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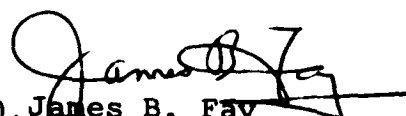


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NAME OF AUTHOR...James. B..Fay. ....  
TITLE OF THESIS..Canadian Military Criminal Law;.....  
...An Examination of Military Justice..  
.....  
UNIVERSITY.....Dalhousie University.....  
DEGREE FOR WHICH THESIS WAS PRESENTED...LLM .....  
YEAR THIS DEGREE GRANTED...1974 .....

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**CANADIAN MILITARY CRIMINAL LAW :**  
**AN EXAMINATION OF MILITARY JUSTICE**

by  
**James B. Fay**

**Submitted in partial fulfilment of the requirements  
for the Degree of LL.M at Dalhousie University,  
July 1974.**

*Approved by W. Charles  
for  
John Willis  
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DALHOUSIE UNIVERSITY

Date 31 July 1974

Author James B. Fay


Title Canadian Military Criminal Law:

An Examination of Military Justice

Department or School Dalhousie University Law School

Degree LLM Convocation \_\_\_\_\_ Year 1974

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## ABSTRACT

This thesis was written to accomplish three objectives. The first was to provide an outline of current Canadian military criminal law as enforced through the judicial processes of the Canadian Forces. The second was to critically examine both the substantive and procedural military criminal law within the Canadian Forces from the point of view of its suitability for the Canadian serviceman in the 1970's. The third objective was to advance suggestions for changes in the military criminal law and its judicial procedures to improve the provision of justice to the person tried under it, and thus to better serve the interests and objectives of the military society

The thesis is in three main parts. The first consists of the initial three chapters where factors governing the development of Canadian military law, its background, history and sources, and the jurisdiction of today's military criminal law are outlined. The following five chapters set out the current substantive and procedural military law in a sequence proceeding from a charge, through the investigation, the summary trial procedures, the court martial, and finally the reviews and appeals available to the convicted serviceman. In each of these chapters, strengths, weaknesses and defects in the current law, as outlined in the chapter, are examined and commented upon. The final segment is Chapter IX in which suggested changes to the Code of Service Discipline and the military judicial procedures are proposed.

## PREFACE AND ACKNOWLEDGEMENTS

### Preface

This thesis was originally conceived as a comparison of Canadian military criminal law with the Canadian civilian criminal law applied daily to the Canadian citizen. It was quickly realized that, like apples and oranges, the comparisons were few and the differences many and basic, and that the time would be better spent in outlining just what Canadian military criminal law encompasses, and what are its strengths and weaknesses in providing just and fair treatment to those under its jurisdiction.

This thesis is designed to interest and generally inform the following:

- (1) The student, who may be intrigued by this unfamiliar field of law, unfamiliar in the sense of knowledge held by the normal civilian practitioner in civilian life, but far from unfamiliar in history and fiction;
- (2) The practicing lawyer, who may find here a partial understanding of how the military judicial system works, and who will thus have a starting point when he must plead within that system;
- (3) The average military officer and man, who regrettably knows little about the military criminal processes that govern his life and career;

- (4) The senior military officer, in whose hands the development of military law rests; and finally,
- (5) The military legal officer, who will agree, and disagree, with many of the criticisms and conclusions set out here, hopefully more of the former than of the latter.

This thesis has concentrated on Canadian military law as it governs the trial procedures applicable to service tribunals. It is in no way intended to be exhaustive or to be a manual of military law.

As a final matter, it must be stated that where this thesis expresses opinions, it expresses the opinions of the writer. It in no way reflects the opinions of the Judge Advocate General, the Department of National Defence, or indeed the opinions of any person other than the author.

### Acknowledgements

Acknowledgements are sometimes unfair as many times the writer appears to be attempting to share the blame. This thesis however, good or bad, would never have been written without the devotion of Professor John Willis of Dalhousie University Law School to the project. Merit that may be assigned to this thesis is in no small way due to his unflagging support and critical analysis of the many drafts. A second acknowledgement must be made to Associate Professor Clayton Hutchins who, in war and peace, was part of the

military justice system within the Canadian Armed Forces.

Two final acknowledgements are offered to Colonel (Ret.) Jack Hollies, the first Chief Judge Advocate of the Canadian Forces, who taught by example many of the principles of judicial conduct upon which this thesis is based; and to Colonel Al Beaupre, the present Chief Judge Advocate of the Canadian Forces, who will be considering many of the problems that are outlined herein. Both of these officers have provided valuable advice and assistance and critical comment, though never complete agreement.

## I

A GENERAL INTRODUCTION TO CANADIAN MILITARY LAW AND  
SOME OF THE FACTORS THAT GOVERN ITS DEVELOPMENT

Introduction

The Canadian public has shown little real interest in the development of the Canadian military to its present peacetime stage, but that may be gradually changing. Since the early 1960's the activities of the Canadian Armed Forces, along with those of the armed forces of other countries, have become more and more subject to public examination and discussion. It is becoming evident that the time when military decisions and operations were made and conducted under circumstances that were rarely exposed to public view, has now passed. Matters that would have remained publically unknown until history eventually disinterred them, now may be published within hours of their occurrence. This has resulted, many times, in extensive public comment, usually of a critical nature.

There was the apparent casual burning of a thatch hut in Viet Nam by a United States serviceman. This act was given international publicity within days. There was an immediate public outcry, as the people who saw it shown on television or pictured in the newspapers, did not bother with the strong military reasons that were given to justify

the act, but only remembered the fact that it was done with a Zippo lighter, and, recalled the distress of the villagers. The destruction of that hut may have been fully supported by the existing military requirements of the operation that was being conducted, but that fact was lost completely in the public discussions that followed the event. The validity of a major military operation was subsequently called into question on humane grounds because of this one incident, and its publication.

Previously such small matters were rarely reviewed as they were rarely known. Today's citizen however, can watch and judge the military from the living room. Today's communications permit the citizens' views to be aired so contemporaneously with acts of the military that are brought to their attention as to create a new major consideration and constraint to be applied by the armed forces in determining a course of conduct.

Military law, as part of the military system, will not escape this developing public interest and its generated pressures. The rights of the citizen to protection under the law have become subjects of great interest and are under close examination in today's civilian society. The rights of the citizen in uniform are also involved. The passage of such Canadian legislation as the Bill of Rights,<sup>1</sup> the bail

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<sup>1</sup>R.S.C. 1970, App. III.

reform provisions of the Criminal Code,<sup>2</sup> and the rationale for the wiretapping legislation, are indicative of this concern with the individual, in or out of uniform. Because of this public awareness and interest in criminal law and individual rights, military law in peacetime has to consider and adapt to conditions and pressures that were unknown at the end of World War II, if it is to be accepted by the serviceman, the public and the courts of the 1970's as law suitable for application to a significant portion of the Canadian population. In the future the principle that justice must not only be done, but must also appear to be done, will achieve greater and greater importance as the Canadian military law matures.

#### Historical Development of Canadian Military Law

Canadian military law has its roots in the military law of the United Kingdom. When the Canadian Army was first organized under the Militia Act of 1868,<sup>3</sup> Canada adopted British military law for application to the new Canadian Army. This was a logical step as British forces had been present in Canada since early colonial days and were the only regular armed forces in the Dominion. Further, the Canadian Army was organized and trained to support the United Kingdom

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<sup>2</sup>Stat. of Canada (1970-71-72), Vol. I, c.37.

<sup>3</sup>Stat. of Canada 1868, c.40.



troops. The 1868 Militia Act was therefore not a Canadian attempt to create a Canadian military law. It merely incorporated the existing Army Act of the United Kingdom into the Canadian statute, making only minor changes to cater to different circumstances that existed in the new Dominion. The same approach was followed by the Canadian Parliament when the Royal Canadian Navy was organized in 1910. The United Kingdom Naval Disciplinary Act<sup>4</sup> was made applicable. On the creation of the Royal Canadian Air Force, the United Kingdom law governing the Royal Air Force was adapted and adopted for Canadian use. The modified United Kingdom Acts remained the governing statutes for the Canadian Army and the Royal Canadian Air Force until 1950. In 1944 however, the Royal Canadian Navy did develop through the Naval Services Act<sup>5</sup> its own disciplinary code. This was a first try to create a purely Canadian disciplinary code of conduct, and marked a step towards a Canadian military law, as opposed to the military law of the United Kingdom.

Following World War II, both the United Kingdom and the United States commenced studies of the military law applicable to their armed forces, with Canada as an interested observer. In Canada itself there was a review of all legislation that applied to the Canadian services. The

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<sup>4</sup>29 & 30 Vict., c.109.

<sup>5</sup>Stat. of Canada 1944-45, C.23.

result was the passage of the National Defence Act<sup>6</sup> in 1950. This Act ended the application of the United Kingdom statutes in Canada. For the first time military law in Canada was placed on a Canadian foundation. The National Defence Act provided for a single code of service discipline to be applied to all three Canadian services. Its enactment recognized that the military organization and considerations in Canada had reached a stage where it was necessary for Canada to pass its own laws for the government of its military. The National Defence Act remains today the formal legal basis for Canadian military law.

While the principles and the history of Canadian military law have their basis in the United Kingdom, the organization and the role of the Canadian Forces have followed such divergent courses from those pursued in the United Kingdom, that the current law as expressed in the United Kingdom statutes is not a factor that should affect the future development of the Canadian law. Such matters as integration, unification, peacekeeping roles, budget restraints, no real awareness by Canadians of a military organization outside of war, place Canada on a path separate from the United Kingdom where foreign commitments, attempts to maintain a super-power status, inter-service rivalry and a lengthy military history, require legislators to act on vastly different considerations from those that face Canada. The pre-1950 United Kingdom

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<sup>6</sup>Rev. Stat. Canada 1952, c.184.

Acts do however give the legislator, and the lawyer, the basis for understanding the principles, the general role and status of the military law in this country, as of course British common law provides for the present day Canadian law.

### Canadian Military Criminal Law - General Composition

Military law, as distinguished from civil law, is the law relating to and administered by military courts, and concerns itself with the trial and punishment of offences committed by officers, soldiers and other persons (eg sutlers and camp followers) who are from circumstances subjected, for the time being, to the same law as the soldier... the object of military law is to maintain discipline among the troops and other persons forming part of or following an army.<sup>7</sup>

This definition of military law, in the criminal sense, and the statement as to its objective, is as valid today for the Canadian Forces as it was for the British Forces when it was given in 1894. Current Canadian military law, as has been noted, is based on the National Defence Act. This might be termed the tip of the iceberg however, as the main body of Canadian military law is not found in statute form, but is in regulations and orders issued under the authority of the National Defence Act. These regulations and orders are as much a part of the military law of the Canadian Forces as any statute passed by Parliament. The scope and problems arising from such authority in relation to the

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<sup>7</sup>Manual of Military Law (U.K.), 1894 (3rd Ed.) p.6.

enforcement of military criminal law will be examined in Chapter II.

In addition to the orders and regulations, Canadian military law incorporates all offences created by the Criminal Code of Canada or any other Act of the Parliament of Canada, as well as all offences created by the laws of any country where the serviceman may be present. While the effect of these provisions will be examined in Chapter III, it might be pointed out that one result of the latter is to make servicemen outside Canada liable for criminal offences unknown in Canadian criminal law.

Thus while military law can be defined, the scope and content is not easily determined. The authority in the National Defence Act providing for the creation of military law through regulations and orders is so extensive as to have the effect of taking the responsibility for making of what must be termed a form of criminal law, from the hands of Parliament and placing it in the hands of individuals. This is not necessarily bad. If the military is to be a flexible and an effective organization, it must have the capacity to adapt to changing conditions. The approach adopted by the National Defence Act of granting general authority to make regulations is an ideal one, and it has given the Canadian Forces an ability to react quickly to altered circumstances. However it does also place a greater burden on the military to ensure that uncertainty and unfairness are avoided, and

the exercising of these wide powers are closely supervised and reviewed.

Factors Governing Future Development  
of Canadian Military Law

Military Law To Support The Military Society

The object of military law has been stated as being to maintain discipline among the members of the armed forces. However military law must also, in the wider sense, be designed so as to support the military system as a whole and to assist the military organization to achieve the ends for which it was created. An unrealistic code of conduct for the serviceman would defeat this aim. In creating military law for instance, it must be recognized that it must cater to the different emphasis that may be placed on conduct in the military as opposed to the civilian environment. No serviceman can be given the right to unilaterally leave the service. If he does so he is subject to the most severe penalties for desertion. A civilian, of course, is completely free to leave his employment with no penal sanctions. A civilian can combine with others to protest against management. The serviceman doing so may commit the offence of mutiny for which he may suffer death, even today in peacetime. Thus the requirements of the military organization, the requirements of military discipline, result in a vastly different emphasis being placed on the acts of the serviceman than would be applied to

the actions of a civilian, and military law, and indeed society, must take cognizance of, and accept, this fact.

The ultimate objective of the military in time of peace is to prepare for war to support the policies of the civil government. The military organization to meet this objective requires, as no other system, the highest standard of discipline able to function under the most adverse of conditions. Discipline can be defined as an attitude of respect for authority which is developed by leadership, precept and training. It is a state of mind that leads to a willingness to obey an order no matter how unpleasant the task to be performed. This is not a characteristic of the civilian community. It is the ultimate characteristic of the military organization. It is the responsibility of those who command to instill discipline in those they command. In doing so there must be the correction and the punishment of individuals. Fairness and justice are indispensable.

For the soldier the ultimate result of obedience to an order can be death in battle. The serviceman, to take such a risk, must have confidence in those who issue the orders and have the belief that the system he is called upon to support, and that the military system of which he is a part, are good ones, fair, and with regard for him as an individual. When the serviceman has confidence in his commanders and believes in the organization, there is discipline.

Military law achieves great importance when viewed in the context of the above. It is from military law that the serviceman receives his most tangible indication of the relationship between himself and those who command. It is under military law that he is tried and punished. If the military law system is a just system, then it will be recognized as such by the serviceman and thus it will promote and support the discipline upon which the military organization is based.

#### Civilian Control of the Military

It was stated earlier that present day military activities are falling under closer and closer examination by the public. This relatively new factor has added weight to a basic restraint that has historically applied to the armed forces of the UK, and subsequently to those of Canada, that is the principle that the military is completely subject to the control of the civil government. This relationship between the civil and military authorities, clearly incorporated in the National Defence Act, results in a fact of life that the military cannot ignore, that it is not independent and that it does not operate outside the framework of the normal Canadian society, but it is part of that society and as a result is subject to all the legal, social and even political pressures that are applied by individuals and groups to achieve their ends. The bilingual and bicultural movement

within Canada is probably the most recent example of this kind of pressure. Without expressing an opinion, it is safe to say that on occasion the pressures generated by the civilian society in relation to this problem resulted in changes and the adoption of courses of action within the military that would never have been considered otherwise. The Canadian military to exist has to be aware therefore, not only of its own requirements and objectives, but also the requirements and objectives that exist for the Canadian citizen, the civilian, as it is he who controls the forces, and indeed who enters and constitutes the forces.

The body of military law that governs the Canadian military must in its turn take into account this fact that the military is not master in its own house and that unfairness and injustice may well be redressed by the civilian society. For example, while service orders generally prohibit the individual serviceman from complaining with regard to service connected matters, except through service channels, such orders may go directly against the traditional right of the voter to communicate with his elected representatives. The serviceman, and certainly his dependents, will come to adopt this method of bringing injustice to the attention of those who rule the military, in spite of service orders, if they consider the system within the forces does not protect their rights.



With these thoughts in mind, it is clear that military law must be far more responsive to the needs and the demands of the Canadian civilian society than may have been the practice in the past. However such responsiveness cannot ignore the requirement that it also support the military organization in the achievement of its objectives. If it does not make any attempt to meet the demands of the civilian society, through the fault of the military, then undoubtedly it will be made to do so by direction of the civil government that will be responsive to such pressures. In such an event there exists the real danger of an over reaction and the resulting creation of law that may meet the civilian requirements, but fails to take into account the demands of the military. As an example, there may exist a need within the civilian community for an appeal system to permit citizens to take appeals from the decisions of quasi-judicial or administrative bodies to a federal court of record. The resulting legislation would have to exempt from its provisions the decisions of service tribunals that try as many as 8000 cases in a given year. The inundation that would result if the legislator was not aware of this fact alone, and merely contented himself with following the principle that what was good for one portion of society is good for another, need not be described. If a formal judicial appeal system was required for the forces in relation to summary trials, for example,

not only civilian considerations and principles would have to be applied, but also purely military requirements would have to be examined to determine the nature of the solution to the problem.

The civil criminal law is under review and there are pressures for changes to reflect new thinking and understanding in such fields as due process, punishment, arrest and incarceration, to cite a few. This has resulted, and will result, in new laws with new emphasis. These pressures for change also apply to the military law, but here the changes must come from within the military system, as far as possible, as it is within the military that the knowledge and the understanding of the requirements of the service to perform its role is found. Examine for instance some of the military considerations that have to be applied to homosexual activity within the forces, even though such activity is no longer criminal per se. There arises the danger of blackmail and resulting security risks. There still exists an abhorrence against such a pastime, legal though it may be. The tensions that would arise among individuals aboard ships, in small isolated units, would result in ever increasing disciplinary problems and loss of effectiveness of the whole organization. Further, if a senior rank was involved with a junior rank, such conduct would justify charges under the Code of Service Discipline. Such factors do not normally apply within the civilian environment, yet if they are

ignored within the military, they could well result in it becoming ineffective.

### Conclusion

Some space has been devoted in this chapter to the role and the development of the military in the Canadian society. These matters are important ones as military law is so closely bound to the requirements of the military organization. Military law cannot be examined in isolation. Thus while the military criminal law of Canada is becoming a distinctly Canadian body of law, it is still in an early stage of development. If it is to become an effective system it must develop under military and civilian pressures and considerations that did not apply when the National Defence Act was first created. As always, there will be a partnership between the civilian and military society, but because of the unique requirements of the military organization, the effective growth of Canadian military law is the responsibility of the Canadian Forces, a responsibility to be achieved by balancing the civilian standards of criminal justice with the demands of the military society.

## II

## SOURCES OF MILITARY LAW AND NOTIFICATION PROBLEMS

Introduction

As was outlined in the previous chapter, the military law of the Canadian Forces is a mixture of statute law, and regulations, orders and instructions that are issued pursuant to grants of authority contained in the National Defence Act. The wide range of the authority given by the National Defence Act to issue regulations, orders and instructions permits flexibility in creating or amending the Canadian military "law" to meet the changing needs of the Forces. The scope of this authority however, also creates problems of ensuring that those to whom the regulations apply are notified of the "law", and that the enforcement of military law, when charges are laid against a serviceman for the violation of such regulations, is fair and just. This chapter will initially define this problem of notification and review how it was dealt with before the National Defence Act was passed. It will then examine as to whether or not today, in the Canadian military law, there may be a mistaken application of the National Defence Act provisions in respect of deeming a serviceman to have been informed of an order when he is being tried for its contravention.

As a preliminary, a general review of present day

sources of the Canadian military law, where it may be found and of the persons authorized to issue regulations, orders and instructions to the Canadian Forces, is necessary.

### Basic Sources of Canadian Military Law

#### The Code of Service Discipline<sup>1</sup>

Canadian military law is based on the National Defence Act. The foundation for the military criminal law is in that portion of the Act known as the Code of Service Discipline. This Code sets out the disciplinary jurisdiction of the Forces, service offences and punishments, powers of arrest, the composition and jurisdiction of service tribunals, post-trial actions relating to findings and sentences, as well as appeal, review and petition procedures.

#### The Queen's Regulations and Orders

The Code of Service Discipline is not exhaustive by any means. It is expanded and explained in the Queen's Regulations and Orders For The Canadian Forces (QR&O). These are contained in three volumes, "Administrative", "Disciplinary" and "Financial" respectively. In Volume Two of QR&O are published the disciplinary, regulatory, procedural, and explanatory regulations, orders and instructions of the Governor in Council, the Minister of National Defence and

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<sup>1</sup>NDA Secs. 55-211 incl.

the Chief of Defence Staff.<sup>2</sup> Its composition can generally be compared to the Canadian Criminal Code in civilian society; the main difference being that while the Criminal Code is legislation by Parliament, Volume Two of QR&O consists mainly of regulations and orders. The end result is the same however, a code of criminal law. In possessing this type of criminal code the Forces are able to employ it to meet the Forces' requirements, easily effecting changes to meet changing circumstances. It has a flexibility not found in a statutory code.

#### Other Regulations, Orders and Instructions

Because the National Defence Act or Governor in Council or Ministerial regulations and orders may require explanation or amplification, or may authorize the Chief of Defence Staff to issue further orders on a subject, the Chief of Defence Staff publishes separate orders from those contained in QR&O. The most extensive group of orders of this nature are the Canadian Forces' Administrative Orders (CFAOs). These deal with the whole spectrum of military administration. Thus

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<sup>2</sup>For powers contained in the NDA see the following:

- (a) NDA sec. 12(1) - Governor in Council
- (b) NDA sec. 12(2) - Minister of National Defence
- (c) NDA sec. 13 - Limitation of Minister's powers
- (d) NDA sec. 12(3) - Treasury Board
- (e) NDA sec. 18 - Chief of Defence Staff Duties

the National Defence Act supplies the authority, the Governor in Council, the Minister or the Chief of Defence Staff issue orders that are published normally in QR&O, and subsequently the Chief of Defence Staff, on his own, may issue additional orders to the Canadian Forces that are found in such publications as CFAOs.<sup>3</sup>

Below the command level of the Chief of Defence Staff and Canadian Forces Headquarters, the structure of the Canadian Forces, broadly outlined, is that of a command, organized on a functional basis, such as Training Command or Maritime Command; a formation, which is a grouping of units for operational purposes, such as a brigade group; a base, which is an administrative unit providing support services, such as accommodation, for a number of units; and finally the unit. Orders published at all these levels of command may amplify and explain orders issued at a higher level, and may themselves contain prohibitions, performance requirements or procedures, the violation of which will constitute a service offence. The provisions in such orders that can subsequently form the basis of a charge under the Code of Service Discipline are also part of the military

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<sup>3</sup>QR&O, art. 1.23 - Authority of the CDS to issue orders and instructions.  
QR&O, art. 1.235 - Authority of other persons to issue orders and instructions.

criminal law of the Forces.<sup>4</sup>

It is apparent therefore, the serviceman is subject to a mass of orders, regulations and instructions, yet they are not law within the statutory sense. How they are made applicable to the Canadian serviceman is of major importance if he is to be fairly convicted for their violation, and awarded penal sanctions. Unfortunately, in this area, Canadian military law may contain deficiencies.

#### The Problem of Notification

The foregoing, and somewhat brief, general outlines provide background for an examination of the problem that the existence of the multitude of regulations, orders and instructions creates for the Forces when that body wishes to try a serviceman under military criminal law for breaking one. The problem arises because of the difference between a "law" as set out in the statute, such as a prohibition contained in the National Defence Act, and the "law" as contained in an order, such as a prohibition contained in a command or unit order. Generally, the principle is that

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<sup>4</sup>For background see the following:

- (a) QR&O, ch. 2 sec. 2 - Command
- (b) QR&O, art. 4.10 - Responsibilities of Officer commanding command
- (c) QR&O, art. 4.12 - Command orders
- (d) QR&O, art. 3.23 - Command of bases and other units
- (e) QR&O, art. 4.20 - General responsibility of commanding officer
- (f) QR&O, art. 4.21 - Standing Orders



everybody is deemed to have been informed of the law when the statute is passed. Thus no person can plead ignorance of a law as a defence. If the violation is not against a statutory law, for example the Criminal Code, then such a defence of ignorance might be available under military law, and generally the accused would have to be proven to have had knowledge or notification of the provisions of the order he allegedly violated before he could be convicted. These different degrees of proof could cause great difficulty in the administration of discipline, as the greatest part of the serviceman's daily existence is governed by the regulation or the order, and not the statute. To be required to prove the accused's personal knowledge of any particular one, beyond a reasonable doubt, at trial, would be extremely time consuming at least, if possible at all. The solution of course, is to place the order or regulation on the same level as the statutory law as far as the accused being deemed to know it, and thus take away from him his defence of ignorance. This is normally accomplished by inserting in the statutory law a procedure that, when followed in regard to an order or regulation, deems the accused to have been notified of the order or regulation and so prohibits him from pleading ignorance.

The National Defence Act contains a notification provision of this nature that is applicable to regulations,

orders and instructions issued to the Canadian Forces.<sup>5</sup> However the practice within Canadian military law is to apply this National Defence Act notification section to all regulations, orders and instructions within the Forces. In doing so Canadian military law has created a rule of law that was never part of the military law of Canada before 1950, and is today one that goes far beyond the military law of either the United States or the United Kingdom. It is one that may never have been intended by the framers of the legislation and furthermore, as will appear from what follows, it is extremely doubtful whether this present day practice is legally supportable under the existing legislation.

#### Pre-National Defence Act Classes of Orders

Prior to the passage of the National Defence Act, in the Canadian military law there were two general, but distinct, classes of orders issued for the government of the

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<sup>5</sup>NDA sec. 48(1) provides for the issuance of Governor in Council regulations setting out the requirements for publication. These regulations are contained in QR&O, art. 1.21.

Note: The text in this section has been written very generally so as not to lose the interest of any reader who has survived to this point. The following footnotes, (6 - 13 incl.) are specific authorities pertaining to the conclusions that are outlined.

three Canadian services. The first consisted of "general orders" and "regulations".<sup>6</sup> These were issued to the service concerned and were comparable to today's regulations and orders contained in QR&O and such publications as CFAOs. The second class was composed of all other orders, actually the orders issued within the services, such as unit or command orders. Except in the case of the Canadian Army,<sup>7</sup> these orders were not referred to in the Canadian legislation.

This distinction was maintained generally in the statutory provisions providing for their notification to those whom they concerned. The first class was covered by statutory authority that stated when certain procedures had been followed, the regulation or order was then deemed to be

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<sup>6</sup>"general orders" defined:

- (a) The Militia Act, R.S.C. 1927, c. 132 as amended by Stats. of Can. 1947, c. 21, s. 2(d).
- (b) The Naval Services Act, Stats. of Can. 1944-45, c. 23, s. 2(f).

"regulations"

- (a) The Militia Act, s. 139.
- (b) The Naval Services Act, s. 38.
- (c) The Royal Canadian Air Force Act, R.S.C. 1940, c. 15, s. 16(1).

<sup>7</sup>"other orders" are dealt with in The Militia Act, s. 137.

sufficiently notified to those whom it concerned.<sup>8</sup> For example, in the Canadian Army, the general order had to be published in the Canada Gazette. Once this was done, every person in the Canadian Army was deemed to have been notified of its provisions.<sup>9</sup> The plea of ignorance then only went to the question of punishment and not as to guilt or innocence.

When it came to the second class of orders, the navy and the air force, as mentioned, did not have any statutory provision for the notification to their members. In the case of these two services, the proof of notification was the same as would apply to any other fact at a criminal trial. The Canadian Army, possibly a bit more experienced in this field, did have included in its Militia Act a separate notification procedure from that applying to the class one orders, for its "other orders". These orders were considered notified when they were published at the unit.<sup>10</sup>

<sup>8</sup>General orders deemed to be notified:

- (a) The Militia Act, s. 136.
- (b) The Naval Services Act, s. 31.

Regulations to have the force of law:

- (a) The Militia Act, s. 140 and 141.
- (b) The Naval Services Act, s. 39 and 40.
- (c) The Royal Canadian Air Force Act, s. 16(2).

<sup>9</sup>The Militia Act, s. 136.

<sup>10</sup>The Militia Act, s. 137.

### Separate Charges

This distinction between classes of orders was clearly recognized in the way charges were laid for their violation. Both the Canadian Army and the Royal Canadian Air Force before 1950, in charging the contravention of orders, applied one of two offence sections contained in their governing United Kingdom Acts, depending on the nature or class of the order concerned. The sections were similar for both services. Under one section the serviceman was charged with neglecting "to obey general, local or other orders".<sup>11</sup> The term "general order" specifically excluded the King's Regulations (today's QR&O) "or any order in the nature of a regulation published for the general information and guidance of the forces". Charges for breaking these excluded orders were laid under a second section<sup>12</sup> alleging conduct or neglect to the prejudice of good order and discipline. There was here therefore, a continuation of the distinction between two classes of orders.

The Royal Canadian Navy, after the passage of the Naval Services Act of 1944, did not follow this procedure of having two different sections, and charged the failure to obey all orders and regulations under a section alleging

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<sup>11</sup>The Army Act, 1881 (Imp.), c. 58, s. 11.

<sup>12</sup>The Army Act, s. 40.

conduct or neglect to the prejudice of good order and discipline.<sup>13</sup> This was however, only a combining of the offence sections used by the other two services. The distinction between the classes was still to be found in other sections of that Act, and was evident when the question of proof of notification was examined.

#### Different Requirements of Proof

The importance of this distinction relates to the question of what had to be proved against the accused when he was on charge for having contravened an order. For example, if a soldier had been in an out of bounds area that had been so listed in a unit order, his trial would be quite different as far as evidence on this point of notification is concerned, than the trial of the soldier who was charged with having taken his rifle out of camp contrary to a general order.

The soldier who had been out of bounds could only be convicted, even if the facts were proved that he had been in the prohibited location, if it was proved beyond a reasonable doubt under the normal rules of evidence applicable to a criminal trial, that the order in question had in some way been physically dealt with so as to be brought to his attention, or that he was in a position to be acquainted with its contents and it was one that the accused ought in the ordin-

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<sup>13</sup>The Naval Services Act, s. 87.

ary course to know. Circumstances such as the order being posted in his barracks for some length of time, or that it had placed him on duty and he had appeared for that duty, would normally be adequate to satisfy a court that he knew or should have known of the order. However it would remain open to the accused to take the stand and swear that he did not know of the prohibition and have his evidence considered by the court as a defence.

The soldier who took the rifle out of camp contrary to the general order would be charged under a different offence section, and the question of whether he knew of the general order was subject to different rules of proof. The prosecutor in his case would merely have to prove his facts and then produce the general order and show that it had been published in the Canada Gazette, as required by the Militia Act. The accused was then prevented from pleading ignorance as he was deemed to have been notified of its contents.

In summary on this point, the requirements of proof against the accused were much greater in the case involving the unit order than the case involving the general order, and thus the accused had a much greater scope for defence in the first case than there was available in the second.

Bearing in mind the state of the law described above, which existed at the time of the passage of the National Defence Act and the accompanying regulations, the present

practice within the Canadian Forces of having no distinction between classes of orders and the requirements of proof of their notification, ought to find clear support in the provisions of the Act. In actual fact however the Act does not give it, and the Act and the regulations, when examined closely, support the continuation of the two classes of orders that existed before 1950 and their accompanying difference in requirements of proof to support a conviction.

#### Present Law of Notification

The National Defence Act replaced with one section all the earlier legislative provisions relating to the notification of orders.<sup>14</sup> It provides that "all regulations and all orders and instructions issued to the Canadian Forces shall be held to be sufficiently notified....." when they were published in accordance with Governor in Council regulations. These state that the regulations, orders and instructions had to be "received at the unit, base or other element" where the person was serving and the commanding officer then took such steps as he considered practical to bring them to the attention of, or make them available to, those whom they may concern.<sup>15</sup>

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<sup>14</sup>NDA sec. 48(1).

<sup>15</sup>QR&O, art. 1.21.



When this was done the National Defence Act then declares that ignorance of such orders, regulations or instructions was no excuse for their contravention.<sup>16</sup> In this manner "all regulations and all orders and instructions issued to the Canadian Forces" were placed in the same position as that occupied by regulations and general orders before the passage of the National Defence Act.

In the light of the history of the matter, the question now is: to what orders is the National Defence Act referring? Are they the general orders and regulations that were covered by the provisions of the Militia Act and the Naval Services Act, or does the National Defence Act now refer to local orders as well when it speaks of notification, a concept that did not exist previously in either the United Kingdom or Canada?

#### Wording of Notification Provisions

The National Defence Act section speaks of orders "issued to" the Canadian Forces. The only authorities that can issue such orders, orders applicable to all the Forces, are the Governor in Council, Treasury Board, the Minister and the Chief of Defence Staff. The use of the word "to" conforms to the similar provisions contained in the pre-1950

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<sup>16</sup>NDA sec. 128.

legislation such as the Militia Act. Also the Governor in Council regulations deal only with orders that are "received at the unit or base or other element". This wording indicates that at least unit, base or formation orders are excluded, as they certainly would not be "received" as they would be issued at that location.

#### Offence Section

The National Defence Act in providing for an offence section to be used to charge the contravention of orders adopted the approach followed in the earlier Naval Services Act, accepting the proposition that wording prohibiting an act, neglect or conduct to the prejudice of good order and discipline was wide enough to cover the violation of all orders, no matter what their source.<sup>17</sup> However this National Defence Act offence specifically distinguishes between classes of orders, much as had existed before. The Act makes an offence the contravention of:

- "(a) any of the provisions of this Act;
- (b) any regulations, orders or instructions published for the general information or guidance of the Canadian Forces or any part thereof; or
- (c) any general, garrison, unit, station, standing, local or other orders;"<sup>18</sup>

By setting out the two classes of orders, (b) and (c), in

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<sup>17</sup>NDA sec. 119.

<sup>18</sup>NDA sec. 119(3).

effect the same two classes that had existed under the previous legislation, those who drafted the section must have intended those classes to be continued under the new act. This wording of the offence section is consistent with the wording of the notification section of the Act and the Governor in Council regulations, and all are consistent with the conclusion that the National Defence Act did not change the law as it existed prior to 1950 by widening the notification provisions so as to have them apply to local orders, but merely consolidated the existing law.

#### Appeal Judgments

There has been no real examination of the problems of notification, as discussed in this chapter, in the decisions of either the Court Martial Appeal Board or the later Court Martial Appeal Court. In only one appeal, that of Platt v. The Queen<sup>19</sup> before the Court Martial Appeal Court in 1963, was there an issue involving the question whether or not the accused had received notification of a unit order. The Court did not examine the whole problem however, as the decision on this issue was based on the fact that there was no evidence "beyond a reasonable doubt that the order was brought to the attention of the accused in any way".<sup>20</sup> The

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<sup>19</sup>Court Martial Appeal Reports, Vol. II, (1963), p.213.

<sup>20</sup>Court Martial Appeal Reports, Vol. II, per Norris, J. p. 230.

judgment does contain the observation that the order that the accused allegedly violated "was not a standing order of which the accused might be presumed to have knowledge".<sup>20</sup> It is to be regretted that this line of thought was not pursued. It may indicate however that there was in the mind of the court some conception of a distinction between classes of orders and the requirements to prove their notification to those whom they concern.

The only other decision that might be worthy of note is that of the earlier Court Martial Appeal Board in 1957 in the appeal of Howe v. The Queen.<sup>21</sup> In this appeal the Crown argued that the National Defence Act general offence section<sup>22</sup> when used to charge the violation of an order, such as a unit order, did not require "mens rea" to be proved. Mr. Addy, in giving the judgment of the Board, rejected this argument and expressed the opinion that "mens rea" must be established in such a charge. In this case there was no issue as to notification of the particular order, only the defence of innocent purpose.

### Conclusion

It is submitted that this examination has established

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<sup>21</sup>Court Martial Appeal Reports, Vol. II, (1957), p.51.

<sup>22</sup>NDA sec. 118 (now sec. 119).

that in the Canadian military law of today there are two distinct classes of orders. There are those referred to in the National Defence Act as being "issued to" the Canadian Forces and that are subject to that Act's notification provision, as well as the Governor in Council Regulations. These are orders of the nature described in the offence section as:

"(b) any regulations, orders or instructions published for the general information or guidance of the Canadian Forces or any part thereof;".

The second class of orders are not subject to notification under the authority of the National Defence Act and are generally those described in the offence section as:

"(c) any general, garrison, unit, station, standing, local or other orders;".

As a result of this continuation of the distinction between classes of orders that existed before 1950, when a service tribunal today tries a serviceman on a charge of violating an order, the class of that order must be initially determined in order to establish the nature of the proof required to show the accused's knowledge. If the National Defence Act notification provision is applied to orders issued within the Forces as opposed to those "issued to" the Forces, the accused serviceman is deprived of the opportunity to present the defence of ignorance, without statutory authority. The practice within the Forces of placing all orders under the National Defence Act notification provision is on an

extremely doubtful legal foundation.

To complete these comments, it should be pointed out, as will be done many times in the course of this thesis, that the matters raised are not set out to indicate that unfairness or injustice does actually exist; in actual fact the opposite is true. In relation to this problem of notification of orders, the administrative practices within the Canadian Forces of publishing and posting all orders do normally give adequate notification to those whom they concern, and only rarely is notification an issue in a service trial. But because regulations, orders and instructions are such a major part of military law, any review of that law by legislators or courts, possibly inclined to be critical of procedures outside the framework of normal criminal law where such procedures affect the rights and liberties of the individual, should leave no doubt that the substantive law supports the procedural law of the Forces, and that justice and fairness are apparent in both.

## III

THE JURISDICTION OF THE CODE OF SERVICE DISCIPLINE  
OVER PERSONS AND OFFENCESIntroduction

The National Defence Act took a distinctly Canadian approach in the sections providing for the jurisdiction of military law over both persons and offences. The sections of the Act that give military courts jurisdiction over civilians, especially the families of servicemen posted and living outside Canada, and that incorporate foreign offences into the Canadian military law, will give rise to strong criticisms if ever the Canadian system of military justice is subjected to critical examination, such as has occurred in the United States. Both these areas of jurisdiction of Canadian military law are purely Canadian and they incorporate principles far beyond those found today in the United States or United Kingdom military law. Because of this alone, they deserve close examination.

This chapter is broken into a number of parts. The first will outline generally the jurisdiction of the Code over persons and examine in detail this jurisdiction over the families of servicemen serving outside Canada. The second will review the jurisdiction of the Code over service offences, the categories of such offences, and discuss the

effects of the Code provisions incorporating foreign offences into Canadian military law. The final part will outline recent developments within the United States military law that may well affect the future development of the Canadian military law in relation to jurisdiction over offences that are not purely military in nature.

### Jurisdiction Over Persons

#### Jurisdiction Over Members

Section 55 of the National Defence Act lists in detail the classes of persons to whom the Code of Service Discipline applies, as well as the conditions of that application. It applies at all times to the full time members of the Regular Force, and when one is organized, to the members of a Special Force. Members of the Reserve Force are made subject to the Code, but only under certain conditions, such as the officer or man being on duty, or being in uniform, or being within a defence establishment or undergoing training. Another uniformed group falling under the Code are those officers and men of foreign forces who may be attached to the Canadian Forces. A general court martial in Canada some years ago did try an officer of the Royal Air Force, attached to the Royal Canadian Air Force, for a number of service offences against the National Defence Act, and sentenced him to Dismissal From Her Majesty's Service. This Canadian



sentence was subsequently carried out in the United Kingdom.

#### Jurisdiction Over Civilians - General

In addition to members of the Forces, the Code has been made applicable to a number of classes of civilians. There are two main groups. The first consists of those civilians who are "serving with" the Canadian Forces under an agreement whereby they agreed to be subject to the Code.<sup>1</sup> School teachers employed overseas teaching Canadian service children are an example. The members of this class have voluntarily accepted the application of military law to their actions as one of the conditions of their employment. The second, and largest group, is composed of civilians who "accompany" any unit or element of the Canadian Forces.<sup>2</sup> This class includes the families of servicemen who go with the servicemen when they are sent outside Canada. At the present time there is only one major group of such civilians, the families of servicemen stationed in Germany. It is here that the validity of the application of military law can be seriously questioned, as it may not provide adequate safeguards for the rights of such civilians, and it is questionable if military law was ever designed to be applied to such an extensive civilian class under the circumstances that exist today.

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<sup>1</sup>NDA sec. 55(1)(j).

<sup>2</sup>NDA sec. 55(1)(f) and sec. 55(4).

### Periods of Limitation

The Code may remain applicable to an offender even though he has become, between the time of the offence and the time of the trial, a person no longer subject to the Code. The period of limitation for most offences is three years from the time of the crime to the date of the commencement of the service trial. There is however, a continuing liability for the offences of mutiny, desertion, absence without leave, and for any offence carrying with it the death penalty.<sup>3</sup> This is similar to the United Kingdom law, but the jurisdiction of the military courts of the United States ends when the serviceman is released from the forces.

### Limitation of Jurisdiction of United States

#### Military Courts Over Persons

Under the military law applicable to the United States Forces, there is no jurisdiction in a military court to try any person who is not a member of the forces. The background leading to this complete lack of jurisdiction over civilians has implications for the Canadian Forces, for until the mid-1950's United States service tribunals exercised jurisdiction over civilians similar to that now exercised by Canadian military courts. Commencing in 1955 how-

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<sup>3</sup>NDA sec. 59.

ever, the United States Supreme Court, in a series of decisions, held that court martial jurisdiction could not be exercised over any person who was not a member of the Armed Forces both at the time of the offence and the trial, and thus service courts only had jurisdiction over actual members of the forces.<sup>4</sup> These United States decisions, while primarily based on constitutional questions, were strongly influenced by an examination of the historical reasons for military courts, that is, to promote and maintain discipline within the armed forces.

#### The Canadian Serviceman's Family and Military Law

When the National Defence Act was passed, the present section regarding families falling within the "accompanying" class was not included. The "serving with" section was to apply to such groups as war correspondents, civilians who operated meteorological services or who provided canteen facilities. At that time the present day situation of having

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<sup>4</sup>For the United States cases on this question see the following:

- (a) Toth v. Quarles, 350 U.S. 11, (1955) - Discharged servicemen.
- (b) McElroy v. Guagliardo, 361 U.S. 281, (1960) - Civilian employees.
- (c) Grisham v. Hagan, 361 U.S. 278, (1960) - Civilian employees.
- (d) Kinsella v. Singleton, 361 U.S. 234, (1960) - Civilian employees.
- (e) Reid v. Covert, 354 U.S. 1, (1957) - Civilian dependents.

thousands of Canadian wives and children travelling with servicemen outside Canada was not provided for. When the situation did arise, the amendment to the Act placing them all in the classification of "camp followers" was made. The dependents then became the only group to which the Code applied, aside from the alleged spy for the enemy, where there is no element of real consent to the jurisdiction of military law. The serviceman accepted it by joining the forces. Those "serving with" the forces normally signed agreements and contracts.

#### Justification and Support

The justification of the blanket application of military law to dependents is based on the principle that the dependents overseas are part of the military community and that they are permitted to become part of that community because they accept military control. Their status as part of the military society requires the military to have disciplinary control. The effectiveness of that control in a foreign country depends on a readily available form of trial providing speedy punishment, and thus deterrence. The strongest argument today for maintaining the status quo is that there are no complaints from the civilians involved, or from the foreign countries where the military courts sit. There is also one signal advantage in having Canadian military courts try these dependents, and that is that trial under

Canadian military law ensures that the accused is not placed before unfamiliar foreign courts that may not be sympathetically inclined. Possibly this is an overriding consideration when all is said and done.

Further support for the Canadian situation is in the fact that historically the United Kingdom military law provided for jurisdiction of that law over civilians accompanying the forces, but only when those forces were on "active service". The term "active service" related to operations against an enemy, warlike operations in a foreign country or occupation duties in a foreign country.<sup>5</sup> The military law of the United Kingdom also established classes of civilians and offences over which service tribunals could exercise jurisdiction, but this is not as extensive as that of the Canadian military courts where there is no real distinction, and civilians have been generally placed in the same classification as the uniformed service member.

From a morale standpoint the presence of families in Europe is a necessity. It would be difficult, if not impossible, to fulfill adequately long range commitments to NATO unless the Canadian serviceman was able to bring his family with him when he left the country for a period of years. Experiments in the Canadian Army with the one year separated posting to Europe showed that the peacetime forces outside

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<sup>5</sup>Army Act (UK), 1955, s. 224(1).

of Canada could not be adequately trained, operate efficiently or be maintained at an effective strength under such a system. This was the United States experience also. The families are, because of their large numbers and the requirement for their presence in the foreign country with the serviceman, a new group not previously found in the history of military law, and it is a group to which the historical justification outlined above for the application of military law may not today completely apply, especially when it is considered that their numbers outnumber the army they accompany, possibly by three or more to one.

It can be argued that the families in Europe have voluntarily accepted the jurisdiction of military law because they didn't have to go. But the argument has no real validity. They are strongly encouraged, and urged, to go with the soldier in the Forces' interests. Further the social and family pressures for the maintenance of the family unit make their presence in Europe almost mandatory. The family generally has no real choice.

#### Disabilities of Civilian Under Code

The Canadian wife, subject to the Code in Europe, charged with a Canadian criminal offence, should receive treatment at least equal to that available before the Canadian criminal courts. Even though it may not be in the same form, it should be comparable. As families are not part of the

armed forces of Canada, the justification for procedures that support the affecting of what can be termed the civil rights of the serviceman, does not apply to them. It may be desirable, even necessary to try them, but the military law applying to them must recognize and provide for their different status, as far as possible.

The Canadian dependent under military law cannot obtain bail, has no rights as to the type or form of trial, no realistic access to selection of qualified civilian counsel, no rights with regard to a jury, no access to legal aid assistance, no rights to appeal sentences to a judicial body, and indeed the range of sentences that can be awarded is severely restricted in comparison to the range available to the civilian criminal court. However, as will be evident in the review of courts martial, the accused has been given rights under the military law that are not available to the normal Canadian civilian before the Canadian civil criminal courts. While this is a plus factor, it does not offset the defects that may exist, which may be acceptable for the disciplining of the serviceman, but are not so for his family.

#### Service Tribunals Considered Necessary - For Members

The leading Canadian judgment on the justification for service tribunals generally is that of the Supreme Court

of Canada in Regina and Archer v. White.<sup>6</sup> This case upheld the necessity for such courts, but dealt with the matter purely on the basis of their necessity for the administration of discipline with regard to the actual members of the Forces. The judgment, given before the Bill of Rights, in no way supports the extension of the jurisdiction over civilians, especially over those who would be "accompanying" rather than "serving with" the Forces. None of the reasons for judgment in this appeal are applicable to support the trial of the members of the families of the serviceman overseas.

Rand, J., in his decision, stressed the voluntary acceptance by the member of his military status when he enrolls and becomes subject to the military law, and pointed out that that law is designed for the "administration of discipline by men sharing a special life in which those who are to judge participate". Such an approach does not support the application of that law to a civilian whose only real connection with the Forces is one of marriage to a serviceman and a questionable voluntary acceptance of military law because she wishes to be with her husband.

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<sup>6</sup>Regina and Archer v. White, (1956) S.C.R. 154. This case was based on an appeal by a member of the Royal Canadian Mounted Police from a conviction under the Royal Canadian Mounted Police Act, R.S.C. 1952, c. 241. The Supreme Court in dismissing the appeal, related the requirements of the RCMP to maintain discipline within the force to the similar requirements of the military. All decisions in this appeal were based on the application of military law and the position of military courts to the case being appealed.



## Conclusion and Suggestions

Having laid the ground for the proposition that military law is not, in its present form, and especially in procedural matters, either suitable or adequate to provide for the just trial and punishment of the civilian dependent, some conclusion should be advanced as to how the system could be strengthened. Any changes should not alter the principle that it is highly desirable that Canadian dependents should, whenever possible, be tried by Canadian service tribunals as opposed to trial under foreign law before foreign courts. However it must be recognized that the families of servicemen, while subject to military law, are a group requiring different procedures for trial and punishment from those that are utilized for the service member. Procedural military law therefore should permit their trial within the military society, but trial as closely as possible to that they would receive before the Canadian criminal courts. Because of the powers of the Governor in Council and the Minister, most of that procedural law could be established by regulation.

The Governor in Council or the Minister, by either amending existing regulations or by issuing new ones could establish procedures to:

- (1) provide bail for civilian accused;
- (2) provide a special general court martial with powers

similar to those of the civil courts, adapted to the military environment; and  
(3) provide trial by jury.

With regard to the problem of appeal of a sentence to a civilian court, such as the Court Martial Appeal Court, and the clothing of a court martial with a range of sentences to include suspension and conditional and unconditional discharges, the National Defence Act would have to be amended. This somewhat lengthy procedure would be amply justified however by the principles of criminal justice involved.

The access to civilian defence counsel by the civilian accused would be primarily a matter of administration.

These procedures could be created and adopted within the framework of the present military court system. Practically speaking, the numbers of civilians tried by military courts are not large and those conducting such trials are normally well qualified to adapt to such new procedural law, yet to retain the essential military connection that a service court should have. There are, because of the nature of his profession and his acceptance of the law of the Forces that he joined, good and valid reasons for the serviceman to be placed under the additional liabilities imposed under military law. Such reasons do not apply to the family of the serviceman, whose offences normally cannot be said to affect the actual discipline of the Forces, and their different status should be reflected in the military law that is to be applied to try and punish them.

## Jurisdiction Over Offences

### Introduction

The term "service offence" is defined in the National Defence Act as an offence under that Act, "the Criminal Code or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline".<sup>7</sup> In incorporating domestic criminal offences the Canadian Code of Service Discipline is merely following the pattern of the United Kingdom law. It has however gone a step farther than that law by also incorporating foreign offences. This is a uniquely Canadian legislative provision, and under the conditions of today, has ramifications that may result in injustice to an accused. Before examining this aspect of the Code however, a description of the categories of service offences would be helpful.

### Categories of Service Offences

Service offences can be broken down into categories relating to the nature of the conduct prohibited. The initial, and largest, group consists of what can be described as disciplinary offences. These are offences that are peculiar to armed forces and include offences relating to such matters as misconduct in the presence of the enemy, insubordination,

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<sup>7</sup>NDA sec. 2.

desertion, absence without leave, negligent performance of duties, offences pertaining to service custody and arrest, as well as other sundry matters.

A second category consists of offences primarily criminal in nature. The specific offences of stealing, conspiracy and receiving are in this category. The third group consists of those offences that do not fall squarely within either of the other two but contain elements of both civilian and military crimes. The offence of striking a superior officer, for example, contains the civilian criminal element of assault, but the military element of disrespect for authority and superiors is its major thrust. This service offence, though possibly only a simple assault under civilian criminal law standards, has obvious military ramifications, and the penalty of life imprisonment as a maximum punishment underlines the seriousness of the charge within the military society.

#### General Offence Sections

In addition to the offences falling clearly within the three categories outlined above, the Code contains three general offence sections that widen the scope of jurisdiction of Canadian military law for the trial of offences to an extent where it is almost unlimited.

The first is a section that has been called "The Devil's Article". This is an omnibus offence found in all

military codes of conduct and it prohibits, in Canadian military law, "any act, conduct, disorder or neglect to the prejudice of good order and discipline".<sup>8</sup> This section was referred to in the previous chapter in relation to the charging of offenders for violation of regulations, orders or instructions. Because of its breadth, and the fact that convictions under it are normally based on general service knowledge and custom, it is a controversial offence. It is however a basic offence section in any code of military law.<sup>9</sup>

The second offence section of a general nature is one providing that any act contrary to the Criminal Code of Canada or of any other Act of the Parliament of Canada, is an offence under the Code of Service Discipline.<sup>10</sup> This section incorporates into military law all civilian criminal offences, and like "The Devil's Article" will be in all military codes. Under this provision the civilian criminal offence of impaired driving, for example, becomes a service offence, as do the civilian offences of possession of drugs, trafficking and customs' violations created under other Acts of Parliament. The section does not however bring with it

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<sup>8</sup>NDA sec. 119.

<sup>9</sup>For a detailed review of this purely military offence see "The Devil's Article", by Wing Commander D. B. Nichols, The Military Law Review, (U.S.) Oct. 1969, 111 (Department of the Army Pamphlet 27-100-22).

<sup>10</sup>NDA sec. 120.

any of the procedural law or the administrative provisions of the Criminal Code or the other Acts, beyond those required to define or explain the offence. This has raised some interesting problems for the military lawyer. Suppose for example he is acting in a case before a military court where the accused is charged with having a blood alcohol count over .08. While the Criminal Code procedures are clear as to the production of evidence relating to the proof of certificates, such procedures are not applicable in the military court and recourse must be had to proving all elements of the case under rules of evidence that would apply if the Criminal Code provisions had never been passed.

The third of the general offence sections is one providing that when an officer or man is serving outside Canada, (and this includes dependents and other civilians), an act or omission that would be an offence if committed by a person subject to the foreign law of the place where the officer or man is serving, is an offence under the Code of Service Discipline when committed by the officer or man.<sup>11</sup> The effect of this is to take into military law all the offences of any country where Canada may have troops. In enacting this section, Canada has gone much further than the United States or the United Kingdom, where foreign law is not made a part of their military law. Where a foreign offence is committed by

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<sup>11</sup>NDA sec. 121.

a serviceman of the United States or the United Kingdom forces, the service courts only have jurisdiction if the circumstances of that act are such that they are also capable of supporting a charge under a United States or United Kingdom statute. If no specific statute has been violated, then the approach used in both these forces is to employ the general offence relating to acts or conduct to the prejudice of good order and discipline. If this general provision cannot be made to apply, then the act of the serviceman that constituted the offence against the foreign law is left to the courts of that country.

A somewhat similar, but restricted, authority is contained in the Canadian Criminal Code<sup>12</sup> where jurisdiction has been given to Canadian criminal courts to try members of the Public Service who commit offences outside Canada. However the offence must be one that is an offence under the laws of the foreign country and also one that, if committed in Canada, would be an offence punishable by indictment. Here therefore, while the proof of foreign law as to the existence of the foreign offence is required, the conviction is really for a Canadian criminal indictable offence and not purely a foreign offence, as provided for in the National Defence Act.

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<sup>12</sup>Can C.C., sec. 6(2)

The National Defence Act also contains a section<sup>13</sup> giving the Canadian civil courts jurisdiction to try offences committed outside Canada by a person subject to the Code of Service Discipline, if the offence was one that, if committed in Canada, would be within the competence of the Canadian criminal courts to try. This authority has never been exercised as far as can be ascertained. It is slightly wider in its application than the Criminal Code section, and is intended to provide a reserve of authority for the Canadian criminal courts to allow civil authorities to step in if Canadian military justice were to prove inadequate to deal with a particular case.

#### Primary Jurisdiction of Canadian Civilian Courts

To this point the review has concentrated mainly on the jurisdiction of the military, and its courts, over the trial of offences. The National Defence Act however has insured that, in relation to crimes committed within Canada, the civilian courts are in the primary and dominant position. The Act prohibits the trial by a service tribunal of the criminal offences of murder, rape and manslaughter committed within Canada.<sup>14</sup> Further, the civilian courts retain jurisdiction over any offence committed within Canada and tri-

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<sup>13</sup>NDA sec. 231.

<sup>14</sup>NDA sec. 60.



able by a civilian court.<sup>15</sup> If the civilian courts try an accused for an offence, that trial is a bar to any future trial by a military court for the same offence.<sup>16</sup> The converse is not true however, as the Canadian civilian courts may try a serviceman for a criminal offence even though a service tribunal has previously tried him for the same offence. The National Defence Act only requires that the civilian court take into account any sentence awarded by the service court when it sentences the accused.<sup>17</sup> In actual practice though, little conflict arises as military authorities in Canada invariably will discuss with the civilian authorities any case on which it is proposed to take action, if it is considered that the case is one that those authorities may have an interest in prosecuting. This is especially true of offences involving drugs or large thefts, where both servicemen and civilians are involved. Finally there is also the National Defence Act authority that gives Canadian civilian courts jurisdiction to try Canadian criminal offences committed outside Canada by any person subject to the Code, mentioned earlier.<sup>18</sup>

The effect of all these provisions is to permit the

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<sup>15</sup>NDA sec. 61(1).

<sup>16</sup>NDA sec. 56(1).

<sup>17</sup>NDA sec. 61(2).

<sup>18</sup>NDA sec. 231.

the removal from the military the jurisdiction to try a criminal offence, and to allow the civilian authorities to restrict service courts to the trial of purely military offences, those that were earlier classed as disciplinary. These provisions represent a good example of the maintenance of the civilian control factor described in Chapter I.

### Foreign Offences as Canadian Service Offences

#### Background

When the National Defence Act was passed in 1950 there was no provision relating to foreign offences. The offence section was inserted in 1952 when Canadian troops were first dispatched outside Canada to Germany for lengthy peacetime service. Military law for the Canadian Forces was at that time extended far beyond what had previously existed. The justification for this extension was that Canada did not wish its troops to be subject to the jurisdiction of the foreign courts, yet wished to ensure that offences against foreign law could be adequately dealt with by Canadian service courts when necessary. This objective was achieved, and under the conditions that existed in Europe in 1952, it was a highly desirable one. However over 20 years later the application of this jurisdiction by military courts over foreign offences, without limitation, may not be as justifiable as it once was.

### Scope

The length to which the provisions incorporating all foreign offences into Canadian military law could be extended can be demonstrated by considering the fact that, while the German Penal Code contains the main body of German substantive criminal law, there are criminal and penal provisions contained in such laws as the Press Law, the Pure Food Law, the Narcotics Law, the Traffic Laws, the Hunting and Fishing Laws, the Tobacco Tax Law as well as in many others. All offences in all these laws are service offences when committed by persons subject to the Code. It should be pointed out also, that this provision regarding foreign law offences, has an effect similar to that relating to Canadian Criminal Code offences being service offences: it only takes into the Canadian law the offence and not any of the administrative or procedural laws that may surround it in German law.

### Lack of Justification Today

Earlier in this chapter critical comments were made on the application of military law, without effective limitation, to the families of servicemen overseas. Similar critical comments apply to this total incorporation of foreign offences into Canadian military law, and the wholesale application of them to Canadian servicemen and civilians. When

Canadians and their families first went to Europe in the early 1950's, that country was still recovering from the devastation of the war and was occupied by the Allies. The memories of that war were still vivid enough in Canada to cause the government of that day to adopt a policy of ensuring that its servicemen and their dependents would not be tried by those German courts. The resulting agreement was that the German courts had no jurisdiction in those early days and Canada undertook to protect the German rights through its own courts and incorporated the German offences into its military law.

In the 20 years since that time the fears and feelings that existed then have largely evaporated. In 1974 the situation is completely different from the one that supported the original amendment to the Act to take all foreign offences into Canadian law. German law and German offences are routinely applied by German courts to foreign nationals, including Canadians, such as tourists, who travel to that country. Distrust of these foreign courts cannot be considered a factor today, as it may have been in 1952. Also worthy of note is the fact that the United States and the United Kingdom, who over the years have maintained much larger forces in Germany than Canada, complete with dependents, have encountered no real difficulty in either controlling their dependents or troops or maintaining discipline, even though they do not have such provisions as are in the

Canadian Code of Service Discipline. As described earlier, purely foreign offences are left to foreign courts.

It is true that under international agreements between Canada and West Germany the question of jurisdiction of West German courts over Canadian servicemen and families has been resolved until today there is a situation much as exists in Canada between the civil and military courts. In spite of this however, the Canadian jurisdiction is so wide that it stands out as a jurisdiction that may well risk injustice, with no compensating military or civilian reasons to justify it.

#### Trial of Foreign Offence Not Known in Canadian Criminal Law

Consider the position of the Canadian accused who is being tried before a Canadian military court in Germany on the German criminal charge of causing death by negligence, contrary to section 222 of the German Penal Code. The degree of negligence required for conviction is generally any amount, and would cover a range of negligence from the minor negligence of leaving a cigarette burning that subsequently burns a hole in a table to the gross negligence of driving an automobile at a high rate of speed at night without lights and defective brakes. The definition of criminal negligence employed by the German courts is thus quite different from the one that would be used by the Canadian criminal courts

in trying negligence cases.<sup>19</sup>

The offence under the German Penal Code is not an offence under the Canadian criminal law in Canada. In its scope, it has no relationship to Canadian criminal offences, as is required by the more realistic criminal code provisions pertaining to members of the Public Service outside Canada, mentioned earlier. Military law has made it a criminal offence outside Canada for those that military law regulates however, and therefore has placed Canadian military courts in the position of having to enforce foreign law, but that enforcement being undertaken with no regard for the detail of the foreign law involved. The Canadian court is required to make a finding as to whether the foreign offence was committed, but in making the finding it does not deal with the question as to what a German court would find or how that court would reach the finding.

The accused before the Canadian military court is thus deprived of possible defences that would be available to him before the German court. This applies especially to defences arising from the procedural law, which is not incorporated into the Canadian Code. It is entirely possible to have a case of this nature tried by a military court and a conviction made even though the expert testimony as to the

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<sup>19</sup> See Mazerolle v. The Queen, Court Martial Appeal Reports, Vol. II, 131.

German law was to the effect that while legally possible, the charge under the particular section of the German Penal Code would be rarely, if ever, laid in German courts as the German procedural law required the use of another offence section to charge the accused, under the circumstances of that particular case. Before a German court this defence could be pleaded. Before a Canadian court it cannot. The Canadian serviceman, or civilian subject to the Code of Service Discipline, faces two aspects of the implementation of this Canadian offence section that can be termed highly unfair. The first is that there is a strong possibility of being convicted of a foreign offence by a Canadian court, even though a German court would not convict. The second is that the Canadian accused may well find himself convicted of a criminal offence, though if it had occurred in Canada it might be only a matter for settlement between insurance companies with no taint of criminal liability. It is dangers such as this that make this section of the National Defence Act so hard to justify today. The justification should be obvious. It is not.

### Conclusion

To conclude this portion of the chapter, two general statements must be made. The first involves the general breakdown of service offences outlined at the beginning of it. If ever a decision is made that Canadian military law

requires some revision to bring some aspects of it more clearly into step with Canadian civilian criminal law, categories of offences similar to those set out herein may well have to be formally created and defined by legislation or regulation to permit new procedures reflecting new approaches. This would not be a new concept for Canada as regulations of this nature were passed as a result of the Bill of Rights. At that time two classes of offences were created,<sup>20</sup> one of purely military nature and one of offences having civilian criminal aspects. In discussing summary trials and courts martial, this topic will be examined in greater detail.

The second comment involves foreign offences being given the status of service offences. Canada has adopted an approach that could be a most dangerous one in terms of rendering justice and appearing to do so. It is one that is not followed in the military law of the two countries with which Canada shares its legal history. The requirement for such a wide jurisdiction under the circumstances that exist today is not apparent. While such a situation might be argued to be acceptable for application to a member of the Forces, its application to the members of the families with the serviceman overseas, raises greater questions of fairness. There still exists today the requirement that the Forces be able to discipline its members. But should it be possible for a Can-

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<sup>20</sup>QR&O, art. 108.31.



adian citizen to be convicted by a military court of a foreign offence; should not a purely foreign offence, especially in a country such as West Germany, be left to the foreign courts and the foreign law? The United States and the United Kingdom practice appears far more correct than the Canadian, and certainly seems to provide more apparent justice for the accused.

#### United States "Service Connected" Offences

Some space has been devoted herein to the United States law on the jurisdiction of its military courts over its citizens. This has been done because what has been done in the United States may well enable the Canadian military lawyer to foretell, to some extent, possible developments in the Canadian law. Canada today does not remain unaffected by the social pressures that exist in the United States, and when their military law(that looks, as Canadian military law does too, to the United Kingdom military law for its beginning) undergoes a basic change because of the changed approach of their courts, the possible implications for Canada should be examined.

Such a basic change occurred in the Supreme Court of the United States 1969 judgment in the case of O'callahan v. Parker.<sup>21</sup> This decision was continuation of the earlier

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<sup>21</sup>O'Callahan v. Parker, 395 U.S. 258.

judgments restricting the jurisdiction of military courts to only members of the forces. The Supreme Court ruled here that military courts only had jurisdiction to try service members for crimes that were "service connected", and if there was no "service connection" then the accused must be tried by the civilian courts. Prior to that time the United States position had been that the status of the serviceman gave jurisdiction to the military court. In general this is the situation today in Canada. In the United States forces today however, not only must the accused be a serviceman, but the offence itself must be "service connected".

The accused O'Callahan was convicted by a court martial in Hawaii of attempted rape, housebreaking and assault with attempt to rape, in violation of the Uniform Code of Military Justice. He was sentenced to ten years imprisonment. At the time he committed the offences he was on leave, off base, and the person attacked and the place entered were civilian. The whole of the crime had no military connection beyond the fact that the accused was a serviceman.

The majority decision of the United States Supreme Court rested on United States constitutional law, but again, as in earlier cases, the Supreme Court examined the background and the justification for military law and military tribunals. The court reaffirmed and recognized that there is a need for specialized military courts utilizing procedures different from those of the regular civilian courts, and possibly

operating less favourably to an accused. It took the view however that the justification for that system is based on the special needs of the military. They pointed out that historically the United Kingdom military law, and the subsequent development of the United States military law following the War of Independence, was based on the trial of offences related to military discipline, and that the trial by service courts of acts that were not so related and that were common law offences, was to be exercised very sparingly, and that the exercise by the military of such power was always suspect. In the result they went beyond the examination of the accused's status as a serviceman and added a new test, an examination of the nature of the offence.

The importance of this decision to the Canadian Forces does not rest on the fact that there are unrestrained trials by service tribunals of civil offences committed by servicemen in Canada. In actual fact the service connection is almost always followed, in practice. Its importance lies in the fact that, aside from formally greatly restricting the jurisdiction of United States military courts, it considered factors that are as valid in Canada as in the United States. Aside from the purely United States constitutional aspects, the court reviewed both the British and United States history in this field. It generally examined and commented upon the practices and procedures of courts martial. It discussed the application of military law in times of peace and the result-

ing deprivation of civil rights. The bearing of the case on Canadian military law is to give strength to the proposition that that law must be brought as closely as possible, bearing in mind the requirements of the military organization, to the civilian criminal law, and the rights of those falling under the jurisdiction of military law must be protected, again having regard to the needs and the role of the military society. The Supreme Court of Canada in its judgment in Regina and Archer v. White, referred to earlier, considered many of the matters discussed by the Supreme Court of the United States in support of its judgment.

## IV

PRE-SUMMARY TRIAL PROBLEMS AND  
THE ROLES AND THE RESPONSIBILITIES OF THE COMMANDING OFFICERIntroduction

The summary trial is a military form of trial under which an accused is tried for a service offence by a single officer who, acting in a judicial role, hears evidence, normally makes a finding as to guilt or innocence, and passes sentence if he convicts. This chapter will examine two areas of concern that arise in the period between the commission of the offence and the holding of the summary trial. The first pertains to the creation and laying of charges against those subject to the Code. The second relates to the conflicting, and possibly incompatible, roles and responsibilities of the commanding officer in the pre-trial procedures. The actual conduct of a summary trial will be examined in Chapter V, while the second method of service trial, that of court martial, will be the subject of Chapter VII.

The Creation and Laying of Charges

## Charges

"For the purposes of proceedings under the Code of Service Discipline a charge is a formal accusation that a

person amenable to that Code has committed a service offence".<sup>1</sup> This Chief of Defence Staff definition in QR&O contains the requirement that there be some "formal accusation" to create a charge. As will become evident, the procedural law within the Canadian military law fails to provide for such an occurrence before the commencement of the summary trial, at the very earliest.

#### Regulations and Orders

##### Governing Pre-Summary Trial Procedure

Before proceeding further, it would be beneficial to outline what the regulations and orders actually do provide for a pre-summary trial procedure. The National Defence Act, regulations and orders contained in QR&O, as well as the Notes therein explaining the regulations, envisage the receipt by some authority, not indicated, of a "complaint". This is "an informal report that an offence has been committed".<sup>2</sup> A charge, as defined in the previous paragraph, is then created and laid. There is an absence of regulations on this aspect. The National Defence Act then provides that "when a charge has been laid" there shall be an investigation "forthwith".<sup>3</sup> Regulations of the Governor in Council require

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<sup>1</sup>QR&O, art. 106.01.

<sup>2</sup>QR&O, art. 107.01, Note A.

<sup>3</sup>NDA sec. 139.

that this investigation of a charge should be conducted by the commanding officer or any officer acting under the authority of the commanding officer.<sup>4</sup> The commanding officer receives the report of the investigation, if he has not conducted it himself, and must then decide on one of two courses of action after he has reviewed it.<sup>5</sup> The first is to decide that the charge should be proceeded with. From this decision flow other options as to how it will be dealt with. These will be examined in detail later. The other course of action open at this stage is to dismiss the charge, that is as a competent authority, making a formal decision that the charge will not be further proceeded with. This term "dismiss"<sup>6</sup> is used in a military legal sense and should not be confused with the term as it is used in civilian criminal procedures. The National Defence Act provides that the dismissal of a service offence prevents any subsequent trial by a service tribunal in respect of that offence, or any other offence of which that accused might have been found guilty on that charge.<sup>7</sup> One other rule of procedure that should be noted at this time relates to the requirement that all charges against an accused be initially recorded on a

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<sup>4</sup>QR&O, art. 107.02.

<sup>5</sup>QR&O, art. 107.04.

<sup>6</sup>QR&O, art. 101.015.

<sup>7</sup>NDA sec. 56(1).

form known as a Charge Report.<sup>8</sup> There are no other significant applicable regulations or orders.

### The Charge Report

As mentioned, the regulations require that all charges, with the exception of those against civilians who are not subject to summary trial but only to trial by court martial, be initially recorded on a Charge Report.<sup>9</sup> This form sets out the name and details of the accused, and the offence. It may also list witnesses. It is unsigned, and while it contains the statement that the accused is charged, it fails to give any indication by whom the charge is made or when it was made.<sup>10</sup> The accused does not receive a copy of the Charge Report nor has any formal knowledge of its contents until he is paraded before the officer who is to try him, usually his commanding officer, and it is read to him to commence his summary trial. The Charge Report is the only accusatory document before the commanding officer.

### Drafting of a Charge

In a unit there will have been the decision to lay a charge made by some person in authority. This decision

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<sup>8</sup>QR&O, art. 106.02(1).

<sup>9</sup>QR&O, art. 106.02, Note A.

<sup>10</sup>QR&O, Vol. II, Ch. 106, sec. 2.



could be taken by a non-commissioned officer, a commissioned officer or even by the commanding officer. While the accused undoubtedly will be told of the decision to charge him in relation to some incident, he normally receives no further information as to the details of the charge. As a next step, a charge is drafted and then typed on a Charge Report. The wording of the charge that may be indicated by a police or other report, (a complaint?),<sup>11</sup> can be prepared by any person ranging from the command legal officer to the clerk in the unit orderly room. This however is really administration, as that charge may be altered many times and the wording re-drafted until it reflects the evidence actually available. Eventually the Charge Report will be given to the commanding officer, who in turn may require further changes before he commences the trial. At the commencement of the trial, the charge is then read to the accused.

#### Basic Questions on Pre-Trial Procedure

There are two basic questions that should be answered by the regulations that apply to the pre-trial procedures relating to the summary trial of a serviceman. They are as follows:

- (1) When is a service charge created? When is there a "formal accusation"?
- (2) When is a service charge laid?

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<sup>11</sup>QR&O, art. 107.01, Note A.

As will become evident, on the answers to these questions depend the validity of the subsequent proceedings. As was detailed, the National Defence Act specifically envisages that a charge will be "laid" and that this event requires the commanding officer to conduct or have conducted an investigation. Generally, if it cannot be determined when a charge comes into existence and is laid, or alternatively, if the procedures are not being conducted according to the requirements of the law in the National Defence Act, then there may be a cloud over all subsequent proceedings.

#### "Formal Accusation" - The Charge

There is no point in time prior to the commencement of a summary trial when there can be said to have been a "formal accusation" against an accused, if the term has any meaning at all. The police or other investigation reports cannot be said to constitute such an accusation. At best they constitute a complaint. The mere typing on a Charge Report form with the accused's name certainly does not qualify, especially as it is subject to continual change and is never seen by the accused. The lack of any requirement that the accused be given a copy of the Charge Report or the charge before trial, informed of its contents or even that it exists, precludes a finding that a Charge Report containing the charge is converted, by a series of acts, into a "formal accusation" from its previous status of only a form

containing the accused's name and the charge to be made against him. The first formal action in relation to the serviceman, as far as that charge is concerned, is the reading of it at the opening of his summary trial, and it is only at this time there may be "a charge" as defined by the Chief of Defence Staff. What has occurred to that time is administration. Thus the answer to the question as to when a charge is created must be that it comes into existence as a "formal accusation" when it is read to the accused at the commencement of his summary trial. However this leads to other problems.

#### "Laid" Charge

If it is accepted that the service charge does not come into existence until the commencement of the summary trial, then the laying of that charge must follow that time. To lay a charge there must be some formal dealing with the charge, directed against the accused. It would appear that the only logical answer to the question as to when a service charge is laid, is that this event occurs when the charge comes into existence. It is at this time that the charge is initially dealt with formally and it becomes something that the accused must answer. The creation and the laying of a charge in Canadian military law, as far as summary trials are concerned, seems therefore to occur normally when the accused has been brought before an officer who can try him

and the charge is read. This is somewhat different from the civilian criminal practice as there the information can be created, possibly when it is signed, but it is not "laid" until it has been sworn to before a Justice of the Peace. It then has a formal existence within the judicial criminal system.

#### The Accused and the Charge Before Trial

Before moving to the examination of the commanding officer's position in this pre-trial procedure, the accused's situation during this time should be reviewed. As has been said, under the military procedural law the accused has no formal knowledge of the charge until his trial. He is excluded from all pre-trial procedures and investigations. This is not a serious matter when an accused has been late for parade and is told by his corporal that he is going to be on charge for the offence. However consider the position of the serviceman who is found with stolen goods in his possession and he is merely told he is on charge. The actual charge against him could range from the purely military offence of conduct to the prejudice of good order and discipline to the serious criminal offences of receiving or theft of the goods. Until he hears the charge report read he normally will have no knowledge of the specific charge or its wording. This inhibits the development of a defence, to say the least.

The accused before the Canadian civil criminal court

will, following the signing and swearing of the information, have a summons or a warrant served on him setting out briefly the offence in respect of which he is charged, an indictment, if one has been returned, will be available, or he may even participate in a preliminary hearing. All of these procedures place the accused on notice, at least, of the actual charges against him, and in serious cases permit him to hear and examine those who may give evidence against him. While these procedures will be referred to later in relation to courts martial, the point to note at this time is that at any level of trial, under Canadian civilian criminal procedures, there is notification to the accused, and the availability of procedures to ensure that he is not taken by surprise, has the opportunity to prepare a defence and to properly contest the charge. There are no similar safeguards in the military law applicable to the summary trial.

The United States military law requires that military charges be formally laid as would an information in the Canadian criminal court. The charge is laid only after an independent investigation of the accusation, and a sworn declaration to that effect. The pre-1950 Canadian military law contained the United Kingdom provisions calling for a charge to be laid within 48 hours of the accused's arrest, the accused be advised the rank and name of the person making the charge and then given a copy of the charge report. Under both the United States and United Kingdom military law the

accused is present at all further proceedings, such as formal investigations into the charge by or on behalf of the commanding officer. This should not be confused with the police investigation that may be continuing. Thus in the Canadian civil procedure, as well as in the procedures of the United States and United Kingdom forces, there is a degree of protection and fairness to the accused that is not provided for in the present Canadian Code of Service Discipline.

### Conclusion

In relation to this matter of creating and laying charges in the pre-trial procedures, it is apparent that the regulations and the orders have not been effective in creating a coherent and workable procedure. The objective of the Act and the regulations to simplify the pre-trial obligations of the commanding officer, and of others concerned with military discipline, from what had existed in the pre-1950 military law, was an excellent one. In achieving it however, Canadian military law may have failed to place many of the present day procedures on a legally sound base. Further, the absence of any notification to an accused at an early stage of the charge against him, may well result in the appearance of unfairness, at least.

The Pre-Trial Roles and Responsibilities  
of the Commanding Officer

Rigidity of Pre-Trial Requirements

The first portion of this chapter has been concerned with the validity and possible unfairness in the pre-trial procedures applicable to the summary trial. This part will examine the commanding officer's position during this time, as well as the development, because of the present procedures, of a rigid and unwieldy system for laying and trying charges that considerably hampers the effective operation of the whole military justice system. The basis of the rigidity is in the statutory and regulatory requirements that:

- (1) The commanding officer investigate or have investigated every charge.<sup>12</sup>
- (2) The commanding officer has complete and unfettered discretion to dismiss any charge or have it proceeded with.<sup>13</sup>
- (3) A charge, once laid, can only be dismissed or dealt with by trial, never withdrawn.<sup>14</sup>

The combination of these three rules has taken away all flexibility from the system and the resulting procedures require

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<sup>12</sup>NDA sec. 139, and QR&O, art. 107.02.

<sup>13</sup>NDA sec. 140.

<sup>14</sup>NDA sec. 140, and QR&O, art. 107.04.

ingenuity by those applying them to make them work.

### The Investigation of the Charge

Earlier in this chapter the statutory requirement that the commanding officer investigate, or have investigated, all charges once laid, was set out. This investigation is in no sense a trial but is "merely an exploratory step designed to enable service authorities to decide whether there are grounds to justify proceeding with a charge".<sup>15</sup> This investigation can be in any form and conducted under any procedure that the commanding officer (or the officer or man conducting the investigation on behalf of the commanding officer) considers appropriate. This it may consist of merely reading reports of the incident, especially if witnesses are not available. Its ultimate use however is to inform the commanding officer so he can properly exercise his discretion.

The role and responsibility of the commanding officer in relation to this investigation will be examined later in this chapter, but the important fact at this time is that one must be conducted. If there is none, then there will be no jurisdiction on the part of the service tribunal to try the charge. This requirement applies to any charge from that of murder to having dirty boots, and to the trial by a service tribunal ranging from the summary trial by a delegated officer to that by a general court martial. No superior to the

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<sup>15</sup>QR&O, art. 107.01, Note B.



commanding officer can avoid this unalterable requirement, and thus a superior officer, such as an officer of the rank of lieutenant general commanding a command, and who therefore commands commanding officers, is in the rather odd position of being unable to "lay" a charge unless he wishes to act as a commanding officer personally.

The law as set out in the National Defence Act<sup>16</sup> requires that the investigation be conducted after the charge has been laid. Rarely, if ever, does a commanding officer today investigate a charge after he has started the summary trial, i.e., when the charge is created and laid. This requirement therefore creates the strong possibility that if the investigation is not so conducted, and the commanding officer proceeds with the trial, he may do so without jurisdiction.<sup>17</sup>

#### Commanding Officer's Discretion

Once the commanding officer has reviewed the investigation, only he can make the decision as to the disposal of the charge, irrespective of the offence involved. If he

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<sup>16</sup>NDA sec. 139.

<sup>17</sup>See Rex v. Thompson (No. 1) and (No. 2) (1946) 86 C.C.C. 193 and 206 for review of pre-1950 military law on this subject. Also see Weiner v. The Queen (1957) Court Martial Appeal Reports, Vol. II, 27, for judgment of Court Martial Appeal Board on investigation.

should decide to dismiss the charge, his decision is a final one, no matter how erroneous. There are no appeals and no second chances. The extent of this power can be realized when it is understood that, outside Canada, an accused could quite possibly get away with murder if the charge was dismissed by the commanding officer.<sup>18</sup> Further, no service tribunal will have jurisdiction over the accused until the commanding officer has made this independent decision as to dismissal or proceeding with the charge. This exercising of discretion by the commanding officer is as mandatory for jurisdiction as is the requirement for the investigation. Thus any charge from any source has to be placed before a commanding officer for his investigation and the exercising of his discretion before it may be tried.<sup>19</sup>

The independence of his discretion can fall under suspicion when a new charge, in addition to those already laid, is "suggested" or "recommended" by a superior authority to the commanding officer. Consider the case of a serviceman who has lost equipment and is charged with two minor charges before his commanding officer, but the investigation into the incident supports the laying of a more serious charge involv-

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<sup>18</sup>The only saving provision is NDA sec. 231 giving civil courts jurisdiction.

<sup>19</sup>See Nye v. The Queen, (1972), Court Martial Appeal Reports, Vol. III, 85, for a review of the role of the commanding officer and his discretion. This judgment also relates to the investigation requirement.

ing negligent performance of duties. This investigation is reviewed by a superior authority who, because of greater experience and wider responsibilities, considers that the more serious offence should be charged. If he refers the matter to the commanding officer with say, a "recommendation", the commanding officer must of course consider it. If the new charge is going to be created and laid, the requirement for the investigation as well as the free exercise of the commanding officer's discretion automatically arise. The commanding officer's action in laying the charge, and then either trying it or putting it forward for trial by a superior commander, or by court martial, becomes suspect.

In fairness to the Forces, and in the interests of justice to the military society, such a new charge should be able to be laid without incurring the danger that it will come to naught because of the inflexible rules that only the commanding officer can initially decide on charges. Certainly the ends of justice do not require that an accused be allowed to profit and escape censure because of an error or lack of appreciation by the commanding officer of the serious nature of the offence that may have been committed by the accused. Canadian military law does not have this flexibility, and attempts to attain it within the regulations inevitably result in suspicion of the commanding officer's independence. Canadian military law in this way fails to meet the needs of the Canadian Forces.

### Continued Existence of Charges

The third restriction that a charge, once laid, continues in existence until it is dismissed or dealt with by trial, has created needless procedural difficulties that can only be circumvented by the adoption of unwritten practices. The regulations do not envisage a situation where a charge, once laid, will ever have to be withdrawn and a new charge subsequently laid, as is a common occurrence in civilian criminal practice. A charge with deficient particulars, a badly worded charge, a charge of a minor offence when a major offence should have been alleged, all remain alive until they are either dismissed or tried.

The difficulties that arise can be best shown through the example of a commanding officer who commences a summary trial, and then finds that the charges against the accused are bad in that they fail to allege essential ingredients of the offence, or they are laid under incorrect sections. They cannot be withdrawn and new charges laid. They cannot even be amended. If he dismisses them, then there will probably be a valid plea in bar of any subsequent trial by a service court on any similar charges arising from the incident. They cannot be tried in their existing form. At this point the commanding officer could not be criticized if he wished for a little more assistance from the regulations to permit him to adequately administer discipline. The inflexibility of

the procedures and their requirements have created a situation where the interests of the military are not being served or supported.

What might be termed unwritten procedures have had to be adopted to get around this complete lack of power to dispose of charges except under circumstances that may do great damage to the administration of discipline within the Forces. Initially, no further action is taken in relation to the first set of charges. There is no "formal decision" that they will not be proceeded with; they are just placed off in Limbo for the time being. A new set of charges is created and given to the commanding officer. At this point all pre-trial procedures must start again because of the operation of the requirement of an investigation into any charge and the requirement that the commanding officer exercise his discretion as to the disposal of the charge. The commanding officer is then in the position of adopting the proposed charges he has been given, laying them, investigating them as he must by statute, and then deciding independently as to their disposal, probably for the second time in relation to that accused. If events follow their normal course, the new charges will "pass" the old charges somewhere in the chain of command and subsequently be tried. After the trial on the new charges, the old charges are resurrected and dismissed. A procedure permitting the withdrawal of charges and the laying of new charges would be much simpler.

### Conflicting Responsibilities of Commanding Officer

The commanding officer has been given two areas of responsibility in relation to the enforcement of discipline within the Forces that may not, under present day conditions, be compatable. He is by regulation, as well as historically, responsible for the whole of the organization and safety of his unit. This includes the administration of discipline within his unit and the application of discipline to his men. In addition to this wide military responsibility he is required to don a second hat, that of acting as part of the judicial machinery to deal with offences committed by members of the armed forces. Locke J. and Abott J. of the Supreme Court of Canada in the case of Regina and Archer v. White,<sup>20</sup> both stressed that in this capacity he must act judicially. In the pre-trial procedure these responsibilities are in general conflict, leading to the real danger of the appearance of bias, conscious or unconscious. The question of the possible appearance of bias to the onlooker will be developed further in the next chapter in discussing summary trials.

The problem can be best demonstrated, at this time, by reviewing the responsibility of the commanding officer before the summary trial of a serviceman belonging to his unit. It is the commanding officer who initiates the charge. Some

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<sup>20</sup>Regina and Archer v. White, 1956 S.C.R., 154.

other person may complain, but the effect of the procedures is to place the commanding officer in the position of accuser at the commencement of the summary trial. He has had the charge investigated, if he did not do it himself. He has decided that it should be tried after reviewing the evidence against the accused. He is the one person responsible for the discipline of his unit and all persons therein answer to him. In the course of the administration of discipline of the unit it is the commanding officer who may even direct that a charge be laid and what charge will be drawn up. Criminal charges are disputes between Her Majesty the Queen and Her subjects, and while it is Her Majesty who is the ultimate accuser, others act on Her behalf. For the prosecution of an offence against the National Defence Act, the only person who can be singled out as filling that role is the commanding officer.

It is when the commanding officer is required to act judicially in the administration of discipline of his unit that the conflict between the roles becomes apparent. In the pre-trial procedures he must review the investigation and then make decisions that are, at least, quasi-judicial in nature in relation to the charge before him. These decisions are based on the evidence before him as contained in the investigation. This of course is evidence that will be subsequently submitted before the summary trial as to the guilt or innocence of the accused. At this stage he is

acting much as required of a magistrate in the civilian criminal procedure when that official examines and swears the information, or even conducts a preliminary hearing. The decision that both have to make is the same: is the charge to be proceeded with or not?

An example of the operation of these conflicting responsibilities can be found in a case where a unit has had a large number of thefts. The investigation has placed suspicion on one individual, though there is insufficient evidence to support a charge. An incident then occurs where the serviceman is found in possession of a stolen item but there is no evidence of his having committed the theft. The commanding officer in reviewing the matter is now faced with direct conflicts and pressures arising from his two responsibilities. As commanding officer he will undoubtedly have read all the reports and be fully aware of the background of thefts within the unit, and the suspicion against the serviceman. Having regard to the morale and effectiveness of his unit, the trial and conviction of this man would be most beneficial to that small society. This consideration is in conflict with his responsibility to review the evidence produced by the investigation to determine if the accused should even go to trial on a single minor charge. Under other circumstances, marginal evidence could result in him dismissing the charge. Such action is not unusual when the accused is up on a first offence and has a good record. How-



ever, his conflict here is between the good of the whole unit against a small injustice to the accused, whom he strongly suspects of other offences. The next step of conducting a summary trial will be the subject of the next chapter, but that action really accentuates this danger of appearance of bias.

The commanding officer has such divided responsibilities that, with the best will in the world, he will find it extremely difficult, if not impossible to meet them. As commanding officer his prime concern must be for the future welfare of all. As a disciplinary officer in the system of military justice, his prime concern must be to ensure that the individual accused is justly dealt with. Too often the situation will arise where one cannot be carried out except to the detriment of the other.

#### Command Influence

The review to this point leads logically to the topic of "command influence". This may be defined as pressure exerted, intentionally or otherwise, on individuals involved in the administration of service justice, to reach decisions or to take courses of action desired by a superior authority. It is this factor that gives rise to the greatest doubts as to the fairness of service justice. How, it may be asked, can a commanding officer of, say, the rank of major, in a military command structure where he is responsible to, say,

a major general, really ever be said to be actually independent in any of his actions or decisions? There is the implied command influence situation because of the military command structure, and of course the more blatant aspect, where intentional pressures are applied by a superior officer to a commanding officer.<sup>21</sup>

The Canadian attempt at a solution to this problem of command influence within the military judicial system is the principle, discussed earlier, providing for complete discretion in the commanding officer as to the disposal of a charge. If the commanding officer has a guaranteed free and unfettered discretion then, theoretically, he is safe from the application of outside influence. In Canadian military law the question of command influence cannot be dealt with in isolation from the commanding officer, as it is upon his independent status the whole judicial system is built.

However Canada has also attempted to retain the concept of the role of the commanding officer as a "Pater familias". This role is in complete opposition to his judicial role and attempts to combine them runs the grave risk of destroying the validity of both.

The United States military law has recognized this fact that the previous role of the commanding officer as a father figure, dispensing both wisdom and justice, is no

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<sup>21</sup>See the judgment of Noel, ACJ, Nye v. The Queen, (1972), Court Martial Appeal Reports, Vol. III, 87.

longer completely valid for the armed forces in the 1970's, when examined in relation to the requirements of justice and judicial objectivity. The United States military law has moved towards a position of an independent judiciary and has also removed from commanding officers some of their judicial responsibilities in relation to more serious offences. The United States experience in this field could well be of benefit to Canada if the role of the commanding officer is ever reviewed.

#### Institutional Command Influence

Intentional command influence, where pressures are applied or direct orders are given to a commanding officer in relation to his disciplinary duties, needs no explanation. What does need explanation are the more subtle influences that may destroy the appearance of independence of the commanding officer. His appearance of independence in matters of discipline may be seriously undermined by the realities of the command structure of the military organization. At each command level the responsibility for the discipline of men, units, bases or formations under command widens. Each superior level has considerations that do not apply at the lower levels. Yet, under the existing regulations, these senior levels of command are seriously hindered in ensuring that the disciplinary needs of the Forces above the unit level are met. Attempts to do so from a senior level risks the danger of

interfering with the commanding officer's discretion.

For example, a base comprising ten units is plagued with thefts. The base commander is responsible for the discipline of the entire base and is therefore concerned with all ten units and their individual discipline. To meet this problem, the base commander issues a directive to all the commanding officers in which he states that in his opinion all charges of theft in the future must be considered to be so serious as to lead a commanding officer to the conclusion that his powers of punishment are inadequate, and therefore the charge should be dealt with by court martial rather than by summary trial. This policy has elements of both direct and institutional command influence, the latter arising from the disciplinary needs of the whole base that have now been communicated to the commanding officer. The base commander should be able to issue such a directive as his responsibilities are greater than those of the commanding officer and he has a greater knowledge of the requirements of discipline within that base. Yet in doing so he may well tarnish the appearance of independence of the commanding officer.

The commanding officer of one unit on that base is now faced with an incident involving a minor theft by a member of his unit. This is the first theft in that unit and the general disciplinary problems within the unit are few. Further the accused is a good soldier and this is his first offence. Aside from all the other decisions that the commanding

officer must make, there is now the problem of the base thefts and the base commander's policy. To try the charge by summary trial, as he would normally, creates the danger of unspoken censure, at least, from his base commander upon whom he may be dependent for such matters as his efficiency reports and his duties. Further the interests of the base discipline may well be seriously undermined. Yet to send such a case forward for trial by court martial would raise questions as to the actual independence of his decision. He would have a great deal of difficulty in convincing a serviceman that his decision was a free one. His credibility to his men suffers. Possibly at this point the phrase: "Dammed if he does and dammed if he doesn't" is the most applicable.

Thus it would seem that while the independence of the commanding officer is an ideal concept, it is not one that can realistically exist to the degree it must if it is to be equated to judicial independence. The actual situation is that a commanding officer is guided and influenced by the requirements of his unit and the military organization as a whole, and applying common sense and the tenets of fairness, will administer discipline. Yet the existence of institutional command influence continually exposes the commanding officer's position to attack.

### Acceptance of Command Influence

There can never be true judicial independence of a commanding officer within the military command structure. There is however, nothing really wrong with this fact of life that command influence does exist and that it not only is applied to guide the decisions of commanding officers, but it should be so applied, under proper safeguards. The needs of the Forces cannot be ignored. Attempting to ignore command influence through an unrealistic adherence to a principle that a commanding officer is judicially independent creates more problems, and solves none. How much better would be a procedure that is based on this fact of institutional interest and permitted those responsible for the discipline of the Forces to meet those responsibilities openly rather than indirectly. Such a procedure, for example, would authorize the base commander with the base theft problem, to direct the commanding officers not to try cases of theft, but to refer them to him for disposal. Such a direction today would be fraught with dangerous implications of interference with the commanding officer's discretion. Such a direction in itself is not a bad one, as the base commander would be merely substituting himself for the commanding officer. The rigid application of the commanding officer's retention of an independent discretion however does make it bad. This should not be so.

### Conclusions and Recommendations

The following general conclusions appear to be justified from the review to this point:

- (1) New procedures for the creating and the laying of a service charge must be created as existing regulations leave doubt as to the legality of present practices.
- (2) The accused serviceman should have some formal notification of the charge against him before he is tried on that charge.
- (3) The commanding officer should have his role reviewed in an effort to remove, if possible, areas where there may arise conflict between his responsibilities as a military commanding officer and that as a military tribunal.
- (4) New regulations should be created to permit a degree of flexibility in the creation, laying and disposal of service charges.

The pre-trial procedures should provide a formal procedure for the laying of charges, as it is at this time that the accusations become part of the judicial process designed to bring an accused to trial. This could be accomplished by having the Charge Report delivered to the accused before the commencement of his trial. The charge would then be considered "laid" and the accused would then have knowledge

of the allegations against him. This procedure should be limited to offences of purely a criminal nature or to those of the mixture of criminal and disciplinary. The accused could be protected, as far as charges of a disciplinary nature were concerned, by giving him a right of adjournment if he had not received the Charge Report before the trial.

Recommendations concerning the conflicting roles and responsibilities of the commanding officer will be made at the end of Chapter V, but essentially he should have his roles clearly separated.

The "investigation" should be removed from the responsibilities of the commanding officer to either conduct or to review, if he is to subsequently sit as a service tribunal. His present powers at trial permit him to adequately safeguard the accused serviceman at that stage.

Further, with regard to the investigation, some thought might well be given to the participation of the accused in this process. This procedure could well result in a more balanced investigation being conducted than may now be the case. This opportunity of participation might be limited to cases where the accused specifically so requests and in relation only to charges of a serious nature.

Of great importance is that the present rigid rules preventing the withdrawal or amending of charges, and the laying of charges only at the commanding officer's level of jurisdiction, must be altered to permit some flexibility.



To accomplish this may only require the altering of the definition of "dismissal" contained in the Governor in Council regulation.

Reassessment of Canadian procedures should be made in the light of the US military experiences. They may not all be applicable to the Canadian Forces because of differences in roles and sizes of the forces, but the principles are valid and the procedures could be modified to fit the obvious Canadian requirement that there be a clear separation between the command and judicial function of the commanding officer.

Resistance of the strongest kind would be raised to any suggestion of a diminution of the commanding officer's powers in any area pertaining to discipline. However the reasons for those powers have diminished to such an extent today that they do call for a review. Today in the armed forces specialization is a must for the career soldier. This has fragmented the military society to some degree, even at the unit level. The serviceman looks to his commanding officer still, but not as he once did as the fountainhead of all authority and knowledge. The commanding officer's role has also altered somewhat as he becomes concerned more and more with management concepts and less with leadership. Historical reasons for the wide powers of commanding officers involved difficulties of communication, slowness of travel, unavailability of immediate advice, isolated service, and of

course, wars. These no longer apply to the Canadian Forces, at least. Today a commanding officer in Europe speaks daily to his headquarters in Ottawa on problems. Assistance of any nature can be dispatched by air at short notice to arrive when needed. A military president of a Standing Court Martial can leave Ottawa on a Friday night and try a case in Cyprus on Monday and be back into his Ottawa office on Wednesday morning. There is no real isolation of units, men or commanding officers.

Another consideration is that today in the Canadian Forces, the full powers of commanding officers are rarely used to their maximum of 90 days detention. This occurs because of the nature of the serviceman, who is a career soldier. Actually the requirements for discipline at the unit level have altered to where there are really two separate problems, the disciplinary problem and the criminal problem. The review that might be conducted should be based on the question as to whether or not the changing roles and composition of the Canadian Forces requires some corresponding and basic changes in the approach to military justice and the powers over individuals. Such a review may well come to the conclusion that the commanding officer's judicial role is no longer necessary in its present form, that he should not be required to attempt to meet the requirements of both a military leader and a military judge. Possibly answers that may be developed may be based on the principle that many of the

basic decisions that have been discussed in this chapter still should remain with the commanding officer, and the emphasis of any change should be to remove the trial of the issues from the possible taint of influence.

## V

## THE SUMMARY TRIAL

Introduction

The summary trial is the basic tool of the Canadian Forces for the administration of discipline to those subject to the Code of Service Discipline. It is well established that the officer conducting such a trial, and in his actions before trial as already discussed, is exercising judicial functions and must act judicially.<sup>1</sup> The trial itself has been described by Mr. Justice Locke of the Supreme Court of Canada as being "of a judicial and not an executive or administrative character".<sup>2</sup> The review in this chapter, and indeed in this whole thesis, is based on this judicial character of all service tribunals, as well as the fact that these tribunals, because of the possible consequences to the accused of their proceedings, are within the scope of the criminal law of Canada, no matter what the nature of the charge before them, whether truly criminal, such as theft,

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<sup>1</sup>See Regina and Archer v. White, (1956), S.C.R., 154.

<sup>2</sup>This description is contained in the judgment of Locke J. in the Regina and Archer v. White appeal. It might be noted however that Abbott, J. in the same appeal was of the opinion that the officer conducting the proceedings is not acting as a court or a judge but as an officer administering discipline. He agreed however that the officer should act judicially in performing his duties.

or merely disciplinary, such as conduct to the prejudice of good order and discipline.

Many of the provisions of the Code of Service Discipline are based on the Criminal Code.<sup>3</sup> Further, convictions under the Code of Service Discipline are dealt with under the Criminal Records Act.<sup>4</sup> The punishments that can be awarded by a summary trial are certainly penal in nature, including as they do incarceration and fines. The only civilian courts mentioned in the National Defence Act as having jurisdiction are those of ordinary criminal jurisdiction. Any civilian court required to review the nature of proceedings under the Code of Service Discipline would undoubtedly reach the conclusion that they are well within the scope of the criminal law of Canada.

From this conclusion it is reasonable to move to an examination of the summary trial as a form of trial that should, as far as possible, meet the requirements of Canadian criminal justice. There is however the strong possibility, to say the least, that under present practices and regulations the summary trial cannot meet such tests.

#### Types of Summary Trial

There are three levels of summary trial in the Can-

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<sup>3</sup>As an example, see NDA sec. 62 and Criminal Code sec. 21.

<sup>4</sup>Criminal Records Act, R.S.C. 1970 (1st Supp.), ch. 12.

adian Forces. The lowest is the summary trial by a delegated officer. The second, and controlling level, is that by a commanding officer. The third is the summary trial by a superior commander. Before proceeding to examine the summary trial procedure, an outline of these three levels of jurisdiction would be helpful.

### The Delegated Officer<sup>5</sup>

A delegated officer is an officer of at least the rank of captain to whom his commanding officer has delegated powers of trial and punishment over servicemen of the rank of sergeant and below. These powers, less than those of the commanding officer, are limited by the regulations in regard to the types of service offences that can be tried and the severity of the sentences that can be awarded.

The delegated officer can only try purely disciplinary offences and has no jurisdiction over service offences that can be classed as criminal or are a mixture of criminal and disciplinary. Thus, for example, he has the power to try a charge of absence without leave but cannot try a charge of theft or of striking a superior officer.

The maximum punishment that can be awarded by a delegated officer is limited to 14 days detention, and this is

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<sup>5</sup>QR&O, ch. 108, sec. 2. This section contains the detailed regulations. It is not intended that the text be exhaustive. The same approach is followed with regard to the commanding officer's and the superior commander's summary trial.

in relation to the private soldier only. This restriction prevents the delegated officer from passing a sentence that will affect the rank of the accused. Other punishments that he may award include that of a fine, a reprimand or minor punishments such as extra work and drill.

In addition to the limitations imposed by the regulations, the powers of the delegated officer may be further limited by his commanding officer to any degree he wishes. He may limit him to trying only certain offences, such as absence without leave of not more than one day's duration, or prohibit him from awarding the punishment of detention at all, restricting him to a fine of twenty-five dollars or less, and minor punishments. This practice permits the commanding officer to reserve for himself all cases of a serious nature or those requiring more severe punishments. It also frees the commanding officer from the time consuming trials of the many minor offences that occur within a unit.

#### The Commanding Officer<sup>6</sup>

The only limitation as to the offences that may be tried by the commanding officer by summary trial is the prohibition of the trial of murder, rape and manslaughter committed within Canada. His jurisdiction extends over all ranks of sergeant and below and over subordinate officers,

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<sup>6</sup>QR&O, ch. 108, sec. 3.

i.e., officer cadets. The commanding officer's powers of punishment in relation to men ranges from 90 days detention, which also includes the loss of pay and any rank the accused may hold, to minor punishments. In regard to the officer cadet he can award a punishment of loss of seniority of rank of up to three months, a fine of up to 60% of the monthly basic pay of the accused, reprimands or a caution. No commanding officer below the rank of major however can try and punish a subordinate officer.

#### The Superior Commander<sup>7</sup>

The highest level of the summary trial is that by the superior commander who will usually be an officer of the rank of brigadier-general or above. He has jurisdiction to try officers below the rank of lieutenant colonel or a man above the rank of sergeant. However before there can be a trial of an officer of the rank of major, the approval of the Chief of Defence Staff must be obtained.<sup>8</sup> His trial jurisdiction over any accused is based on the decision of the commanding officer in the first instance, who had originally considered the charge, to refer the charge to the superior commander for trial and not to dismiss it. The procedure for such referral is similar to that required to refer a charge for court martial, and will be reviewed in conjunction with

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<sup>7</sup>QR&O, ch. 110.

<sup>8</sup>CFAO 110-2.



the examination of pre-trial procedures applicable to courts martial in the next chapter.

The jurisdiction of the superior commander over offences is the same as that for the commanding officer. He is severely limited as to the punishments that he may award however, being restricted to the punishments of a severe reprimand, a reprimand, or a fine of up to 60% of the accused's basic pay.

This three-tier jurisdiction permits the summary trial, and therefore the speedy trial, of all ranks up to and including the rank of major. It is only the sergeant and below who may be sentenced to detention or who may lose his rank. Higher ranks have to be tried by court martial if such a severe sentence is considered appropriate. It is a reasonable system that permits minor offences to be tried at a low level of command and ensures that accused from the senior levels of the non-commissioned ranks, as well as junior officers, are tried by senior experienced commanders. It permits a personal type of discipline to be enforced by officers, commanding officers and commanders who are most immediately concerned and who would have the greatest knowledge of the surrounding military circumstances.

### Procedure at Summary Trial<sup>9</sup>

The military summary trial differs from the civilian criminal trial in that there are no pleas of guilty or not guilty. The officer conducting the summary trial is required by regulation to hear all the evidence before making a finding. This is subject to the provision that he can dismiss the charge at any stage to the time that he makes a finding. If however, as commanding officer he has already "investigated" the charge, as described earlier, the possibility of a dismissal after the commencement of the trial is not a major one.

At the beginning of the trial the charge report is read to the accused. After this formal charging, the accused may be asked if he wishes to elect trial by court martial. This aspect of the summary trial will be reviewed later in this chapter. If the officer trying the case is not prevented from continuing the summary trial by an election, he must ask the accused if he wishes to have the evidence taken under oath. This is normally a decision for the accused,

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<sup>9</sup>QR&O, ch. 108, sec. 3. This section contains the detailed regulations for the conducting of a summary trial by a commanding officer. See also QR&O, ch. 108, sec. 2 for the trial procedure for a delegated officer and QR&O, ch. 110 for that to be followed by a superior commander. All are essentially the same, and the comments in the text relate to all three procedures. The text is not intended to be exhaustive but to outline only the main procedures so as to make the comments clearer.

though the commanding officer may on his own direct that it be done, without reference to the accused.

### Evidence Under Oath

If it is directed that the evidence be taken under oath, the witnesses against the accused are required to personally appear, be sworn, and to give their evidence. In a simple trial there is little difficulty as a corporal's complaint and sworn testimony on the condition of the kit of the accused, for example, is uncomplicated and readily available. However when the charge involves evidence from a number of witnesses, possibly from outside the unit, the difficulties increase, even for the uncomplicated charge. A commanding officer trying an accused for mis-use of a military vehicle arising from an incident in another city or even in another country, may face a major problem of obtaining evidence if the accused requires the personal presence of the witnesses. If this request is not met, or if the accused is not asked regarding the taking of the evidence under oath, then any conviction will be quashed.

If the accused does not ask that the evidence be taken under oath, the officer hearing the case may examine any material in any form that he considers desirable. As an example, he could take a police report with all its contents as evidence, even though such a report would never be admissible before any other court. If the accused does not demand that

the witnesses appear he has no real knowledge as to what evidence the commanding officer will consider, as the reports of a police investigation, for example, certainly will not be turned over to him to examine, though portions of them would possibly be read to him at his trial.

### Hearing of Evidence

Following the resolution of the evidence under oath question, the commanding officer is required "to receive such evidence as he considers will assist him in determining whether" the charge should be dismissed or the accused found not guilty, or found guilty, or referred to higher authority for disposal, such as by court martial. The commanding officer must also hear the accused, his witnesses and permit the accused to question witnesses. Aside from the reading of the charge report, the asking of the accused concerning his wishes as to the evidence being taken under oath, and possibly the extending of the right to elect trial by court martial, the order of all other steps in the conduct of the summary trial is left to the discretion of the commanding officer. The hearing of "prosecution" witnesses, the accused or his witnesses can be done as may be "convenient" for the commanding officer.

### Witnesses

The eliciting of the evidence from all witnesses against the accused is normally done by the officer trying him. In doing this, this officer appears to move from his judicial role to a role resembling that of a prosecutor. The accused is permitted to ask questions personally of the witnesses on matters "relevant to the charge, or as to his own conduct and character". He may call his own witnesses, but at the discretion of the commanding officer who will base his decision on the factor that their presence can be reasonably procured having regard to the exigencies of the service. Also if the commanding officer is of the view that the request is frivolous or vexatious, then he will not call them. There is no law or guidelines as to the exercise of this discretion and it is left really to the common sense and fairness of the individual concerned. The accused may also be heard if he wishes, but if he does so, then he becomes a witness and of course is subject to questioning by the commanding officer.

### Adjournments and Remands - Uncertainty of the Nature of the Proceedings

The commanding officer may adjourn the trial at any time to have further investigations conducted or more evidence produced. He also may, at any time during the conduct of the proceedings, decide not to try the accused at all,

i.e., not make a finding as to guilt or innocence, but to send the charge forward for disposal by higher authority, i.e., court martial. These two continuing options open to the commanding officer raise problems for an accused, who having accepted the commanding officer's jurisdiction, and the commanding officer apparently having decided to exercise it and try the case, presents a full defence. He could then be advised that the case is adjourned for further investigation of the points raised in the defence. The trial then could resume after the commanding officer had obtained advice or further evidence that would answer the defence. A similar procedural situation would be found in the civil criminal court if the presiding judge, after hearing the defence, was able to halt proceedings, return the matter to the prosecutor, tell him to conduct a further investigation, receive the report, and then continue the trial, hearing the further evidence. The regulations state that the adjournment to obtain "further information" should be only made when the "interests of justice" are to be served. As such interests are applicable to both the accused and the forces, this direction imposes little restriction.

In addition to the possibility of adjournment, the accused could find that no finding at all would be made after he has given his testimony, and the commanding officer at that point had decided to exercise his discretion to forward the case for court martial action. This step could well be

taken if the accused raised complicated points of defence. The result would be that prior to the convening of any court martial all matters raised by him in defence could be reviewed, investigated and corrective action taken, if necessary.

The summary trial procedure requires an accused to put in his defence, theoretically to raise a reasonable doubt in the mind of the commanding officer at least, but if he does so there is no obligation on the commanding officer to make a finding. The accused to the moment of a finding at a summary trial is really in ignorance of the nature of his trial. At any stage it may be converted from a trial to a hearing or even an investigation, at the option of the commanding officer. This, in reality, deprives the accused of the opportunity of determining the nature of his defence. If his guilt or innocence is to be determined, then a full defence should be offered. If however he raises matters of deficiencies in evidence that can be corrected by further investigation, he runs the risk of being deprived of that defence by the commanding officer ordering such further investigation. A defence may also result in the proceedings being converted to an investigation, as the commanding officer may well consider that the matters raised are too serious for him to deal with, or too complicated. Yet if the accused stands mute there will undoubtedly be a conviction and a possible sentence of detention or fine. Such uncertainty would not be acceptable in the civilian criminal pro-

cedures, and possibly the Canadian military criminal law should take steps to resolve it for the accused serviceman.

### Evaluation of the Summary Trial as a Criminal Trial

Canadian criminal process is based on the common law principles that "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done",<sup>10</sup> and that "it is essential that justice be so administered as to satisfy reasonable persons concerned that the tribunal is impartial".<sup>11</sup> These, and other principles have been incorporated into the Canadian Bill of Rights<sup>12</sup> in such sections as 2(f) that provides that no law of Canada shall be construed or applied so as to

"(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal....".

As was pointed out at the beginning of this chapter, the administration of discipline within the Canadian Forces through service tribunals is within the scope of the criminal law of Canada, and indeed this position was taken by the Crown in the Regina and Archer v. White appeal before the Supreme Court of Canada.<sup>13</sup> If the summary trial is to be

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<sup>10</sup>R. v. Sussex Justices, ex. p. McCarthy (1924) 1 K.B. 256, at 259.

<sup>11</sup>Swift, J. in R. v. Essex Justices, ex. p. Perkins (1927) 2 K.B. 475, at 490.

<sup>12</sup>R.S.C. 1970, App. III.

<sup>13</sup>Regina and Archer v. White, (1956), S.C.R. 154, at 162



accepted by the serviceman and the civilian of today as a fair form of trial in the criminal sense, it should clearly meet the standards of criminal law that are ingrained into the Canadian system of criminal justice, such as having an ascertainable body of law binding on the conduct of the process, the right of an accused to stand mute and hear the evidence against him, and of course that the independence and impartiality of the tribunal be clearly evident. Such standards can be said to be basic to the conduct of a criminal trial and certainly well within the spirit, if not the wording, of the Bill of Rights. The following examines these and other aspects of the criminal trial in relation to the summary trial.

#### Proof of Guilt "According to Law"

The guilt of an accused tried by a summary trial cannot be said to have been proved "according to law" as there is really no law as to what proof is required. The doctrine of reasonable doubt is the only principle of law that is made applicable to the summary trial, all these tribunals being enjoined by regulation to "consider whether it has been proved beyond a reasonable doubt that the accused committed the offence stated in the charge....".<sup>14</sup> Nowhere is this explained or defined however. As any criminal judge

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<sup>14</sup>See QR&O, arts. 108.15, 108.32 and 110.07.

will attest, the application of this doctrine is a difficult matter. The Code of Service Discipline and regulations are completely silent otherwise on the matter of proof and law in relation to the summary trial. Even the notes following many of the offence sections in QR&O, where general statements of law applicable to the offence are sometimes made, are specifically stated as being for guidance only and that they do not have the effect of law.<sup>15</sup> The Minister has said that these notes should not be deviated from without good reason,<sup>16</sup> but this injunction falls far short of establishing rules of law to be used in determining the guilt or innocence of the accused on a criminal charge. The impropriety of the implied authorization to depart from a rule of law, contained in the Minister's order, just complicates the matter further.

There is no ascertainable body of law made applicable to the conduct of the summary trial, and this is a most serious defect. What does the commanding officer do with such problems as hearsay, accomplice evidence, corroboration, documents, and all the other rules that protect the accused under our criminal law? Of equal importance, on what principles can a review be conducted into the legality or fairness of that trial? The officer conducting the summary trial can

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<sup>15</sup>QR&O, art. 1.095.

<sup>16</sup>Ibid.

apply any standards he wishes, the accused cannot ascertain at any time on what principles of law the decision as to his guilt or innocence will be based, and finally those required to review the conviction have no knowledge of the basis for any of the decisions reached during the trial.

### Presumption of Innocence

It has been stated that "it is manifestly improper to put an accused person on his defence if the Crown has not produced evidence on which he might properly be convicted".<sup>17</sup> This is an aspect of the fundamental principle of criminal law that an accused does not have to say anything but may stand mute to hear the evidence against him. The summary trial procedure however does not give effect to this principle. As was discussed earlier, the emphasis within the regulations is on flexibility and convenience. In achieving this the procedures have run counter to the principle of criminal justice that would appear to require that the role of the commanding officer should be to initially receive such evidence as may be presented as to the guilt of the accused, and that if such evidence, when completed, is not evidence "on which he might properly be convicted", the charge against the accused should be dismissed. It is only after this point in the trial that the accused should be put to his defence

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<sup>17</sup>Campbell, C.J., Perry v. The King, (1962), 17 M.P.R., 439.

and be heard, if he wishes, either through his own witnesses or personally. Under the regulations there is no requirement for this separation of prosecution and defence evidence, and as has been pointed out above, the accused in a summary trial can never be sure that all the "prosecution" evidence is in until he hears the finding.

#### Independence and Impartiality of Tribunal

The commanding officer's position has already been reviewed in Chapter IV as to the conflict that may exist between his military and judicial responsibilities. Those comments apply with greater force here, as at this stage he is acting in a full judicial capacity. When the commanding officer's roles, as outlined earlier, are reviewed in relation to the common law principles of appearance of justice, and the satisfaction of those concerned that the tribunal is independent and impartial, there arises a real danger that his position as a person charged with acting judicially in a criminal trial cannot be sustained.

When the commanding officer conducts a summary trial his general position may well be similar to that of the magistrate who tried an accused for breaking and entering a curling club and committing theft therein. The accused pleaded guilty but subsequently entered an appeal based on the fact that the magistrate was president of the curling club. The appeal court ordered a new trial stating: "The

president of any club has a vital interest in its success during his term of office. It is my opinion that the average intelligent man would have reasonable apprehension of bias on the part of the Magistrate, if he should hear the case, due to the latter's substantial interest in the welfare of the club".<sup>18</sup>

The "substantial interest" of the commanding officer may well disqualify him from acting judicially, especially in relation to members of his unit. It is difficult to distinguish his position from that of the magistrate when an accused serviceman of his unit is before him on a charge of theft from one of his unit's canteens.

Before leaving this topic of the "impartiality" of the commanding officer a final comment should be made concerning the investigation that he is required to carry out before trial. If one were to review the history of many of our present day procedures in law, it would be found that originally a Grand Jury was created to hear evidence against an accused to determine if sufficient evidence existed to send him to trial, and the same jury then sat as jury at the trial. This procedure was eventually discredited as it was obvious that it was almost impossible for such a jury to put from its collective mind what it had considered as a Grand Jury returning the indictment, and to render a verdict

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<sup>18</sup>Boudreau v. The Queen (1960), 127 C.C.C., 355.

at the trial based only on the evidence that it had heard there. The unfairness to the accused was equally obvious. The position of the commanding officer is open to the same criticisms with the added factor that he has other responsibilities that complicates his decision making to an even greater degree. Most important, this background of the commanding officer's responsibilities, "taints" any decisions that he may make.

#### Publicity of Trial - Record of Proceedings

The hearing of a summary trial is not a public one. Normally only the commanding officer, the accused and escort, an assisting officer if any, and possibly a senior non-commissioned officer, will be present. The attendance of other persons will be at the discretion of the officer conducting the trial, but normally will be restricted to persons having an interest in the proceedings, such as the accused's immediate superior. This alone is not a serious defect and can be justified under space limitations and the exigencies of the service. There is no recording of the proceedings however, except in the memory of those present. The only reference to evidence given at a summary trial is in the Punishment Warrant that is submitted by the commanding officer to an Approving Authority<sup>19</sup> in which the commanding officer sets out briefly the circumstances surrounding the

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<sup>19</sup>QR&O, art. 108.40.

commission of the offence that are relevant to the proposed sentence. This factor, together with a closed trial, can create an unhealthy atmosphere when conflicts later develop as to the testimony of witnesses and the basis for the commanding officer's decision. This danger affects not only the accused's interests, but also the interests of the military authorities administering discipline.

### Counsel

The question of counsel at a summary trial is a difficult one for the military. Appearance of counsel at this level of service tribunals would defeat the reason for their existence, a more informal and quicker method of trial than that offered by the court martial. Also the average commanding officer has neither the background nor the time to deal with such counsel. The presence of counsel for the accused at the summary trial would automatically require the presence of a military legal officer to at least advise the commanding officer. The difficulties are obvious.

On the other hand the denial to an accused of the right to have his own counsel at his summary trial where the offence charged is criminal in nature and conviction may well result in detention or heavy fine, appears unjust, especially in view of the considerations contained in the recent Supreme Court of Canada decisions in relation to breathalizers and

the right to counsel.<sup>20</sup> It should be pointed out that the limitation being discussed relates only to trial, as the serviceman has complete freedom "to retain and instruct counsel".<sup>21</sup> It is when such counsel wishes to appear at the trial that difficulties arise. Counsel can advise before and after trial but is excluded from the hearing. Advice given after the trial would be subject to the defect that he did not hear the evidence given at the trial and no transcript is made. Unless the accused receives a final copy of the charge report before trial, even advice given before trial will be of little value. It is certainly a most frustrating position for a civilian counsel, and possibly even more so for the accused who has retained and instructed him.

No military legal assistance is normally available at the summary trial level to any accused, except to advise him of his rights under the Code of Service Discipline and the regulations. As will be seen, an accused before a court martial is provided, at his request, with a military defending officer after the order convening the court martial is signed. The provision of a legal officer to an accused at

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<sup>20</sup>Brownridge v. The Queen, (1972), 18 C.R.N.S. 308 (S.C.C.).

<sup>21</sup>Canadian Bill of Rights, R.S.C. 1970, App. III, sec. 2(c)(ii).



the summary trial level however is in conflict with the legal officer's prime responsibility, i.e., to advise the commanding officer and the Forces.

#### Assisting Officer

The denial to an accused serviceman of counsel at trial before his commanding officer is alleviated by the Canadian Forces's policy that all accused will be offered "an assisting officer".<sup>22</sup> This will normally be a unit officer, if possible one selected by the accused, who though not legally trained, assists the accused in the preparation of his defence and advises him as to the evidence and witnesses. This officer takes no part in the summary trial and is not permitted to question witnesses. He may state, when requested by the commanding officer, "any fact that should be brought out in the interests of the accused".<sup>23</sup> This is normally done in regard to the severity of punishment. The assisting officer can obtain advice from other sources than the military in respect of the charges against the accused, and these sources would of course include legal ones. He is able to act as advisor to the accused as to his rights and possibly provide an objective view of as much of the case against the soldier as he may be able to find out. In

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<sup>22</sup>QR&O, art. 108.26.

<sup>23</sup>QR&O, art. 108.29(1)(h).

the normal course legal counsel could do little more for the majority of the charges heard by a summary trial.

### Actual Administration of Discipline Through Summary Trial

Before moving on to examine other aspects of the summary trial, a few general comments should be made to prevent the reader reaching wrong conclusions over the actual administration of discipline within the Canadian Forces through the summary trial. The purpose of the evaluation that has just been made is to see what the summary trial does and does not provide in relation to a general standard normally found in the Canadian criminal law as it would be applied to the average Canadian citizen. As we have seen, the summary trial suffers from many defects that cast doubt on its suitability, as it is presently constituted, as a method of trial for criminal offences. There are, nevertheless, many intangible balancing factors that must be remembered when it comes to evaluate its fairness as actually conducted.

The Canadian Forces are a highly professional group and, being a small force, even the smallest complaints may receive high level attention. Those charged with administering discipline are for the most part fair minded, well trained, equipped with common sense and generally aware of their judicial responsibilities. While the regulations and the law may be vague or deficient when examined in detail,

those trying cases attempt as well as they can to render justice and to be fair. Thus the remarks in this chapter concerning possible bias or partiality on the part of officers conducting a summary trial, are not made to attack in any way the actual performance of that function. On the whole the administration of discipline through the summary trial is of a high standard. From the viewpoint of the accused however, or the civilian, the present procedures leave doubt as to the appearance of justice, especially when the service tribunal tries a purely criminal offence.

The possible lesson from this portion of the review of the summary trial procedure is that it should be rewritten to provide a clear and just method for the trial of an accused, leaving no doubt as to the impartiality and independence of the tribunal and the fairness of the trial procedures. The onus to achieve these results should not be left to the fairness of the commanding officer, as may well be the case today.

#### Election For Trial by Court Martial

As mentioned earlier, at a summary trial before either a commanding officer or a superior commander, an accused may be asked to decide if he wishes to elect to have his trial on the charge before a court martial rather than by a summary trial. Originally this election was only available to non-commissioned officers when the commanding officer

came to the conclusion that if the accused was to be found guilty of the offence, a sentence of detention or of reduction in rank would be appropriate. With the passage of the Bill of Rights, the Code of Service Discipline was reviewed to determine those service offences that were criminal in nature, and thus those to which the Bill of Rights might apply. Governor in Council regulations were subsequently passed that had the effect of generally dividing service offences into two groups, offences containing elements of civilian criminal offences and those being purely military in content. The right to elect trial by court martial was then extended to any accused who was charged with an offence in the first category.<sup>24</sup> The private soldier who previously could not elect a court martial form of trial now could do so, as could the captain being tried by a superior commander. The right of non-commissioned officers to elect because of the punishment that was being considered, remained.

In view of the earlier remarks in this chapter on summary trials, this right to elect trial by court martial deserves some examination, for it was hoped that some of the criticisms that might be raised against the summary trial after the passage of the Bill of Rights might be answered by this procedure. In actual fact the anticipated criticisms

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<sup>24</sup>QR&O, art. 108.31 - Commanding officer's summary trial - election.  
 QR&O, art. 110.055 - Superior commander's summary trial - election.

did not materialize; little comment or interest ever being taken by any person or group outside the Forces in these matters.

### Election Rules

If an accused elects trial by court martial, such an election cannot be refused. He will either then be tried by court martial or the charge dismissed.<sup>25</sup> The accused however can withdraw his election if he wishes, and return his case to the jurisdiction of the commanding officer or the superior commander.<sup>26</sup> If the accused does not elect to be tried by court martial, then the summary trial will proceed, as was outlined earlier. As has been observed however, the commanding officer retains the option of himself putting the accused forward for trial by court martial up to the time he makes a finding. The accused's decision to not take a court martial is final as far as he is concerned however. He cannot change his mind once the summary trial has continued. There is only one election given an accused at the summary trial, even though the nature of the charge may require one to be offered and the rank of the accused and the appropriate punishment also requires one to be given.

This principle that the right to elect is not divis-

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<sup>25</sup>QR&O, art. 109.05(2)(d).

<sup>26</sup>QR&O, art. 111.65.

ible can create a problem in a case where an accused of the rank of corporal or sergeant, and thus subject to the commanding officer's summary trial, is charged with an offence such as theft. When the commanding officer extends the right to elect at the beginning of the summary trial, the accused is not advised whether the right is offered solely because of the nature of the charge, or because the commanding officer also considers that, if he convicts, the award of a punishment of detention or reduction in rank would be appropriate. Thus the accused may have to take a bit of a gamble if he decides to remain under the jurisdiction of the commanding officer, as he will not know what the commanding officer has in mind as to the possible punishment. Once the accused refuses the election however, the commanding officer is free to impose the more severe punishments of reduction in rank or detention. The element of chance as far as the accused is concerned, is that the commanding officer offered the election because of the nature of the charge and not because of the proposed punishment, and that he will not change his mind before he passes the sentence, if he convicts.

There is one further matter to be observed upon in this part, and that is the regulations fail to make any provision for the case where an accused refuses to make an election. It is a minor point, but it is one that could cause consternation at the summary trial if it was to occur.

### Election Benefits

In electing trial by court martial an accused is assured that, after the signing of the convening order, a legally trained officer will be made available to advise him and to act as his defending officer at the trial. Alternatively he is assured civilian counsel of his own choice, and at his expense, will be permitted to represent him at his trial. The election also assures him that the trial will be conducted under formal rules of legal procedure before a court composed of officers who have no knowledge of the case against him. He knows that there will be a legally trained judge advocate present, and that his guilt or innocence will be determined on the basis of criminal law strictly applied. Essentially his election permits him to cure the defects that are evident in the conduct of the summary trial. If he does not elect to have his case heard by court martial, then it might be argued that he has waived his rights to such matters as counsel at the trial, rules of evidence and legal procedures. The accused then might be said to be in the position similar to that of the civilian who elects to be tried by a magistrate, rather than by a judge or a judge and jury. But of course all the accused waives in the civilian criminal process is the trial by a judge or judge and jury. He is still tried by the magistrate under criminal procedure that provides for rules of evidence and all the other matters

that the summary trial lacks. Further, as there is no obligation on the commanding officer to explain to the accused the effect of his election, it is really doubtful if the analogy between the civilian accused and the military accused can be made with any force. The only saving provision in this aspect is the 24 hour period that must elapse between the time that the commanding officer extends the election and the time that the accused must give his decision. Theoretically the accused will use that period to obtain advice. However if it is accepted that he does effectively waive his rights, there should be some formal explanation to the accused before he does so, in order that he may clearly understand the vastly different options open to him.

#### Election Gamble

The compromise procedure of extending the right to elect trial by court martial instead of making the summary trial a true trial, has not met the requirements of criminal justice. The position of the accused in this procedure is not a simple one. In spite of all the "goodies" he may receive by having his case heard by court martial, there is one factor that every accused must consider, and which will probably be the governing one in most cases. If the accused is tried by a commanding officer, the maximum punishment that he can be given is 90 days detention. To obtain the advant-



ages and protections offered by the trial by court martial, he must place himself under the jurisdiction of a tribunal whose punishment jurisdiction will be at least that of imprisonment for two years less one day. The procedure may appeal to the gambler, but there is little room for it in criminal law.

#### Post-Summary Trial Procedures

Following the completion of a summary trial, the regulations move from the position of weakness they occupy in governing the procedures for the holding of the trial, to a position of strength in the protections they offer to the convicted serviceman. This is particularly true in relation to sentences of detention or reduction in rank imposed on non-commissioned officers of the rank of sergeant and below, as well as the punishment of detention of over 30 days imposed on the private. Of equal importance is the availability of an administrative appeal procedure for all servicemen convicted by summary trial.

#### Approval of Sentence<sup>27</sup>

When an accused non-commissioned officer has been convicted, and the commanding officer proposes to award a sentence of reduction in rank or of detention, which auto-

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<sup>27</sup>QR&O, ch. 108, sec. 4.

matically includes the punishment of reduction in rank, the sentence is not passed immediately. The accused is informed that the proposed sentence requires approval, and the trial is adjourned.<sup>28</sup> The commanding officer then normally prepares a Punishment Warrant in which he records the circumstances of the offence and the proposed punishment. This document is forwarded to an "approving authority", usually an officer of the rank of brigadier-general or above, for his approval. If approval is obtained, the accused is brought back before the commanding officer and sentence is announced. The approving authority however may approve only a portion of the proposed sentence, such as a reduction in rank from sergeant to corporal rather than a requested reduction to the rank of private. If there is no approval then the commanding officer can only pass a sentence that does not involve the accused's rank, i.e., a fine or a minor punishment.

Similar approval is required with regard to the sentencing of a private soldier to a period of detention of over 30 days.<sup>29</sup> The commanding officer will pass sentence at the end of the trial but tell the accused that the period of detention in excess of 30 days requires approval. If there is no approval of the punishment warrant, the sentence

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<sup>28</sup>QR&O, art. 108.33(3).

<sup>29</sup>QR&O, art. 108.37(4).

is deemed to be one of 30 days only, and the accused, who will have commenced serving this sentence, will be released at the expiration of that 30 day term, less time off for good behaviour.

This procedure ensures that the more serious punishments are quickly and adequately reviewed. If the circumstances of the offence, as outlined by the commanding officer in the punishment warrant are weak, or he has imposed a harsh sentence based on arbitrary or unfair considerations, or the sentence is inconsistent with sentences imposed in other parts of the Forces for similar offences, then the approval procedure should bring such facts to the fore and permit the matter to be quickly corrected.

#### Redress of Grievance<sup>30</sup>

Because of the approval procedures, the correction of harsh sentences rarely require action by the accused. If however he considers that he has "suffered any personal oppression, injustice or other ill treatment" he may appeal his conviction and sentence through an administrative procedure known as submitting a Redress of Grievance. To take advantage of this method of appeal he has only to submit his complaint with the request that the matter be reviewed and corrective action taken. There is no time limit for the

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<sup>30</sup>QR&O, art. 19.26 and art. 19.27.

submission of a request for redress and no particular form is required. In addition, if the soldier requests, an officer will be made available to him to assist in the preparation of the complaint. This officer will be one requested by the accused, if possible.

The serviceman submits his request orally to his commanding officer in the first instance. If he receives no satisfaction within fourteen days he may then submit his complaint in writing to the commander of the next level of command. If satisfaction is again not obtained, this procedure may be followed through the levels of command to the point where the request for redress will be considered by the Minister, and if the complainant requests, by the Governor in Council. At all levels the circumstances leading to the request are investigated and reviewed, together with the basis for earlier decisions on the matter. Legal opinions are obtained when necessary, especially in cases involving the conduct of disciplinary proceedings. When a refusal of a request for redress is made, the reasons for the decision are normally communicated to the applicant.

Thus a serviceman who was charged with theft and then tried, convicted and sentenced by his commanding officer, could submit a redress of grievance based on the fact that the commanding officer had not given him the right to elect trial by court martial, or that he was not given the opportunity to have the evidence taken under oath. If the command-

ing officer failed to take any action to quash the finding and sentence, as he has power to do, then the serviceman could submit his complaint to the base commander or the officer commanding the command, depending on the command structure. Further appeals would be available to him to the Chief of Defence Staff, then to the Minister, and finally to the Governor in Council.

While this system in no way involves a judicial determination of the appeal from the conviction and sentence, it is probably far more effective as it permits decisions to be made with greater flexibility. An accused may have been dealt with correctly under the regulations, and yet because of the circumstances of his case, have elements of unfairness evident in their application. His appeal can be dealt with more fairly by the officer commanding a command than by a court bound by a statute. Furthermore, the procedure permits the private to place his complaint before the general, and even before that officer's masters, the Minister and the Governor in Council. These last are outside the military structure where sometimes military considerations could overshadow those of fairness.

The decisions at the senior civilian levels of government may well rest on considerations that are not those of the military society. Suppose for instance a serviceman was to refuse to sign a form written in English, insisting that it be produced in French, even though he speaks and

understands English as his second language. While the military society could not justify the quashing of his conviction for disobedience of a lawful command, the civilian society might well come to an opposite conclusion.

The existence of this system is a major strength of the Canadian military law. As the submission of the request for redress is completely within the discretion of the serviceman, and because of the fact that in the procedure the decisions at each level of command are subject to review at higher levels, the existence of the right to submit a redress alone acts as a brake on the making of arbitrary or unfair decisions. Such rights of the serviceman place him in a far better position to have injustices remedied than has the civilian portion of Canadian society.

#### Alteration of Punishments<sup>31</sup>

There are other post-trial procedures that may be employed in relation to the conviction and sentencing of an accused at a summary trial that work for his protection and his fair treatment. A commanding officer may suspend sentences of detention under most circumstances. He has no power to suspend the passing of sentence as may be done in a civilian criminal court, but after passing sentence he may suspend its commencement for up to one year in the case of

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<sup>31</sup>QR&O, ch. 114.

detention of up to 30 days, and for the period of the sentence in the case of detention of periods up to 90 days. He has powers to commute, remit and mitigate punishments awarded at a summary trial. He can quash the findings in certain cases. Thus the power to correct errors and remedy injustices have been initially placed at the unit level where such matters will first come to light. The only limitations imposed on the commanding officer's powers in this area are that the serviceman be under his command at the time the power is exercised, that the trial will have been a summary trial before a commanding officer or delegated officer, and that his action be not in relation to a punishment for which approval had been given by an approving authority. Similar powers are also held by formation commanders, commanders of commands, the Chief of Defence Staff as well as the Minister. Thus at all levels the convicted serviceman may have his conviction or sentence reviewed and altered as the interests of justice dictate.

#### Suggested Changes

If changes are to be made to the existing procedures for the conduct of a summary trial, they should concentrate initially on the commanding officer's role in the administration of discipline and then the form of the summary trial. The summary trial should be made just that, a trial. The following are suggested changes.

### Commanding Officer's Role

The commanding officer should be removed from the pre-trial procedure if he is to act in a judicial capacity and try the charge. If he does become involved, or has a "substantial interest", then he should refer the charge to another commanding officer for trial. This involvement limitation could be linked to the trial of specific offences, such as those of a criminal nature as opposed to those purely disciplinary. Such procedure would require a subordinate officer, possibly a delegated officer, to take a more active part than at present in the disciplinary process, as it could be that officer who would be responsible for the laying and investigating of charges.

### Guilty Plea

The trial procedure should permit a guilty or not guilty plea by the accused. In the case of a guilty plea the commanding officer would explain the charge to the accused, hear a statement as to the evidence that would have been produced, and then decide whether or not to accept the plea. The commanding officer could retain the option of forwarding the charge for trial by court martial or of ordering a further investigation on the facts as outlined in the statement of evidence, to the time that he accepts the plea. The accused should also be allowed to withdraw his plea of guilty to that time of the commanding officer's decision



### Not Guilty Plea

In the event of a not guilty plea, the present procedure as to the taking of evidence under oath should be followed. However the commanding officer should be required to conduct the trial in a form that would provide for the following:

- (1) The hearing of all evidence against the accused before he can be put to his defence.
- (2) The recording and the announcing, by the commanding officer at the completion of the "prosecution" case of the following decisions:
  - (a) That there is or is not sufficient evidence in his opinion to put the accused to his defence. In the event that there is not, the commanding officer would dismiss the charge.
  - (b) That the commanding officer, having found that there is a case for the accused to answer, is then prepared to continue the case to a finding. Having so informed the accused, the commanding officer would be prevented after that time from referring the charge for court martial or from having further investigations conducted. He would be bound by this decision to resolve the charge within his jurisdiction and on the evidence before him. If on the other hand, the commanding

officer was not prepared to so commit himself, then he would advise the accused and give a decision as to either dismissing the charge or of referring it for court martial.

### Evidence

The reception of any evidence by the commanding officer at a summary trial should be governed by the basic rules of evidence that apply in criminal cases and which refer to such matters as hearsay, confessions and accomplices. The doctrine of reasonable doubt should be clearly set out and made applicable to all findings. Oral evidence should be recorded, possibly in note form, and the accused given a copy of such evidence, at his request, if he is convicted. This would provide at least a basis upon which the summary trial could later be reviewed.

### Evidence Not On Oath

If there is no request by the accused that the evidence be taken on oath, yet there is a not guilty plea, an unlikely situation, a procedure should be developed whereby the evidence placed before the commanding officer is in writing. Such evidence could either consist of the written statements of witnesses or be contained in a form similar to the synopsis that is now prepared for applications for court martial or for the summary trial by a superior commander.

The accused would be given a copy of this evidence, at his request, but in any event the documents would be attached to the charge report if the accused was convicted. While such a procedure might be said to delay the proceedings, as in some cases the amount of evidence available would require an adjournment of the summary trial, the major benefit of providing a record of the evidence accepted by the accused, and upon which the commanding officer reached his decision, should outweigh the delays caused by adjournments. The commanding officer would retain the option of calling witnesses to testify under oath if the material supplied was vague or ambiguous.

#### Charge Withdrawal

The procedures should be altered to permit the commanding officer to order the withdrawal of a charge, or its amending, up to the time that the accused is asked for his defence. In the case where the charge was withdrawn, the proceedings would be terminated with no prejudice to an accused's subsequent re-trial on that or other charges. The propriety of the commanding officer hearing the subsequent case is doubtful if he was to have the charge withdrawn late in the presentation of the prosecution evidence.

### Counsel at Trial

The accused at his summary trial should have the right to have counsel appear on his behalf. This right could be linked to other matters, such as the right would only arise when the nature of the charge was criminal or a mixture of criminal and disciplinary. Possibly it could be linked to the right to elect trial by court martial as is now followed. The right might also be linked to the proposed punishment, for example, incarceration as against the minor punishment of extra work and drill. A procedure might well be developed whereby, if an accused did request that his counsel appear, the commanding officer could refer the charge specifically to a Standing Court Martial. These courts will be discussed in Chapter VII, but they provide a reasonably speedy form of trial with all the legal protections of a court martial. Under these circumstances the standing court might have its powers limited to those of a commanding officer on the certification of the commanding officer that he considered his powers adequate in the first instance. It would provide an accused with the opportunity to have his case heard by a form of trial that exceeds, in most cases, the civilian criminal trial as conducted at the summary level.

The above only amount to general suggestions as any formal and detailed changes will require basic re-thinking as to the role of the commanding officer in the administ-

ration of discipline within the Canadian Forces. They may however provide a departure point to develop a system of service trial that may stand up under the examinations that it might well undergo in the future.

## VI

## APPLICATION TO HIGHER AUTHORITY FOR DISPOSAL OF CHARGES

Introduction

When a commanding officer is required to refer a charge to higher authority for disposal, either by a summary trial by a superior commander, or by trial by court martial, the position of the serviceman, as an accused person in a criminal process, improves from that which an accused serviceman occupies in the summary trial before a commanding officer. The regulations governing this referral provide a procedure for a general recording of the evidence against the accused, for his formal arraignment on the charge, for the provision to the accused of a written statement of the evidence against him, and give him an opportunity to make a formal statement.

The regulations establishing the procedures to be followed in applying to higher authority for the disposal of a charge attempt to achieve two main objectives. Initially, they try to ensure that serious charges, and the evidence against the accused, are reviewed at levels of command where objectivity may exist to a greater degree than may be present at the unit level. Secondly, they permit higher authority, in the case of application for trial by court martial, to prevent the arbitrary exposure of an

accused to this form of trial, and thus to the severe punishments that may be imposed by such a court. To attain these ends, the regulations require that superior military authorities to the commanding officer review the case, and that these officers then make decisions of a judicial nature, based on information provided by the commanding officer in support of his application for disposal of the charge. What they must decide is whether or not the charge should be dismissed or the accused stand trial. These decisions are identical to the ones that the commanding officer was required to make after the charge had been originally laid and investigated.

Dispite the improvement of the position of the accused therein, this area suffers, as will be seen, from a major weakness. Prior to the passage of the National Defence Act in 1950, the decision of the convening authority to convene a court martial for the trial of a serviceman was preceeded by a complete investigation in which the accused was given an opportunity to participate, and in which the evidence was normally taken on oath and recorded. This is substantially the position today in both the United States and the United Kingdom military law. In Canada, the regulations that were passed to implement the National Defence Act, to provide for a referral procedure, are not based on these principles. They are designed to place before the superior authority only the general case for the prosecution. With only that case before

him, the officer who is required to make the decision to either dismiss the charge, or to put the accused on trial, cannot adequately meet his judicial responsibilities. No accused, for example, can realistically expect that any charge will be dismissed by a convening authority when the information given that officer is designed for the sole purpose of supporting the commanding officer's recommendation that the accused be tried. This is the major weakness in these referral procedures.

This chapter will examine, generally, the Canadian referral procedures, the form and content of the synopsis that accompanies the commanding officer's application, outline the United States and United Kingdom referral procedures in contrast with the Canadian procedures, outline the rights and privileges of the Canadian accused in the period before his trial by court martial, and finally propose suggested changes to the existing referral procedures in order that they may more adequately meet the needs of the Forces.

### The Canadian Referral Procedures

#### Required Documents

In all cases where there is to be application made to higher authority by a commanding officer for disposal of a charge, whether the application is in regard to the trial of the charge by court martial, or is a request that the



accused be tried by a superior commander, the regulations require the preparation of two documents to accompany the application. These are the Charge Sheet and the Synopsis.

The Charge Sheet<sup>1</sup> is a formal accusatory document, based on the Charge Report, setting out the charge, signed and dated by the commanding officer. It is the document that will eventually be read to the accused in formally charging him at the commencement of any subsequent trial.

The Synopsis<sup>2</sup> is a brief report of the statements describing the circumstances relating to the charge, together with the names of the persons by whom each of the statements may be substantiated in evidence. The preparation and content of the synopsis will be examined in detail under its own topic heading later in this chapter.

### Appearance Before Commanding Officer<sup>3</sup>

When a Charge Sheet and a Synopsis have been prepared, a copy of each is given to the accused. At least 24 hours after the receipt by the accused of these documents, he is brought before the commanding officer. The commanding officer at this point, in all cases, is required to ask the accused if he wishes to make a statement respecting the circumstances

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<sup>1</sup>QR&O, art. 106.03 and ch. 106, sec. 3.

<sup>2</sup>QR&O, art. 109.02.

<sup>3</sup>QR&O, art. 109.03.

disclosed in the synopsis. If the accused is a person, such as a warrant officer, who is liable for trial by a superior commander, he must also be asked whether, if a higher authority decides to try him summarily, he is willing to have the synopsis read at the summary trial instead of the witnesses, as mentioned, being called. This is similar to the evidence under oath question put to the accused at the summary trial before the commanding officer. These procedures having been completed, the commanding officer forwards the charge sheet, the synopsis, any statement given by the accused, and, if applicable, the agreement or otherwise of the accused as to the reading of the synopsis at any summary trial by a superior commander, to the next superior officer to whom he is responsible in matters of discipline. The accompanying letter will include the commanding officer's recommendation as to the type of trial.<sup>4</sup>

#### Statement By Accused Before the Commanding Officer

Any statement by an accused before the commanding officer is a protected one, in that it cannot be used as evidence in any subsequent trial.<sup>5</sup> The opportunity to make such statement is often valuable to an accused. The decision as to whether or not the accused warrant officer, for example, is to

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<sup>4</sup>QR&O, art. 109.04.

<sup>5</sup>QR&O, art. 109.03(3)(b).

be tried summarily by the superior commander or is to be court martialled, is not one for the commanding officer, but rather that of his superiors. While the commanding officer may recommend a court martial, an explanation or a defence by the accused in his statement may result in the higher authority rejecting the commanding officer's recommendation and trying the case summarily, or even dismissing the charge. This protected statement does permit the accused, possibly for the first time, to put forward his side of the story, if he wishes. The danger, of course, is that if he includes matters of defence, then he may well find them corrected or overcome in any subsequent trial. The decision as to whether or not to make a statement is similar to the one a civilian faces as to whether he wishes to enter a defence at a civilian preliminary hearing. But there is far more protection for the accused under the military procedure, for the statement cannot be used in evidence as could a statement given in the civilian criminal court.

#### Jurisdiction of Officer To Whom Application Is Referred

In reviewing the commanding officer's application for disposal of a charge, it should be understood that not all senior commanders have the necessary powers to deal with the application for a court martial.<sup>6</sup> The disciplinary

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<sup>6</sup>QR&O, art. 111.05. See also NDA sec. 143(1).

structure, in a simplified form, is one with the commanding officer at the lowest level, with responsibility in matters of discipline normally, but not necessarily, to a base commander. This officer will rarely have the power to convene a court martial, though in most cases he will have the powers of a superior commander. The next level of disciplinary jurisdiction may be that of the commander of a formation to which the unit belongs. Again, rarely will this commander be a convening authority, but in most cases he will be a superior commander. The senior level of jurisdiction in the field, (as opposed to Canadian Forces Headquarters), is that of the commander of the command to which the unit and formation belong. This officer will be a convening authority and a superior commander, and it will normally be at this level that a court martial is convened.

Some of the later comments with regard to the synopsis may be clearer if an example of these relationships, and the possible physical separation involved, is outlined. A unit belonging to Mobile Command and commanded by a lieutenant-colonel is located on a base on Vancouver Island, British Columbia. This unit may be responsible in matters of discipline to the headquarters of the base, normally commanded by an officer of the rank of colonel, and through the base to a headquarters of a formation commanded by a brigadier-general, located in Calgary, Alberta. The application for disposal of the charge will be sent from the unit, through

the base headquarters to the formation headquarters. Neither the base nor the formation commander can convene a court martial, though the latter will be a superior commander. To have a court martial convened, the application will be sent to the Commander of Mobile Command, a lieutenant-general, whose headquarters is in Montreal, Quebec. The Commander Mobile Command, thus, is thousands of miles from the unit initiating the application and separated from it by two intervening headquarters, that of the base and the formation. He will have little, if any, first hand knowledge of the surrounding circumstances of the incident and, short of personally communicating directly with the commanding officer concerned, he makes his decision on the application solely on what is submitted in writing to him. Thus the content of the application is of great importance if the decision is to be a valid one as objectively selecting between a number of courses of action. When the distances between the commander of the command and the commanding officer are considered, it will be readily apparent that requests for further information, and its submission from the unit, may well result in extensive delays in the process of bringing the accused to trial and the disposal of the charge.

#### Disposal of Application: Courses of Action Open<sup>7</sup>

When a commander who has jurisdiction to try the

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<sup>7</sup>QR&O, art. 109.05.

accused summarily, or to convene a court martial, receives a commanding officer's application for disposal of a charge, he may take one of a number of courses of action. He may always dismiss the charge, and that is an end to it. If he is a convening authority, he may convene a court martial. If he has the powers of a superior commander, and the accused is a person subject to his jurisdiction, he may try the accused summarily. He can also refer the case to a convening authority, if he is not one, with a recommendation that a court martial be convened. He may send the case back to the commanding officer, if the accused is a person whom the commanding officer has jurisdiction to try summarily, with a direction that he so try the case. If the accused, however, elected trial by court martial in the first instance, as opposed to being recommended for court martial action solely as a result of the commanding officer's decision, then the higher authority can only convene a court martial or dismiss the charge.

The courses of action open to the higher authority receiving an application for disposal of a charge may be clearer if they are illustrated by the following examples of the disposition of charges against three accused; a private charged with theft, a sergeant with disobedience, and a captain charged with absence. The private will have been given an election by the commanding officer because of the nature of the charge. If he elects court martial, then higher

authority can only convene a court or dismiss the charge. If the private does not elect to be tried by court martial, the commanding officer nevertheless may decide, before making the finding as to guilt or innocence on the charge, that it should be tried by court martial anyway because his own powers of punishment are inadequate. Higher authority, when he gets the application for disposal, may then dismiss the charge, (highly unlikely), convene a court martial as requested by the commanding officer, or he may consider that the offence, or the circumstances, do not warrant the time and expense of a court martial, and send it back to the commanding officer with a direction that he try it within his powers of punishment.

In the case of the sergeant, if he is given the election, then he will know that it is because of the proposed punishment, for the offence of disobedience is not an offence that carries with it the right to elect. If the sergeant elects trial by court martial, then he must be so tried, unless the charge is dismissed. If the sergeant does not so elect, but the commanding officer, as he did in the case of the private, comes to the conclusion that the charge against this accused should be tried by a court martial, the higher authority can convene the court as requested, or he can possibly take a more lenient view of the case than that adopted by the commanding officer, and send it back to the commanding officer with a direction that he try it within his powers of punishment. The commanding officer in that event cannot award any

sentence involving incarceration or reduction in rank. There is one exception to this restriction of the commanding officer's powers of punishment when the case has been sent back by the higher authority. If, at the original appearance by the accused before his commanding officer, the sergeant had never been given the right to elect trial by court martial, the commanding officer at that time having taken the view, after his investigation, that his powers of punishment were inadequate, then it is possible for the commanding officer in the trial that commences after the case has been returned to him by higher authority, to give the accused an election based on the proposed punishment. If the accused then elects trial by court martial, the matter again will be sent to the higher authority for disposal. If the accused does not elect, then the commanding officer will be free to sentence to the limits of his powers, i.e., 90 days detention.

The only person who can try the captain summarily is a superior commander. The commanding officer in his application may recommend such a trial or a court martial. It is the superior commander however, who makes the decision as to whether he will try the case or not; he does not necessarily follow the recommendation of the commanding officer, though in practice he invariably will when the recommendation is one for a summary trial. If this accused officer had been charged with theft, rather than absence, then at his summary trial he too would have the right to elect trial by court



martial, because of the nature of the charge. This right would be extended to him at the commencement of his trial before the superior commander.

#### Legal Officer's Review

In practice, though not by regulation, when there is to be an application for disposal of a charge, whether by summary trial or by court martial, the commanding officer will request a legal officer to review the charge and the evidence, and in many cases this officer will prepare the synopsis that accompanies the application. Further, a legal officer will invariably be consulted by the superior commander or the convening authority before a decision is made as to the disposition of the commanding officer's application. The involvement of legal officers in this referral procedure will normally prevent ill-founded charges being carried forward, and the legal advice given will hopefully ensure that the interests of both the military society and the accused are protected.

#### The Synopsis and a Comparison With the United States and United Kingdom Referral Procedures

##### The Preparation of a Synopsis

The synopsis that accompanies the commanding officer's application for disposal of a charge represents a Canadian

attempt to move away from the highly formalized United Kingdom military law procedures of taking a summary of evidence in serious cases, and to provide the Canadian Forces with a more informal method of obtaining sufficient information to permit the superior commander, or the convening authority, to make a decision as to the disposition of the charge. It has resulted in a procedure that fails, from the point of view of the accused, to ensure him an adequate and impartial examination of the charges and evidence against him, and it also fails, from the point of view of the higher authority, to put before him all the circumstances so as to permit his decision to be based on full knowledge.

The principle followed in today's Canadian military law in the preparation of the synopsis is that it only outline the case against the accused. The instructions as to its preparation state that "an officer preparing a synopsis may obtain the necessary information by telephone, by personal interview, by letter or by such other means as he sees fit, having regard to the necessity of prompt and accurate preparation".<sup>8</sup> The contents of a synopsis are often based on a police report or on hearsay as, if a witness is not readily available, his evidence may be recorded when received from another party. Thus the evidence of A would be shown on the synopsis as being to the effect that he saw

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<sup>8</sup>QR&O, art. 109.01, Note A.

the accused do an act, though it was B who stated what A saw.

Such a synopsis cannot claim to be objective nor accurate, and certainly does not present the complete circumstances surrounding the charge. This is an unhappy change from the situation that existed before the passage of the National Defence Act in 1950. In evaluating the present day Canadian referral procedures, and the synopsis, it would be helpful by way of contrast to describe the United Kingdom and United States military law on this subject of examining and recording the proposed case against an accused serviceman, and advising the convening authority.

#### The United Kingdom Referral Procedures

Under the United Kingdom military law that applied to the Canadian Forces prior to 1950, and which is essentially the same today, the commanding officer, having had the charge formally investigated through the hearing of witnesses in the presence of the accused, and having decided not to dismiss the charge or to try it summarily but to recommend trial by court martial, was required to prepare "a summary of evidence" to accompany his application. This required that the evidence of all material witnesses be taken down in writing before the commanding officer or, as was usually the case, before some other officer appointed for the purpose by the commanding officer. The presence of the accused

was mandatory and he had the right of cross-examination. The witnesses against the accused were normally sworn, either at the direction of the commanding officer or at the request of the accused. The accused was not permitted counsel however, though he was given access to an assisting officer to advise him. When all the prosecution evidence had been completed, the accused was given a formal caution and then an opportunity to make a statement and to call witnesses.

When the summary of evidence was completed, the commanding officer was required to review it and finally determine whether or not to remand the accused for court martial. It was not unusual for the evidence in the summary to be at variance with the evidence he had considered in the investigation of the charge, and thus he could change his decision and come to the conclusion, at this point, that the charge should be dismissed or that he should try it summarily, if he held jurisdiction to do so.

The convening authority under this United Kingdom procedure thus received a complete outline of the circumstances surrounding the charge, and therefore when he exercised his discretion, he did so with full knowledge of the available evidence and its nature. Further, the accused was extended a full opportunity to participate and was completely informed of the case against him.

### The United States Referral Procedures

The United States Uniform Code of Military Justice<sup>9</sup> has recognized the need that a convening authority must be supplied with accurate and reliable information on which he can base his decision as to the disposition of the charge against the accused. It provides that "no charge or specification may be referred to a general court martial for trial until a thorough and impartial investigation of all matters set forth therein has been made".<sup>10</sup> Any officer who may be involved in either the prosecution or defence of any subsequent trial is excluded from conducting this investigation, known as "An Article 32 Investigation". The purpose of the investigation is to formally inquire into the truth of the matters set forth in the charge, the form of the charge, and to recommend what disposition should be made of the case. The function of the investigator is not to just make a case out against the accused, but to ascertain and impartially weigh all available facts.

The form of the investigation is similar to that of the United Kingdom summary of evidence procedure, except that the accused is permitted counsel under the United States military law. It requires the presence of the accused during

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<sup>9</sup>The United States Code of Military Justice, Title 10, ch. 47.

<sup>10</sup>Ibid, art. 32.

the taking of statements from the witnesses and permits cross-examination. He also may offer a statement on the evidence produced against him by the prosecution witnesses and present witnesses on his own behalf, if he wishes. At the completion of the investigation a formal report is made by the investigating officer that includes the statements taken from the witnesses, a statement as to the substance of their testimony, and a statement by the investigating officer that, to the best of his knowledge and belief, the matters set forth in the charges as to which he recommends trial are true and that the charges are in a proper form.

Thus the convening authority under United States military law, when he receives the application for a general court martial, also has the benefit of a thorough and impartial investigation of all circumstances, and one in which the accused had full opportunity to participate. His decision as to the disposition of the charge can then be reasonably made on adequate information.

#### The Canadian Referral Procedure Compared

The United States and United Kingdom referral procedures are based on the principle of obtaining all information for and against the accused in order that a fair, impartial and objective decision may be made by higher authority. The Canadian synopsis merely states what evidence may be available to support the charge and is purely a document

to support the prosecution of the charge. It is prepared on the assumption that the commanding officer has already conducted or reviewed an impartial and objective investigation after the charge was laid. This is a valid assumption in regard to both the United States and the United Kingdom "commanding officer's investigations"; it is not so under the Canadian military law. The weakness in the application of this principle and procedure to the Canadian serviceman has already been examined in earlier chapters. The Canadian referral procedure is strictly a prosecution procedure which is of little assistance to a convening authority when he receives the application for disposal of the charge, especially as to the exercise of his powers to dismiss.

The United States procedure requires a fully independent investigation. The United Kingdom procedure leaves the taking of the evidence in the hands of the commanding officer, but because of the opportunities extended to the accused to be present, cross-examine and to present a defence that must be recorded, this is not a real weakness. The Canadian synopsis is prepared by an officer whose interest, by regulation, is to only set out the prosecution case; indeed, in many cases the prosecutor at the subsequent court martial will be the officer who prepared the synopsis. A synopsis cannot give a complete picture when its objective is to prosecute, not to investigate or to report.

The United States and United Kingdom procedures permit

full participation by the accused and, in the United States Forces, by his counsel. The Canadian accused cannot speak to the evidence until after the synopsis has been completed. He does, it is true, receive a copy of the synopsis and can subsequently make a statement before the commanding officer, but it must be obvious to him that the commanding officer has made up his mind from his own "investigation" when the charge was laid, and he, the accused, cannot really expect that it will be changed at this late stage.

The content of the United States and the United Kingdom investigations is based on the formal examination of witnesses who may be sworn and who sign their testimony. The Canadian synopsis may be based on interviews, but no formal statements are taken and no oaths are administered. This sometimes results in interesting changes in testimony at subsequent courts martial where the rules are slightly more demanding.

The Canadian officer preparing the synopsis will sign it, but does so only as having prepared it "in support of the charge against" the accused. The commanding officer is under no obligation to determine the correctness, fairness or adequacy of its contents. He is merely required to have one prepared to support his application. Even though the officer preparing the synopsis may be the only person with any detailed knowledge of the evidence and the witnesses, he makes no findings and no recommendations. Under the United



States procedure, the officer conducting the Article 32 Investigation must make a certification as to the truth of the matters he has investigated and recommends the trial of the accused. Under the United Kingdom procedure, the commanding officer must review the summary of evidence and again reach a decision, based on the contents of the investigation, as to whether the charge should be dismissed, tried by summary trial or be remanded for court martial.

Re-emphasizing what has just been said, the result of the Canadian procedure is that when the Canadian convening authority receives an application for disposal of a charge by court martial, its sole formal support is the synopsis, and this contains statements designed for only one purpose, that of supporting the charge against the accused and the commanding officer's recommendation. The convening authority is clearly not well served by this procedure. What is the point of giving him powers to dismiss a charge or to send it back to the commanding officer to try by a summary trial, when he rarely receives a thorough, impartial and properly conducted investigation? Upon the evidence that will be contained in the normal synopsis, higher authority will have but one choice, that to accede to the commanding officer's recommendation. Under the present procedure as to the content of the synopsis, to expect him to take another course of action is not considering the matter realistically.

As has been said several times already, the purpose

of this whole thesis is to attempt to provide grounds upon which the whole Canadian military law system might be strengthened. With respect to the topic presently under review, i.e., the synopsis, the important fact is that the convening authority is not given full particulars and the important result is that a procedure which is supposed to prevent the convening of a court martial where none is required, or where the available evidence indicates that the process would be a fruitless one, signally fails to attain that end. It is not unusual for a convening authority to return an application with blunt questions that require answers before he will make a decision as to the disposition of a charge. It is also, unfortunately, not unusual for a court martial to be convened where the subsequent trial reveals circumstances that indicate that an objective, impartial examination and evaluation of the complete case would have resulted in the opposite decision by the convening authority or the commanding officer.

#### Inadequacy of the Canadian Referral Procedure Illustrated

To complete the review of the synopsis, consider the following case. A convening authority receives an application for disposal of a charge of impaired driving. The commanding officer reads the police report and because there have been a number of cases of this nature, decides that this accused should be tried by court martial. The synopsis is prepared and delivered to the convening authority. It states that the

accused was the driver of a vehicle and late one night, on his way home from the mess, left the road and ran into a tree. It also states that the investigating military policeman saw the accused at the scene, and having smelled alcohol and observed him, was of the opinion that the accused was impaired. As a result of the contents of this synopsis a court martial is convened. At the trial however, a medical officer who had examined the accused a short time after the accident, and two other witnesses at the scene, say that in their opinion the accused was not impaired. The result is an acquittal.

The synopsis in this case gave a false picture as it was based on the reading of the police report alone, and made no reference to evidence conflicting with it. It is easy enough to blame the officer who wrote the synopsis, or the prosecutor or even the commanding officer, but the real fault is with the regulations which only require that something that is little more than a prima facie case be put before the convening authority - as was done in this case. Here the synopsis completely disregarded anything except that which supported the accused's guilt.

The convening authority was, in a word, misled, and was misled because of the defective approach taken by the regulations. The acquittal did little to advance the cause of discipline. On the one hand the convening authority and the commanding officer must have been unhappy that the full

facts were not brought to their attention to assist in their decision making. On the other hand, the accused, while pleased at his acquittal, must wonder why he was ever placed in such jeopardy.

In summary, the Canadian synopsis procedure neither adequately informs a convening authority of the circumstances upon which he is requested to make a decision, nor achieves the degree of impartiality, objectivity and quality of investigation needed to give it credibility as a part of a judicial process dealing with serious criminal charges calling for possible severe punishments.

Rights and Privileges of Accused  
Before Trial by Court Martial

While the interests of the military society as a whole are not well served by the synopsis, and its failure to provide adequate information to the convening authority or the superior commander, the position of the accused during the period of referral leading to his trial by court martial is highly favoured. In terms of rights and privileges, he is, if he is to be tried by court martial, in a far superior position as to the preparation and presentation of his defence to that of the civilian accused before a Canadian civilian criminal court. The basic principles adopted by the Canadian system of military justice are, that as far as possible, the defence and the prosecution shall be on equal

footing as to the availability of resources, and that, by providing openness in regard to the nature of the evidence to be produced, the defence shall never be "surprised" at trial. The following are some of the areas where these principles are evident.

#### Availability of Counsel

As was mentioned in the previous chapter, from the time that a charge is laid, the accused has available an Assisting Officer.<sup>11</sup> Through this officer he can receive advice as to his rights under the Code and as to the courses of action open to him at various stages of the pre-trial procedure leading to a court martial. When the convening order for the court martial has been signed, a legally trained officer of the Office of the Judge Advocate General will be made available to advise and represent him, if necessary, at any subsequent court martial as his Defending Officer. Although a legal officer is not normally offered him prior to the convening order being signed, in cases involving possible charges of murder, rape or manslaughter committed outside Canada, one is made available to him immediately following his arrest. This provision of a legal officer to advise and act for him does not affect his right to retain and instruct civilian counsel of his own choice, but it would be at his

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<sup>11</sup>QR&O, art. 108.26. See also Footnote 22, ch. 5.

own expense. If he does exercise this right, a legal officer will only rarely participate in the defence; a military officer will, however, often be assigned to assist the civilian counsel with administrative matters.

The availability of military, legally qualified, defence counsel to the service accused is a plus factor in the system. Such counsel will normally have far greater knowledge of the military and its administration than will civilian counsel. This knowledge of his, together with his close association with the military society, often results in the presentation of a defence case that is likely to be far more effective; for it will be presented within the military system instead of appearing to challenge it. Criticism of military defence counsel is sometimes based on the argument that he may not, because of his military connection, have sufficient independence to adequately represent the interests of his service accused, as would a civilian who is bound by no military considerations. This is not valid. Any military defence counsel who appears to have placed military considerations ahead of the interests of the accused will be severely criticized, and a conviction of his accused in such a case may well be quashed on the ground of miscarriage of justice. Furthermore, the reputation of counsel within the military legal fraternity is, as in civilian life, often made as defence counsel. This factor alone ensures a high standard of representation.

In summary, the accused has under Canadian military law available to him continual assistance and advice from the moment he is charged, and will have legal counsel offered to him immediately it is known that he will be tried by court martial.

#### Availability of Access to Evidence and Witnesses

The accused has, prior to the commencement of his trial, the right through his counsel, to review all reports relevant to the investigation, has access to all witnesses and can examine all evidence against him.<sup>12</sup> Evidence is not taken at the trial until the accused has been asked if he wishes an adjournment because he has had insufficient time to prepare a defence and any reasonable request on this ground is normally granted.<sup>13</sup>

No prosecution witness will normally be called at the trial unless the accused has been given reasonable notice of not only the identity of the witness, but also of the nature of the evidence to be given. In a case where there is a surprise witness, the defence usually will request an adjournment before the evidence is given in order to interview the witness, or if the prosecution evidence is given, the defence may request that the cross-examination be post-

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<sup>12</sup>QR&O, art. 111.61. See also NDA sec. 160.

<sup>13</sup>QR&O, art. 112.05(7).

poned to a later time in the trial in order that it may be properly prepared.<sup>14</sup>

All the witnesses listed in the synopsis are normally required to be called by the prosecution, if the defence so wishes, for at least cross-examination. The prosecution can only avoid this requirement by giving the accused reasonable notice before trial of its intention to not call a witness.<sup>15</sup>

These practices ensure that there is complete disclosure to the defence, that at all times the accused will be aware of the nature of the evidence against him and that he will have ample opportunity to prepare to meet it.

#### Availability of Resources

The resources of the investigatory and police branches of the Forces are as fully available to the accused as they are to the prosecution. Defence of major cases becomes almost a pleasure. It is not unusual, if there is a need, to have one or more service investigators assigned to the defence. The accused has access to all the areas of expert advice that can be found in the crime laboratories in both Canada and the United States. The defence may have witnesses located and interviewed through the use of police facilities on an equal basis with that of the prosecution. The expenses

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<sup>14</sup>QR&O, art. 111.64.

<sup>15</sup>QR&O, art. 111.645.



of the defence are met on the same basis and from the same funds as those available to the prosecution. In adopting these practices, the Canadian Forces have adopted an approach that has been long advocated for use in the civilian society to ensure a greater equality of justice, by removing the constraints that may result to an accused because of financial disabilities and lack of resources to prepare a defence.

In addition to the availability of resources, such as police and financial, an Advisor to the accused will, if the defence requests, be appointed.<sup>16</sup> Through such an officer assistance at an expert level is always available in specialist fields for the preparation and conduct of the defence. In a case involving theft of funds through the falsification of books, for example, an advisor having specialized knowledge of the Canadian Forces' financial regulations could be requested. One familiar with the requirements for the maintenance and operation of Canadian Forces' aircraft could be appointed in a case where the charge involved negligent performance of duties in relation to aircraft. Thus, whether a legal officer or civilian counsel is representing the accused, the regulations ensure that he, as defence counsel, has immediate advice available on technical or specialist matters that are, or may be, produced in evidence.

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<sup>16</sup>QR&O, art. 111.60, Note A.

### Division of Referral Procedures

The existing referral procedures are not adequate. The regulations, in requiring that the same procedure be followed to apply to have a charge disposed of by summary trial by superior commander, or have a charge tried by court martial, have failed to afford any recognition of the different forms of these trials, as well as the scope of the punishments that may be awarded under each. The summary trial by a superior commander should provide a method of reasonably swift trial of a charge, which is usually one of a minor nature, under, as its name denotes, a summary form of trial procedure. A minimum of time should elapse between the laying of the charge and its disposal. The scope of the punishment that can be awarded, only a fine or reprimands, emphasizes this summary aspect. The court martial, on the other hand, is a highly formal trial procedure and its jurisdiction to award punishments involving lengthy imprisonment requires that care should be required before an accused is so tried.

Considering these aspects, there are reasonable grounds to state that the regulations should distinguish between these forms of trial in providing for referral procedures. Such procedures should support the form of trial that is being requested, providing a speedy arraignment of the accused before the superior commander, but giving, when

the case is one for court martial, a greater formality and emphasis, than at present, on the recording and evaluation of the evidence.

The following will set out, in more detail, factors that support this division of referral procedures and suggest avenues of approach that might be considered in revising the present procedures.

#### Grounds Supporting Present Referral Procedure For Trial By Superior Commander

The main area of concern in the Canadian referral procedures to higher authority for the disposal of charges rests in the preparation, form and content of the synopsis. In relation to the referral of a charge to a superior commander for summary trial however, even the use to which the synopsis is now put, is a questionable one. There are two main grounds for the present requirement of providing a superior commander with a synopsis. They are:

- (1) The superior commander must have sufficient information before him to be able to:
  - (a) dismiss the charge without requiring the accused to appear;
  - (b) refer the charge to a convening authority with his recommendation that it be tried by court martial; or
  - (c) make the decision to try the charge himself, summarily.

(2) The superior commander must be given the synopsis in case the accused dispenses with the calling of witnesses at his trial, and so elects to be tried on the evidence set out in it.

For the reasons given below, ground one has today no validity, ground two being the only ground really supporting the present procedure.

The reasons why ground one is said to have no validity are two; firstly, the realities behind the application by the commanding officer to the superior commander asking that the accused be tried summarily make the superior commander's decision completely predictable, i.e., to so try; and secondly, the possibility that the superior commander would reject the commanding officer's recommendation for a summary trial, and himself recommend a court martial, is a merely theoretical one.

In considering the first reason, the following realities must be accepted by the superior commander as he considers his course of action in response to the commanding officer's application. First, before making the application the commanding officer has laid the charge, has investigated it, has decided that there is a case for the accused to answer, and has as a result, recommended trial by the superior commander. Second, charges are not lightly laid against senior non-commissioned officers or commissioned officers within the military, and when they are, they are carefully

investigated because of the grave consequences that can follow any conviction, such as a delay or denial of promotion or even administrative release. Third, and finally, the commanding officer has specifically directed his mind to the question of dismissal of the charge and to trial by court martial, and has nevertheless recommended that the trial be a summary one before the superior commander. His decision and recommendation are based on far more complete knowledge of the circumstances of the incident and the accused than are available to the superior commander through the synopsis. With these matters in mind, the decision of the superior commander cannot realistically be expected to be anything else than the one asked for by the commanding officer, that of a summary trial by a superior commander.

The second reason why ground one is no longer valid as supporting the synopsis follows closely from the first. Even if the superior commander came to the decision to recommend to a convening authority that the accused be tried by court martial, in spite of the commanding officer's recommendation, the possibility that he could successfully convince the convening authority, would be so rare an event as to be classed as merely theoretical. How can it realistically be said that there is any real possibility of the superior commander, out of hand, dismissing the charge, based on the evidence contained in the synopsis when the realities of the investigation and the reviews of the matters prior to its

submission to him are considered? He may well dismiss the charge on other grounds, such as compassionate, but compassionate matters are not included in the evidence set out in a synopsis. In any event, the possibility of these courses of action being selected by the superior commander, in opposition to the commanding officer, is so remote as to justify it being disregarded as a factor that should govern a referral procedure from the commanding officer to a superior commander. While the superior commander should retain his powers to dismiss a charge or to refer it for consideration of a court martial, if referral procedures are changed, the exercising of those powers need not be based on the evidence contained in the synopsis.

It is clear from the above that, if the only ground supporting the synopsis and its use in the referral procedure to a superior commander was the first one, then the synopsis could be dispensed with entirely in any new procedure. However the second ground of support for the synopsis, viz. the use of the synopsis at the superior commander's summary trial where the accused agrees to its reading and does not require the attendance of the witnesses against him, does have validity. If there was no synopsis of evidence of any kind, then the accused before the superior commander would be under the same disadvantage as was outlined earlier in relation to the accused at the commanding officer's summary trial, i.e., he has no knowledge of what evidence will be

considered or as to what evidence he must meet at his trial and upon which the superior commander will make his decision as to his, the accused's, guilt or innocence. If witnesses can be dispensed with, (and this would see a reasonable thing to allow, given the military summary trial system), there must, at least, be some outline of evidence which will be considered by the superior commander, and be known to the accused. This ground therefore, strongly supports the continuation of the synopsis procedure. It permits a more efficient summary trial as it allows the reception of evidence with far less formality, and thus much more quickly, than would be required in swearing and questioning individual witnesses, and it has the added major advantage that it creates a record of evidence that was considered by the superior commander in reaching his finding at the trial.

It would seem therefore, ground two is a governing ground and that the creation of some sort of record of evidence against the accused should be provided for in any new referral procedure. The following suggestions are built on this ground of having a record of evidence, but, as will be seen, the suggested procedure would limit its use by the superior commander to the trial of the accused and not make it available to him before that time.

Suggested Referral Procedure For  
Summary Trial By Superior Commander

An accused who is subject to trial by a superior commander cannot be tried by a commanding officer, so when a charge is laid against such an accused, the commanding officer knows that, unless he dismisses the charge, the trial will be before a superior commander or by a court martial. In any event, the charge having been laid, the commanding officer must then have it investigated, even though he cannot try it. A written record of the evidence considered in the investigation should be made. The formalities of this should be kept minimal, and the record of evidence could well be in the present synopsis form or in abstract form. Having reviewed the record of evidence against the accused, and having decided not to dismiss the charge, but to refer it for summary trial by the superior commander, the commanding officer should have a copy of the record of evidence delivered to the accused, and the accused should then be asked to express his wishes on the following matters:

- (1) If the offence is one for which there is the right to elect trial by court martial, whether he so elects;
- (2) Whether he wishes to have the witnesses named in the record of evidence called at his summary trial or is prepared to have the record of evidence read at that trial as the evidence supporting his guilt.



Prior to forwarding the charge and his recommendation, the commanding officer would see the accused and record his replies to these questions. He would, of course, still retain his power to dismiss the charge at that time if the accused raised some matter that he had not previously considered. If however, he does forward the charge for summary trial, the record of evidence would not form part of that application, but would be submitted separately at the time of the trial.

This procedure at the commanding officer's level of jurisdiction would considerably speed up the reference of a charge to a superior commander by removing the present requirement for a double investigation, i.e., the initial one of the commanding officer into the charge and then the one that is conducted to prepare the synopsis. Further, it would allow determination at an early stage of the disciplinary proceedings, the question as to election for trial by court martial as under the present procedures, the accused is only asked to elect after the commencement of his summary trial before the superior commander.

The superior commander would receive only the charge and the commanding officer's application; he would not receive the record of evidence. He would set a time for trial, and, unless the accused had dispensed with the calling of witnesses, the commanding officer would be responsible for their attendance. At the commencement of the trial, the acc-

used would plead. If there was a plea of not guilty, and also an agreement that the record of evidence could be read in lieu of calling the witnesses, then, and only then, would the superior commander receive the record of evidence. Unless, in other words, the accused agreed to the reading of the record of evidence, it would play no part in the summary trial and the superior commander would not receive a copy. The superior commander under this procedure will attain the appearance of judicial non-involvement to a far greater degree than he has now, when he tries the case. His decisions will be based on the evidence given by the witnesses and not subject to the criticisms that they may be coloured by previous knowledge obtained through the synopsis. Detailed suggestions for these procedures are set out in Chapter IX.

This procedure would diminish to a vanishing point the possibility that the superior commander would dismiss the charge before trial. As pointed out earlier, he is most unlikely to do it now. It would also apparently remove from the superior commander his option of referring the charge for trial by court martial; this is not quite correct, for he would retain the power, but he would, as now, be most unlikely to exercise it before trial. It would, finally, remove from the superior commander the opportunity to review the evidence on the charge and obtain further information - so that he would be, in effect, at the mercy of the commanding officer. This is correct; but that is as it should be, for the super-

ior commander is acting in a judicial capacity and not in one of an investigator. If the commanding officer did not meet his responsibilities, then this will become quickly evident at the trial. At some stage there should be an end to reviews and further investigations and a determination of the matter.

In summary, this suggested referral procedure involves four major changes. The first is that the synopsis, as such, is done away with - with a consequent decrease in the time consuming formalities now required to bring an accused to trial. The second is the emphasizing of the "commanding officer's investigation". This is reasonable as it is upon that investigation that the commanding officer decided not to dismiss the charge, but to have it tried by a superior commander. The third change is that it places the superior commander clearly in a judicial position when he tries the charge. The fourth major change is that these procedures recognize that, if the commanding officer laid the charge, investigated it, and normally have obtained legal assistance before making his application, the charge should be quickly tried on its merits and that further investigations and reviews will accomplish little.

Before moving on to suggest a referral procedure that might be used when the charge is to be recommended for trial by court martial, it might be noted, as a side issue, that there would seem to be no reason why the recording of

the commanding officer's initial investigation into the charge could not be applied to the trial procedure of the commanding officer's summary trial, in cases where the accused does not require the evidence to be taken under oath. It would provide a record of such a trial, as it does for the superior commander's trial, and the existence of such a record of evidence would do away with many of the uncertainties that now exist in this aspect of the commanding officer's summary trial, as was discussed in the previous chapter.

#### Suggested Referral Procedure For Court Martial

The Canadian military law procedures to refer a charge for trial by court martial require re-writing. They should emphasize the necessity of a full, thorough and impartial investigation into the charge. An investigation of this nature will provide the convening authority with the complete information on the case, and thus allow him to make his decisions with knowledge of all the circumstances. In these new procedures the principles found in the Article 32 Investigation of the United States Forces and the Summary of Evidence employed by the United Kingdom Forces should be followed.

The main change required is that when there is to be application for disposal of a charge to higher authority with a recommendation for trial by court martial, whether

because of election or otherwise, the regulations should require a formal investigation of the evidence by the officer making the recommendation. The following general principles should be incorporated into the procedures governing this investigation.

- (1) The examination should be as formal as possible under the circumstances, and should be conducted in the presence of the accused.
- (2) The accused should have the right to question all witnesses giving evidence against him. The appearance of counsel at this stage is not necessary, though there should be an Assisting Officer appointed.
- (3) All witnesses should be sworn. If a witness does not give evidence at this stage, the reason for his failure to do so should be recorded, together with an outline of the evidence that he is expected to give at the trial.
- (4) There should be a recording of the evidence taken, possibly in a synopsis form. The most desirable record would be a transcript of each witnesses' testimony, signed by the witness.
- (5) The accused, at the completion of the hearing of the evidence against him, should be given the opportunity to make a statement and to call witnesses.
- (6) The accused should be given a copy of the record of the examination.

- (7) The officer conducting this examination should be required to certify as to the accuracy of the record and to submit recommendations as to the disposition of the charge.
- (8) The commanding officer, or the officer recommending trial by court martial, should be required to certify that the recommendation is based upon the evidence as contained in the record.

As stated at the end of the previous chapter, the suggestions made under this heading are no more than suggestions, but they are suggestions from which new thinking and new approaches might be evolved in the Canadian military law judicial system. A referral procedure that applied the above principles would be a fair one, and would undoubtedly meet the needs of both the accused and the military society.

#### A Practical System

Is such a referral system practical? What of the commanding officer aboard a ship where typists are rare and facilities for elaborate administrative procedures are restricted, to say the least? Would not the trial of an accused be unduly delayed while these formalities are followed? These are valid considerations and they will have to be examined before changes are made in the present referral procedures. The initial reply to such observations should point out however, that the United Kingdom Forces have been

employing procedures involving these principles for many years, and they appear to have coped; the Canadian Forces should be able to do the same. As to delay, the present procedures require the production of documents and letters in relation to any application for court martial, and any officer who is conscientious conducts many personal interviews while preparing the synopsis, though not as formally as is being suggested here; delays should not be greater than those presently encountered and overcome in any matter of importance. As to there being more paper, there will be more, but the result in fairness to the accused and the provision to the convening authority of adequate and accurate information is well worth the cost and the effort. As to time and manpower and availability of facilities, on which the arguments against alteration of the present procedure may well center, applications for court martial within the Canadian Forces today rarely exceed one hundred in a given year, and the administrative difficulties may not be so great as they at first appear.

### Conclusion

The present Canadian military law referral procedure to have an accused tried by court martial is not adequate. The convening authority is requested to make a decision of a judicial nature, but he is required to make it, if not blindfolded, at least with blinkers on. Such a blinkered decision

making process should not be acceptable to any senior military commander. It contravenes the very first principle on which the military decision making process is based: that a commander makes his decision only after he has received as complete and accurate information as can be made available. The basis of his military decision as to the trial of the accused should not be different because the question to be decided is a legal one rather than an operational one.



## VII

## THE COURT MARTIAL

Introduction

From its origin as a Court of Chivalry established by William the Conqueror to administer military law, the court martial has evolved into a highly formal military trial that is part of a military judicial system, as has been described, completely separate from that found in the civilian community. The court martial is the senior service tribunal, and a major strength of the Canadian military law is found in the law and the regulations governing its proceedings.

This chapter, in addition to reviewing generally the types of courts martial and the general procedures that are followed at the trial itself, will examine in detail the role of the Judge Advocate sitting on a court martial, and thus the role of a legal officer of the Canadian Forces acting in a judicial capacity, and the selection of members to sit on a Disciplinary and General Court Martial. Appeals from the finding of courts martial as well as the post-trial reviews that are conducted, will be reviewed in Chapter VIII.

Types of Courts Martial

There are four types of courts martial within the Canadian Forces, distinguished by different jurisdictions and compositions. The following are brief outlines of these courts.

### The General Court Martial (GCM)<sup>1</sup>

The General Court Martial is composed of not less than five and not more than nine officers, the senior of whom is appointed President. That officer must be of or above the rank of colonel. The General Court Martial has jurisdiction to try any person subject to the Code of Service Discipline and may impose any punishment to the maximum prescribed for the offence in the National Defence Act. At every General Court Martial a Judge Advocate shall be appointed to officiate at the trial.<sup>2</sup>

### The Disciplinary Court Martial (DCM)<sup>3</sup>

The Disciplinary Court Martial consists of not less than three and not more than five officers, the senior of whom will be the President. He is required to be of or above the rank of major. The Disciplinary Court Martial has jurisdiction to try any person subject to the Code of Service Discipline, but by regulation its jurisdiction has been limited to the trial of commissioned officers of or below the rank of captain. It also has jurisdiction to try all non-commissioned officers and the private soldier. No Disciplinary Court Martial may pass a sentence that includes a

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<sup>1</sup>QR&O, ch. 111, sec. 3.

<sup>2</sup>NDA sec. 146.

<sup>3</sup>QR&O, ch. 111, sec. 4.

punishment greater than imprisonment for two years less one day. While there is no statutory requirement that a Judge Advocate be appointed, the appointment being optional,<sup>4</sup> in practice one will always be appointed to advise the President and Members.

#### The Standing Court Martial (SCM)<sup>5</sup>

The Standing Court Martial is a one man court consisting of one officer, called the President, who is appointed by or under the authority of the Minister. To be appointed the officer must be or have been a barrister or advocate of more than three years standing. The Standing Court Martial cannot try a civilian nor an officer who is senior in rank to the President. It cannot award a punishment higher in the scale of punishments<sup>6</sup> than imprisonment for less than two years. To the present time, only legal officers have been appointed Presidents of Standing Courts Martial.

#### The Special General Court Martial (SGCM)<sup>7</sup>

The Special General Court Martial consists of a person, called the Presiding Judge, designated by the Minister,

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<sup>4</sup>NDA sec. 152. Also see QR&O, art. 111.41.

<sup>5</sup>QR&O, ch. 113, sec. 3.

<sup>6</sup>NDA sec. 125(1).

<sup>7</sup>QR&O, ch. 113, sec. 2.

who is or has been a judge of a Superior Court in Canada or a barrister or advocate of at least ten years standing. The Special General Court Martial has jurisdiction only over civilians subject to the Code, and may award only the punishments of death, imprisonment or a fine.

These four types of courts martial allow a flexibility for the selection of the most appropriate tribunal when considering the status of the accused, the charge and possible punishment, as well as the location where the trial is to be held. An SCM for example, can be used to try an accused in isolated locations where there are insufficient officers to readily convene a DCM. The civilian can be tried by a GCM if the offence is a military one, or by a SGCM where it is primarily civilian in nature. The GCM and DCM permit the full participation of the service officer in the trial and punishment of the serviceman. With the appointment of a Judge Advocate to advise the GCM and DCM there is some basis for their comparison with the judge and jury procedure in the Canadian criminal courts.

The SCM makes available to the Forces a form of court martial that retains all the protections of the GCM and DCM, but permits a speedier trial with less of their formality. It removes requirements for such time consuming procedures as having to exclude the court while the Judge Advocate hears argument or to have lengthy argument and summings up at the completion of the evidence. The SCM is similar to that of

the judge sitting alone in the civilian criminal court. The SCM may well be a type of court martial that can be adapted as a speedy and less formal trial by court martial to supplement the commanding officer's summary trial. Suggestions along this line will be included in Chapter XI.

The SGCM provides the same method of trial as the SCM for the trial of the civilian subject to the Code. It is designed to ensure that for the trial of a civilian there can be a "trial judge" in respect to background and experience comparable to one that might sit in the civilian criminal court. The SGCM is only held outside Canada, and while normally qualified legal officers sit, on two occasions Justices of the Supreme Courts of Manitoba and Ontario respectively have been appointed a Special General Court Martial to try, in Europe, dependents on charges of non-capital murder.

### Court Martial Procedure<sup>8</sup>

The procedure in a trial by court martial is generally the same as would be found in the Canadian criminal court. The prosecution evidence is presented by a prosecutor through direct examination of witnesses, followed by cross-examination by the accused or his counsel and, if necessary, re-ex-

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<sup>8</sup> See QR&O, ch. 112, entitled "Trial Procedure at General and Disciplinary Courts Martial". The text merely outlines the trial procedure. The detailed regulations and orders may be found in this chapter of QR&O. Also the reader should examine ch. 113 to obtain the detailed procedure that is followed for a Special General Court Martial and the Standing Court Martial.

amination by the prosecution. While the Judge Advocate and the court are permitted to question the witnesses, they do so only to clarify matters that have remained obscure and are under the same restraints that are imposed on a judge in the civilian criminal court.

At the completion of the prosecution's case, a motion may be made that no case has been presented requiring the accused to be put on his defence. While normally the accused will initiate this motion of no prima facie case, the court can, on its own, request the motion to be made by the accused. If the motion is successful, then the accused will be found not guilty.

There follows the presentation of the defence case through witnesses, including the accused if he wishes. At its completion there is an opportunity for the prosecution to present rebuttal evidence, but this is subject to the same rules that would apply in the civilian criminal court. The court itself may call or re-call witnesses at any time before it makes its findings as to guilt or innocence. This power is rarely exercised, and if it is, the questioning of the witness is restricted by the Judge Advocate to matters of clarification or amplification of the existing evidence. Further, while the regulations permit this action by the court at any time prior to the finding, courts martial are discouraged from exercising it after the accused has either made a motion of no prima facie case or has opened his defence.

Following the completion of the hearing of evidence, the prosecutor and defence counsel will sum up their cases in that order. In a DCM or a GCM the Judge Advocate will address the court, summing up the evidence and advising the court on the applicable law, much as a judge would to a jury. The court, in a GCM or a DCM, then closes, the Judge Advocate being excluded, to make a finding, again much as a civilian jury. The decision however is reached in a majority vote and does not require a unanimous vote, except in the case where the death penalty is mandatory. If there is a guilty finding, the accused may present evidence and address the court in mitigation of punishment. The punishment is then decided upon by the court.

#### Military Rules of Evidence<sup>9</sup>

All evidence to be produced before a court martial is subject to admissibility determined on rules of evidence contained in the Military Rules of Evidence. These Governor in Council rules apply only to a court martial form of trial, and are not applicable to the summary trial. These rules of evidence contain the normal evidentiary rules followed in the Canadian criminal courts, and represented at the time they were created, a firm forward step in resolving the uncertainties that then existed in this complicated field of law.

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<sup>9</sup>Order in Council 1959-1027 dated 13 Aug. 1959.

Following the passage of the National Defence Act and prior to the creation of the Rules of Evidence, at Canadian courts martial the rules of evidence of the province in which the trial was being held were followed. Where the trial was outside Canada, the rules of evidence of the accused's home province were made applicable. Judge advocates had great difficulty under this rather loose system, especially overseas where reference books were rare. The Military Rules of Evidence when passed by the Governor in Council in 1959, resolved much of the uncertainty that was evident in the conduct of courts. This Canadian approach to the problem is now being examined by the United States Forces for possible application to their service tribunals. The Canadian rules have been applied at courts martial since 1959 with little difficulty or criticism.

#### Elements of Weakness

These trial procedures followed by the military courts martial do provide a strong and a fair system of trial designed to protect the rights of the accused and to ensure that his guilt is proved according to law. As outlined in earlier chapters, the rights and the interests of an accused are of prime consideration. The post-trial procedures, to be reviewed in the next chapter, also strengthen the aspect of fairness to an accused under this form of military trial. However, a trial before a court martial does contain elements



that could expose it to criticism if it is compared to the trial of a Canadian citizen before a Canadian criminal court on a criminal charge. These areas of possible weakness are found in the lack of a truly independent military judiciary, the complete absence of an appeal procedure that can be utilized by the Crown, and the possible inference of unfairness that might be drawn following an examination of the procedure to select the President and Members of a GCM or DCM.

### The Judge Advocate<sup>10</sup>

The judge advocate at a court martial is a military officer, normally of at least the rank of lieutenant colonel, legally trained and a member of the Judge Advocate General's Branch of the Canadian Forces. His appointment may be made by the convening authority, but normally the selection of the officer to act as judge advocate, or any officer to act in a judicial capacity at a court martial, is made by the Judge Advocate General.

By regulation the position of the judge advocate is an impartial and an advisory one.<sup>11</sup> He is charged with determining questions of law and of mixed law and fact before

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<sup>10</sup> See QR&O, art. 112.55 for the duties of the judge advocate.

<sup>11</sup> Ibid.

and during the trial. His rulings on such matters become the rulings of the court,<sup>12</sup> as it is the court martial itself that is the judge of both law and fact at the trial. This is in contrast to the civilian procedure where the judge will be the judge of the law and the jury will make the findings of fact. The judge advocate, in addition to advising the court on matters of law during the trial, will, at the completion of the hearing of evidence and the addresses by counsel, sum up the evidence and the law that he considers applicable to the case. This function is similar to that performed by a judge with a jury in a civilian criminal trial. The President and Members of the court are required by regulation to be guided by the opinions of the judge advocate on matters of law as expressed by him during the course of the trial, and are not permitted to disregard them except for very weighty reasons.<sup>13</sup> The President of the court is required to sign a certificate at the completion of the trial stating whether or not in fact the court followed the opinion of the judge advocate in matters of law in arriving at the finding. In spite of the regulations therefore that have the effect of paying lip service to the historical concept that the President and Members of a General or Disciplinary Court Martial are the judges of both law

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<sup>12</sup>QR&O, art. 112.06.

<sup>13</sup>QR&O, art. 112.54(3).

and fact, the present day duties of a judge advocate advising a court martial "are in most respects similar to those of a judge sitting with a jury in a criminal trial".<sup>14</sup> There are limitations however. The judge advocate cannot take independent action, as could a judge in a civilian criminal court, to declare a mis-trial for example, or to direct a verdict of acquittal, in effect to withdraw the case from the jury. He does not control the sittings of the court, the adjournments, nor have any real authority beyond that given to him through the President. The judge advocate may, and does, express his opinions strongly when necessary, but all authority is expressly placed in the hands of the President and the Members of the court.

In reviewing the position of the judge advocate within the military system of justice, many of the comments expressed also apply to the position of the military legal officer who is appointed as President of a Standing Court Martial or is a Special General Court Martial. The following comments thus pertain to the problems that face any officer appointed to a judicial duty as a military judge under the present day Canadian military law practices and procedures. It should also be kept in mind that this review is based on the possible

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<sup>14</sup> See the remarks of Norris, J., Byrne v. The Queen (1962) CMAR, Vol II, 175, at 203. For other reviews of role of judge advocate see Blank v. The Queen (1952) CMAR, Vol I, 29 and Doutre v. The Queen (1953) CMAR, Vol I, 155.

appearance as to the application of justice, and that the criticism and conclusions, where stated, are designed to indicate that there may be areas where improvements might be made.

### The Military Officer as a Military Judge

While the present day duties of a judge advocate may be said to be those of a judge, as are those of the President of the SCM or the Presiding Judge of the SGCM, the actual capability to perform the role of a judge is not as clear. He is a military officer. His objectivity and independence are not, as a judge's are, protected by tenure and judicial tradition. His employment, his duties, his efficiency reports, his promotions, his salary, and indeed his whole career is within and under the control of the military organization that he may be called upon to judge. He is completely dependent upon the military structure.

### Appointment

The appointment of an officer to act in a judicial role at a court martial is made only for a particular case. The Canadian Forces does not have an independent judicial section. The military judge of a case may be an officer whose normal duties have nothing to do with criminal law. His prime responsibility may involve directing a section dealing with such matters as pensions, international law

or administration. The duties he is called upon to perform as a military judge are considered secondary, or even lower, duties. A military judge will have a reasonably wide service background and will usually have exhibited some ability in the field of criminal law through earlier employment in defence or prosecution. However his employment as military judge at a court martial is by individual appointment only, and thus realistically each succeeding appointment will be based on his performance in preceeding cases. His decisions in a case therefore cannot be said to be made on the basis of security of appointment as far as his position of a military judge is concerned. This is an important consideration and factor if he personally wishes to be so employed and to specialize in the criminal law field, as some do. The problem of security of tenure may not be considered a major one, but it certainly is one that forms part of the greater problem pertaining to the appearance of judicial independence and all that that means.

### Judicial Independence

Great emphasis is placed in the common law history of our judicial system on the ensuring that those who have to act in a judicial role are protected as far as possible to permit them to make their decisions impartially, objectively and according to law. These protections, such as tenure, give effect to the appearance of independence. The military

judge however does not achieve this aura of independence. This arises, not because he is not supported by the military in the performance of his duties, or that he is intentionally hindered, but because the system that places him in the judicial role has tried to effect a compromise between the role of the judge and the role of the career military officer. It has failed to take into account the difficulties that are faced by any person sitting as a judge in a criminal trial. These two roles of an officer sitting as a military judge are in continual conflict, much as has been described in relation to the commanding officer and the exercising of his discretion before the summary trial. On the whole however, military judges, as trained legal officers with wide military experiences, do resolve these conflicts between roles as they arise through the recognition that their judicial function of the moment is the governing duty. Hopefully his military seniors will agree. The stresses that are placed on a military judge under the present system deserves examination, as they are matters that might be changed to help present a more valid appearance of independent justice. This is especially true where there are major decisions that must be made by a military judge during the course of a trial.

Consider the position of a judge advocate who is sitting on a case involving a charge of murder committed outside Canada, and who may be required to give a ruling that would result in not only that the accused be acquitted,

or that the court martial had no jurisdiction to try him, but also has the result of finding, for example, that existing regulations governing the commanding officer's jurisdiction are either inadequate or that they do not conform to statutory requirements. As he ponders his decision, two results are foremost in his mind. The first is that if he makes his finding the way he thinks it should be made, then the accused may never be tried for the crime. The second is that the whole system of military trials might be called into question. The duty of the military judge at that moment is to be judicially impartial and independent. He is, in effect, being paid for his judgement based on the law, and the results of that decision are not a consideration. Yet to make a decision, whether a little one involving the question of the nature of evidence, or a major one of the type described here, he receives little assistance from the military law system that has concerned itself primarily with the accused and his protections, and ignored many of the other aspects of the administration of criminal justice. The military judge, the military society, and the interests of criminal justice, all suffer from this one-sided approach.

#### **The Rulings of the Military Judge - No Crown Appeal**

The ruling of the military judge on a major point of jurisdiction or of law, as described in the previous section, is given with the knowledge that if the accused is not

convicted there is no appeal by the Crown, Canadian military law having no provision permitting the Crown to enter an appeal from any ruling or finding or sentence of a service tribunal after the termination of the proceedings of a service tribunal. The only provision that might have some application is one that authorizes the Minister to order a new trial after the conviction of an accused when the Judge Advocate General certifies that in his opinion a new trial is advisable because of an irregularity in law in the original proceedings.<sup>15</sup> But if the accused is acquitted this provision is not applicable, and so this authority of the Minister is of little assistance to the Crown. It does however permit the correction of grave irregularities without creating a situation where the accused could plead double jeopardy at a second trial. If, for example, a commanding officer was to omit the extension of the right to elect trial by court martial on a theft charge, the subsequent conviction at summary trial might well be set aside by the Minister and a new trial ordered, as if the accused had never been tried. Or if, to take another example, a confession was admitted before a court martial under circumstances that indicated that it should not have been, the Minister might well order a new trial, if there was other evidence upon which the accused might be properly convicted.

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<sup>15</sup>NDA sec. 181.



This failure of the Act to give the Crown any right of appeal has the initial result of applying pressure on the military judge in making a ruling on such questions of jurisdiction and adequacy of the regulations as were outlined earlier, to adopt a course of action that does not "burn all the bridges". The "results" of the ruling may well become the dominant consideration. In making his decision, the knowledge that if he is wrong, and the accused suffers, then if the reviews that are conducted after the trial do not correct the error, then the accused can appeal to the Court Martial Appeal Court, is a strong consideration. The determination of the issue, and the results, can therefore be on that court's head, and not his. If the military judge wrongs the military by his decision however, both the military society and he personally, are stuck with it and with no appeal.

A second result of this absence of any authority for the Crown to appeal is that the military judge may make a ruling in one case, and then be subsequently convinced that he was in error, possibly through his own reviews of the law or after discussions with his colleagues. But his appearance of independence is seriously weakened if he changes his mind on the issue at the next trial he sits on, without there having been a judicial review binding upon him, especially in major matters. This is not to say that when a judge becomes convinced he was in error he should not change his

ruling when the issue is raised before him again, even though there was no appeal. The point is that a military judge, because of his rank and position in the military structure, is almost certain to be a figure of suspicion as far as his real independence is concerned. If he makes a ruling on a major issue against the Crown in one case, and then changes his mind in a second, it creates uncertainty in the law and gives wide scope for expressions of criticism as to his independence. On major issues of law there must be a method of obtaining a judicial decision binding on the military judge. This is especially true in the field of military law on which there is almost no Canadian case law, and what does exist, is mainly an application of the Canadian criminal law to the military.

#### The Judge Advocate General and the Military Judge

The Judge Advocate General, as part of his responsibilities to the Canadian Forces, reviews all courts martial as to their legality. If in his opinion, there has been an error in law or procedure in the trial, it will usually be brought to the attention of the military judge concerned. If the issue is one that may cause difficulties in other courts, then the Judge Advocate General may distribute, internally, an "opinion" giving his views on the problem. This practice leads to further complications of the military judge's appearance of independence.

While the Judge Advocate General's "opinion" may have

persuasive value for the legal officer employed by the Judge Advocate General, it cannot be said to have the status of a judicial decision binding upon a court. Thus the military judge may easily be faced with a submission at a court martial that convinces him that he should adopt a course of action in direct opposition to that set out in a Judge Advocate General opinion. Even the existence of the opinion under the command relationship between the legal officer and the Judge Advocate General gives the impression of judicial dependence rather than the opposite, and it may render any decision that the military judge may make, on whatever grounds, suspect in appearance.

The Judge Advocate General too is in a difficult position. It is from and through the Judge Advocate General that the military judge receives his appointments, his salary, his duties, and it is the Judge Advocate General who controls his entire career. The Judge Advocate General, cognizent of these facts, must walk a narrow path that hopefully will not impair the independence of his military judges, yet permit him to express opinions on the criminal law and the procedures that should be followed in the service courts. When a basic difference of opinion does arise however, there is no opportunity for him to obtain a judicial decision by way of an appeal from a finding in the court where the decision was made and with which he disagrees. In many cases the procedure found in the civilian criminal procedure of submitting

a "stated case" would be invaluable for the use of the Judge Advocate General. The problem that really faces the Judge Advocate General is that while he has been charged with the operation of service courts, the National Defence Act and the regulations have failed to provide him with any reasonable method of doing so.

The Judge Advocate General has no real authority and can only advise those senior in military rank to him, who may or may not accept that advice. In practice, advice given on strictly legal grounds is always accepted. When he expresses opinions on such matters as the fairness or justice involved in a trial and as to the courses of action that might be followed, such may not always be the case. Though on paper the Judge Advocate General sits apart from the military command structure of the Canadian Forces, in practice, he may well have become part of that structure, with a resulting erosion of his position. His rank as a "junior" general (a brigadier-general) places him in an extremely difficult position when he must criticize or attempt to overrule, for example, a recalcitrant major-general or lieutenant-general, unless he wishes to refer the matter to the Chief of Defence Staff or the Minister, as he may do --- but thus provoke confrontations with his military superiors. Yet when matters such as fairness and justice are concerned, it is the Judge Advocate General who is best qualified to express an opinion, and it is one that should

be binding. The effectiveness of his role within the Forces would be greatly strengthened if he was empowered to take action as a result of his reviews, rather than advise and leave the decisions to others. If his judges attain a formal independent status, this may well require that the Judge Advocate General be granted powers to quash, substitute findings, order new trials and possibly to alter punishments. Through this, the role of the Judge Advocate General as a military officer may become more compatible with his role as the senior legal advisor to the Canadian Forces, especially in matters pertaining to criminal justice within the Forces.

#### Attempts to Attain Appearance of Independence

The comments given to this point pertained to some of the matters that may erode, or appear to erode, the actual independence of the military judge at a court martial. These are not intentional pressures in any way. They are institutional pressures that arise from the present procedures. They occur because the system is not properly balanced between the interests and protection of the accused and the interests and protection of the military society as a whole. As for the appearance of independence however, the following attempts have been made to give this appearance of independence.

The military judge in any case will not normally be the legal officer who has the responsibility of advising the

commanding officer or the convening authority and will usually be brought in from another region. This practice is followed to avoid any suggestion that the military judge might be influenced by the fact that the commander of the command will normally comment, at least, on the yearly efficiency report of the legal officer at his headquarters. Further the legal officer's responsibility to advise the commander is in direct opposition to the judicial role of trying the case that the commander has directed will be tried.

Military judges are discouraged from utilizing quarters and messes or having any official contact with the bases where they are sitting, beyond those required by their duties; in isolated locations this may not always be possible, but as a general rule the military judge attempts to divorce himself as much as he can from the military command structure that is trying the accused. At trials the military judge does not wear a uniform but is robed; this clearly separates him from the court itself in the case of the GCM and DCM. Many military judges do not comply with the required military practice of officially paying compliments to the officer in command where the trial is being held because of the appearance of reporting.<sup>16</sup> The regulations themselves have formally recognized the principle of objectivity that is necessary for the carrying out of the duties of a military judge by pro-

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<sup>16</sup>QR&O, art. 4.05.

hibiting him from being given a copy of the synopsis,<sup>17</sup> lest his appearance of independence and impartiality be jeopardized. Thus the military command structure recognizes the requirement for judicial independence for its legal officers and on the whole, attempts to avoid any action that gives the appearance of interfering with it. Yet by the very terms of the military employment of the military judge this actual independence can be open to suspicion.

### Conclusions

There are three major conclusions that can be drawn from this examination of the role of the legal officer acting in a judicial capacity as a judge advocate at a GCM or DCM or the President of a SCM or as a Presiding Judge of a SGCM. First, there must be available some form of judicial determination of questions of law on appeal by the Crown, as well as the present one available to the accused. Second, the legal officer so sitting, requires greater independence to permit his decisions to be clearly made on legal grounds with no basis for the criticism that "results" and not law were the governing factor. The military judge may be impartial and learned in law, but he is human also, and too often on a major issue the decision might appear to go against the accused on the basis that he can always appeal, but the

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<sup>17</sup>QR&O, art. 109.02, Note D.

Crown cannot.

The third conclusion is that the military judge must be professional and not part-time, as is the case today. To achieve the high standard of experience and knowledge in the field of criminal law that is necessary to competently sit as a military judge, requires the full attention of the legal officers involved. The present division of his duties does not permit this, except where the officer is employed on duties related to criminal law and his efforts are consequently directed to those matters of law and procedure that may arise in the performance of his judicial functions in the criminal trial. His independence and impartiality must be clearly established, not only to the accused but to the serviceman generally and the military society as a whole. His duties as a judge must be performed with the capacity of a judge.

Appointment of President and Members  
Of a Court Martial

The GCM and DCM form of court martial permits the full participation of the service officer in the trial and punishment of service offenders. The advantage of this is that military personnel, because of their training and experience, may be especially competent to try servicemen for infractions of military rules, especially purely military offences. The disadvantage of it is that it takes away from



the serviceman the right he may have as a citizen to trial by judge and jury when he is tried within the military system, even though the offence may be purely criminal in nature. The evolution of the right to trial by jury needs no elaboration here beyond stating that it is a cornerstone of our judicial system within the criminal courts. The present Canadian military law procedures that provide for the appointment by the convening authority of the President and Members of the court martial, instead of a jury as would be available in a civil criminal trial on serious criminal charges, may not today be as justifiable as they were previously in military law, and should now possibly give greater consideration for the principles of a jury trial that they replace.

#### General Historical Justification

In the early stages of the development of military law in the United Kingdom there were many factors that restricted the size of the group from which the selection of members of a court martial could be made and supported the practice of the convening authority making the direct appointments. "Military law" existed only in times of war, and under the Articles of War no provision for a jury was ever made as the courts that were created did not try civilian criminal offences that called for a jury in the civilian courts. Commencing with the original appointment of the two senior officers of the British Forces, the Lord High

Constable and the Earl Marshal, as the original Court of Chivalry, the selection of the members of a court to administer military justice has always been by appointment.

While the original appointments were made by the King, as the armed forces became more and more dispersed in the conduct of their military operations, a single court was obviously insufficient, and the practice developed of issuing commissions to commanders authorizing them to issue their own Articles of War and to sit in judgment, or to appoint deputies to do so, on the courts they established.

Throughout the history of the evolution of the present day court martial, the procedure of appointment by the convening authority of the members to sit on a court martial has been retained, and until relatively recently there has been no real alternative for the effective operation of the judicial system. The group from which the commander could select the members was small; an officer could only sit on a court martial within his own service, i.e., army, navy and later, air force; and he could only detail for this duty those under his command. Because of slow communications and methods of transportation he would rarely go outside his own resources as such action would create extensive delays in the commencement of the trial. Under the original concept of courts martial they were to provide an in-house, speedy method of trial for serious offences and the punishment of those offences, in order to achieve the maximum effect on

the discipline of the military forces involved. Also the commander was deemed to know his officers and thus those best qualified to sit in judgment. Further, the military organization was to a great extent fragmented by the communication and transportation difficulties, and commanders therefore had a freedom of action in such matters as trial and punishment that are completely unknown today.

#### Present Day Situation

The Canadian Forces today do not suffer from the historical constraints outlined. Methods of communication and transportation have developed to a stage where members can be requested and obtained from anywhere in the Forces. Frequently the President and Members of a court are nominated by Canadian Forces Headquarters from Canada to sit on a lengthy major trial in Europe or in Cyprus where the resources of personnel are inadequate. In one court martial involving a medical officer, the President and Members were brought from all over Canada to sit, all being medical officers. There is no longer the restriction that prevents an officer of one service (now known as an element) from sitting on a court martial involving an accused of another service. The military structure is integrated and no longer fragmented at the formation or command levels. Convening authorities rarely, if ever, personally select the members, and will frequently "borrow" an officer from outside his command to

sit if that officer is in the immediate vicinity of the location where the trial is to be held.

The concept of the court martial has also suffered radical changes. The checks and balances that have been applied to the convening of it have done away with the original concept that it must be speedily convened and swiftly administer justice. The extensive post-trial reviews and time consuming appeal processes are new factors that did not exist in the early development stages. Further, the responsibilities of the judge advocate and the role of the lawyer in the court martial procedure have increased to such a degree that today, the previous concept of a court martial providing the President and Members with complete authority has altered, to where they are much like a jury in the performance of their major duties.

There are also the following three other aspects to this appointment procedure that bear examination as possibly re-inforcing the requirement for its re-examination as to suitability under the conditions that exist in the Canadian Forces and Canadian society in the 1970's.

#### Convening Authorities Association With Prosecution

When the convening authority decides that the accused, on the evidence in the synopsis, should undergo trial by court martial, he makes the final basic decision in the process to prosecute the accused. The decision is made in much the same

atmosphere as surrounded the commanding officer earlier when he laid the charge, and investigated it. The commanding officer, in applying to the convening authority and recommending trial, is part of the prosecution process against the accused. As far as the accused is concerned, the convening authority is also part of that process when he too reviews the evidence and then directs that the accused will be placed on trial. The action of the convening authority in directing trial by court martial, and therefore agreeing with the commanding officer, allies the convening authority with the prosecution of the case against the accused. The fact that this appearance arises is not put forward as a criticism of the system. Its existence however affects the subsequent procedures when the accused finds that it is the convening authority, and thus one of those who are prosecuting him, who "picks the jury", instead of the selection of those who will determine his guilt or innocence being a separate procedure as it would be before a civilian criminal court. To an accused, the military law procedure would appear to be an inadequate substitution for the civilian criminal jury system, without any strong reasons to support its application to him.

#### **Relationship Between Convening Authority and Members**

Once the membership of the court has been determined, other possible unfair aspects of the appointment procedure

may arise. These pertain to the possible relationship between the President, the Members and the convening authority who assigned them their duty. The members of the court are frequently in the executive chain of command and responsible to the convening authority in that chain of command. They may well look to him for possible promotions, their duties and he may well comment upon, if not initiate the yearly efficiency reports. In general, the convening authority, because of his rank and position, may well control, at least, the immediate careers of the officers concerned. This aspect raises the spectre of command influence discussed previously. The question could also be asked; is it fair?

Again a word of caution. Intentional command influence, as might be taken to be implied here in this discussion, is so rare within the Canadian Forces at the court martial level that it may be disregarded, this is because of the care that both convening authorities and members use in meeting their obligations. It is hard however to convince an accused who has heard the convening authority speak against the too prevalent offence of disobedience, and threaten dire penalties to those who transgress, that when he is tried by a group of officers, all of whom have also been exposed to the convening authority's views, there will be no command influence present. To the outsider, not acquainted with the military, the task of so convincing may be an impossible one.

### Trial by "Peers"

The appointment of the members by the convening authority, instead of by an independent authority, gives an unsatisfactory impression as to the whole procedure. There is no random selection from a panel permitting even different backgrounds to be represented on the court. For example, an accused seaman might well wish his guilt or innocence to be determined by a court that contained a variety of experiences, and not just sea experience. The principle that juries bring to a court a variety of different experiences, feelings, intuitions and habits is the essential trade mark of the jury trial. Such a group may well reach different decisions than would be reached by specialists in a single field.

Another facet of this appointment procedure is one permitting only officers to sit as members. This was understandable in the early history of military courts but is not clear today. In the present day Canadian Forces there is a high degree of professionalism at all rank levels. The average non-commissioned officer is normally a career soldier, well trained and undoubtedly mature enough to sit as a member of any civilian jury. In experience, many are far superior to the average junior officer who is tasked with the duty of sitting on a court. In a word, today's court martial is not composed of the accused's peers in most cases, yet there

would seem to be little reason why the composition of a court martial could not take this into consideration. The opportunity, similar to that now offered in the United States Forces, for an accused enlisted man to have included on the court an enlisted man, who would bring his own, and very different background and experience, would do much to dispel the appearance of "packing the jury" that might arise under the present system of appointment.

#### Right of Objection

However the appointment process is not all one sided. The accused at the beginning of his trial can object to the President of the court or a Member for "any reasonable cause" and the court martial will then decide if the objection should be allowed.<sup>18</sup> The prosecution has no right of objection and neither side has the right to object to the judge advocate, though this has occurred. There is a right to object to the Presiding Judge sitting as a Special General Court Martial<sup>19</sup> as well as the President of a Standing Court Martial.<sup>20</sup> Thus an accused can take some action against the composition of the court that will try him, but only for cause. Such challenges for cause are rare however. The selection of officers

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<sup>18</sup>NDA sec. 163. Also see QR&O, art. 112.14(2).

<sup>19</sup>QR&O, art. 113.11.

<sup>20</sup>QR&O, art. 113.63.



to serve on a court martial is normally carefully made in respect to matters that might give basis for an objection at the trial by the accused or his counsel. This fact reinforces the earlier remarks that what is being examined here is the appearance of fairness in the present procedure and how it can be improved upon without loss of effectiveness.

### Conclusions and General Recommendations

There are a number of general conclusions and recommendations that should be outlined to conclude this chapter. They are of importance if the Canadian military law, and its judicial system, is to continue to develop to meet the needs of the Forces and the requirements of criminal justice.

First, the court martial and the procedures before, during and following trial, provide an accused serviceman far more protections and rights than are available to the general Canadian public. Nevertheless, the appearance of the court martial form of trial should be improved wherever possible. The court martial continually faces a bad historical image, based on the conception that such trials are arbitrary, unjust and apply military considerations rather than legal protections. While this is not the fact, the regulations and practice should work to make it clear.

Second, the effectiveness, as well as the image, of the court martial form of trial can be improved by creating an independent judicial role for the legal officer employed

sitting on a court. If an independent judiciary, of some form, was created within the military, the duties of such officers might well be integrated into other aspects of the military justice system; such as sitting in a form of trial that would offer to an accused serviceman many of the rights that he is now denied at the summary trial, yet without requiring the present formality of full court martial proceedings. Such a concept is not a new one as it is now being examined by the United States forces where the pressures for the rights of an accused are far greater than those being applied in Canada.

Third, the selection and appointment of the president and members of a court, if possible, should be removed from the jurisdiction of the convening authority. There could possibly be a panel of eligible officers provided both counsel from which the selection could be quickly made. Such an approach would permit the selection of a court reflecting a greater variety of experience and background than is now the case. The historical concept that only officers could sit on courts martial should also be reviewed. There is a need for the active and full participation by all the members of the Forces in this aspect of the administration of military law, but it must be coupled with the appearance of fairness and provide justice acceptable to the whole of the Canadian society, and not just the military. The military society is better served by a "jury" of military personnel, as that group will

better understand the matters placed before it and be better qualified to give fair decisions. The civilian society will not require civilian trials for the trial of military offences, but it will require that the form of trial be as fair and just as the Forces can make it.

Fourth, there should be a balancing of the existing procedures in relation to appeals, to permit the Crown to participate on the same basis as the accused, or as the Crown can under the Criminal Code. This would permit the Crown to obtain judicial decisions on points of military law that would be binding on the courts that sit under the authority of that law.

Fifth, and finally, there should be a review of the trial procedures to permit, for example, the judge advocate to hold pre-trial hearings in the case of the GCM or DCM. Such a procedure would allow speedier hearings of the charge by the full court without the necessity of long delays during the trial proper. Present pre-trial procedures are too formal and too time consuming and serve little real purpose. If an accused was provided counsel at an early stage the necessity of a great deal of the present administration would disappear. These however are essentially minor matters when reviewed in relation to the overall topic of courts martial. They merely suggest line of improvement to an extremely good system of justice where the interests of the accused are paramount - though possibly too much so.

## VIII

## APPEALS AND POST-TRIAL REVIEWS OF COURTS MARTIAL

Introduction

When the sittings of a court martial are ended, the military law becomes concerned with the question of appeals and the conducting of post-trial reviews into both the legality of the findings and the severity of the sentence. In these post-trial procedures, the Canadian military law has taken as its primary goal protection of the accused, and has not paid enough attention to the interests of the Forces as a whole.

This chapter will first review the appeal as to the legality of findings and sentence available to the convicted serviceman, and examine the strengths and weaknesses of these appeal provisions. It will then outline the internal review procedures carried out within the Forces and suggest changes in order that they might be improved.

Appeals

Prior to the enactment of the National Defence Act there was no appeal, as such, available to the convicted serviceman permitting him to have his conviction reviewed by the civilian courts or any other judicial body. The National Defence Act created the Court Martial Appeal Board,

subsequently replaced by the Court Martial Appeal Court, (CMAC), to hear the appeals from courts martial on grounds of legality of any or all of the findings or the legality of the whole or any part of the sentence.<sup>1</sup> As has been stated, no provision was made for an appeal by the Crown. Also while provision was made for an appeal as to the severity of sentence<sup>2</sup> by the accused, this appeal was not included within the jurisdiction of the Court Martial Appeal Court and was left to the Forces' administration to handle.

### Court Martial Appeal Court<sup>3</sup>

The Court Martial Appeal Court has the general powers of a civilian criminal court of appeal and is composed of judges of the Federal Court of Canada, as well as designated judges of the superior courts of criminal jurisdiction of the provinces. The Court has issued Rules of Appeal Procedure<sup>4</sup> and will normally conduct its hearings in Ottawa, though on occasion it has heard appeals in other parts of Canada.

The formal appeal hearing is conducted before a minimum of three judges with Crown counsel being a legal off-

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<sup>1</sup>NDA sec. 197.

<sup>2</sup>Ibid.

<sup>3</sup>NDA sec. 201. See also NDA sec. 195 to sec. 208 incl. for full appeal provisions. QR&O ch. 115 should also be examined.

<sup>4</sup>QR&O, Vol. II, App. XV.

icer appointed by the Judge Advocate General. The appellant's counsel will be civilian counsel, as the military defending officer who may have acted at the court martial is not permitted to appear. The appellant may, if he wishes, appear personally also, or with leave of the President of the Court, submit his arguments in writing without appearing. This last rarely occurs.

The convicted serviceman may enter an appeal by submitting a Statement of Appeal Form<sup>5</sup> within 14 days after he receives a copy of the transcript of his trial. This transcript is automatically provided the serviceman, at no cost, by the Forces. The initial Statement of Appeal normally contains only wide and general grounds of appeal. The detailed grounds are usually submitted at a later time by way of amendment.

The appellant under the Rules of Appeal Procedure, issued by the Court, may request the President of the Court to have civilian counsel appointed to act on his behalf before the Court. This request is considered where the serviceman can show financial hardship or inability to pay for such counsel. Many of these requests are approved by the Court.

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<sup>5</sup>NDA sec. 199(1).

### Strengths, Defects and Suggestions

The effect of these provisions is that the convicted serviceman can easily, and frequently at no expense to himself, obtain highly qualified civilian counsel and have his conviction reviewed by the "second highest court in the land", in effect the Federal Court of Canada. Further, he may have his appeal considered by the Supreme Court of Canada on any question of law if he is granted leave by that court, or as of right, if there has been a dissent on a matter of law in the judgment of the Court Martial Appeal Court. Such rights of appeal and opportunities for counsel are far in excess of those available to the civilian segment of the Canadian society.

The defect in this appeal system results from the failure of the Rules of Appeal Procedure to place any requirement on the appellant to pursue his appeal. After submitting the Statement of Appeal Form no further action is required by him until the President of the Court sets a hearing date for the appeal. It is only at this time that he becomes obligated to set out detailed grounds of appeal and to submit memoranda of fact and law. As civilian counsel are involved, this results in many cases in requests for extension of time or even postponement of the hearing because of other commitments. Rarely are the final grounds of appeal before the Court or the Crown any appreciable time before the hearing. This procedure, coupled with the overload of the

Federal Court in its normal functions, has resulted in excessive delays when civilian counsel do not pursue the appeal. One accused, sentenced to Dismissal by a court martial, delayed the carrying out of the sentence for almost two years by submitting a general Statement of Appeal and then taking no action to bring it to hearing. In the meantime the accused remained on full pay and became pensionable, which he was not when convicted and sentenced. When the appeal was actually set down for hearing, for the second time as appellant's counsel had not been able to attend the first date, the appeal was withdrawn the day before. The appellant was then released from the Canadian Forces, but as he had become pensionable, he also received part pension. This certainly was never the result that had been envisaged by the court which had imposed the sentence and had, on the record, strongly found that he was unfit to continue to serve.

The entitlement of the serviceman to appeal to the Court Martial Appeal Court is another of the major strengths of the Canadian military law. The court and its judgments are the only source of judicial review of current Canadian military law. The majority of the judgments of the Court Martial Appeal Board and the Court Martial Appeal Court have been published in the Court Martial Appeal Reports of which there are three volumes. These may be obtained through the Queen's Printer.

The value of the Court Martial Appeal Court to the



military could be greatly enhanced through an expansion of its jurisdiction to permit it to hear appeals by the military under the same provisions as are now available to the Crown in the civilian criminal process under the Criminal Code. The ramifications of such a widening of the Court's authority were discussed in the previous chapter.

The Justices of the Court Martial Appeal Court itself, because of their Federal Court responsibilities, are experiencing an extremely heavy case load, and this fact has reduced the general effectiveness of the present appeal procedures because of resulting delays in hearing of appeals. The operation of the appeal process, and indeed of the Court Martial Appeal Court, would be greatly improved if provision was inserted in the Act for a "leave to appeal" procedure, such a request to be heard by a single judge of the Court. This would prevent many of the frivolous and unsupported appeals that now require a full bench to hear.

The Rules of Appeal Procedure for the Court Martial Appeal Court must also be amended to require an appellant to actively pursue his appeal, possibly under the same rules as now apply for appeals to the Federal Court. The Crown should be in the position to require the appellant, or his counsel, to "fish or cut bait", and not have to wait until he can find time to pursue the matter, as is generally the case now. The case load of the Court would decrease under these suggested provisions, even with the additional responsibility

of the Court to hear appeals by the military Crown.

### Forces' Reviews

When a court martial has been completed, the transcript of the proceedings is reviewed by the convening authority, the Judge Advocate General, and then at Canadian Forces Headquarters on behalf of the Chief of Defence Staff. These reviews are conducted automatically and are separate from those that occur as a result of any appeal. Theoretically the review of the convening authority will include a review of both the legality of the findings and the severity of the sentence. The review by the Judge Advocate General is confined to the legality of the proceedings. The review at Canadian Forces Headquarters is the same as that conducted earlier by the convening authority, except that it does not include a review of the legal aspects, these have already been reviewed by the Judge Advocate General. The existence of such an extensive review procedure demonstrates once again the concern of the Forces for the protection of the accused.

The weakness of this review system is that there may be "too many cooks in the kitchen", with a resulting duplication of effort. The procedures have also resulted in the erosion of the credibility of sentences awarded by a court martial, arising from a tendency, at the senior review level, to re-try cases on the transcript, and the downgrading, to say the least, of the position of the convening authority

once the trial has been completed. These matters will be expanded in the following sections.

Before proceeding to examine the weaknesses and strengths of the review procedures, it might help in evaluating the effectiveness of these procedures if there was set out as background an outline of the general development of the role of the military lawyer within the military.

### Role of the Military Lawyer

Military codes were written to provide for the administration of military law by laymen and not lawyers. At the time they were written lawyers were not available, (or really wanted), and the military commander on the ground had to have a disciplinary code that permitted the administration of discipline to his forces by officers without legal training, and with the least possible delays. The presence, and role, of the military lawyer within the military was therefore almost completely ignored in the codes and the regulations, except at the forces' headquarters level where the Judge Advocate General was found. For example, only within relatively recent years does the Judge Advocate sit with the court at a naval court martial instead of being placed off on his own to one side of the court. There was indeed an historic distrust by many of the senior military of the lawyer, arising from the fear that he would hinder, rather than promote, the cause of discipline through the application of "unrealistic legalities" to the military system. In today's

Canadian Forces however, these considerations seem to have diminished to a point where they may be disregarded.

Today, the military has accepted the military lawyer as an essential part of the administration of discipline within the Forces. The fact that courts martial may be appealed to the Court Martial Appeal Court, or even to the Supreme Court of Canada, requires the involvement of the military lawyer at all stages of such trials. No commanding officer would refer a charge for court martial, and no convening authority would order such a trial, without receiving advice from the military lawyer. Military lawyers today are available at all levels of command. Every convening authority has a senior legal officer present at his headquarters, and every base and unit can obtain the services of a legal officer whenever required. The value of the advice that the legal officer can provide today is strengthened because the advancement in methods of communication permits any legal officer to consult quickly with more senior and experienced colleagues. All these matters have resulted in the recognition of the value of the military lawyer.

Thus the Code may have been written partially based on the concept that lawyers would not be the guiding hand, but in practice they have become just that. The law and social changes and pressures that surround the questions of trial and punishment today have become just too complex.

Because of this, and because of the changing nature of the Forces, rarely today is there anything but partnership between the military lawyer and those he advises.

What bearing on the question of reviews have these remarks on the present role of the military lawyer? The point is that the presence and role of the military lawyer in today's scheme of things, permits a greater latitude in decision making, and a greater reliance to be placed on those decisions, at the junior levels of command, such as that of the convening authority, than now is the practice. These lower levels now have access to advice and assistance that was not contemplated in the development of the early principles upon which too much of today's military law is based.

#### Convening Authority's Review

As soon as it is prepared, a copy of the completed transcript of the court martial proceedings is given to the convening authority for his review. This review will examine the trial record for such matters as failures in administration that may have contributed to the commission of the offence, or the conduct of other officers and men who may have been involved in the incident. It will also review the sentence awarded by the court as to severity. Under the regulations the convening authority has power to remit, mitigate or commute the sentence, and also may alter or quash

the findings of the court if they are not legally supportable.<sup>6</sup> In conducting the review the convening authority has available to assist him, in addition to his normal staff, a senior legal officer, who normally will be the officer who advised him prior to the convening of the court martial.

Concurrently with this review however, the Judge Advocate General is also conducting a review as to the legality of the proceedings. For this reason the convening authority does not, in practice, deal with legality but only with the quantum of punishment - a reasonable practice for the Judge Advocate General is in a far better position to make the difficult legal decisions that may require that the finding of a court martial be quashed. The advice of the Judge Advocate General on legality however, should be directed in the normal case to the convening authority, rather than to Canadian Forces Headquarters and the Chief of Defence Staff, as is the case now.

#### Judge Advocate General's Review

The Judge Advocate General receives a copy of the transcript at the same time as the convening authority, and conducts his review, in practice, concurrently with that of the convening authority. The National Defence Act however only requires the Judge Advocate General to review proceedings

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<sup>6</sup>QR&O, ch. 114.

on legal grounds when the period for the submission of an appeal has elapsed, i.e., fourteen days from the time the convicted serviceman is given a copy of the transcript, and then only as to matters on which there has been no appeal.<sup>7</sup> This provision of the Act, as a practical matter, is not realistic as the Judge Advocate General must, and does, review all courts martial, if for no other reason than to determine the efficiency of the legal services for which he has responsibility. If the Judge Advocate General contented himself with merely following the requirement of the Act, then even though there were irregularities in the trial, he would take no action unless an appeal was submitted, and the result would be that every convicted serviceman would automatically submit an appeal in order to have his case examined by the Judge Advocate General. In practice however, the review is carried out automatically.

If, in the opinion of the Judge Advocate General, the findings and the sentence of the court martial are legal, he will so certify the case and then refer the transcript to Canadian Forces Headquarters and the Chief of Defence Staff for review. If the Judge Advocate General is of the opinion that the findings or the sentence are not legally supportable, then he will so advise the Chief of Defence Staff and make such recommendations as to the quashing or substitution of find-

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<sup>7</sup>NDA sec. 209.

ings or sentence, as he thinks necessary.

The computed effect of the review by the convening authority and the review by the Judge Advocate General, is that all administrative and legal aspects of the case have now been examined, and examined reasonably quickly. From the point of view of the accused, he has had his sentence considered by an authority with power to mitigate it, if too severe, and he has had the legality of the proceedings at his trial reviewed by the senior legal advisor to the Canadian Forces. From the point of view of the Forces, their interests have been protected, for the convening authority will have had brought to his attention any secondary matters arising from the case that might affect the administration of the Forces. Despite this already complete review, there is now a further review at Canadian Forces Headquarters, conducted on behalf of the Chief of Defence Staff. This automatic additional review by senior headquarters adds little, if anything to the effectiveness of the review procedure.

#### Canadian Forces Headquarters Review

The examination of the transcript of a court martial by Canadian Forces Headquarters, on behalf of the Chief of Defence Staff, is carried out after the Judge Advocate General has certified the proceedings, and is the same kind of review as was carried out by the convening authority, in that it is



concerned only with the administrative aspects of the case and the quantum of punishment. The Chief of Defence Staff has similar powers to those of the convening authority as to the quashing of findings or the alteration of sentences. As stated earlier, this review achieves little, if the convening authority has properly conducted his review.

There are two occasions however when the Chief of Defence Staff must become involved in a review of the sentence awarded by a court martial. The first occasion is when the accused has been sentenced to Dismissal or Dismissal With Disgrace; these sentences require the approval of either the Chief of Defence Staff or the Minister.<sup>8</sup> (The only other sentence requiring approval before it may be carried out, is that of death; in a case involving such a sentence the approval of the Governor in Council is required.)<sup>9</sup> The second occasion is when the accused has appealed as to the severity of his sentence.

#### Appeal As To Severity of Sentence

When an accused appeals from his conviction by court martial, including an appeal as to severity of sentence, the Statement of Appeal form is submitted directly to the Judge Advocate General. The Judge Advocate General will examine

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<sup>8</sup>NDA sec. 178(2). Also QR&O, art. 114.08(2).

<sup>9</sup>NDA sec. 178(1).

and advise the Chief of Defence Staff on any legal aspects of the appeal, but the appeal as to the severity of sentence is purely a matter for the Chief of Defence Staff. The convening authority plays no part in this procedure. The Chief of Defence Staff will consider the grounds of appeal, possibly concurrently with his administrative review, and then take such action as he may consider appropriate to allow it in whole or in part, or to disallow it. If the accused's appeal is disallowed, he may still take further appeal action through the redress of grievance procedure whereby he can have his appeal placed before the Minister and the Governor in Council; this rarely occurs however.

The Crown has no right of appeal from sentence, and what is more, no authority has any power to increase a sentence awarded by a service tribunal. On some, but rare occasions, this has resulted in service discipline and justice appearing unrealistic. An example is when a general court martial, having had enough fortitude to find an accused guilty on a difficult and major charge, takes the easy way out and awards an extremely minor punishment, thus ensuring no appeal, on any grounds, by a most grateful accused.

#### Defects of Forces' Review Procedures

Two major weaknesses have resulted from the present review procedure, and these seriously affect the whole of

the trial system. They are:

- (1) A considerable weakening of the credibility of courts martial when they award a major sentence.
- (2) The rendering, in practice, ineffective, the carrying out by the convening authority of his responsibilities after the trial has been completed.

The roots of these weaknesses are in the automatic review conducted at Canadian Forces Headquarters.

#### Credibility of Sentences

Dealing first with the credibility of a court martial when it awards a major sentence, there has arisen a tendency at the senior headquarters level to generally ignore the court's decision in matters of sentence, together with a trend of re-trying the case on the facts as found in the transcript. The finding and sentence of a court martial trying a serious charge, where the case is a marginal one, as sometimes they are, come under continual criticism as the reviewer does not consider one without the other. If he disagrees with the finding, then his review of the sentence becomes coloured. He too often places himself in the position of the court - and this is not his function.

Major punishments awarded by courts martial are all too often altered; few sentences of imprisonment, for example, ever remain unchanged. This results in the following undesirable results:

- (1) The court martial may well award a more severe sentence than it normally would, to allow for the expected mitigation.
- (2) The prestige, the credibility of sentences, and possibly the credibility of the other decisions of the court martial suffers when it is accepted as a matter of course that sentences will usually be changed.
- (3) The members of the courts themselves become discouraged and are inclined to adopt the view, when considering sentence, of "Oh well, it will be changed anyway."

These matters do not add lusture to the court martial form of trial in the eyes of the serviceman, but rather tarnishes it as far as the court being accepted as an independent and fair form of trial. There is the danger that it will merely become an "interim" court if the trend was to continue.

This tendency to alter punishments have developed in spite of the fact that all punishments at courts martial are awarded by legal officers, or at least, in the case of the general and disciplinary court martial, with the advice of legal officers. Because of their court martial experience, this relatively small group of officers develop deep understanding of the principles of sentencing as applied in both the civilian and military societies. In addition, because of their service experience, they have an understanding of the requirements of the military organization in matters of dis-

cipline, possibly far more than is held by a service officer who may be a member of a court martial once in his career, or who has never so sat, but reviews the sentence of the court as a staff officer.

In support of the Canadian Forces' Headquarters review and the alteration of punishments that occur, there is the argument that this procedure protects the accused in that his whole "file" is considered: factors and background not normally made available to the court are often considered in reaching the decision to change the sentence. The reply to that argument is that that kind of material is available to the convening authority when he conducts his review. There is a further argument that this review at Canadian Forces Headquarters ensures that a uniform standard of punishment exists throughout the Forces; the accused should not suffer because he is tried in one locality rather than another. One answer to this argument is that if this is the end to be attained, then the court should not sentence at all, but leave the problem to the reviewer. Another answer is that it fails to recognize that it is an acceptable principle in sentencing - as it is in making the decision to have the accused tried by court martial in the first place - that the court consider such matters as the prevalence of the offence, the necessity for deterrence or other factors that may change from locality to locality; thus a thief in one location may be sentenced to imprisonment when the offence is becoming too common, while

in another location he would receive only a fine as there are no problems of that nature. The commanding officer may well consider such aspects of the offence when he is considering the disposition of the charge after his initial investigation. Yet another answer is that in attempting to make all sentences "equal" there arises a strong inclination to equate them with what would be awarded by a civilian court for a similar offence, something which very definitely should not be done. The factors taken into account by civilian courts are very different from those that are of importance to the military court; the different emphasis that may be placed on service offences by the requirements of military discipline have already been discussed in Chapter I.

If the serviceman comes to believe that the court martial when sentencing him is only imposing an interim sentence - as if it is severe at all it will be probably changed - then the serviceman may well question the other decisions of the court martial. Why should they be right in convicting but wrong in sentencing? A first step to forestall the growth of this feeling would be the establishment of regulations requiring more information to be given to the court before sentence is passed, and in this way re-inforce the validity of the sentence they subsequently impose. There is no provision today for such things as pre-sentence reports, for example. The court is at the mercy of the prosecutor who rarely speaks as to sentence, and the defence counsel who

rarely presents any strong mitigation evidence. Possibly he too knows that whatever sentence the court awards, if severe at all, will be reviewed by a far more favourable "court" than the present one which has convicted his client.

The objection to such procedures as pre-sentence reports is that they could well delay the court proceedings while the information was being obtained. Aside from the fact that such a report for the court could be prepared beforehand, any procedure that would strengthen the position of the court when it gives a sentence is a desirable one. The more reliance that can be placed on the decisions of the court, the less requirement there is for elaborate and extensive reviews.

#### Ineffectiveness of Convening Authority

Coming now to the convening authority, it is obvious from the outline given above, that he has no effective part in any of the administration once the trial is over, yet the same principles as to his administration of discipline that applied before the trial apply even more strongly after the trial. Up to the time that the trial is completed, the convening authority has the sole responsibility for that trial. The subsequent procedures however downgrade his position to where, in practice, they almost ignore him completely, and this despite the fact that in the interests of the administration of discipline within the Forces, he is the

one authority that should be most closely involved. He has the power to speedily correct injustices, and in the realm of administration within the military, he can take action much more quickly, and with far less formality, than is mandatory at Canadian Forces Headquarters. Further, as he was the one that convened the court martial, he is in the most knowledgeable position concerning the circumstances. As the accused, the commanding officer and the court are normally all under his command, again in the interests of promoting discipline within the forces he controls, he should be the one to take the major action with regard to his courts, and not have to leave it to a superior headquarters. If corrections are required in the findings or sentences are to be altered, then he should be the authority, in the normal course of events, to take the action. He can receive advice, especially from the Judge Advocate General, but it is to him that the accused and the commanding officer first look for just treatment, and such treatment should not be delayed by the uncertainties of a possibly less well informed superior headquarters.

In the Canadian Forces today there is no longer a need to supervise the convening authority in the execution of his responsibilities after trial. After all, the Act and the Regulations considered that he was responsible enough to convene it in the first place. The review at Canadian Forces Headquarters should add something positive to the administra-



tion of discipline within the Forces. It does just the opposite, as it tends to ignore those matters that support the role of the convening authority in the administration of military justice. If the present review by the convening authority as to punishment is to be a believable one, then it should be the major review, especially when the appeal opportunities open to the convicted serviceman are considered.

As a further point on this question of the position of the convening authority after the trial, the complete bypassing of this officer in the appeal as to severity of sentence is another aspect of the weakening of his position, and therefore the system. If any authority has an interest in this type of appeal, it is the convening authority, and he is the authority best qualified to advise, at least, on its merits. While it can be argued that a formal appeal from a sentence should be finally determined in possibly a more objective forum than that of the convening authority, the interests of the Forces are not well served by ignoring him, especially if he has already reviewed the sentence.

#### A Suggested Review Procedure

The present review procedure results in a duplication of effort, produces delay in finalizing the court martial findings, and creates a situation where the decisions as to sentence by the court martial, and later by the convening authority, may not be given the weight due them. The follow-

ing is a suggested procedure to be employed in the review of the proceedings of a court martial that might correct some of these defects.

- (1) The proceedings of the court would be reviewed as now by both the Judge Advocate General and the convening authority.
- (2) The certification, or otherwise, by the Judge Advocate General would be initially directed to the convening authority for his action.
- (3) The convening authority would exercise his powers as to the findings based on the certification and the advice of the Judge Advocate General. He would also take such action as he considered desirable to confirm or alter the punishment.
- (4) When the sentence of the court martial requires Chief of Defence Staff approval, or that of the Minister, then, if the convening authority did not alter it as a result of his review, the proceedings would be forwarded to the Chief of Defence Staff with the recommendation of the convening authority. If such an approval was not required, then the proceedings, after the completion of the convening authority's action, would be forwarded to Canadian Forces Headquarters as a completed matter, for filing.
- (5) In the event of an appeal as to severity of sentence, the appeal form would be sent directly to the Judge

Advocate General, as now, but the serviceman would also send a copy directly to the convening authority. The convening authority would review the appeal and then, if he wished, take such action as he considered necessary to grant it in whole or in part, or to deny it. If he grants any portion of the appeal, the accused would be requested to advise whether or not he wished to continue the appeal. In the event that he denied the appeal, the convening authority would refer the matter to the Chief of Defence Staff with his reasons for such denial. The Chief of Defence Staff would then finally determine the matter.

The thrust of the above suggestions is to have the convening authority review the normal case, and to do away with the present time-consuming practice of a Canadian Forces Headquarters review. It would still be open to the convening authority to refer the proceedings to the Chief of Defence Staff, if for some reason he could not act, and it would still be open to the Chief of Defence Staff to call for proceedings for a review by him in cases involving major charges or having major administrative implications for the Forces.

As a support for such a review system, the amount of information given the court prior to its decision as to the sentence of the accused, should be greatly increased. Aggravating, mitigating and extenuating factors should be clearly brought out. Such matters as the accused's pay, his

marital status and circumstances, his military record of service, even his recent Personnel Evaluation Reports, should be available to the court. The court should have a full knowledge of not only the offence, but of the accused, when it passes sentence.

## IX

## SUGGESTED CHANGES FOR A REVISED CODE OF SERVICE DISCIPLINE

Introduction

This final chapter will consolidate some of the comments and suggestions put forward earlier in this thesis in an outline of suggested changes to the present Code of Service Discipline, such changes to strengthen some of the weaknesses that now exist. In assessing the changes that are proposed herein, it must be recognized that not every point that has been raised in the previous chapters is covered; to do so would require another thesis length presentation. The changes that are suggested however, are the major ones and attempt, as far as possible, to be practical ones, considering the wording and the requirements of the present Act. They will be a base upon which those charged with the administration of discipline within the Canadian Forces can build to make the Code of Service Discipline more responsive, than at present, to the requirements of criminal justice today, while still having it meet the needs of the Forces.

The suggestions are mainly in point form. They are broken down into Parts that reflect the separate periods of time that occur from the time that a decision is made to charge a serviceman to the time that the charge is finally disposed of under the Code. There are four such main periods

of time in the service trial procedure:

- (1) the time before the summary trial;
- (2) the time of the summary trial;
- (3) the time before the court martial; and
- (4) the time of the court martial.

As was apparent from the contents of the previous chapters, what occurs during one period of time may well affect the legality of the proceedings during a subsequent period; in this outline therefore there will be some overlapping in the Parts setting out the suggested changes in the Code. Nor does the outline of suggested changes try to provide for every situation that can arise in the procedures to try and punish a serviceman; such detail would be of little value at this stage, as its development rests on the acceptance of major changes proposed. The outline of these suggested changes concentrates on where the present Code needs strengthening. Small consequential changes are ignored, as are the majority of the existing procedures that are not applicable to the proposed change. Hopefully however, the suggestions, as outlined, will provide a point of departure for revision of the present Code, a revision that does not require wholesale amendments to the National Defence Act.

Each Part will end with a summary of the major defects discussed in the earlier chapters that are dealt with by the suggested procedures. All the matters reviewed, and sometimes criticized, are not answered herein, and the "answers" con-

tained in the suggestions are certainly not the last word. Some points of criticism may well be never corrected, except through "skillful administrative neglect", but at least thought may be given to the fact that they do exist. The Conclusion to the chapter, and the thesis, will primarily summarize where the suggested procedures have failed to provide "answers" and as to whether answers in some cases are really possible or desirable.

Before commencing the outline of suggested changes to the present procedures, it should be noted that some of these procedural changes in all Parts are based on the concept that service offences are formally divided into two categories, i.e., criminal offences and disciplinary offences. This is the situation now in regard to the right of an accused serviceman to elect trial by court martial. The following proposals will extend this division of charges, by nature, into other aspects of the trial process. A further basic procedural change that is applicable to these changes, is that if a case involves charges of both categories, the procedure applicable to the criminal offence would be followed. This proposed division of charges was examined in Chapter III.

## PART ONE

### BEFORE THE SUMMARY TRIAL

#### Introduction

This period of time in the procedures applicable to the trial of a serviceman is mainly concerned with the creation of a charge, the laying of a charge, and then with the commanding officer's investigation that is carried out after the charge has been laid. These matters were discussed in Chapter IV. Suggested changes in this area are as follows.

#### The Charge Report

- (1) All charges against all accused will be recorded on the Charge Report Form and the Charge Report will be signed and dated by the person laying the charge.
- (2) When it has been completed, the Charge Report will be delivered to the commanding officer, or to a delegated officer belonging to the accused's unit.
- (3) A copy of the Charge Report will be delivered to the accused, a "reasonable time" before the commencement of any trial, considering the nature of the charge and the exigencies of the service. As an alternative, the accused will be informed of the charge against him and its wording. The fact that an accused does not receive a copy of the Charge



Report or is not advised of the details of the charge, will not be a bar to the subsequent trial of the accused on the charge, but it may be a ground to support his request for an adjournment.

- (4) The Charge Report will be the sole accusatory document used at all summary trials, including those by a superior commander.
- (5) The Charge Report will accompany any application to higher authority for disposal of the charge.

#### The Charge Sheet

- (1) The Charge Sheet will be prepared and signed by the convening authority at the time that he convenes a court martial.
- (2) The Charge Sheet will contain all the charges upon which the accused will be tried by court martial. The convening authority will, if need be, prepare the Charge Sheet from charges contained in more than one Charge Report; he will be required, in other words, to consolidate the charges for the trial by court martial.

#### The Charge

##### The "Laying" of a Charge

- (1) A charge is said to be "laid" when the Charge Report

is signed and dated.

- (2) A charge may be laid by any member of the Forces.

#### The "Withdrawing" of a Charge

- (1) A charge is "withdrawn" following the direction of a competent authority that the charge be removed from a Charge Report or Charge Sheet and that the prosecution of that charge under the disciplinary procedures then in progress be terminated.
- (2) A charge may be withdrawn at any time prior to the accused being put to his defence at any trial or to the acceptance of a guilty plea by him.
- (3) The withdrawal of a charge does not act as a bar to the subsequent relaying of that charge, or any other charge, and the trial of the accused on that charge.
- (4) Charges may be withdrawn before trial by:
- (a) a delegated officer, but only in respect to charges of offences that he has jurisdiction to try, and only up to the time that the charge is referred to the commanding officer for disposal;
  - (b) the commanding officer, but only up to the time that he makes an application to higher authority for disposal of the charge;
  - (c) any higher authority to whom the commanding officer is responsible in matters of discipline, or who has the power to convene a court martial.

### The "Dismissal" of a Charge

- (1) The dismissal of a charge remains as presently constituted.
- (2) The act of dismissing a charge will be recorded on the Charge Report or Charge Sheet as the "formal decision".

### The Amendment of a Charge

- (1) A charge, once laid, can be amended to the same extent as it may be amended by a court martial under the present regulations.
- (2) An amendment to a charge may be made by any authority that has the power to withdraw the charge.
- (3) When a charge is amended, a copy of the amendment will be delivered to the accused, or he will be otherwise informed of the amendment.

### Commanding Officer's Investigation - The Inquiry

- (1) The investigation that the commanding officer conducts, or has another conduct, into a charge after it has been laid should be known by the more descriptive title of "The Inquiry".
- (2) The Inquiry into a charge should be held as soon as possible after the charge has been laid.
- (3) The Inquiry will be conducted:

- (a) by an officer, where the offence charged is criminal in nature, or where the status of the accused requires that he be tried either by a superior commander or by court martial;
  - (b) by either an officer or non-commissioned officer where the offence charged is purely a disciplinary one.
- (4) A record of the Inquiry will be made in either synopsis or abstract form and it will be known as "Record of Inquiry".
- (5) The Record of Inquiry will only reflect evidence supporting the prosecution of the charge and will be prepared without any necessity for:
- (a) the presence of the accused;
  - (b) the swearing of witnesses or of the making of their signed written statements.
- (6) The Record of Inquiry will be signed and dated by the person conducting the inquiry and will recommend disposition of the charge, i.e., withdrawal, dismissal or trial.
- (7) The Record of Inquiry will be initially delivered to a delegated officer of the accused's unit or the unit where the accused may be present for the purposes of disciplinary proceedings.
- (8) The Record of Inquiry will constitute the evidence to be considered by an officer conducting a summary

trial if the accused agrees to dispense with the calling and swearing of witnesses at his trial.

### Additional Charges

When there is an application made to higher authority with a recommendation for trial by court martial and, as a result of the review by higher authority of the material submitted by the commanding officer in support of his application, the higher authority considers that additional charges should be laid, such charges may be laid by the higher authority and forwarded for disposal without any reference back of them to the commanding officer for consideration or further investigation. (See Summary for elaboration)

### Pre-Trial Administration Within Unit

#### The Delegated Officer Before Trial

- (1) The delegated officer will be the initial recipient of all charges prepared or received at a unit.
- (2) If the accused is subject to trial on the charge by the delegated officer, the delegated officer will have an Inquiry carried out. When the Record of Inquiry has been completed, he will commence the trial. The outline of the details of the summary trial will be set out in Part Two.
- (3) If the accused is not subject to summary trial by

the delegated officer, but is subject to summary trial by either the commanding officer or a superior commander, the delegated officer himself will normally prepare the Record of Inquiry.

- (4) If the accused is not subject to trial by the delegated officer, but subject to trial by the commanding officer, the delegated officer will, when the Record of Inquiry has been prepared, see the accused and:
- (a) deliver to him a copy of the Charge Report and a copy of the Record of Inquiry;
  - (b) ascertain from him if he agrees to the reading of the Record of Inquiry at a summary trial before a commanding officer in lieu of the calling of witnesses. The accused's agreement, or refusal will be recorded on the Charge Report;
  - (c) if the offence is one of a criminal nature, he will advise the accused he has the right in Canada, to be represented at any trial of that charge by civilian counsel of his own choice and at his expense. If the accused indicates his intention to retain counsel, this decision will be recorded on the Charge Report;
  - (d) if the offence is one of a criminal nature, he will advise the accused that he has the right to elect trial by court martial because of the nature of the offence. The decision of the accused will

be recorded on the Charge Report.

Following these proceedings, the delegated officer will refer the Charge Report, with his recommendations as to the disposition of the charge, to the commanding officer.

- (5) If the accused is a person who is subject to summary trial by a superior commander, the delegated officer will deliver a copy of the Charge Report and the Record of Inquiry to the accused and refer the Charge Report and the Record of Inquiry to the commanding officer.
- (6) If the accused is only subject to trial by court martial, the delegated officer will not conduct an Inquiry, but refer the Charge Report directly to the commanding officer.

#### The Commanding Officer Before Trial

- (1) If the accused is a person whom the commanding officer has jurisdiction to try summarily, the commanding officer, on receipt of the Charge Report from the delegated officer, will:
  - (a) review the charge and the recommendation of the delegated officer;
  - (b) consider if his powers of punishment are adequate having regard to the gravity of the offence;
  - (c) determine if, because of the accused's election

for trial by court martial made before the delegated officer, he is prevented from trying the accused summarily;

(d) determine if, because of the accused's retention of civilian counsel, the charge should be referred to a Standing Court Martial;

(e) if he is not prevented from trying the accused summarily, set a time and date for trial and have the accused advised.

(2) If the accused is a person who is subject to summary trial by a superior commander, the commanding officer will review the Charge Report, the Record of Inquiry and the recommendation of the delegated officer. He may then take one of the following courses of action:

(a) dismiss the charge;

(b) withdraw the charge;

(c) order a further Inquiry;

(d) order an investigation to support an application for trial of the charge by court martial; (This procedure will be outlined in Part Three)

(e) forward the Charge Report and the Record of Inquiry to the superior commander with a recommendation for summary trial of the charge.

(3) If the accused is a person who is not subject to summary trial, but only to trial by court martial, the commanding officer, on receipt of the Charge Report,



will conduct an Inquiry. On completion of the Record of Inquiry he will take one of the following courses of action:

- (a) dismiss the charge;
- (b) withdraw the charge;
- (c) order an investigation to accompany an application for the trial of the charge by court martial.

(4) When a charge is to be referred to a superior commander for summary trial, the commanding officer will see the accused and determine from him the following matters:

- (a) whether he agrees to the Record of Inquiry being read at any summary trial by a superior commander in lieu of the calling of witnesses; (The agreement, or otherwise, of the accused will be recorded on the Charge Report)
- (b) if the offence is criminal in nature, whether he elects trial by court martial; (The accused's decision will be recorded on the Charge Report)
- (c) if the accused does elect trial by court martial, whether he wishes such trial to be by the Standing Court Martial form of trial (judge alone) or by the disciplinary court martial form (judge and jury); (His preference is not binding on the convening authority however)
- (d) if the offence is one of a criminal nature, he

will advise the accused that he has the right in Canada to be represented at any summary trial of that charge by civilian counsel of his own choice and at his expense. (If the accused indicates his intention to retain such counsel, this decision will be recorded on the Charge Report)

- (5) If the accused does elect trial by court martial, then the commanding officer will order an investigation to accompany the application for such a trial.
- (6) If the accused does not elect trial by court martial, then the Charge Report will be forwarded to the superior commander with the commanding officer's recommendation for summary trial. The Record of Inquiry will also be forwarded to be available, if required, at the trial. This procedure was discussed earlier in Chapter VI.

#### The Superior Commander Before Trial

- (1) The superior commander on receipt of the Charge Report and recommendation for summary trial from the commanding officer will:
  - (a) review the charge and recommendation by the commanding officer;
  - (b) consider if his powers of punishment are adequate having regard to the gravity of the offence;
  - (c) determine if, because of the accused's retention

- of civilian counsel, the charge should be referred to a Standing Court Martial for trial;
- (d) if he is not prevented from trying the accused summarily, set a time and date for trial and have the accused advised.
- (2) The superior commander may dismiss the charge at any time.
- (3) The superior commander may withdraw the charge at any time up to the time that he calls upon the accused for his defence at the summary trial, or accepts his plea of guilty.

#### Summary

Chapter IV discussed the main areas of concern or uncertainty that exist before the trial of a person subject to the Code. They were essentially in the areas pertaining to:

- (1) the creation and laying of a charge;
- (2) the failure to formally advise the accused before trial of the charge against him;
- (3) the conflicting responsibilities of the commanding officer at this time because he must act both as an investigator and as a service tribunal;
- (4) the lack of flexibility in the disciplinary procedure because a charge, once laid, can only be dismissed or tried, it cannot be withdrawn or amended;

- (5) the requirement that a commanding officer exercise his discretion in relation to a charge before it can be dealt with by any other authority.

These matters have been dealt with in this Part.

A charge is "created" and "laid" at ascertainable times in the disciplinary process. The accused goes to his trial knowing what he is charged with and who is his "accuser". The commanding officer has been, at least partially, removed from the pre-trial procedure of the "investigation" through the expansion of the role of the delegated officer to review all charges and to either conduct or have conducted the majority of the Inquiries into such charges. He is, of course, always subject to the direction of the commanding officer who retains responsibility for the administration of discipline for the whole unit, and his duties could be limited by a commanding officer if the commanding officer wished to take a more active part in the pre-trial procedures. In such an event however, the commanding officer might well jeopardize his judicial position at any subsequent summary trial he conducts.

The "investigation" into a charge has been given formal existence through the Inquiry and Record of Inquiry procedure. This, at first, may seem to be an unnecessary addition to the paperwork that occasionally plagues the military administration. Further, the creation of the Record of Inquiry may delay the commencement of trials through the

imposition of too much formality. The trial of a soldier for being absent from parade really doesn't require such a procedure. If however, the Inquiry is kept informal in obtaining information, and the Record of Inquiry is placed on a properly drafted form, undue delays should not occur as it should be quickly completed for the normal case. When the advantages of having such a record are considered it is a highly desirable addition to the procedures governing the administration of discipline within the Forces. A major advantage is that it provides a record of evidence that can be considered at any summary trial without the necessity of calling and swearing of witnesses, if the accused agrees. Another advantage is that it permits the commanding officer to clearly act in a judicial role when he tries a charge.

The addition of a "withdrawal" and an "amendment" procedure gives some scope for correcting errors which does not exist under the present regulations.

The final point of concern related to the strait-jacket that is placed on the administration of discipline by the combination of the requirement for a commanding officer's investigation and that requiring the commanding officer exercise his discretion as to the disposal of a charge before any higher authority may deal with it. This is considered in the suggestion that permits the laying of charges by a higher authority who receives an application for court martial. In elaboration of this proposed procedure of laying charges and

their disposal without reference to the commanding officer, and thus avoiding his "investigation" and the exercising of his "discretion", it is pointed out that this could be accomplished by amendment to two regulations.

The first amendment would be to designate higher authorities reviewing applications for court martial as "commanding officer" for the purpose of laying, investigating and disposing of charges.<sup>1</sup> The second amendment would be to the Governor in Council regulation<sup>2</sup> providing for the investigation of charges. Such an amendment would be to the effect that when a higher authority receives an application for court martial, and following his review of the material submitted in support of such charges, he considers that further charges should be laid, he may lay such charges, and that no further "investigation" is required. The higher authority would then be in a position to lay the charge, and then dispose of it by either referring it for trial by court martial or referring it back to the commanding officer for trial, as he saw fit. This power, together with the power to withdraw and amend charges would considerably strengthen and speed up the administrative process within Canadian military law to try an accused on proper and adequate charges.

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<sup>1</sup>QR&O, art. 1.02(xix)(b) defines "commanding officer" as including an officer who is so designated by or under the authority of the Chief of Defence Staff.

<sup>2</sup>NDA sec. 139 and QR&O, art. 107.02.

There has been some overlapping in this Part with points of concern that arise with regard to the actual summary trial. This has occurred in relation to such matters as elections and the retention and representation by civilian counsel. As these suggestions attempt to resolve the administration early in the disciplinary process, and thus allow it to quickly move toward trial, this is unavoidable.

## PART TWO

### THE TIME OF THE SUMMARY TRIAL

#### Introduction

The proposed changes in the summary trial are designed to make it a true trial rather than just a hearing - which is what it is now. A procedure to provide for pleas by an accused is introduced as a major change to the present procedure, on the ground that in the majority of cases tried by a summary trial, there is little dispute by the accused as to the accuracy of the charge or as to his guilt. By a plea procedure considerable time is saved with no diminishment of the accused's rights. There has been no real change in the rights that an accused may have now as to elections nor as to the options open to the officer trying the case, except that he must exercise them before he calls upon the accused for his defence. A formal appeal procedure is introduced on the basis that an accused should be able to have his appeal dealt with quickly by a superior authority to the officer who convicted him, which is not provided for in the redress of grievance procedure as it is now constituted.

The following are general procedural changes in the summary trial procedure. This Part will also outline generally a recommended summary trial procedure at the three levels of such trials.



### General Procedural Changes

#### Elections By Accused

- (1) Though the accused may have already been given the right to elect trial by court martial when he was seen by the delegated officer, he will be given a second right to elect trial by court martial by the commanding officer, if the commanding officer determines at the summary trial that the punishment he may award the accused, if he finds him guilty, will involve the accused's rank.
- (2) If the accused does elect trial by court martial, he shall be asked by the commanding officer to state a preference for either a Standing Court Martial form of trial or of a disciplinary court martial one.

#### Counsel at Summary Trial

As was outlined in the pre-trial responsibilities of the delegated officer and the commanding officer, when an accused is charged in Canada with an offence of a criminal nature, and is subject to summary trial, he is advised of his right to retain civilian counsel of his own choice and at his own expense to appear on his behalf at any trial. The commanding officer and the superior commander will be aware of the intention of the accused to retain such counsel through a review of the Charge Report. If the accused does

actually retain counsel prior to the time set by the commanding officer or the superior commander for the summary trial of the accused, the charge will then be referred to a Standing Court Martial for trial. The procedure for such referral will be outlined in Part Three.

### Trial Record

At the completion of every summary trial where the accused has been convicted of a criminal offence or where he has been sentenced to detention or reduction in rank, a "Trial Record" will be created that will consist of the Charge Report, the Record of Inquiry, and if evidence was given through witnesses, a short outline of such evidence. The Trial Record will be forwarded for review by the next higher authority to whom the officer conducting the summary trial is responsible in matters of discipline.

### Appeals

Following completion of a summary trial, the convicted serviceman may enter an appeal, in writing, as to the finding or sentence. This appeal will be directed to the next senior officer to whom the officer conducting the summary trial is responsible in matters of discipline. If the appeal is disallowed, it may be sent, at the request of the appellant, to the Commander of the Command for final disposition.

## Rules of Evidence

The officer conducting a summary trial must be bound by rules of evidence that provide, as a minimum, for the following:

- (1) proof of guilt beyond a reasonable doubt;
- (2) exclusion of hearsay evidence;
- (3) the acceptance of statements made by the accused previous to the summary trial only when the officer conducting the summary trial is satisfied that they were freely and voluntarily made.

### Summary Trial Procedure

#### Delegated Officer's Summary Trial

- (1) The accused will be arraigned at the commencement of the trial by the reading of the Charge.
- (2) The accused will be asked to plead to the charge.
- (3) If the accused pleads guilty, the delegated officer will then read the Record of Inquiry and then decide:
  - (a) whether to refer the case to the commanding officer for trial; or
  - (b) whether to accept the guilty plea.
- (4) If the delegated officer does not accept the guilty plea he may:
  - (a) order a further Inquiry on specific points;
  - (b) continue the trial as if the plea had been not

guilty; or

(c) refer the case to the commanding officer for trial.

- (5) If the delegated officer accepts the guilty plea he will so advise the accused and consider sentence.
- (6) If the accused pleads not guilty, or refuses to plead, the delegated officer will ask him if he wishes the witnesses against him called and sworn, or is he prepared to accept the Record of Inquiry as the evidence against him.
- (7) If the accused accepts the Record of Inquiry, that document will then be read by the delegated officer to the accused.
- (8) If the accused requires the witnesses to be called, then the delegated officer will hear their evidence as he does under the present procedures.
- (9) When the delegated officer has heard the evidence against the accused, or has read the Record of Inquiry, he will then determine if there is a case for the accused to answer. If there is not he will dismiss the charge.
- (10) If he decides that there is a case for the accused to answer, he will advise the accused of that finding, and then hear such evidence as the accused may wish to present in his defence.
- (11) The delegated officer may withdraw the charge, or

terminate the proceedings and refer the case to the commanding officer for disposal, at any time up to the time that he calls upon the accused for his defence or accepts his guilty plea.

#### Commanding Officer's Summary Trial

- (1) The accused will be arraigned.
- (2) If the commanding officer considers that his punishment, if he finds the accused guilty, will involve reduction in rank, he will give the accused an election for trial by court martial. This election may be given at any time to the time the accused is called upon for his defence or to the time the commanding officer accepts his plea of guilty. The accused's election because of the criminal nature of the charge, will have already been recorded by the delegated officer on the Charge Report.
- (3) If the trial continues the accused will be asked to plead.
- (4) If the accused pleads guilty, the commanding officer will then be given the Record of Inquiry prepared by the delegated officer, read it and decide:
  - (a) whether to refer the charge for court martial; or
  - (b) accept the guilty plea.
- (5) If the commanding officer does not accept the guilty plea he may:

- (a) order a further Inquiry on specific points;
  - (b) continue the trial as if the plea had been not guilty; or
  - (c) dismiss or withdraw the charge.
- (6) If the commanding officer accepts the guilty plea he will then advise the accused of that fact and proceed to consider sentence.
- (7) If the accused pleads not guilty, or refuses to plead, the commanding officer will ask him if he wishes the witnesses against him called and sworn, or is he prepared to accept the Record of Inquiry as the evidence against him.
- (8) The summary trial procedure from this point is similar to that of the delegated officer's, with regard to the hearing of evidence.
- (9) The commanding officer may withdraw a charge or refer the charge for trial by court martial at any time up to the time that he calls upon the accused for his defence or accepts the guilty plea.

#### Superior Commander's Summary Trial

- (1) The summary trial by a superior commander does not involve any elections by the accused as all elections will have been taken and recorded by the commanding officer.
- (2) The procedure for the summary trial will be the same

as for the commanding officer's summary trial as to the hearing of evidence.

- (3) The superior commander retains the option of referring the charge for trial by court martial, or of withdrawing the charge, up to the time that he accepts the guilty plea of the accused or he calls upon the accused for his defence.

### Summary

The review of the summary trial conducted in Chapter V dealt with a number of areas where there were elements of unfairness or where either the interests of the Forces or of the accused were not protected. These were mainly concerned with the positions of the commanding officer and the accused at the trial, as well as the procedures followed at the trial itself.

The defects of the summary trial by a commanding officer are also found, for the main part, in the summary trial by a superior commander. In Chapter VI the procedure that is now followed to refer a charge to a superior commander for summary trial was outlined and was found, it is submitted, to be unduly formal and time consuming considering the limited scope of punishment that could be awarded. While the trial is termed "summary", the procedure to make application for such a trial certainly is not. As will have been seen from the suggested procedures in the Part, the time con-

suming formality of such referrals has been done away with, and the two levels of summary trial have been generally placed on the same plane. The suggested changes therefore apply to the summary trial by a superior commander as well as to that by a commanding officer, though more attention is, and has to be, paid to the role of the commanding officer because of such matters as elections and his basic jurisdiction to deal with a charge.

There are three main weaknesses or defects outlined in Chapter V. Firstly, under the present regulations, the commanding officer has great difficulty in even appearing to meet the dual responsibilities placed on him by his position of commanding officer and the judicial role he fills when he acts as a service tribunal to try an accused; further his independence and impartiality is seriously open to attack. Secondly, the accused serviceman faces uncertainty at his summary trial because of the options open to the officer trying him to refer the case at any time, prior to the finding, to court martial, or to re-open the investigation that has already been conducted into the offence. As well, he may have to gamble in electing or not electing trial by court martial when he is a non-commissioned officer. Further, the accused is denied counsel at his trial. The third is that the trial itself is a hearing and not a trial. It does not clearly require the reception of all the evidence against the accused before he is put to his defence, the application of



any rules of law as to the reception of evidence at the summary trial, and there is no record kept of the actual proceedings.

These weaknesses and defects are all considered by the suggested changes that have been outlined in this Part. All are within the present wording of the Act and can be accomplished by amending regulations and orders. There have been no major rights or options removed, and in fact there have been several added for the accused, such as right to counsel, the separation of rights to elect trial by court martial, as well as a more efficient appeal procedure.

No commanding officer, nor any military officer, will ever achieve the judicial impartiality and independence that the purist will demand of a judge trying criminal cases. The procedures outlined in Part One however, have generally removed him from the pre-trial administration. This principle of non-involvement is continued in this Part. If he does become involved, then he should refer the charge to some other commanding officer for trial, at least, if the offence is a serious one or of a criminal nature. On the whole, the conscientious commanding officer may well achieve in the eyes of the accused much of the impartiality and independence that attaches to a provincial judge who sits in judgment within the community where he resides. The officer trying an accused by summary trial under the proposed changes has his judicial role clearly established through the

revised trial procedures and the principle of non-involvement he should follow.

The accused's position at the summary trial has also improved. The two election procedure, one because of the nature of the charge outlined in Part One, and the election because of the nature of the punishment, removes the element of gambling. Further, the accused may stand mute and hear the evidence against him before being put to his defence. The uncertainty of the nature of the proceedings has been removed for the accused as the officer trying him must make his decisions as to the disposition of the charge, other than a finding, before the accused is asked for any defence. There is now a Trial Record and an appeal procedure available to the accused in order that he may have his trial and conviction adequately and quickly reviewed on ascertainable evidence, and evidence that has been subjected to at least basic rules of admissibility.

Finally, there is the provision of the right of an accused to have counsel represent him at any trial. This step is not as drastic as it may first appear. The denial of counsel to an accused being tried for a criminal offence cannot be justified, especially in Canada where civilian counsel are readily available. If counsel must be permitted, then the logical forum in which to hold the trial is that of a court martial. However if one considers that the accused is only given the right to counsel in criminal cases (as opposed to

disciplinary), and he would at the same time have the right to elect trial by court martial where military defence counsel would be provided, the times that an accused would reject a court martial, yet ask to have defence counsel, would be rare indeed.

These procedures do provide a trial of service offences. In addition, they result in a far more effective method of trial than is conducted today. Those who try are removed generally from the pre-trial procedure and administration. There are adequate records of evidence created, yet the system of justice is not unduly hampered. The summary trial becomes just that, as it becomes a true trial and one that can be quickly conducted. The delegated officer, the commanding officer and the superior commander will be required to have a greater appreciation and knowledge of military law, but that is a desirable result, and not a defect.

### PART THREE

#### BEFORE THE COURT MARTIAL

##### Introduction

Some general suggestions were advanced in Chapter VI as to a referral procedure that would ensure a convening authority can make his decision whether or not to convene a court martial with as complete information on the charge as possible. There would appear, however, no compelling reason why the formal, time consuming, investigative procedure that was discussed should apply to all applications for trial of a charge by court martial.

The convening authority requires the results of a comprehensive investigation in all cases where the commanding officer unilaterally has decided to refer the charge for trial by court martial, or where the accused has elected such trial because he was advised that the nature of the punishment the commanding officer considered appropriate, if he was to convict the accused, would involve the accused's rank. As was described in Chapter VI, in such cases the convening authority has an option to refer the charge back to the commanding officer for summary trial within the commanding officer's powers of punishment. He does not have this option however when the accused elects trial by court martial because of the criminal nature of the charge; in

that case he can only dismiss the charge or convene the court, as requested.

The following suggestions outline procedures for a swift referral of a charge for trial by court martial in cases where the accused elects such trial because of the criminal nature of the offence, and a more formal referral procedure, requiring a complete investigation into the circumstances of the charge, for all other applications for court martial. The proposals envisage a greater use than present of the standing court martial form of trial to provide a speedy trial, and they have the effect of reserving the disciplinary and general court martial form of trial for serious disciplinary offences or for offences of such gravity that the power of punishment of the standing court would be inadequate.

Application For SCM Because of Nature of Charge  
And Accused's Election

- (1) When an accused elects trial by court martial because of the criminal nature of the charge, the commanding officer, in lieu of ordering an investigation, may refer the Charge Report and the Record of Inquiry to an authority having power to order a trial by Standing Court Martial, with a recommendation that such trial be ordered without further investigation.
- (2) The application of the commanding officer for such

trial will be directed to higher authority through a legal officer who will:

- (a) review the charge and Record of Inquiry;
- (b) conduct such further inquiry as he may consider necessary into the circumstances of the incident giving rise to the charge;
- (c) either recommend trial by standing court martial and refer the Charge Report and Record of Inquiry directly to an authority who has power to direct such a trial, or return the matter to the commanding officer with a recommendation as to withdrawal of the charge.

(3) When an authority who has the power to direct trial by standing court martial receives the application by the commanding officer, and the recommendation of the legal officer, he may:

- (a) order an investigation into the charge;
- (b) direct that the charge be tried by a standing court martial, in which case he will prepare a Charge Sheet, and then forward the Charge Report and the Charge Sheet directly to the President of a standing court martial, as well as have the accused served with a copy of the Charge Sheet; or
- (c) dismiss or withdraw the charge, in which event he will return the Charge Report and the Record of

Inquiry to the commanding officer.<sup>3</sup>

All Other Applications For Court Martial

- (1) When there is to be an application for the trial of any charge by court martial, other than that by an SCM as was outlined in the previous section, the commanding officer will order an investigation to accompany the application.
- (2) When the investigation has been completed, the commanding officer will review it and take one of the following courses of action:
  - (a) dismiss or withdraw the charge;
  - (b) order a further investigation on specific points;
  - (c) if he has jurisdiction, take steps to have the accused tried summarily. He would take this action if he decided after his review of the in-

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<sup>3</sup>This procedure to have a charge brought before a SCM is only applicable on the election by an accused because of the criminal nature of the charge. It still remains open for a convening authority to direct that a charge be tried by an SCM, just as he may convene a DCM or GCM for the trial of any charge. This proposed procedure however could be used by the commanding officer to quickly dispose of relatively minor criminal charges without having to become involved in massive administrative procedures more suited for the trial of a charge of murder, for example, than a minor theft. It is not unknown for an accused to elect a court martial on a criminal charge, and for the charge to be dismissed when the administration and the tying up of officers to sit on a DCM are weighed against the minor nature of the offence, or alternatively to have disciplinary charges twisted to fit criminal facts in order that the accused not have the right to elect trial by court martial.

vestigation that the facts brought out indicated that his powers of punishment would be adequate to deal with the offence, or that, if he convicted, he would not award a punishment affecting the accused's rank; or

(d) forward the Charge Report, the Record of Inquiry and the Record of Investigation to the next higher authority to whom he is responsible in matters of discipline, with his recommendation for trial by court martial.

(3) A copy of the Record of Investigation will be delivered to the accused when the charge is referred to higher authority for trial by court martial.

(4) When an authority who has power to convene a court martial receives the application for court martial he may:

(a) dismiss or withdraw the charge;

(b) return the matter to the commanding officer with a direction that he try it within his powers, in the same way as provided for by present procedures;

(c) order a further investigation on specific points;  
or

(d) convene a DCM or GCM or direct trial by a SCM or SGCM, as he may consider appropriate.

(5) When a court martial is to be held, the convening authority will prepare a Charge Sheet and cause the accused to be served with a copy.



**The Investigation to Accompany Applications For**  
**Court Martial**

**Investigating Officer**

The Investigating Officer will, whenever possible, be a legal officer. This is almost the rule in practice now in the preparation of a synopsis.

**Taking of Evidence**

- (1) The accused will be present at all formal interviews of witnesses against him by the Investigating Officer where the evidence is to be recorded as part of the Record of Investigation.
- (2) All witnesses will be sworn and questioned by the Investigating Officer.
- (3) All statements by a witness will be recorded in at least note form and, if possible, be signed by the witness as accurately reflecting the evidence that will be given at the trial.
- (4) At the conclusion of each statement before the investigating officer the accused will be permitted to ask questions of the witness on matters relative to the charge.
- (5) All persons subject to the Code are compellable witnesses.
- (6) The evidence of a witness, other than the accused,

given before the investigating officer cannot be used against him in any subsequent trial of that witness, except on a charge of giving false evidence.

- (7) Where a witness against the accused cannot be formally examined by the investigating officer, either because of non-availability or because he is not a compellable witness and has declined to appear, this fact shall be recorded together with an outline of the nature of the evidence expected to be given at any subsequent court martial. The source of the information upon which the content of the evidence is based shall also be indicated.
- (8) At the completion of the taking of evidence from witnesses against the accused, he shall be asked by the investigating officer if he wishes to make a statement or to call witnesses.
- (9) The accused will be cautioned, before he makes any statement at this time, that such statement may be given in evidence against him at any trial; the procedure provided for by Section 467 of the Criminal Code at a Preliminary Inquiry should be followed.
- (10) The accused is not entitled to counsel at the proceedings conducted by the investigating officer as they are investigative only.

### **Form of Record of Investigation**

On completion of the hearing of evidence the investigating officer will:

- (1) prepare a summary of the evidence, possibly in a synopsis form;
- (2) make recommendations as to the disposition of the charge, i.e., withdrawal, dismissal or trial, and the nature of the trial;
- (3) sign and date the Record of the Investigation; and
- (4) deliver the Record of Investigation together with all statements and evidence considered, to the officer ordering the investigation.

### **Investigation of a "Withdrawn" Charge**

If an investigation has been conducted into a charge and that charge is subsequently withdrawn, the portions of that investigation which are relevant may be used as the basis for any subsequent investigation ordered into any charge that may be later laid against the accused and which may be referred for trial by court martial.

### **Provision of Defence Counsel and Assisting Officer**

- (1) If the accused has not retained civilian defence counsel he will be provided military legal assistance:
  - (a) when he has been arrested on a charge of murder,

rape or manslaughter;

(b) at any time, on any charge, on the direction of the commanding officer or higher authority; and

(c) at the time an application for his court martial is submitted.

(2) The accused will be provided with an Assisting Officer at the time a criminal charge is laid against him. If the charge is one of a disciplinary nature, and Assisting Officer will only be provided if specifically requested by the accused.

#### Summary

In Chapters V and VI the procedure to refer a charge from a commanding officer to higher authority, either for summary trial by a superior commander or for trial by court martial, was reviewed. In relation to the latter application, Chapter VI set out the major weakness of the regulations providing for the creation of a Synopsis, viz, failure to give a convening authority a sufficiently comprehensive investigation to enable him to make his decisions based on adequate information. As will have been noted from the outline of suggested changes in Part Two, the procedure for application for court martial has been separated from the procedure for application to have a charge tried by a superior commander by summary trial. The application for such a summary trial has been made far less formal than at present, while the court

martial application procedure has been strengthened to require a more adequate examination of the evidence.

Because of the separation of these procedures, depending on the nature of the application to higher authority, this Part has been mainly concerned with the Investigation that accompanies the application for trial by court martial - this to replace the present synopsis - and upon which investigation the convening authority will base his decision. As a subsidiary matter to this expansion of the synopsis procedure, the present defect in the regulations that does not permit the accused to participate in this pre-court martial investigation has been corrected by granting to him rights similar to those now given service accused in both the United Kingdom and United States Forces. Where at present he is almost completely ignored, the suggested procedures emphasize his attendance at the Investigation and permit him to take an active part if he wishes.

The suggested procedures in this Part provide for the following:

- (1) the speedy referral of charges under certain circumstances to a standing court martial, with a minimum of formality and administration;
- (2) the creation of a procedure to provide for a thorough and complete review of the evidence pertaining to a charge for the use of the convening authority; and
- (3) the formal recognition of the use and responsibilities

of the legal officer in the administration of discipline.

The use of the standing court martial to try charges that have not been the subject of an "Investigation" is a forward step in providing for an efficient judicial process. As has been stated, the Investigation has as its main purpose the advising of a convening authority. If the charge and evidence have been reviewed by a legal officer before being referred to higher authority for trial by a standing court, there should not be further delays while a fourth investigation or review (the Inquiry, the review by the commanding officer and the review by the legal officer being the first three) is conducted.

The formal employment of the legal officer in the disciplinary process will prevent, to a great extent, the carrying forward of charges that are not legally or factually supported. In addition, his early availability to the accused will do away with the necessity for continually interviewing the accused and with the granting of adjournments or remands. Once an accused elects trial by court martial, for example, he need not be formally seen again. Documents and notices can be delivered to him and he will be in a position to ascertain his rights through advice of counsel, rather than the commanding officer having to do so, as is the present practice. This early accessibility of an accused to counsel will considerably speed up the administrative pro-

cesses leading to his trial. Such counsel however, would only act in an advisory capacity to the accused prior to the time a court martial was ordered.

## PART FOUR

### THE TIME OF THE COURT MARTIAL

#### Introduction

The court martial requires little change from its present form. As was evident from Chapter VII, it provides a fair forum for the determination of the guilt or innocence of the accused. If it is to be improved, such improvements will be mainly designed to improve its image by bringing it closer to civilian criminal justice and yet maintaining its essential military identity. The most important change to the present procedures suggested here is in the role and the authority of the Judge Advocate. The rest of this Part merely hits the high spots of the recommendations contained in the earlier chapters and is designed to complete the suggested judicial process outlined in the first three Parts of this chapter.

#### DCM and GCM Form of Trial - Suggested Changes

##### Convening of Court

A disciplinary or general court martial shall be considered to be convened when the convening order is signed. The time and the place of the assembly of the court will be determined by the Judge Advocate and the President, following the completion of any pre-trial hearings by the Judge Advocate.



### **The Role of the Judge Advocate and The Court**

The Judge Advocate will have the sole responsibility for the determination of matters of law or of mixed law and fact. The President and Members of the court will be the judges of fact. The relationship between the Judge Advocate and the court will be similar to that now existing between a judge and jury in the Canadian civilian criminal procedure.

### **Pre-Trial Hearings**

- (1) The Judge Advocate of a court martial will, prior to the formal assembly of the full court, hold pre-trial hearings to determine such questions of law, or of mixed law and fact, as may be raised before him.
- (2) The proceedings at a pre-trial hearing will form part of the trial record and all rules of evidence and such procedures, as may be applicable, that apply at a trial before a court martial, shall be followed.
- (3) The following matters, at the discretion of the Judge Advocate, may be heard and decided at a pre-trial hearing:
  - (a) objections to the Judge Advocate;
  - (b) objections to the President or members of the court;
  - (c) requests for separate trials on the charges;
  - (d) pleas in bar of trial on any grounds;

- (e) any motions as to delay of the commencement of the trial proper;
  - (f) determination of such questions as to the admissibility of evidence as may be reasonably heard at that time;
  - (g) determination of the question as to the admissibility of an admission or confession; and
  - (h) any other matter that would normally be heard in the absence of the court at the trial proper, and which may reasonably be decided upon at the hearing.
- (4) The rulings of the Judge Advocate on the matters heard by him at the pre-trial hearing shall become part of the record of the trial.
- (5) The Judge Advocate may, if he considers it desirable, decline to hear evidence or argument, or to make a ruling, on any matter that is raised at the pre-trial hearing. In that event, he will direct that the issue be raised at the trial proper for decision, but at the option of the party requesting the ruling.
- (6) The Judge Advocate will, when necessary, repeat his rulings or findings at the trial proper. Relevant evidence on the issue may then be introduced in the same way as it would be before a jury: for example, the circumstances surrounding the taking of a confession or admission from an accused, the statement

having been ruled admissible at the pre-trial hearing.

- (7) The Judge Advocate, on completion of the pre-trial hearing, will so advise the President, who will then set a time and place for the assembly of the members of the court.

### Challenges

#### To President or Other Members of Court Martial<sup>4</sup>

- (1) The accused may object to (challenge) the president or other members of a court martial for any reasonable cause.
- (2) The accused may exercise one peremptory challenge in relation to any member of a court martial, but not as to the president.
- (3) The determination of a challenge for cause will be normally decided upon at the pre-trial hearing by the Judge Advocate. A challenge for cause however may also be made at the trial proper if the Judge Advocate is satisfied that it could not have been made earlier and is not made for the purpose of delay.
- (4) The peremptory challenge will be made at the pre-trial hearing. If made, the member will be replaced by the convening authority.
- (5) In determining the merits of a challenge for cause

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<sup>4</sup>NDA sec. 163. See also QR&O, art. 112.14.

the Judge Advocate may permit both sides to question the member challenged, to introduce evidence and to argue.

#### To Military Judge

- (1) An accused may challenge for cause at the pre-trial hearing the Judge Advocate, or at the trial, the Presiding Judge of a SGCM or the President of a SCM.
- (2) The challenge will be ruled upon by the military judge so challenged.
- (3) The accused may introduce evidence to support the challenge and both sides may argue.
- (4) The military judge is not subject to formal interrogation on the challenge.
- (5) Among other grounds that would support such a challenge are those establishing that the military judge acted as an advisor to the commanding officer or the convening officer, or that officers under his command so acted, in relation to the charges before the court, or that in the normal course of his duties he may be required to advise any reviewing authority following completion of the trial.

#### Report of Presiding Judge of SGCM or President of SCM

When the trial by a SGCM or SCM has been completed,

the Presiding Judge or the President shall record his reasons for judgment, including such matters as his findings of fact, credibility of witnesses, corroboration, as well as reasons for refusal of objections made at the trial on major issues. If the accused has been sentenced by the court, the basis of the sentence will also be reported.

This report will be submitted to the Judge Advocate General.

### Appeals

#### Military Appeal Review Board

- (1) There shall be a Military Appeal Review Board created whose members shall be appointed by the Judge Advocate General.
- (2) The Board shall hear, at the request of the Judge Advocate General, the initial appeal by an accused from his conviction by court martial.
- (3) The accused shall be represented, if he wishes, by his counsel at trial.
- (4) The procedure to hear an appeal shall be the procedure followed in the hearing of an appeal before the Court Martial Appeal Court and the Board may exercise, as far as possible, similar powers.
- (5) The judgment of the Board will be in writing and will be delivered to the accused or his counsel, the Judge Advocate General and the Chief of Defence Staff.

- (6) The accused may continue his appeal from his conviction to the Court Martial Appeal Court following the judgment of the Board.
- (7) The judgment of the Board shall form part of the material referred to the Court Martial Appeal Court if the accused continues his appeal.
- (8) The Board will also review, at the request of the Judge Advocate General, the proceedings of any court martial that has not been appealed, and will provide the Judge Advocate General a written opinion as to the legality of the findings and the sentence of such a court martial.
- (9) The judgment or the opinion of the Board is not binding on the Judge Advocate General, though it would be expected to have some persuasive value.

#### **Appeal By Crown**

- (1) The Crown may appeal to the Court Martial Appeal Court on any matter or ground that would be available to it in the Canadian civilian criminal procedure.
- (2) The Judge Advocate General, where there has been no appeal by either the Crown or the accused on an issue being questioned, may submit to the Court Martial Appeal Court a "stated case" for determination.

### **Court Martial Appeal Court**

Recommendations with regard to this court were contained in the previous chapter. However, the suggestion that an appeal by the accused be initially considered by a single judge in a "leave to appeal" procedure is worth repeating. This is especially so if the Military Appeal Review Board has already considered the appeal.

### **An Independent and Trained Military Judiciary**

In a military organization, such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.

If, for this reason, true independence cannot be achieved, then a partial answer may rest in the formal training of the military legal officers as judges, and their sub-

sequent employment in that role on full time duty. One way of doing this would be to create a Judicial Division within the military legal structure. Officers selected by the Judge Advocate General would be assigned to serve in that Division and they would be solely and directly responsible to the Judge Advocate General for the performance of their judicial duties. All matters of administration concerning them that might give rise to "institutional" influence would also be the direct responsibility of the Judge Advocate General; this would include Personnel Evaluation Reports, leaves, promotions, pay, duties, and the like.

Put in its widest terms, the creation of a Judicial Division would result in the "separation" of a number of legal officers from the normal stream of military life, and such a result may be objected to as being administratively difficult. To this it may be answered that the roles of the barrister and the solicitor were originally separate, and of course, the judiciary is today from the practicing lawyer. Further, such a separation would only occur at the senior rank levels; it would not involve officers of the rank of captain or major. The number of such officers selected by the Judge Advocate General would be small, and thus the requirements for their administration would also be small. The selection of the members of the Judicial Division would be made from officers who had expressed a wish to specialize in criminal law within the military, and while some at a later time might



request a return to general legal duties, many would undoubtedly elect to remain in this challenging and interesting employment, even though opportunity for promotion, for example, was small.

It is quite true that under the present system of military justice, the creation of a Judicial Division would be wasteful of experienced manpower - already in short supply: for there are not many courts martial (less than one hundred a year is the average). But if a greater demand for the standing court martial form of trial were to develop, (and this would be the result if some of the suggestions put forward in this thesis were to be accepted), such trained officers would have to be supplied, and a Judicial Division would not only become feasible, but a requirement. To make the same point another way, if the administration of the Code of Service Discipline through the court martial system of trial were given the importance that it deserves, more legal officers would be needed on the establishment. Such an increase, and it would be small, could well result in a division at the more senior levels of rank, of the career employment of legal officers into those concerned with the administration of discipline, and then those who act in a solicitor role to the Forces in regard to such matters as claims, pensions or as to the drafting of orders.

Assuming that the creation of a Judicial Division is administratively feasible, and that it would be of bene-

fit to the Forces, other responsibilities and duties for such trained officers come to mind. For example, officers from such a Judicial Division could well be designated as part of the Military Appeal Review Board outlined in the previous section of this Part. A Judicial Division could be given the responsibility of providing all pre-trial and trial advice to officers employed on court martial duties. If greater need for legal officers does develop in the disciplinary process, there will be a corresponding requirement for such experienced senior counsel to advise. Further, the Division could be made responsible for all appeals to the Court Martial Appeal Court, either those of the Crown as is being recommended, or those of the convicted serviceman, where an officer from the Division would represent the Crown.

These results are not attained overnight through the change of a regulation, or even the Act. They do reflect some long range objectives that might be aimed at however. The image and the effectiveness of the whole military judicial system would be greatly improved by them.

The question of training, mentioned at the beginning of this section, is not as difficult. This concept of training of judges is gaining greater and greater acceptance as the complexities of today's criminal law and social awareness and pressures increase. An appointment does not make a "judge". The United States Forces do train military judges now, and the requirement for such training is under active consideration

within the legal profession in Canada. With these considerations in mind, and the acceptance that, if the Canadian Forces are to continue to justly administer the Code, military judges are going to be a continuing requirement, then the military judges of the future should receive more than "on-job training".

### Summary

Chapters VII and VIII dealt with the court martial and the post-trial administration, both as to the Forces' reviews and as to appeals to the Court Martial Appeal Court. The main points of criticism leveled at the court martial in Chapter VII were in regard to the subsidiary role of the Judge Advocate in relation to the court, the position of the legal officer generally when he acts as a military judge, the selection of the president and members of a court by the convening authority, and the complete failure of the Act to provide for any appeal by the Crown to such a court as the Court Martial Appeal Court. It was evident also that the disciplinary and general court martial form of trial and its present form is cumbersome when compared to the standing court martial form, and it would be a logical development to have the disciplinary court martial (and therefore the active participation of the average service officer in the role of a juror), being convened only when the offences are disciplinary in nature, and the general court martial being

reserved for the trial of offences of such a serious nature that the powers of punishment of either the standing court martial or the disciplinary court martial are obviously inadequate to punish the accused if he should be convicted.

Chapter VIII criticized the review procedures within the Forces because they resulted in time wasting duplication of effort, because they excluded the convening authority from any effective part in such reviews, and because the automatic review at Canadian Forces Headquarters may well be undermining the court martial system as a whole, due to a tendency to both re-try a case and to alter punishments.

With regard to the formal appeal to the Court Martial Appeal Court, the following three criticisms were expressed. First, the Rules of Appeal Procedure in practice place no obligation on an appellant to pursue his appeal. Secondly, a bench of three judges must hear all appeals, and with the present case load of the Federal Court of Canada, this causes delays. Finally, there is no effective method of winnowing out frivolous or unsupported appeals as there would be under a "leave to appeal" procedure.

The suggestions that have been made in this Part deal with the majority of these matters. The Judge Advocate is placed in the role of a judge, and a greater formal responsibility is placed upon the Judge Advocate General and his officers for the administration of the military judicial system. The suggested changes bring that system closer to that found in

the civilian society, yet, without ignoring the essential military connections that it must have to adequately serve the interests of the Forces.

The extension of the authority and role of the Judge Advocate, especially in the pre-trial hearings, would permit the hearing of a case by the court without the extensive delays that now so often occur while motions are made and argued in the absence of the court. The great complaint of the military with regard to the convening of a disciplinary or a general court martial is that service officers who are involved are lost for unreasonable lengths of time from their normal duties, primarily because of the time consuming adherence to the legal requirements that surround this form of trial. By resolving the majority of these legal issues before the assembly of the court, the time spent by the members of the court on this duty would be considerably reduced from what it is now. There would be no diminishment of the protections offered the accused by the implementation of this procedure, and in fact it might well be to his benefit to have these issues resolved at this early stage of the proceedings.

The recommended creation of a Military Appeal Review Board is not a "fifth wheel" to the present appeal or review process, as outlined in the previous chapter. While the Judge Advocate General has the ultimate responsibility for the decision as to the legality of the proceedings of a court martial, this decision must necessarily be based many times

on the recommendations of his staff. Because of the relatively few legal officers within the Canadian Forces (45 all ranks), the responsibility for such advice falls upon one or two officers stationed in Ottawa. Such an officer conducting a review may well be required to criticize the conduct of a fellow officer, or may reach a different opinion on a basic legal issue involved in the case than that given by the military judge. This creates two undesirable results. The first is that the reviewing officer and the military judge may well come into direct conflict, personally, over their opinions. The review of such proceedings when this occurs by a second officer does not help, except to create "sides". In addition, the fact that the military judge being criticized, and the reviewing officer may well exchange duties as a result of subsequent postings, complicates the matter further as far as their relationships are concerned. The second result is that the Judge Advocate General is placed in the middle of any controversy between the reviewer (and therefore his advisor) and the military judge, or even possibly between reviewers. Instead of receiving a firm recommendation following a thorough formal examination of the proceedings, he may well, in an extreme case, be required to give a ruling that seriously undermines the position of the reviewer, or he may appear to express a lack of confidence in his military judge.

**The Military Appeal Review Board is not recommended**

as something for the Judge Advocate General to hide behind, but rather as a method of removing from the review process any possibility of a personal element, and to provide the Judge Advocate General with what he needs, a thorough, impartial and formal examination of the proceedings. Further, it would result in the speedy disposal of many appeals that are now referred to the Court Martial Appeal Court due to the fact that the judgment of the Board would clearly record the validity of the grounds of appeal as submitted by the convicted serviceman. The existence of such a judgment would in turn support a "leave to appeal" procedure before the Court Martial Appeal Court with a resulting decrease in the number of appeals that would have to be formally heard by that Court.

The creation of a Military Appeal Review Board would also permit the utilization of officers with specialization and experience in criminal law, who are holding field appointments outside of Ottawa and who are not now available to the Judge Advocate General, in the review process. The employment of such field officers on the Military Appeal Review Board would further de-personalize the present procedures while strengthening the Board's "bench".

Other matters in this section, such as appeals by the Crown and the revision of the Forces' review procedures, have been fully outlined in Chapter VIII and it would be wasteful to repeat them all again here. Their implementation however would strengthen the disciplinary procedures.

As a final matter, there is the problem of the selection of the president and members of a disciplinary or general court martial by the convening authority. A considerable amount of time was spent on this topic in Chapter VII. Any change in the present procedures to select members to sit on a court martial must balance the factors that support the change against the problem of probable delay while the members are being selected from outside the resources of the convening authority. The recommended changes in this Part have concentrated on the challenge procedure before or at trial as a partial answer. The present procedure is not all that bad, in spite of the fact that it is open to criticism. Generals and admirals today rarely become personally involved in the selection of a court, being well insulated by their staff. By having the members of a court picked from personnel under the command of the convening authority, they can be quickly nominated without time wasting reference to other commands or to Canadian Forces Headquarters. This is a problem that may exist, but the knowledge that it does exist may provide a partial solution, as those who are involved in the selection of members to sit on a court martial will do so fairly because of the real possibility of criticism.



## PART FIVE

### CONCLUSION

#### Introduction

This Part fills three needs in bringing this chapter, and this thesis, to an end. Firstly, the need to refer back to matters that have been raised in the thesis, (sometimes criticized severely), but seem to have been completely ignored thereafter - just let drop. Secondly, the need to make mention of some matters in Canadian military criminal law that have not been mentioned at all in the text - though possibly they should have been. Thirdly and finally, the need to end this thesis, much as it began, with a general comment.

#### Thesis Topics Not Resolved

A number of matters have been raised in these chapters - criticisms have been expressed and changes advocated - but have not been included in the outline of changes suggested in this chapter. The main topics, and one to which a lot of words were devoted, were:

- (1) The notification problem of orders, regulations and instructions and the questions of proof of such matters before a service tribunal. This problem was set out in Chapter II.
- (2) The criticisms in Chapter III that were leveled at the Code's jurisdiction over the families of servicemen overseas.

- (3) The accompanying critical comments concerning the Code's jurisdiction over purely foreign offences.
- (4) The problems of command influence applied to those who must try offences.

None of these have been dealt with in this chapter because they are not matters that can be resolved without far more discussion than has been included in this examination. Possibly, when all is said and done, they really don't have to be resolved, as long as they are known to exist.

In Chapter II the case was made for a formal division of orders and an accompanying requirement for different degrees of proof of such orders. Those responsible for the judicial system of the Forces will have to decide whether or not the argument is to be accepted. At some future time the Court Martial Appeal Court may be required to rule on the problem, and the final answer will then be known. In the interim the Judge Advocate General and the military judge will have to weigh the matter.

The jurisdiction of the Code over families and foreign offences was thoroughly discussed in Chapter III. Departmental and governmental policy will decide those questions. The factors that will go into that decision, if it is ever made, involve not only the military and the citizen, but of course has international implications. The proposition in this thesis is that the wide scope of these sections of the Act are neither justified nor required today - yet they work

because the Canadian military judicial system and those involved with it, from the commanding officer to the general and the military judge, make it work fairly and with common sense. The saying "let sleeping dogs lie" may apply here.

Finally, the eternal criticism of possible "command influence" has not been answered. Indeed there can never be an answer to this one because, due to the very nature and requirements of the military, the possibility of such criticism will always be in the background. The effective answer is evident fairness and openness in all disciplinary processes and a willingness to change to meet changing times.

#### Topics Not Mentioned

Criminal law is a wide ranging field having many facets. Some of the more obvious ones not even mentioned in this thesis, as far as the military criminal law is concerned, are powers of arrest and search, punishment, its scope and what it really involves for the convicted serviceman, and custody before and after trial. These and other topics must await the examination of some other student. There has been no mention of the use of the prerogative writs in connection with military justice. What would be the approach of the civilian courts of the 1970's to problems that have been considered as settled when the United Kingdom law was the governing law that judged the actions of the military, but which now may be re-opened for examination under

Canadian laws, such as the Bill of Rights? As has been said, these topics await examination and evaluation.

#### General Comment

Canadian military law and Canadian military justice is at a critical stage of development in its maturing process. It is today a good law, a good system of criminal justice and the Canadian Forces are well served by it; but it could be better and the Canadian Forces could be better served. The development need not be as outlined in these suggestions, but the factors discussed will have to be considered if there is to be an end of "patching" the disciplinary procedures and the Act, and a beginning of a re-evaluation of the whole disciplinary system to meet the needs of today - and tomorrow.

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