⁷*Id.*, subs. 56(5) (6).

⁸⁸*Supra*, note 28.

⁸⁹*Id.*, sub-subs. 90(2)(a).

of Service Discipline to females.⁹⁰ While such may have been the practice before, this was the first time that the practice was incorporated into a statute.

In addition to the changes in jurisdiction the NDA melded the names and powers of the courts martial specified in the previous legislation. The army and air force had referred to the highest form of court martial as a "General Court Martial." The navy had simply referred to it as a "Court Martial." The old army and air force "District Court Martial" had been known in the navy as a "Disciplinary Court." The new system retained the army and air force General Court Martial and combined part of the army and air force term with the navy term to form the Disciplinary Court Martial.

The punishments that were made available to service tribunals by the 1950 version of the NDA differ only slightly from those that are currently in force. Besides those punishments that are now listed in section 125 of the Act, the 1950 Act included just below "forfeiture of seniority" the punishments of "dismissal of an officer from the ship to which he belonged" and "forfeiture of service towards progressive increase in pay." In addition, at that time the punishment of a fine was higher in the scale of punishments than a severe reprimand or reprimand.⁹¹

Differences between the Services in the regulations dealing with minor punishments continued to exist after passage of the NDA. In keeping with tradition the army and air force still maintained different minor punishments from the navy.⁹² In some cases this is not surprising as "stoppage of grog" would have little effect on any army or air force personnel who were not issued grog.

With respect to the punishment of death, the original Act required only two-thirds of the members of the General Court Martial to concur with the punishment.⁹³ This was generally in keeping with the old *Naval Service Act, 1944*⁹⁴ and the *British Army Act*⁹⁵ and *Air Force Act*.⁹⁶

⁹⁰*Supra*, note 2, subs. 56(14). This provision will be repealed by *Bill C-27* (see *infra* note 111).

⁹¹*Id.*, s. 121.

⁹²E.g. Article 104.13 of the 1951 K.R. (Army) had extra work and drill, confinement to barracks and caution as minor punishments while Article 104.13 of the 1952 Q.R.C.N had deprivation of good conduct badges, extra work and drill, stoppage of leave, stoppage of grog, extra work and drill not exceeding two hours a day and caution.

⁹³*Supra*, note 2, subs. 121(3).

⁹⁴*Supra*, note 28, sub-subs. 98(1)(b).

⁹⁵*Supra*, note 57, subs. 48(8).

⁹⁶*Supra*, note 73, subs. 48(8).

That other basic tribunal for enforcing military discipline, the summary trial, saw its greatest change as a result of the passage of the NDA in the area of punishments. Prior to the 1950 NDA, the maximum period of detention that a Commanding Officer (CO) in the Canadian Army or RCAF could award was 28 days.⁹⁷ In the navy it was three calendar months.⁹⁸ The new Act specified that all COs could now award 90 days but included the safeguard of requiring any period in excess of 30 days to be approved by higher authority.⁹⁹ Evidently during the Second World War the 28 day limitation on detention powers for COs resulted in so many courts martial that, inevitably, they adversely affected the ongoing operations. It was felt that using the Navy standard as the common one would reduce the number of courts.¹⁰⁰ For the army and air force COs the powers of punishment were also increased by permitting the awarding of detention to non-commissioned officers with the approval of higher authority.¹⁰¹ For a delegated officer, however, the possible punishments available were restricted to a fine not exceeding \$10.00, a reprimand and minor punishments.¹⁰²

The first significant amendments to the NDA in the area of discipline came in 1952.¹⁰³ In particular, COs were given the authority to delegate powers of punishment of up to 14 days detention.¹⁰⁴ Unfortunately, while the committee debates on the NDA amendments in 1952 discuss the nature of the delegation authorized under the amendment, they do not provide any insight into the requirement for the increased power.¹⁰⁵

In addition to authorizing the delegation of the power to award detention, the 1952 amendment also added the power to award severe reprimands to the list of potential punishments for delegated officers.

⁹⁷*Supra*, note 57, subs. 46(2) and note 73, subs. 46(2).

⁹⁸*Supra*, note 28, subs. 101(2).

⁹⁹*Supra*, note 2, sub-subs. 136(2)(a).

¹⁰⁰See *The National Defence Act: Explanatory Material*, dated 1 Nov. 1950 prepared at National Defence Headquarters.

¹⁰¹*Supra*, note 2, sub-subs. 136(2)(b).

¹⁰²*Id.*, subs. 136(3).

¹⁰³*The Canadian Forces Act, 1952*, S.C. 1952, c.6.

¹⁰⁴*Id.*, subs. 2(8).

¹⁰⁵For the committee discussion, see the 1952 Debates of the House, Vol III, pp. 2414-15.

The punishment of "forfeiture of service towards progressive increase in pay" was abolished in that amendment and the scale of punishments was modified so that the fine was at the bottom of the scale just above minor punishments.¹⁰⁶ The reasons given for this latter change were that a \$5.00 to \$10.00 fine would be one of the least effective punishments available at a summary trial and should be lower in the scale than the severe reprimand or reprimand.¹⁰⁷ In this day and age of relatively high pay, fines are significantly greater than \$5.00 to \$10.00 and, considering the lack of publicity given severe reprimands and reprimands, the fine is now seen, in many cases, as a more severe punishment than either of the other two.

Between 1952 and the present day, most of the changes to the NDA have been of a procedural nature, mainly dealing with rights of appeal and terminology. One important exception came in 1959 when it was made mandatory that a court martial decision to award death be unanimous.¹⁰⁸ While the reorganization of the Canadian Forces through integration in 1965 and unification in 1968 had a major impact on the appearance and structure of the Forces, those upheavals had relatively little effect on the maintenance of discipline under the Code of Service Discipline. One result of integration was the issuance of a common set of Queens Regulations and Orders for all three services in 1965. The minor punishments for the three services were standardized at that time to those which are currently in force. Only "stoppage of grog" has been deleted as a minor punishment since that time.¹⁰⁹ This was done as an incidental amendment to other changes in 1982 as grog is no longer issued to naval personnel. Probably the major impact of integration and unification on discipline was a mixing of attitudes towards discipline due to the increased intermingling of members of the three former Services.

As a result of the *Canadian Charter of Rights and Freedoms*¹¹⁰ (the *Charter*) being proclaimed on 17 April 1982, the Canadian Forces are once again closely examining the Code of Service Discipline. Even prior to that time certain amendments were viewed as desirable and the preliminary work to have the amendments incorporated into the NDA was done. Unfortunately, for many reasons the pre-*Charter* amendments were never placed before the House of Commons. They are still

¹⁰⁶*Supra*, note 103, subs. 2(3)(4).

¹⁰⁷*Supra*, note 105 at p. 2414.

¹⁰⁸*An Act to amend the National Defence Act*, S.C. 1959, subs. 4(2).

¹⁰⁹This was deleted by Order in Council P.C. 1982-3153 of 14 Oct. 82.

¹¹⁰*Constitution Act, 1982*, Part I.

awaiting consideration at senior governmental levels. Further amendments to the Act have been drafted in order to bring the NDA into line with the requirements of the *Charter*. Those amendments and the amendments required by other government departments are incorporated in *Bill C-27*¹¹¹ that is before Parliament at the time of writing.

In addition to the proposed changes to the NDA to bring it into conformity with the *Charter*, some amendments have already been made to the regulations governing disciplinary procedures in order to maximize compliance. For instance, the time when a charge is being laid has been definitely established by requiring the charge report to be signed by an authorized individual.¹¹² Once signed, the charge is laid. In addition, the accused now is entitled to a copy of the charge report specifying the alleged offence(s) prior to trial.¹¹³ Furthermore, the right to elect trial by court martial has been increased to permit such an election whenever the accused is in danger of being sent to detention, losing his rank or receiving a significant fine.¹¹⁴

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 trial by 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 detention. From the operational commander's point of view, the latter option was preferable.

In addition to internal review of disciplinary procedures, there has also been an increased consideration of these matters by the courts. For instance, the jurisdiction of courts martial has been "read down" where an individual has been released from the forces so that the nature of the offence and the impact on discipline if the military failed

¹¹¹*Bill C-27, An Act to amend certain Acts having regard to the Canadian Charter of Rights and Freedoms*, Part III and Schedule II.

¹¹²Queen's Regulations and Orders for the Canadian Forces (QR&O), Vol II, article 106.01.

¹¹³QR&O article 106.04(7).

¹¹⁴QR&O article 108.31.

to take action must be considered before jurisdiction can be taken.¹¹⁵ In fact, the validity of the court martial system itself has been judicially considered¹¹⁶ as has the question of applying a different standard when sentencing a person subject to the Code of Service Discipline for an offence which is essentially similar to a civilian criminal offence.¹¹⁷ In both situations the validity of a separate military standard was accepted.

Undoubtedly the *Charter* will have a continuing effect on the discipline of the Canadian Forces for many years to come. As the courts interpret its application to the procedures used by the Canadian Forces to maintain the discipline of its members, those procedures may have to be modified to comply with the constitutional requirements. In addition, governmental policy outside the requirements of the constitution may also impact on the blueprint for discipline. Therefore, discipline in the Canadian Forces is not, and will not remain, static but rather will continue to attempt to balance the requirements of the military to control its personnel with the rights and liberties of those personnel as Canadian citizens.

¹¹⁵*R. v. Rutherford* (unreported), 1983, C.M.A.C. No. 173.

¹¹⁶*MacKay v. The Queen*, [1980] 2 S.C.R. 370, 114 D.L.R. (3d) 393, 54 C.C.C. (2d) 129.

¹¹⁷*R. v. MacDonald* (1983), 6 C.C.C. (3d) 551 (C.M.A.C.).

CONCLUSION

This article has attempted to provide a brief outline of the development of discipline in the Canadian Forces from its British beginnings to its current state. Much of the material is, of necessity, superficial as an in-depth analysis of the military law, and of the societal factors influencing that law, at any particular point in history would provide sufficient material for many books, let alone an article of this nature. Certain points, however, are evident. While the British nation, and later Canada, were evolving from an all-powerful monarchy to a monarchy under complete constitutional control, the military forces were undergoing a similar transformation. The strict, brutal and arbitrary disciplinary procedures and punishments specified by Richard I have gradually given way to procedures and punishments that are generally in keeping with the values of modern society.

The fact that the military system of justice is not identical to its civilian counterpart in no way detracts from its validity. The system is designed to maintain discipline within the Forces so that the Forces can carry out the role of protecting the nation. In order to accomplish

this aim, the disciplinary system must rely on the lessons of history while staying in touch with the values of the civilian population.

An undisciplined military force is a greater danger to Canada than to any foreign enemy. Therefore, those involved in the development of the disciplinary system must constantly keep in mind not only the pressing arguments being made to modify the system but also the reasons why the system has developed into its present form. The rules created to meet the disciplinary needs of a particular era in history should be rejected if they are no longer valid, but those disciplinary procedures which have proven useful and enduring in controlling military forces should be retained unless compelling reasons for change exist. To maintain morale and discipline in the Canadian Forces, we should continue to proceed on the trail of discipline with a progressive outlook using the torch of history to light the way.



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PREFACE

This journal is designed as a forum for those interested in military law in the broadest sense, including the law of armed conflict, to share the products of their research and experience. It is hoped that the journal will serve as a focal point for professional thought in the military legal community. It is also hoped that dissemination of this journal will assist in better integrating Canadian military law with more general bodies of law and in bringing Canadian military legal concerns before a wider audience.

The views expressed in articles, comments and reviews contained in this journal are those of the authors and do not necessarily reflect the opinion or the policy of the Canadian Forces, the Department of National Defence, or the government of Canada. The journal encourages frank discussion of legal issues.

SUBMISSION OF WRITINGS: Articles, comments and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, Canadian Forces JAG Journal, Director of Law/Training, Office of the Judge Advocate General, National Defence Headquarters, Ottawa, Canada, K1A 0K2.

Footnotes should be double-spaced and should appear as a separate appendix at the end of the text.

Footnotes should be numbered consecutively from the beginning to end of a writing.

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