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BASIC FREEDOMS IN THE CANADIAN ARMED FORCES

BY

JOHN W. MASON

MA THESIS

CARLETON UNIVERSITY

APRIL 1972

-

BASIC FREEDOMS IN THE CANADIAN ARMED FORCES

by

John W. Mason

A thesis submitted to Carleton University
in partial fulfillment of the requirements for
the degree of Master of Arts in

Public Administration

School of Public Administration,
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Ottawa, Canada
April 1972

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ABSTRACT

The author emphasizes that the Canadian Armed Forces needs officers and men of high calibre to cope with a rapidly changing technological environment. Service is voluntary, but service also imposes restrictions on basic rights and freedoms which could, in the future, adversely affect public acceptance.

The National Defence Act, and regulations made under its authority, are examined in light of the basic rights and freedoms defined by the McRuer Commission and the Canadian Bill of Rights. Judicial review of action taken by military tribunals is investigated during the course of this examination.

Proposals are made for changes in the Act and its regulations which would redraw the boundary between individual rights and military needs. The author contends that this would not undermine discipline or hazard military efficiency.

"Canadians have always been a non-military people, distrustful of military solutions, reluctant to accord the military establishment a prominent and honourable place in their society."¹

James Eayrs, Northern Approaches: Canada and the Search for Peace (Toronto, 1961), 59.

PREFACE

I had been led to believe that the selection of a topic could be more difficult than actually writing a thesis, but I had little difficulty in making my choice. Since joining the Navy more than twenty-nine years ago (with a gap of three years "outside"), I have found the subject of service crime and punishment both awesome and fascinating. In the "lower deck", I have been brought before The Captain's Table feeling like a criminal before a court, and hoping the punishment would be lenient. Many years later, as a commanding officer, I have stood behind The Captain's Table, feeling most unlike a judge, but with impressive powers to deal with the "culprit" before me.

The precursor to this thesis was an essay, Summary Trials by Commanding Officers, submitted as a term assignment in Professor Ian Hunter's course in Administrative Law at Carleton University in 1971. He suggested military law as the original essay topic, and I am grateful that he subsequently agreed to be my advisor on an expansion of that topic for this thesis. So far as I have been able to determine, the subject of basic freedoms under the National Defence Act has not previously been thoroughly examined. One of the most difficult problems has been the restriction on length, as it would have been easy to write a much longer paper in order to produce a study in depth.

This thesis has created considerable interest in the Department of National Defence, and I am pleased that it will not just gather dust on a remote bookshelf, as there are indications that some action may be taken on the recommendations. Copies of the final draft have been requested by the Personnel Branch and by the Judge Advocate General

Division as a basis for further study. Permission to publish has been obtained, as required by the service regulations.

In researching for this paper, seven people were interviewed on eleven different occasions for periods varying between several minutes and several hours. Nine readers gave considerable time and thought to providing comments on the first draft. I am sure none of them would wish to be singled out for special mention, but to all of them I am most grateful for their encouragement, advice, criticism and assistance. They will be pleased to see that many of their suggestions have now been incorporated, and perhaps disappointed, although I hope not annoyed, to see that some have not. Despite their efforts, the opinions expressed, and any errors perpetrated, remain my own.

Finally, this paper would not have been possible without the tireless work of Miss Thelma Perkins at a dilapidated DND typewriter.

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BASIC FREEDOMS IN THE CANADIAN ARMED FORCES

I

INTRODUCTION

In a speech in the House of Commons, Disraeli once remarked that "Change is inevitable in a progressive country. Change is constant."¹ New technologies were changing his Victorian world, but even Disraeli could not have envisaged that a century later man would walk upon the moon.

Social change has always lagged technological change. Man feels comfortable in the status quo, which he knows is imperfect, but which he accepts. The law, the church, the professional societies, even the trade unions are stabilizing bodies which tend to resist change, and this has increased the gap between technology and social expectations. Nonetheless, governments and corporate bodies are conscious of the mounting pressures for social change and are responding, despite the resistance of conservative elements. The prevailing feature of the current of social change is the search for freedom of the individual.

It is a stereotype that the military resists change - as typified by a remark attributed to the Duke of Cambridge when he was Commander-in-Chief of the British Army during the last century - "change is to be avoided until it can no longer be resisted." If it is to survive, an organization must adapt to changing circumstances and the Canadian

¹ October 20, 1867. Often misquoted, this is the correct version, according to George Seldes in The Great Quotations (New York, 1960), 207.

Armed Forces (CF) is no exception. It has demonstrated the ability to adapt to change in the past¹ and will no doubt adapt to changes which occur in the future, but it is desirable that these changes be evident so that Canadians will see the forces as a responsive and essential element of Canadian society. If the Canadian Forces could be considered a closed society, it would function independently of the outside world, but as it is not, it must depend on outside support for recruits and resources. In return for this support it purports to provide security to Canadian society and to contribute to national development. The taxpayer must be convinced that the CF is worth the candle or he will withdraw his support; in more prosaic terms, the military must reflect the goals of society so that it will continue to attract a sufficient number of recruits of adequate character so necessary in an all-volunteer technically-oriented organization. No particular difficulty is experienced at the present time in filling the ranks, but this may not always be the case. Because service is voluntary, Forces recruiters must compete with civilian recruiters in the manpower market. Like industrial recruiters, they advertize in the media and interview in universities and schools; moreover, the Forces must compete to keep trained men from being lured away by the competition. With the trend towards greater freedom of the individual in the permissive society, youth may, in the future, tend to be less attracted to the military life

¹ Of particular note was the unification of the Navy, Army and Air Force into one service on 1 February, 1968.

with its demands for discipline, availability, discomfort, and occasionally, actual danger.

What are the roles of the Canadian Forces? The White Paper issued in August of 1971 outlines the areas of activity:

- "(a) the surveillance of our own territory and coast-lines,
i.e. the protection of our sovereignty;
- (b) the defence of North America in cooperation with US forces;
- (c) the fulfilment of such NATO commitments as may be agreed upon;
and
- (d) the performance of such international peacekeeping roles as
we may from time to time assume."¹

Included in these roles are a capability to respond in aid to the civil power and to contribute to national development, or what Willett calls "social defence". He points out that the "status" role of the military has always been the fighting role, but without an enemy this role may never need to be played. The "social defence" roles, on the other hand, are unpopular and unattractive to military men, but they could become important to the well being and stability of the country.² Furthermore, taxpayers may feel that such jobs can be done more cheaply, and presumably better, by civilians without the suspected large overhead of a military organization.

¹ Canada, White Paper on Defence (Ottawa, 1971), 16.

² T.C. Willett, "The Military Profession in the 1970's", in Papers from Contributors to the Study of Professionalism in the Canadian Forces, Annex F. Unpublished DND paper.

Military forces are obviously needed if goals set by the Canadian Government are to be fulfilled. While no great difficulty is anticipated in maintaining the forces at the 83,000-man level in the immediate future, this may not always be so if the compatibility gap between military and civilian life is allowed to widen. This is not to suggest that the military should necessarily be "civilianized", but only to urge that the gap must remain bridgeable. The new roles for the CF would appear to downgrade the traditional fighting role and to emphasize the aspects of more military involvement in the national life of the country, which carries with it the reduction in appeal to youthful ambitions, and the lessened opportunity to see more of the world through the adventure of overseas service. The valuable training and experience gained by Canadian Forces serving overseas in NATO, United Nations and other operations, has enhanced their own spirit of professionalism and morale, and convinced most Canadians of their usefulness. Comparison with the armed forces of other countries is more easily made under these circumstances, and the professionalism of Canada's serviceman has favourably impressed our allies. A Canadian magazine states, "the enviable record of Canadian servicemen in the profession of arms has been won abroadThe Dutch, Belgians, Italians and Germans know better than most Canadians how Canadian troops stack up".¹

¹ "Ottawa Report", 5 Canadian Armed Forces Review (November-December, 1971), 13. This is an independent commercial publication.

But what of the image created by the more recent emphasis on internal security and national development? This is not a new idea. In 1870 Colonel Wolseley and a mixed force of British Regulars and Canadian Militia were sent out to the Red River Colony to restore law and order, and in 1885 the North West Mounted Police were supported by an entirely Canadian force of 8,000 in capturing Riel. Fortunately, Canadian troops have been used infrequently in this capacity, although they were called out eight times between 1919 and 1933.¹ Aid to the civil power when the civil police can no longer cope with threatened internal disorder will always remain an essential duty of the CF, performed as recently as October of 1970, when the troops were called upon to augment the Quebec Provincial Police and the Royal Canadian Mounted Police, as it was feared that widespread kidnappings and a challenge to the legally constituted government might occur. In Canada, and most other countries, armed forces provide a last resort against violent overthrow of the legitimate power. This in itself should be justification for the existence of the Canadian Armed Forces, even though this is a role which is unpopular with citizen and soldier alike. As Willett points out, "the role when played at home has unattractive connotations and is full of pitfalls in finding the delicate balance between the use of bluff and the use of real force against 'one's own kind'."²

¹ According to James Eayrs, In Defence of Canada (Toronto, 1967), 66.

² T.C. Willett, "The Military Profession in the 1970's", 5.

Outside of the use of force, the image is burnished by search and rescue operations, the fight against pollution, aid to communities and provinces in civil disaster, fighting forest fires, opening up the north by building roads, airstrips and bridges, by training indigenous people, and by providing youth hostels and opportunities during summer vacation. Outside of Canada, there has been assistance such as the airlift to, and evacuation of, people from disaster stricken countries such as Peru and Pakistan.

Not to be neglected is the influence which credible armed forces can have in international forums. Canada must maintain armed forces if only to keep her seat at the conference tables of NORAD and NATO, and to a lesser extent the United Nations, but by reducing our military commitments to these organizations, there is a possibility that we may appear to our allies to be seeking the minimum fee. As Adrian Preston observes, "Canada's defence policy has never been required primarily for the protection of her sovereignty, and should her alliance commitments dissolve through disuse or detente she would still maintain her forces as she does now, for essentially non-security purposes: to purchase influence and persuade friends."¹

It seems appropriate to seek the motivation behind volunteers for service in the CF. It is assumed that service in the Forces contributes to satisfaction of at least some needs. McGregor says, "man is a wanting animal - as soon as one of his needs is satisfied, another

¹ Adrian Preston, "The Profession of Arms in Postwar Canada, 1945-70", 23 World Politics (January, 1971), 211.

appears in its place".¹ He lists man's needs as physiological, safety, social, egoistic and self-fulfilment, in a hierarchy of importance: when one is satisfied, the next one appears pre-eminent. Military service satisfies the physiological need for food, shelter, rest and recreation. By "safety", McGregor means freedom from danger, threat and deprivation. While it is considered that a serviceman's life may occasionally be endangered, the threat and deprivation to which McGregor refers is job security and freedom from arbitrary management action. A serviceman's job is reasonably secure, but he has no guarantees against arbitrary management action; perhaps only a union could provide him with some satisfaction of his safety needs. Social needs are met, to a large extent, in the Forces through a period of military service in which a person comes to accept, and be accepted by, his fellows. Ego needs which relate to self-esteem and reputation can be partially satisfied in the CF, although McGregor claims they can never be completely satisfied. Self-esteem is enhanced by military service which encourages self-confidence, achievement, competence and knowledge. Reputation depends largely on rank and skill, and with these come recognition and respect of fellow servicemen.

Finally are the needs for self-fulfilment, through self-development and creativity. McGregor believes these are seldom realized in the struggle to satisfy lower needs.

While this hierarchy of needs is provided to varying degrees through military service, it is also satisfied to an increasing extent by life outside.

¹ D.M. McGregor, The Human Side of Enterprise (New York, 1960), 36.

What, then, are the motivating factors? At least there is a desire for satisfaction of the lower needs, and probably there is a desire for travel and adventure. There may be an appeal to the authoritarian side of personality. It may be trite to suggest that patriotism is a motivator, but this ingredient likely is present. Whatever the reason, "joining up" is still attractive enough to fill the recruiting quotas. To remain attractive, the roles of the Forces and its laws and regulations must be acceptable to potential recruits and serving members alike.

Public acceptability is encouraged by a program of public information, which makes the public more aware of the contributions of the military to Canadian society. This, generally speaking, has been successful, and the news media tend to be favourably impressed by the calibre of the Canadian Forces in the military role and in the quick response to disasters at home and abroad.

Public acceptance can be further enhanced by subjecting the National Defence Act, and regulations made under the authority of the Act, to a review which would ascertain whether the basic freedoms of a serviceman are justifiably curtailed. While the traditionalist may recoil in horror at any suggestion of liberalization, he should be reminded that the process has been continuous since the first recorded military law, the Salic Code of the fifth century.¹

The first British military law was established by Richard I in 1190 to govern the behaviour of his Crusaders. In 1689 the Mutiny Act was

¹ Robert O. Rollman, "Of Crimes, Courts Martial and Punishment - A Short History of Military Justice", 11 US Air Force JAG Law Review (Spring, 1969), 212.

passed in Britain, which, for the first time, made it lawful for the King to maintain a standing army in time of peace. Of course the King had for centuries exercised the royal prerogative to issue Articles of War for the mustering of forces in time of war. In 1803 the royal prerogative was merged into the Army Act which has, with amendments, persisted to the present day in the United Kingdom.¹

The Militia Act passed by the Parliament of Canada in 1865 established the first Canadian military force, but army discipline continued to be administered under the British Army Act and amendments until 1950. The Naval Service Act established the Royal Canadian Navy in 1910, and the Air Board Act of 1919 established the Royal Canadian Air Force. All of these separate acts were abolished with the enactment of the National Defence Act in 1950. There have been many amendments to the Act since that time, and these have generally followed the liberalization trend.

Over the centuries, military law has followed the trend towards elimination of cruel and unusual punishment, and the adoption of just procedures. The lash and the summary hanging can now be found only in history books.

In 1812, Chief Justice Mansfield said, "It is therefore highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier,

¹ W.J. Lawson, "Canadian Military Law", 29 Canadian Bar Review (March, 1951), 243.

puts off any of the rights and duties of an Englishman."¹ As our legal system and military law evolved from the British, presumably a Canadian serviceman should not have fewer rights than a Canadian civilian. Where differences in basic freedoms exist between those enjoyed by civilians and those enjoyed by servicemen, these differences should be reduced to the extent that the special roles of the military will permit.

What is the balance between military necessity and individual freedom?

On the one hand, discipline is an essential ingredient in any organization which may have to react and operate in crisis situations. Besides armed forces, this includes police forces, fire departments, ambulance crews and airline pilots. Training is the key to discipline, but the sanctions against the breakdown of discipline are greatest in a fighting force where each individual, in moments of crisis, carries out his assigned duties in a predictable manner and without hesitation, secure in the knowledge that each other individual will similarly react to the advantage of all.

On the other hand, the individualism of Canadians stretches back to the earliest pioneer days, when initiative often meant the difference between death and survival. Traditionally, too, individual rights and freedoms have always had popular support. Indeed, the RCMP and the RCAF are better known for the exploits, courage and initiative of individuals in the face of odds, than for blind attention to discipline.

¹ Burdette v. Abbott (1812), 4 Taunt. 401, 128 E.R. 384 (Ex.Ch.), 403, per Bernard Starkman, "Canadian Military Law: The Citizen as Soldier" in Canadian Bar Review, 414, footnote 1.

Another factor which complicates this Canadian dilemma is the respect for justice in the British tradition, with emphasis on the procedural aspects found in the so-called "rules of natural justice".

This thesis will examine the National Defence Act and its regulations as they stood on February 1, 1972. The basic freedoms will be those defined in the McRuer Commission Report, Inquiry into Civil Rights,¹ and in the Canadian Bill of Rights.²

While military efficiency requires discipline, the initiative of the individual must be encouraged in the highly technical environment of a modern military organization. In this paper an attempt will be made to measure the extent to which a citizen gives up his rights and freedoms on enlistment in the Canadian Armed Forces, and to equate that reduction in freedom to military need.

Following this, proposals will be made where it might be possible to make changes in the laws and regulations governing the discipline of servicemen, without adversely affecting military efficiency.

Finally, conclusions will be drawn concerning the anticipated effect of these changes.

¹ Ontario, Royal Commission Inquiry into Civil Rights (Toronto, 1969).

² Canada, Revised Statutes of Canada (RSC), (Ottawa, 1970), Appendix III.

II

THE YARDSTICKS

Of the many statements concerning the rights of man few are universally acceptable, probably because political, constitutional, legal and moral standards are not universal, and no mere statement can make these standards universal. The United Nations Declaration of Human Rights of 1948 was an attempt to set such a standard, however it is persuasive direction rather than compulsory legislation. Member states were urged to adopt the standards of rights and freedoms set down in the thirty articles.

A Canadian Charter of Human Rights

The Canadian government urged adoption of many of the declarations of 1948 in the White Paper on the subject,¹ and proposed to entrench these principles as part of the Canadian constitution. Much has been written for and against entrenchment of basic rights, but the real problem to date has been the inability to achieve agreement between provincial governments and the federal government on an effective and workable amending procedure. The problem of a suitable amending procedure has been the stumbling block to reform of the Canadian constitution. This White Paper did not suggest an amendment process.

Canadian Bill of Rights

The Canadian Bill of Rights is a 1960 federal statute, applicable only to federal legislation.² Some people would entrench the rights

¹ Canada, A Canadian Charter of Human Rights (Ottawa, 1968).

² RSC (1970), Appendix III, Can. 1960, c.44.

and freedoms declared in this law because they fear that another act of Parliament could change or abolish it. This is true, but equally applicable to the British Bill of Rights, to the Habeas Corpus Act and to Magna Carta, all of which have stood the test of time.

The Canadian Bill of Rights deals primarily with political and legal rights; it does not deal specifically with linguistic or economic rights.

Sections 1 and 2 of Part 1 read as follows:

- "1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
 - (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
 - (b) the right of the individual to equality before the law and the protection of the law;
 - (c) freedom of religion;
 - (d) freedom of speech;
 - (e) freedom of assembly and association; and
 - (f) freedom of the press.
- "2. Every law of Canada shall,¹ unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to:

¹ Part II, section 5(2) reads, "the expression 'law of Canada' in Part 1 means an Act of Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada."

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay, or
 - (iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (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, or of the right to reasonable bail without just cause; or
- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.¹

Despite section 2 of the Canadian Bill of Rights, the courts have up to now, generally held that it does not apply to prior legislation, even

¹ RSC (1970), Appendix III, 457.

where there may appear to be inconsistencies with the Bill in that legislation.¹

McRuer Commission Report

In 1964, the Government of Ontario appointed the Honourable James Chalmers McRuer as a Commissioner,

"to examine, study and inquire into the laws of Ontario... affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario for the purpose of determining how far there may be unjustified encroachment on those freedoms, rights and liberties by the Legislature, the Government, its officers and servants, divisions of Provincial Public Service, boards, commissions, committees, other emanations of government or bodies exercising authority under or administering the laws in Ontario."²

Further, the commission was to make recommendations for changes in the laws and processes to safeguard the basic rights and freedoms.

The first report was published in 1968, and the second in 1969.

McRuer is concerned with the difficulty in accommodating law to rapid social change, although some adjustments can be made by judicial interpretation. Nonetheless, the process of adaptation by this method is not as wide or as fast as the legislative process.³

¹ A Canadian Charter of Human Rights, 13. But note the exceptional Supreme Court of Canada judgement in R.V. Drybones (1969), 64 D.L.R.(2d) 260, 9 D.L.R.(3d) 473. In a 6-3 decision, the Court decided that a section of the Indian Act of 1952 was inoperative, as it conflicted with section 2 of the Canadian Bill of Rights. Twice before, the Supreme Court had decided that the Bill did not apply to previously enacted legislation. In R.V. Gonzales (1962), 32 D.L.R.(2d) 290, 37 C.R. 56, the Indian Act (1952) was in contention, and in Robertson and Rosetanni v. The Queen, 41 D.L.R.(2d) 485, [1963] S.C.R. 651, the Lord's Day Act (1952) was challenged. It is not yet clear whether the courts will invariably follow Drybones and apply the Bill of Rights to other legislation enacted before 1960.

² Royal Commission Inquiry into Civil Rights. Report No. 1, xi.

³ Ibid., Report No. 2, 1567.

McRuer feels that " 'the Bill of Rights' theme is ubiquitous - it leads everywhere".¹ If there is to be entrenchment - and he has reservations about that - then not all but only certain "rights of the individual that are themselves the foundation of parliamentary democracy, as we have inherited it and as we know it"² should be entrenched.

Although an Ontario report, its definition of the "seven rights and freedoms which we believe to be the foundation of the democratic process of government",³ provides a uniform standard against which all Canadian federal and provincial legislation, regulations and orders might be compared.

These are as follows:

- "(1) The right of every person to freedom of conscience and religion.
- (2) The right of every person to freedom of thought, expression and communication.
- (3) The right of every person to freedom of assembly and association.
- (4) The right of every person to security of his physical person and freedom of movement.
- (5) The right of every adult citizen to vote, to be a candidate for election to elective public office, and to fair opportunity for appointment to appointive public office on the basis of proper personal qualifications.
- (6) The right of every person to fair, effective and authoritative procedures, in accordance with principles of natural justice, for the determination of his rights and obligations under the law, and his liability to imprisonment or other penalty.

¹ Ibid., 1570.

² Loc. cit.

³ Ibid., 1595.

- (7) The right to have the ordinary courts presided over by an independent judiciary."¹

An old saw among carpenters is "measure twice and cut once". The National Defence Act will be measured twice and hopefully the cut will be accurate.

The seven basic freedoms of McRuer will be one yardstick by which the National Defence Act and its regulations will be measured. Subsequently the second yardstick of the Canadian Bill of Rights will be applied as a second check. By taking the measure of the NDA, one may gain good knowledge of its dimensions.

¹ Loc. cit.

III

THE FIRST YARDSTICK APPLIED

This chapter will apply the McRuer yardstick to the National Defence Act,¹ to see how it affects the basic freedoms of individuals. Also under examination will be "regulations, not inconsistent with this Act, for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect."² This examination will be particularly, but not exclusively, concerned with the Code of Service Discipline, defined as the provisions of Parts IV to IX of the Act.³

As might be presumed, officers and men of the CF are subject to the Code of Service Discipline, and with some modifications, the Code is applicable to women.⁴ Also subject to the Code are civilians while attending CF training establishments, while accompanying the forces on operations, training manoeuvres, while accompanying them outside of Canada, or while embarked in a ship or aircraft of the CF.⁵

¹ RSC (1970), c.N-4, as amended by R.S. (1st Supp) c.44, s.10; 1970-71, c.1, s.64.

² National Defence Act (NDA), pt.1, s.12.

³ NDA, s.2.

⁴ NDA, s.55(11).

⁵ NDA, s.55

Dependants accompanying officers and men who are serving outside of Canada are also subject to the Code,¹ and so are spies,² no matter where they are "serving". It may seem strange that civilians can, under certain circumstances, be tried, convicted and punished for offences under the National Defence Act. The reasoning behind this is that some of the countries in which Canadian Forces personnel are serving may have legal systems different from our own, and under these conditions familiar legal rights under Canadian law would not be available. It may also happen that local sanctions for specific offences are much more severe than would be anticipated under the Canadian legal system. Furthermore, in NATO countries under the Status of Forces Agreement,³ each member is responsible for the discipline of her forces stationed in another member's country. For instance, Canada is responsible for the discipline of her forces stationed in the Federal Republic of Germany.

A potential recruit for the Canadian Armed Forces must, besides other qualifications, be a Canadian citizen.⁴ The ordinary laws apply to a member of the Armed Forces, but by enlisting, a person also subjects himself to the Code of Service Discipline and other liabilities under the

¹ NDA, s.55(4) (c).

² NDA, s.55(1)(h), (7). For offences under the NDA see Annex B.

³ Visiting Forces Act, RSC (1970), c.V-6 concerns foreign armed forces in Canada. Canadian Forces abroad are governed by the NATO Status of Forces Agreement, in which see art VII, 3(a)(i). This is reproduced as Appendix XIV to QR&O, Vol III.

⁴ Canada, The Queen's Regulations and Orders for the Canadian Forces (QR&O), I (Administrative) (Ottawa, n.d.) Article 6.01(1)(a). The Chief of the Defence Staff may authorize the enrolment of a citizen of another country if a special need exists, and the national interest would not be prejudiced.

National Defence Act, although he does acquire certain additional rights. Discipline is the keystone to any armed force, and this usually means that some of the enrollee's civil rights may have to be revoked, for although he is a citizen, he is no longer a civilian. Nonetheless, as Starkman observes, "unlike tyrannies, ... democracies are also interested in seeing that soldiers retain the fundamental rights of citizens."¹

The enrollee may not be aware that acts which are only minor offences, or perhaps not offences at all under the ordinary law, become major or capital offences under the Code. For instance, the right to strike is common to many working people, and provided that it is done lawfully and without violence, it is not an offence. However, in the context of military law, a strike can be considered as mutiny and under certain circumstances, is punishable by "death or less punishment".² Although a civilian may usually quit his job on short notice, a serviceman would likely be considered absent without leave, which is punishable by imprisonment for up to two years,³ and if it is considered desertion, he may be imprisoned

¹ Bernard Starkman. "Canadian Military Law": the Citizen as a Soldier", 43 Canadian Bar Review (1965), 414.

² NDA, ss.69, 70, 71. NDA, s.2 defines "mutiny" as "collective insubordination or a combination of two or more persons in the resistance of lawful authority in any of Her Majesty's Forces, or in any forces cooperating therewith".

³ NDA, s.80.(1) states, "every person who absents himself without leave is guilty of an offence and on conviction is liable to imprisonment for two years or less punishment".

for life.¹ As a further example, if a civilian disobeys an order from his boss he may be fired; but for a serviceman to disobey the order of a superior is considered insubordination and upon conviction, he could be imprisoned for life.²

Let us see how the National Defence Act stacks up against the "basic freedoms" of the McRuer Report.

(1) The right of every person to freedom of conscience and religion.

Upon enrolment, a member of the CF is required to declare his religious affiliation, although he may change his religion at any time. He may state his religion as any one of the Protestant denominations, as a Roman or Greek Catholic, as a Jew, or under "other religions and persuasions".³ Presumably he may also be an agnostic or an atheist, but this has little relevance at the present time when church is no longer compulsory, except under certain circumstances.⁴ He may be a conscientious objector to religion of any kind, in which case he need not attend a religious service and specifically "shall not be

¹ NDA, s. 78.(1) states "every person who deserts or attempts to desert is guilty of an offence and on conviction, if he committed the offence on active service, or under orders for active service is liable to imprisonment for life or to less punishment, and in any other case is liable to imprisonment for a term not exceeding five years or to less punishment".

² NDA, s. 73. Offences and punishments under the NDA are listed at Annexes B and C, in summarized form.

³ QR&O, 33.05.

⁴ QR&O, 33.01. Church parades are still compulsory on 11 November, Battle of Britain Sunday, Battle of the Atlantic Sunday, a military funeral, a service of a civic or memorial nature, at a training centre or at one of the Canadian Military Colleges.

subjected to any form of pressure in connection with his decision."¹ This may even give him a protection denied to his civilian counterpart who may find himself the subject of interest of missionary zealots in his neighbourhood.

For those who wish to participate, services and accommodation must be provided, by regulation, for officers and men, and, where appropriate, for their families.² In addition, the CF maintains chaplains of the Roman Catholic and Protestant faith. When these are not available, or when the numbers of persons of other faiths so justify, the regulations allow an appropriate civilian clergyman to be employed.³ Even if devotees should insist upon religious services, all religious observances are "subject to the exigencies of the service."⁴ In other words, military duties must always take precedence over religious obligations.

Compulsory church attendance at Canadian Military Colleges has not yet been challenged as a violation of human rights and fundamental freedoms under the Canadian Bill of Rights, "freedom of religion" clause.⁵ However, compulsory attendance at chapel service at the United States Military and Naval Academies was

¹ QR&O, 33.01(4).

² QR&O, 33.01(1).

³ QR&O, 33.02.

⁴ QR&O, 33.01(1).

⁵ RSC (1970), Appendix III, pt.1, 1(c).

challenged by a group of cadets and midshipmen, citing the first amendment to the US Constitution, "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof...". In this case,¹ the defendants maintained that exemptions were available, no one was forced to participate even though present, and the compulsory attendance was not intended to cultivate religious belief, but constituted a ... "vital part of the overall training program".² On this basis the Federal District Court held for the Academies.

This US precedent would tend to discourage any such challenge at compulsory church attendance in a Canadian military college, even though the Canadian Bill of Rights appears more limited than the US first amendment in this regard. The "freedom of religion" clause in the Canadian Bill may not be open to challenge in any case, because it is included in a list which the introductory paragraph says, "have existed and shall continue to exist."³ Voluntary service in a military organization entails involuntary attendance at parades and ceremonial occasions. Attendance at church can be placed in this category. The rather remarkable opinion expressed by District Judge Corcoran in Anderson v. Laird, effectively took the wind out of

¹ Anderson v. Laird, 316 F. Supp. 1081 (1970).

² Ibid., 1090.

³ Canadian Bill of Rights, Part I, s.1.

the sails of those midshipmen who believed that chapel attendance violated the Establishment/Free exercise clauses of the First Amendment, when he ruled,

"the Court accordingly affirmatively finds that church or chapel attendance is an integral and necessary part of the military training of the future officer corps, that its purpose is purely secular, and that its primary effect is purely secular."

This decision would likely be cited if attendance at church services by officer cadets at Canadian Military Colleges should ever be challenged on the basis that it interfered with freedom of religion. Whether men in the ranks could test such a requirement is an open question.

On balance it would appear that the serviceman does not have complete freedom to practice religion, or not to practice religion. Nonetheless facilities will be provided when circumstances permit for those who wish to attend, to do so. There are some ceremonial occasions when attendance is compulsory whether he wishes to attend or not.

- (2) The right of every person to freedom of thought, expression and communication.

This is not an absolute freedom for civilians or servicemen. Both are subject to the laws governing sedition, obscenity, libel and slander which are restraints imposed on freedom of

¹ Op. cit., 1092.

expression for the common good. In Schenck v. United States,¹ Justice Holmes handed down his classic "clear and present danger"² opinion, quoting as an example a person falsely shouting fire in a crowded theatre. In such circumstances, free speech clearly could be punishable.

Limitations on freedom of speech in the United States still hinge on the doctrine of seditious libel, the more remote the "clear and present" danger, the less likely are the courts to curtail freedom of speech.³ Lewis concludes that a member of the US Armed Forces is entitled to have the same test applied to his right to freedom of expression as would apply if he were a civilian, bearing in mind that "an army or navy rife with seditious muttering, with internal dissention and disorder, constitutes a hazard with perhaps as great a potential for danger to this country as a hostile foreign army."⁴ Therefore, there must be some restraints on freedom of speech and communication in the military. How far this can extend is exemplified by the case of one US Army Lieutenant Howe, who, while participating in an anti-Vietnam demonstration off base, in off-duty hours,

¹ 249 U.S. 47 (1919).

² Ibid., 52.

³ Jerome X. Lewis, "Freedom of Speech - An Examination of the Civilian Test for Constitutionality and its Application to the Military", 41 Military Law Review (July, 1968), 55.

⁴ Ibid., 78.

in civilian clothes, was arrested for carrying a sign denouncing President Johnson as a "petty, ignorant fascist"¹ and convicted under the US military law which prohibits the use by officers² of contemptuous words against the President, Vice President, etc.

While there is no exact equivalent in the Canadian Code of Service Discipline, and under circumstances similar to the Howe case, a Canadian serviceman could probably get away with carrying a sign defaming the Prime Minister, it is likely that he could be convicted for carrying a sign denouncing the Queen, under section 84 of the NDA.³ Whether this would apply to the Governor-General is a moot point.

Seditious offences, advocating the use of force to achieve governmental change are, of course, another matter and are adequately covered by the Code of Service Discipline, with a maximum punishment on conviction, of life imprisonment.⁴ Maxi-

¹ United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429, (1967).

² United States, Uniform Code of Military Justice (UCMJ), 64 Stat. 108 (1950), amended by Military Justice Act, 82 Stat. 1335 (1968), Art. 88, "Contempt Towards Officials". This is one area where enlisted men in the US forces have more freedom than officers.

³ NDA, s. 84 reads, "every person who uses traitorous or disloyal words regarding Her Majesty is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding seven years or less punishment".

⁴ NDA, s. 72 states, "every person who publishes or circulates any writing, printing or document in which is advocated, or who teaches or advocates, the use, without the authority of law, of force as a means of accomplishing any governmental change within Canada is guilty of an offence and on conviction is liable to imprisonment for life or less punishment".

mum punishment for a seditious offence under the Criminal Code is imprisonment for 14 years.¹ That a civilian can be sentenced to fourteen years for sedition and a serviceman to life imprisonment for the same offence seems reasonable in view of the latter's sworn undertaking on enrolment.²

Every Canadian, in fact anyone who trespasses into a prohibited place, or is in unlawful possession of a classified document, or engages in espionage is subject to the Official Secrets Act.³ In addition, a serviceman is subject to special security restrictions, violation of which can, upon conviction, be punishable by life imprisonment or even death.⁴

Members of the Canadian Armed Forces and some civilians have, by nature of their duties, access to more classified information than do most other Canadians. For this reason, members of the CF are required to obtain specific permission from the Chief of the Defence Staff or by a designated authority, before preparing

¹ RSC (1970), c. C-34, s.62, states, "every one who (a) speaks seditious words, (b) publishes a seditious libel, or (c) is a party to a seditious conspiracy, is guilty of an indictable offence and is liable to imprisonment for fourteen years".

² Although the oath taken does not specifically refer to the prevention of violent overthrow of the legally established authority, this much can be inferred by the words, "I (name), do swear that I will be faithful and bear true allegiance to Her Majesty, Queen Elizabeth the Second, Her heirs and successors according to law, so help me God". (QR&O 6.04).

³ RSC (1970), c. O-3. Reproduced as Appendix I to QR&O, Vol. I.

⁴ NDA, s. 65. The punishment of death is subject to approval by the Governor-in-Council (NDA, s. 178(1)).

a paper, publishing an article or book, delivering a lecture or participating in a public discussion of a military nature.¹

Although security does place restrictions on a serviceman's right to free speech, it has been the author's experience that when a person is exposed continuously to classified information on military matters and policy, it requires a conscious effort to prevent disclosure when making public utterances. An independent and objective look at the material to be presented can go a long way towards preventing breaches of security and relieving concern about inadvertent disclosure.

Generally speaking, all violations of security are punishable, whether the violator is civilian or military. In one way the serviceman is better off than the civilian because his writings are, or should be screened beforehand, whereas the civilian does not have this safeguard.

On balance, the Canadian serviceman does not have the freedom of speech which the ordinary citizen enjoys under the Canadian Bill of Rights. However, as his main role is maintaining the security of the country, some constraints must be applied. In the author's opinion, this is reasonable under the circumstances.

¹ QR&O, 19.36, 19.37

(3) The right of every person to freedom of assembly and association

Like any person, a serviceman can choose his own friends both inside and outside the service. Off-duty he may tend to associate with persons of like interests and similar behavioural patterns. On duty, however, he will be forced to associate with some whom he would not choose as friends or associates, had he free choice. This can lead to lowered morale, or even morals, depending on the character of the individual.

In wartime, fraternization between armed forces personnel and the inhabitants of an occupied country can be prohibited by regulations. In peacetime, subject to regulations placing certain places or areas "out-of-bounds", no such restriction is commonly made and this can lead to many problems, not the least of which is a wish to marry a foreigner. In order to prevent hasty or ill-advised marriages to foreigners, Canadian military personnel are required to obtain the written approval of their commanding officers.¹ This may take up to five months, and "career action" can be taken against anyone who fails to obtain this approval.² Women members of the CF are also warned about the possible effect that such marriage may have on their citizenship, and in addition to his approval, a woman must show her

¹ Canadian Forces Administrative Orders (CFAO's), 19-17.

² "Career action" in this context, is taken to mean an unscheduled posting, or even an early release. Interview, February 9, 1972.

commanding officer written assurance from the authorities of her intended husband's country that she is acceptable as a permanent resident.¹

What, if any, "career action" has been taken against service personnel who have married foreigners without approval, is not a matter of public record, nor have there been any prosecutions, because it is not a punishable offence. However, it is interesting to note American experience with a similar regulation. In United States v. Nation, the U.S. Court of Military Appeals reversed the conviction of a sailor who married a Phillipine national without permission, on the grounds that the six months waiting period was "arbitrary and unreasonable".² In a subsequent similar case in which the waiting period had been removed as part of the requirement, the Court upheld a conviction.³ The dissenting judge held that the requirement for a commanding officer's permission to marry was illegal and "there is no holier state and certainly nothing more personal to an individual than his intent to embark on the matrimonial seas".⁴

A serviceman who is known to associate with known subversives, criminals or sexual deviates, or drug users, can be

¹ CFAO, 19-27.

² 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958).

³ United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961).

⁴ Arthur A. Murphy, "The Soldier's Right to a Private Life", 24 Military Law Review (April, 1964), 106.

released as being a risk to security because of the danger of blackmail, and possible compromise of classified information.

When the service authorities have ascertained "with reasonable certainty" that a member is a sexual deviate, he, or she, is considered to be "unsuitable for further service"¹ and is released as quickly as possible to avoid unnecessary publicity.²

Similarly, drug users can be released as "unsuitable for further service",³ as the operational effectiveness, general safety, or security of the CF may be adversely prejudiced.

Discipline must not be so severe as to leave no room for self-fulfilment and self-enrichment. At the same time the private right of assembly and association cannot be allowed to interfere with the role of the military in the security of the nation. Servicemen participate in many organizations whose aim is to improve the society in which we live, such as Boy Scouts, Kiwanis, Rotary and other service clubs, school boards, community associations, church groups, minor hockey, little league baseball and so on. This kind of association the CF not only allows, but encourages.

¹ QR&O 15.36 requires that he be given reasons for the proposed release, and he is required to reply in writing within fourteen days stating his objections, or that he has no objection.

² CFAC, 19-20 (6), states, in part, "service policy does not allow retention of sexual deviates in the Forces". The subject of homosexuality is discussed in IV, 90, more fully.

³ CFAC, 19-21, (10).

There should be a legitimate outlet for every interest and there are, therefore, minor constraints on a serviceman's right to freedom of assembly and association, within the bounds of security and public morals.

The implication of assembly and association in connection with labour unions for servicemen is explored in Chapter V.¹

(4) The right of every person to security of his physical person and freedom of movement.

These are really two separate but related rights. By security it is presumed that McRuer meant financial security in terms of freedom from poverty, and the right to work. While it might be argued that in the junior ranks the serviceman is apparently close to poverty,² a major-general can receive up to \$32,000 per year, which is hardly poverty. For cost forecasting purposes, the figure being used for average pay and allowances of a member of the armed forces is \$11,900,³ which is a respectable income. Nonetheless, particularly in the lower ranks, the pay does not allow for luxuries. The problem is not great where an individual is unmarried, for he often will live in government supplied quarters and receives government

¹ V, 132.

² QR&C, 204.30. The pay raise announced on 5 Nov, 1971 provides for the basic pay of a newly recruited private to be \$270.00, or \$3,240 per year. The Report of the Special Senate Committee on Poverty, Poverty in Canada, (Ottawa, 1971), 212, sets the poverty line for a single person at \$2,140. For a family of four, the poverty line is \$5,000.

³ Interview, November 19, 1971.

supplied meals, for which he will pay a nominal sum.¹ But for the married man, the income is probably on the low side, depending on the size of his family and whether or not his wife works. Married quarters, once available for a nominal monthly rent, are now available, usually as an option, with rents which are comparable, or almost comparable, to available non-service accommodation.² This once compensating feature for lower pay has now all but vanished. Furthermore, in many "high cost" areas, such as Ottawa, married quarters are in short supply. In fact many junior ranks "moonlight", that is, hold down one or more jobs in their off-duty hours in order to supplement income.

Even moonlighting is subject to some restrictions. An officer or man on full-time service may not undertake work which, in the opinion of his commanding officer, interferes with his service employment, brings discredit on the Canadian Forces or is "continuous".³ In practice, because so many junior men are so employed, this requirement for the work to be non-continuous is seldom enforced. Moreover, the man does not need to actually apply for permission, but the employment is subject to review

¹ QR&O 208.50 gives details of deductions for single quarters and rations. For instance, a private pays \$20 per month for quarters and \$41 per month for rations, for a total of \$61. An officer above the rank of major pays a total of \$100.

² CFAO 208-1 gives details of applicable rates. Maximum monthly charges are on a sliding scale from \$125 per month for privates to \$235 per month for lieutenant-generals.

³ QR&O, 19.42.

by his commanding officer if it is brought to his attention. The carrying out of civil business by service personnel on defence establishments is subject to many further restrictions.¹

Low salaries in the junior ranks may act as an incentive to improve earnings through promotion, but there is a limit to how many can qualify for promotion, or can be promoted, due to establishment restrictions. It is quite common for a man to attain the rank of corporal after five years service with a basic salary of at least \$607.00 per month² or \$7,284 per year. Depending on the size of his family, this is a reasonable salary.³

The serviceman can never be expected, nor does he expect to work a standard civilian "40-hour week". He frequently works much more than this amount, without compensation in pay or time off, for instance, when he is serving on a ship at sea, or in a land force exercise. Compensating factors are the pension, and a retirement earlier than most civilians.

The service does provide some fringe benefits, however, such as free medical and dental care (but not for dependants except in isolated communities), thirty days paid leave per year, "space available" free transportation on service aircraft, married quarters at comparative rental rates (where available -

¹ CFAC, 19-7.

² QR&O, 204.30.

³ Poverty in Canada sets the poverty line at \$7,140 for a family of seven.

a shortage exists, particularly in high cost areas) and early retirement with a fair pension.¹ For instance, a corporal retiring after 25 years of service could receive about \$3,600 annual pension at age 44, and he would still be able to start a second career, although for a man to be only a corporal after 25 years of service, would be unusual.

With regard to freedom of movement, leave is no longer a privilege in the Canadian Forces, but is now a right, and furthermore it may be withheld only by reason of the exigencies of the service.² However, all leave is subject to recall, and an officer or man requires permission to proceed outside Canada on leave.³ Thirty days leave is the entitlement in any leave year which begins with the government fiscal year on 1 April. In addition, up to eight days leave for travelling time, up to 183 days sick leave, up to ninety-one days compassionate leave may be granted.⁴ Further to this, the Minister may grant special leave "for any period".⁵

¹ Canadian Forces Superannuation Act, RSC (1970), c.C-9; Ist. Supp., c.6. According to QR&O 15.31, - sergeant or above retires at age 50, or 30 years service, whichever first occurs; a corporal at age 44 or 25 years. The pension depends on rank attained and length of service, but roughly speaking is equivalent to 2% per year of service multiplied by the average of the six best years of pay.

² QR&O, 16.01(1).

³ QR&O, 16.01, 16.04.

⁴ QR&O, 16.23, 16.16, 16.17.

⁵ QR&O, 16.20.

An address on leave is required on the leave form, but in practice, if a person plans to travel or camp in the woods, a single point of contact is sufficient.

Normally an officer or man may proceed on overnight leave from his place of duty, except on the occasions when he is required to stay on the base or ship for his turn of sentry duty, fire watch, shift work, etc. Overnight leave is sometimes restricted at training bases, on operational missions, or in areas or countries where a man might be in danger.

A man in the Canadian Armed Forces signs on for a fixed period of service,¹ which is usually five years, although after serving the first five year "hitch" he can apply for "career status" and he can subsequently retire on six months notice. An officer can retire on request if he has "good and substantial reasons and subject to the exigencies of the service".² The sanctions against a serviceman taking unauthorized leave are awesome indeed, compared to his civilian counterpart. For being absent without leave he can be sentenced summarily, in certain circumstances, to reduction in rank or up to ninety days detention,³ and if tried and sentenced by court martial

¹ In practice, release policy is flexible and, at the present time, a man will usually be released on request. Interview, February 3, 1972.

² QR&O, 15.01 (Table) item 4(c).

³ NDA, s.141.

can be imprisoned for up to two years.¹ The sanctions against a civilian would normally be limited to suspension with its attendant loss of pay, or ultimately to being released from his employment.

In sum it would appear that the pay of junior ranks is close to the poverty line, and if a large family is dependent solely on a service income it may be below the poverty threshold even though there are some compensating factors which could be equated to additional income.

The serviceman's freedom of movement is subject to the needs of the service and his personal life is, to some extent, not under his own control. His right to freedom of movement is considerably less than that of a civilian. And, he has an obligation to serve to the end of his contract period, although contracted services are common in civilian life too, with sanctions attached for lack of fulfilment.

- (5) The right of every adult citizen to vote, to be a candidate for election to elective public office, and to fair opportunity for appointment to appointive public office on the basis of proper personal qualifications.

Like any citizen, the serviceman has a right to vote. The service encourages his participation as a voter and special

¹ NDA, s.80.

arrangements are made for him to exercise his franchise in federal general elections, in the advance poll, wherever he may be serving. Furthermore, a member of the Regular Force may cast his vote, "irrespective of age".¹ He does not have to actually reside in the riding in which he casts his vote; once each year, in January and February, he may change or declare his "place of ordinary residence" to any address in Canada.²

For participation in provincial or municipal elections, a serviceman votes like any other citizen, and must make his own arrangements if he is to be absent at the time of the election. Many municipal elections have a property ownership requirement, which may limit a serviceman's participation to those who own property and reside in a particular community.

An officer or man of the regular component of the Canadian Armed Forces may not take an active part in a political organization or party, i.e., he may not make election speeches on behalf of a candidate or accept candidature himself in any federal or provincial election,³ but he may attend political meetings as a member of the audience. However, with the permis-

¹ Canadian Forces Publication (CFP) 237, s.301(1)(a). CFAO 99-9 states that "service policy and administrative procedures pertaining to federal, provincial, and territorial elections are prescribed in Canadian Forces Publication 237".

² CFP 237, s.304(3).

³ QR&O, 19.44.

sion of the Chief of Defence Staff, he may "accept an office in a municipal corporation or other local government body, or allow himself to be nominated for election to such office".¹ These restrictions do not apply to personnel of the reserve forces.

None of these regulations has prevented members of the CF from offering themselves for office and being elected or appointed to non-political bodies, such as school boards and municipal or community councils or associations. On the contrary, participation in community activities of this nature is encouraged, provided that they do not interfere with service commitments.

- (6) The right of every person to fair, effective and authoritative procedures, in accordance with the principles of natural justice for the determination of his rights and obligations under the law, and his liability to imprisonment or other penalty.²

Service tribunals are of two kinds - courts martial and summary trials by commanding officers, delegated officers, or superior commanders. The procedure is the same for all summary trials; differences exist in powers of punishment and rank of the accused.

In Canada, courts martial have jurisdiction over all members of the CF for offences under the Code of Discipline and all

¹ QR&O, 19.44(2)(c).

² "liability to imprisonment or other penalty" is further explored in IV, 109.

offences under the Criminal Code except murder, rape and manslaughter.¹ Outside Canada, all offences under the Criminal Code may be tried, as may a crime under a local law. Dependents accompanying the forces overseas may also be tried by court martial.² Civilians are subject to the Code of Service Discipline when accompanying the forces.³ Sentences which can be awarded by a court-martial range from a fine, to death.⁴ A member of the Canadian Armed Forces is also subject to the jurisdiction of the ordinary Canadian courts.

A commanding officer may try an accused by summary trial if the accused is an officer cadet, or a man below the rank of warrant officer, if he considers his powers of punishment adequate, if the accused has not elected to be tried by court martial, and if the offence is one that he is not precluded by the regulations from trying.⁵ He may award punishments from a caution up to ninety days detention.⁶ Detention of more than thirty days, or to a man above the rank of private, requires the approval of a higher authority.

¹ NDA, s.60.

² NDA, s.55(1)(f), (4)(c).

³ NDA, s.55(1)(f), (4)(a),(b),(d).

⁴ The punishments which service tribunals may administer are contained in NDA, s.125 and are listed in Annex C to this thesis. Note that the death sentence specifically requires the approval of the Governor-in-Council (NDA, s.178(1)).

⁵ NDA, s.141(1). Annex D of this paper lists ranks of the CF.

⁶ NDA, s.141(2).

An officer below the rank of lieutenant-colonel and a man above the rank of sergeant may be tried by a superior commander who is an officer commanding a command or formation, an officer of or above the rank of brigadier-general, or any other officer appointed by the Minister of National Defence.¹ His powers of punishment are limited to a fine, a reprimand, or a severe reprimand.

In any case, every offence is first investigated in the accused's unit, and the results of the investigation are considered by his commanding officer. The CO will decide whether to dismiss the charge, try the accused summarily (if he has jurisdiction), or refer the case to higher authority for disposition by a superior commander, or by court martial. This step is important because the CO is in the best position to assess the alleged crime in light of the man's previous conduct, and in the context of the disciplinary requirements of his unit. If the charge is dismissed, he cannot be tried again for the same offence by a service tribunal,² but he can be tried by a civil court³ for the same offence if it comes under the Criminal Code, whether or not he has been acquitted under the Code of Service Discipline.

¹ NDA, s.142 and QR&O, 110.01.

² NDA, s.56(1).

³ NDA, s.61. The aspects of "double jeopardy" are assessed at V, 147.

Military justice has frequently been condemned by layman¹ and lawyer, alike. Expressing the majority opinion in O'Callahan v. Parker² US Supreme Court Justice Douglas chided the US court martial system characterizing it as "a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favourable to defendants".³ No such scathing indictment has been made of the Canadian court-martial system by the Canadian appellate courts.

There are four types of court martial:

- (a) A General Court Martial which can try any person, military or civilian, for any service offence.⁴

The court consists of from five to nine officers.⁵

- (b) A Disciplinary Court Martial which may not try an officer of, or above, the rank of major, nor award a punishment greater than imprisonment for less than two years.⁶ The court consists of three to five officers.⁷

¹ See Robert Sherrill, Military Justice is to Justice as Military Music is to Music (New York, 1970).

² 395 U.S. 258 (1969).

³ Ibid., 265.

⁴ NDA, s.144.

⁵ QR&O, 111.18.

⁶ QR&O, 111.36.

⁷ QR&O, 111.37.

- (c) A Special General Court Martial may only try a civilian.¹ The court consists of "a person ... who is or has been a judge of a superior court in Canada, or is a barrister or advocate of at least ten years standing ..."² Thus he may be a military officer of the Judge Advocate General Division, or a civilian. A Special General Court Martial may not award all of the punishments listed in Annex C, but only death, imprisonment for two years or more, imprisonment for less than two years, or a fine.³
- (d) A Standing Court-Martial consists of one officer who is or has been a barrister of more than three years standing. He may try any service offender, not senior in rank to himself, but he may not pass a sentence higher than imprisonment for less than two years.⁴

Inasmuch, in (c) and (d) above, the presiding officer must be legally trained, little more will be said about these types of court martial. Discussion which follows on the "natural justice" of courts martial applies to all four types, but before

¹ QR&O, 113.03.

² NDA, s.155.

³ QR&O, 113.04.

⁴ NDA, s.154, QR&O, 113.52.

examining the procedure, it might be useful to explain the roles of the members of the court and the judge advocate in (a) and (b) above.

A court martial consists of a president and from two to eight other members appointed ad hoc for a particular trial, by the convening authority. The president may not be below the rank of the accused,¹ and in any case he may not be below the rank of colonel for a general court-martial, or major for a disciplinary court martial. The members of the court are both judge and jury, in that they determine both fact and law, and determine sentences, but it would be unusual for any of them to be legally qualified. They are not necessarily the "peers" of the accused, particularly if he is not an officer. No provision is made for other than officers to sit as members.² The accused is entitled to object to the president or any member of the court "for any reasonable cause",³ but the court itself decides whether or not to allow the objection. The findings of the court are determined by a simple majority, except when the death penalty is awarded, when the findings must be unanimous.⁴

¹ NDA, s.145, 151.

² It is perhaps of note that in the United States, enlisted men may now be included in the make-up of the court when the accused is an enlisted man. Uniform Code of Military Justice (UCMJ), art 25 (c)(1).

³ QR&O, 112.14.

⁴ NDA, s.168.

The position of the judge advocate at a general or disciplinary court martial is what particularly sets these proceedings apart from a civil trial. He is almost always a member of the staff of the Judge Advocate General which means that he is both a barrister and a military officer, although the regulations specify only that he be "a person".¹ The appointment of a judge advocate to a disciplinary court martial is at the option of the convening authority, although it is now the general rule that a judge advocate sits with all disciplinary courts martial.

The judge advocate must, by regulations, maintain an impartial position. Acting as the legal advisor to the court, he must draw to the attention of the court any defect in the charge, in the composition of the court, in the proceedings or in any matter. He must ensure that the rules of evidence are followed.² He may, if asked by the prosecutor, or the accused, give his opinion on any question of law or procedure. He is responsible, with the president, to ensure that the accused "does not suffer any disadvantage".³

He is especially empowered to determine questions of law, or mixed law and fact. He may determine these questions in the

¹ NDA, s.146, 152.

² The Military Rules of Evidence are authorized by s.158 of the NDA, and detailed in QR&O, appendix XVII.

³ QR&O, 112.55(2)(d).

presence or absence of the court, at the direction of the president.¹ When the judge advocate makes a ruling on a question of law or mixed law and fact in the absence of the court he is really acting as the court, and his rulings become those of the court.² In this case he acts like a judge.

After the prosecutor and defence have concluded their arguments, the judge advocate will advise the court on the law pertaining to the case concerning any special finding which may be made.³

To return to the original purpose of determining whether a serviceman is subjected to "fair effective and authoritative procedures, in accordance with the principles of natural justice", it is proposed to compare courts martial and summary trials to the traditional characteristics of courts of justice, as defined by McRuer.⁴

- (i) "The most essential and fundamental characteristic of courts of justice is that they be independent."

Civilian justices are given tenure to preserve their independence. Members of courts martial and commanding officers conducting summary trials are

¹ QR&O, 112.06(2).

² QR&O, 112.06(5).

³ QR&O, 112.05(18)(e).

⁴ Inquiry, 46 to 51.

not likely to be removed from office because higher authority disagrees with their findings or sentences. There has been much written and alluded to about "command influence" on members of courts martial in the United States. The theory of "command influence" is that, legislation to the contrary notwithstanding, the commander directing the trial endeavours to acquaint the members of the court beforehand about his disciplinary policies in this particular matter and how he would anticipate the outcome of such a trial. In theory, he holds the whip hand because he has an important influence on the possibilities of promotion and future employment of the members. This is understood to be on the wane in the US.¹ It has never been a real issue in Canada largely because there is no pre-trial briefing by a member of the convening officer's staff, although an appeal from a general court martial was allowed and a new trial directed, when it was shown that a superior authority had ordered unit officers not to speak to the defending officer regarding the appellant's case.² Any briefing of the court

¹ Robinson O. Everett, "Military Justice is to Justice as ..."
¹² US Air Force JAG Law Review (Summer, 1970), 212. And see
A.E. Camarinos, "Command Influence" in US Navy JAG Journal (January, 1955),
3.

² Weiner v. the Queen (1957), 2 C.M.A.R. 27.

is done by the judge advocate, who is directly responsible to the Judge Advocate General in National Defence Headquarters.¹ The Command Legal Adviser will not likely be the officer who acts as judge advocate at a trial in the command, because he will most likely have provided pre-trial advice to the convening authority.² The JAG reports to the Minister of National Defence, and not to the Chief of Defence Staff.

McRuer says "the independence of the judges is reinforced by the fact that ... judges of courts of record are exempt from legal liability for anything done or spoken in the exercise of their office and within the scope of their jurisdiction."³

It is doubtful if a commanding officer could be found legally liable for anything said at a summary trial, because the proceedings are not recorded, and are usually held in camera. The members of a court martial are immune from legal action in respect of words spoken or action taken in the course of their duties, unless they have indicated bias or shown prejudice towards the

¹ CFAO 4-1.

² CFAO 4-1(6) says, in part, "no officer who has been consulted on ... pre-trial matters ... should be appointed as judge advocate at the trial".

³ Inquiry, 47.

accused. This aspect of service tribunals has yet to be tested in a Canadian court.

- (ii) "Impartiality is a necessary attribute not only of courts of justice but of all bodies holding the power of decision".¹

This impartiality is based on the rule against bias and the rule that courts are not simultaneously prosecutors and judges. A summary trial by a CO does not always measure up. It is difficult to imagine a case in which a CO would have a "pecuniary interest" or a "challenge in favour" with respect to the outcome of a summary trial, but it is conceivable that he might be prosecutor, witness and judge. This situation could exist when trying offences under such sections of the NDA as s.74 (Violence to a Superior Officer), s.75 (Insubordinate Behaviour) or s.96 (Disobedience of Ship's Captain's Orders).

A member of a court martial would be most unlikely to be biased in any case, because the commanding officer of the accused or a witness for the prosecution are prohibited from sitting as members.²

¹ Inquiry, 47.

² NDA, s.147.

- (iii) ... It is essential to the just functioning of the courts of justice that they be presided over by persons of scrupulous integrity¹ This infers intellectual integrity and a knowledge of the law intuitively applied. It is to be hoped that all officers conducting summary trials or sitting on courts martial have intellectual integrity, but knowledge of the Code of Service Discipline will vary greatly between individuals depending on motivation and experience. However it can never be a criterion for those selected to preside. The influence of the judge advocate at court martial proceedings is considerable and the members will refuse his advice only at the price of having the integrity of the court open to question. In Doutre vs. the Queen² the court failed to direct the judge advocate to sum up the evidence, although it no longer has an option in this regard.³ Nonetheless, on appeal, a new trial was ordered because the JAG had failed to put the theory of the defence "fairly and

¹ Inquiry, 49.

² (1953), 1 C.M.A.R. 155.

³ QR&O, 112.05(18(e)(ii) gives the court an option in that the judge advocate is to sum up the evidence "if requested to do so by the president". CFAO 111-1(38) no longer gives the president this option, for it states in part that "...the president shall invariably request the judge advocate to sum up the evidence...".

specifically" to the court. The peculiar position of the judge advocate in this regard was well stated by Audette, J. in Carroll v. the Queen,¹ when he said, "... Article 112.05(18)(e)(ii) of the Queen's Regulations places the Judge Advocate in a somewhat different position from the Judge in a civilian court in relation to summing-up the evidence itself; the Judge Advocate's obligation to review the evidence is contingent upon the request of the President of the Court Martial to do so."

- (iv) "The procedure of the courts has been developed over the centuries to the end that disputes will not only be decided fairly, but that fairness will be apparent."²

The procedure proposed by McRuer follows the laws of natural justice which are:

- (a) The parties to the dispute must receive notice of intent to proceed. This applies to summary trials, as the accused will have been charged with an offence and ordered to appear before the CO at a specified time. This rule also applies to courts martial for "at least twenty-four hours before commencement of his trial", the accused is to be handed a copy of the convening

¹ (1956), 2 C.M.A.R. 25.

² Inquiry, 49.

order, a copy of the charge sheet, a copy of the synopsis and written notification whether the prosecutor has legal qualifications.¹ The accused must acknowledge receipt of these documents, or the person handing them to him certifies that he refused to do so. The accused may produce a written statement to accompany the synopsis when it is forwarded to high authority.² The statement could, for instance, be an absolute defence against the charge, or even a plea in bar of trial if he had previously been convicted or acquitted of the same charge by a criminal court. The synopsis and statement may not be subsequently entered as evidence at a court martial. Notification whether or not the prosecutor has legal qualifications may have an influence on the accused's decision about retaining civilian legal counsel if an officer with legal qualifications is not available to conduct his defence.

(b) The accused must have the right to seek advice and be represented by counsel of his own choice. With some qualifications, this rule is followed in a summary trial. The accused may request the assistance of an officer and the officer of his choice will be provided

¹ QR&O, 111.51. The "synopsis" gives the accused the general tenor of the case which will be presented by the prosecution.

² Loc. cit.

if "the exigencies of the service permit".¹ It would be most unusual for an officer with legal training to be provided the accused at a summary trial because of lack of availability - there are so few legal officers and so many summary trials.² The assisting officer helps the accused to prepare his defence and advise him about witnesses and evidence, but he may not participate in the summary trial. Nonetheless, the CO is required to "ask the assisting officer to state any fact that should be brought out in the interests of the accused".³

In court martial proceedings, the accused is entitled to have both a defending officer or counsel, and an adviser.⁴ These can be the choice of the accused, and if a particular service defending officer has been requested, endeavours must be made to obtain him.⁵ As he will be a serving officer, no expense is likely to accrue to the accused. However if he elects to have

¹ QR&O, 108.26.

² For instance there were 10,133 convictions by summary trial in 1970, and there is no record of acquittals. There is an establishment of forty-one legal officers in the CF. Interview January 24, 1972.

³ QR&O, 108.29(h).

⁴ QR&O, 111.60.

This has never been popular with the officer selected. As one authority wrote, "To be detailed to act as a defending officer is universally considered to be an honour even more to be avoided than that of serving as a member of the court". See J.A.G. Griffith, "Justice and the Army", 10 Modern Law Review (1947), 296.

civilian legal counsel, responsibility for retaining him lies with the accused, although in serious cases legal counsel may be provided partly at government expense.¹ If a member of the Canadian Armed Forces is to be tried for serious charges before a foreign court of criminal jurisdiction, part of the fees of civilian legal counsel may be paid by the Department of National Defence.² The percentage of the legal fee paid by the serviceman varies from 50% for officers down to 25% for privates.

(c) The accused must have the opportunity to prepare his best case. Before a summary trial, it is at the discretion of the CO how much time is allowed an accused to prepare his case through the gathering of evidence and the search for potential witnesses, although he will have been provided with an "assisting" officer of his choice, if possible, to help him in the preparation of his case. However, in the course of the summary trial, if the CO believes that an adjournment would further the interests of justice by allowing further evidence to be obtained, he may adjourn the trial for an unspecified period.³ This could favour either the accused or the prosecution.

¹ J.H. Hollies, "Courts Martial in the Canadian Forces", 2 Criminal Law Quarterly (1967), 71.

² CFAO 111-2, and Annex A to that order.

³ QR&O, 108.29(1)(i).

Before a court martial, the accused is given at least twenty-four hours notice of the commencement of the trial, at which time he will also be told if the prosecutor is legally qualified.¹ Further to this, he must be given full opportunity to prepare his defence and for full and private discussions with his legal counsel, his advisor and his witnesses.²

During the trial, the court, the judge advocate, and the prosecutor are charged with ensuring that the accused is not prejudiced by not being represented by counsel, by his ignorance of procedure, or that no material fact in his favour is suppressed.³ In the civil courts, only the judge is so charged, so that an accused serviceman has this advantage over an accused civilian.

The president, after the recording of the pleas, is required to ask the accused whether he wishes an adjournment on the ground that he has not had sufficient time to prepare his defence.⁴ After the case

¹ QR&O, 111.51. Under U.S. military law, the accused has at least five days notice before his appearance at a general court martial (UCMJ, art.35).

² QR&O, 111.61.

³ QR&O, 112.54, 112.55, 112.56, 112.57.

⁴ QR&O, 112.05(7).

for the defence has been closed either the prosecutor or the accused may request an adjournment to prepare their addresses to the court.¹

Thus in the case of court martial procedure, the accused is assured of opportunity to prepare his best case. In a summary trial this adjournment is at the discretion of the presiding officer.

(d) It must be possible to summon witnesses and order production of necessary documents. At a summary trial, the CO has the authority to order witnesses to be present and to order that relevant documents be produced. The accused at a summary trial may request that witnesses be called on his behalf and the CO is obliged to do so provided that the CO does not consider that their presence would be "frivolous or vexatious", and provided that the "exigencies of the service permit".²

At a court martial, the convening authority and the president both have authority to order the production of documents and the presence of witnesses provided the attendance of such witnesses is not "frivolous or vexatious" and "having regard to the exigencies of the service."³

¹ QR&O, 112.05(18).

² QR&O, 108.29(1)(f).

³ NDA, s.160.

However, unlike the summary trial, even if the attendance of a witness or witnesses is deemed to be frivolous or vexatious, they must be procured if the accused agrees to pay in advance the fees and expenses of such witnesses. If subsequently the evidence of such witness proves to be relevant, then provision is made for the accused to be reimbursed.

Civilian witnesses can be summoned to appear at a court martial and to produce any relevant documents.¹ Civilian witnesses, unless they are serving with the unit concerned, cannot be summoned to appear before a summary trial.

It is apparent that there are no real limitations on the production of relevant witnesses and documents at a court martial, but at a summary trial there are some limitations on the procurement of witnesses for the accused, and for adjournment to enable the accused to better prepare his case.

(e) A full oral hearing, open to the public must take place in the presence of the parties. The summary trial must take place in the presence of the accused, and the CO must "hear the accused, if he desires to be heard".²

¹ NDA, s.212.

² QR&O, 108.29(e).

There is nothing in the regulations which either requires or denies public attendance at a summary trial. Normally only those directly involved are present.¹ This will in most cases be due to limitations on space because proceedings will often be held in the CO's office, as a convenience to him.

A court martial is a more formal affair and the proceedings are usually held in a place large enough to accommodate those members of the Armed Forces and the general public who may wish to attend.² However, the public may be excluded for the whole or part of a trial in the interests of security or public morals at the discretion of the convening authority or the president. Witnesses are expressly prohibited from attending any part of a court martial trial except when giving evidence.³ The court is also closed during determination of the finding,⁴ when everyone but the members of the court must leave, including the judge

¹ Present at a typical summary trial would be the CO, the accused, the assisting officer, the officer who conducted the preliminary investigation, and the NCO responsible for discipline. There may be additional personnel such as administrative clerks, guards, chaplain etc. Witnesses will only be present when being examined or cross-examined.

² NDA, s.157.

³ NDA, s.157(3).

⁴ QR&O, 112.05(18)(f).

advocate, except when his advice is being sought on points of law or mixed law and fact. This is similar to the in camera deliberations of a jury. The court is similarly closed during determination of the sentence, except that the judge advocate is present to advise the court on legality of the proposed sentence and to provide guidance as to the form in which it ought to be expressed.¹ Therefore a full oral hearing with the usual exceptions in the case of state security or public morals is required at a court martial, but not required at a summary trial, although not expressly denied.

(f) Each party must have the right to examine his own witnesses and to cross examine witnesses for the other side. At a summary trial, the accused himself is permitted to question either his own witnesses or those submitting evidence against him,² but the "assisting officer" may not act as counsel and question witnesses.³ Nonetheless, during the course of a summary trial, the CO is required to ask the assisting officer to state

¹ QR&O, 112.05(21)(c), QR&O, 112.49, especially Note (A).

² QR&O, 108.29(1)(g).

³ See Note (A) to QR&O 108.26 which says, in part "the assisting officer is not normally permitted to take part in a summary trial. He may, however, assist the accused in preparation of his defence, and advise him regarding witnesses and evidence."

any facts which might be brought out in the interests of the accused.¹ There is no prosecutor at a summary trial, the CO acting as a magistrate with no prosecutor present, and the CO can examine witnesses for the prosecution or cross-examine witnesses for the defence.

At a court martial, both the prosecution and the defence have the right of examination-in-chief, cross examination and re-examination, similar to a criminal trial.² This was established as being part of court martial procedure as early as the Bounty Ship Mutineers Case³ where the right of one accused to examine another was denied by the court martial, but subsequently affirmed by "the Judges". Under Canadian procedure, elaborate regulations govern the examination of witnesses so that the procedure is made as uniform as possible, no matter under what circumstances or where the trial may be held.⁴

Thus each party at a court martial has the right to examine and cross-examine witnesses for his own and the other side. At a summary trial, permission to

¹ QR&O, 108.29(h).

² QR&O, 112.05(8) and (13).

³ (1791), 102 E.R. 121.

⁴ QR&O, II, Appendix XVII, Pt. IV, 12, 38-40, "Examination of Witnesses".

question witnesses must be given to the accused by the CO, but in turn the CO must only "receive such evidence as he considers will assist him"¹ in his determinations.

(g) Only facts proven to have real value as evidence are admissible. At a summary trial, the CO has the discretion to hear all evidence proven or unproven, related or not. He has complete freedom to admit hearsay or circumstantial evidence, or even not to hear any evidence at all, for he is only required to "receive such evidence as he considers will assist him".²

At a court martial, however, the Military Rules of Evidence³ must be followed. Because of differing provincial and federal rules of evidence, it was necessary for the officials of the Judge Advocate General Division to draw up rules of evidence which could be used at courts martial not only anywhere in Canada, but anywhere in the world. The rules cannot cover every conceivable case, and when such a situation arises, it is "determined by the law of evidence that would apply in a criminal court sitting in Ottawa."⁴ It is not possible to examine

¹ QR&O, 108.29(1)(d).

² Loc. cit.

³ QR&O, II, Appendix XVII.

⁴ Ibid., First Division, s.3.

the Military Rules of Evidence within the scope of this thesis, but they should stand up to the most critical review. Included in the Rules are parts covering evidence and proof generally, judicial notice, methods of proof and forbidden types of evidence, and permitted methods of proof - forty-nine pages in all, laying down the rules of evidence to be followed at courts martial.

In an interesting case,¹ the court adjourned to conduct an experiment to provide evidence as to the altitude at which numbers on the underside of an aircraft might be read. The Court Martial Appeal Court allowed the appeal on the grounds that this evidence was irrelevant and wrongly conceived.²

It is evident that considerable pains have been taken to ensure that only facts proven to have real value as evidence are admissible at courts martial, but the same cannot be said about summary trials where the rules may or may not be applied, at the discretion of the presiding officer.

(h) The decision made must be based on proven facts or on common knowledge not requiring proof. At a summary trial, the commanding officer is not required to

¹ Edwards v. the Queen (1958), 2 C.M.A.R. 75.

² Ibid., 83.

base his decision as to guilt of the accused on proven facts or even on common knowledge. He has complete discretion in this regard although he will usually instinctively call upon his experience in handling similar cases. But there are no common standards against which to measure a particular case, for no "case law" of summary trials exists. However, the CO is required to consider that guilt has been proven beyond reasonable doubt.¹

The Rules of Military Evidence which must be followed at a court martial are designed to allow only proven fact to be admissible as evidence. A section is included covering "judicial notice",² which is acceptance by the court of the truth of a fact of common knowledge. In Owen v. the Queen,³ the appellant argued that the judge advocate was wrong in directing the court martial, consisting of naval officers, to use its service knowledge of the amount of care which ought to have been exercised in a case involving collision of a ship. Audette, J. in dismissing the appeal, disagreed, "in the present case there is a clearly established set of facts to which the

¹ QR&O, 108.32(1).

² QR&O, II, Appendix XVII, s.4.

³ 2 C.M.A.R. 103.

general military knowledge of the court can be applied without introducing an element of difficult speculation for the accused".¹

The regulations are thus designed to ensure that, at a court martial, the decision made is based on proven facts or on common knowledge not requiring proof. Detailed instructions are provided to the court on the determination of findings.² These instructions need not be complied with at a summary trial.

(i) Reasons for the decision must be given. A commanding officer is not required to give the accused any reasons for his decision, although he may do so. But there is no record of the trial, other than the charge report which will show that he was guilty and the punishment awarded. Thus a "case law" of summary trial cases is not built up and precedent is not created for the guidance of succeeding commanding officers and accused persons.

In the case of a court martial, reasons for the decision should be apparent to the accused during the proceedings, but the court is not normally required to give specific reasons for its decision, as it will have reached this decision based on the evidence adduced before it.

¹ Ibid., 116.

² NDA, s.168 and QR&O 112.40, 112.41, 112.42.

The court may make a special finding of not guilty by reason of insanity,¹ or it may, instead of making a finding of not guilty of the offence as charged, make a special finding of guilty on a new offence.² Under these circumstances, the court may give brief reasons for its findings. If found not guilty, the accused is more likely to believe in the justice of the decision than if found guilty.

Court martial proceedings are recorded, and a case law is built up to which officers of the Judge Advocate General Division, or persons with legitimate interest, will have access. They in turn will pass this experience gained on to members of courts martial when asked for advice, and when required to advise by the regulations, whether asked for or not. Court martial reports are not published in the Canadian Armed Forces, although court martial appeal cases are published.³ This completes the examination of the principles of natural justice as applied to procedures of summary trials and courts martial.

¹ NDA, s.168 and QR&O 112.40, 112.41, 112.42.

² NDA, s.124 states in part, "... the service tribunal may, instead of making a finding of not guilty, make a special finding of guilty and in doing so shall state the differences between the facts proved and the facts alleged in the statement of particulars".

³ The first volume of Court Martial Appeal Reports was published in 1957, and the second in 1966. Subsequent volumes will be published when sufficient appeals have been made to justify them.

The last portion of this characterization "liability to imprisonment or other penalty", is investigated in the next chapter.¹

- (v) To return to McRuer's characteristics of courts of justice, Courts of Justice are and should continue to be open to the public.² The applicability of this characteristic to summary trials and courts martial has been examined in (iv)(e).³ Word of mouth is an important element in the maintenance of discipline in the armed forces. Mere attendance at a court martial is enough to impress upon individuals the formality and dignity of procedure and the justice of the findings. Where an offence is particularly prevalent, the relative severity of the sentence may well serve as a deterrent to repetitions of the offence in that particular command, or throughout the service. The press can be admitted to courts martial, although seldom do they take advantage of the opportunity unless a case is considered sensational news, and what can be released for publication is subject to some constraints.⁴ Nonethe-

¹ IV, 92 and IV, 102.

² Inquiry, 50.

³ III, 57, supra.

⁴ CFAO 19-11, (17) limits release of information to details of the charge, the findings of the court, and the sentence.

less, a program of publicity about court martial sentencing for particular offences can be of great disciplinary value. In addition to this, as McRuer points out "the openness of the courts is one of the basic safeguards of the right of the individual to a fair and just trial: it has a disciplinary effect on the bench, on counsel and on witnesses."¹ To this can be added the disciplinary effect which it has on would-be offenders.

- (vi) The sixth characteristic is that McRuer's ideal court would base its decisions on evidence and judicial notice.² This has been discussed in relation to summary trials and courts martial in (iv)(h).³ The Rules of Military Evidence would appear to match or exceed McRuer's criteria of proven evidence adduced by the parties, judicial notice and expert opinion.
- (vii) McRuer's seventh characteristic of the ideal court would have reasons given for a decision against an individual. "Every individual who may be affected by a decision adverse to his interests is entitled to know the reasons why the case has been decided against him."⁴ This charac-

¹ Inquiry, 50.

² Loc. cit.

³ III, 62, supra.

⁴ Inquiry, 51.

teristic is perhaps more specifically relevant to the decision of an administrative tribunal in a civil case, than to a court martial. Nonetheless a judge in a criminal case may give reasons for his finding of guilt, whereas a court martial is not required to do so. In practice, it would be most unusual for reasons to be given, although the court is not prevented from doing so by the regulations.¹

- (viii) Finally, McRuer states that a "right of appeal is well recognized as an essential part of every judicial system."² An appeal procedure is an established part of Canadian judicial procedure, and has a disciplinary effect on decision makers.

There is no appeal from the findings or sentence of a summary trial. An appeal does not lie through the Court Martial Appeal Court, and an appeal is expressly denied by the new Federal Court Act.³ Although there is no formal appeal as such, there is a redress of

¹ The court is particularly allowed to make known its reasons if the accused is found not guilty by reason of insanity or guilty on a new offence. See III, 65, footnotes 1 and 2.

² Op. cit., 51

³ Can., 1969-70, c.192, s.28(6), which reads, in part, "... no proceeding shall be taken [under the Federal Court Act] in respect of a decision or order of the Governor-in-Council, the Treasury Board, a superior court, or the Pension Appeals Board, or in respect of a proceeding for a service offence under the National Defence Act".

grievance procedure,¹ which is outlined in the next paragraph.

If the offender believes that he has suffered an injustice at a summary trial, he must first complain in writing to his commanding officer, even though the CO may have been the person who awarded the punishment and brought about the alleged injustice. If the complainant does not receive redress from his commanding officer within fourteen days, then he may submit his complaint to his commanding officer's superior commander. If he does not receive what he considers to be fair redress, he may complain in writing to the general officer commanding the command.² Subsequent complaints in writing can be made to the Chief of Defence Staff, the Minister of National Defence and the Cabinet, if in each instance, in the complainant's opinion, the alleged injustice has not been rectified.

¹ QR&O, I, 19.26.

² There are, in addition to Canadian Forces Headquarters (CFHQ), nine commands in the Canadian Armed Forces (CF). These are:

- (a) Mobile Command with headquarters at Montreal.
- (b) Maritime " " " " Halifax.
- (c) Air Defence " " " " North Bay.
- (d) Air Transport Command with headquarters at Trenton.
- (e) Training " " " " Winnipeg.
- (f) Canadian Forces Europe " " " " Lahr, Germany.
- (g) Northern Region Headquarters " " " " Yellowknife.
- (h) Canadian Forces Communications Command " " " " Ottawa.
- (i) Canadian Defence Education Establishment " " " " Ottawa.

As no time limits have been specified beyond the fourteen days limit given to the commanding officer, this process could take a very long time. Obviously this is a long and tortuous process, and may discourage all but the most determined, although pending changes will improve the procedure.¹

Despite the foregoing, the decisions of a commanding officer at a summary trial are all subject to review by the commanding officer's superior. The superior commander is responsible for reviewing punishments awarded by commanding officers in his command.² This enables the superior to gauge the general state of discipline in his command and the standards of punishment being awarded under comparable circumstances by his various commanding officers at summary trials. For this reason, each CO is required to submit monthly copies of all charge reports with which he has dealt.³

Review of summary trial discussions is thus automatically ensured. While it is rare for a superior to quash or alter findings of his subordinate commanding officers, nonetheless he does have this power.⁴

¹ Interview, February 4, 1972.

² CFAC, 114-2.

³ CFAC, 114-2(4).

⁴ CR&O, 114.55, Note (A).

The summary trial is more like an administrative tribunal than a court of law. Although the CO performs a judicial function, he is permitted considerable latitude in the performance of this function, however, unlike an administrative tribunal, there is no avenue for judicial review of administrative action. The privative clause in the new Federal Court Act has yet to be challenged, but with the present popularity of the so-called "civil-rights movement" in Canada, and the emphasis on civil liberties given in the McRuer Report and the Canadian Bill of Rights, it would seem that it may not remain unchallenged. If this does occur it will be interesting to see which course the courts will take, for as Willis points out, "the law still is that the decision of a tribunal 'exercising judicial functions' will be set aside (a) if there was no opportunity to be heard, (b) if at the hearing the members of the tribunal were not disinterested, (c) if at the hearing the person aggrieved did not have a fair chance to present his side of the case".¹ The summary trial will pass test (a), but (b) and (c) might provide openings for judicial review. Test (b) can be passed if a CO who considers himself biased in a case

¹ John Willis, "Administrative Law and the British North America Act", 53 Harvard Law Review (1939), 278.

has the accused tried by another CO.¹ Test (c) can be met through sensible application of existing regulations, or by a proposed change.²

The records kept of a summary trial are largely limited to the charge, finding and sentence. For this reason judicial review via certiorari would be difficult, and in any case it is likely that the courts would first insist that the exhaustion of remedies requirement be met through the existing redress of grievance procedure. Carried to its extreme, the final arbiter of the grievance is the Governor-in-Council who would, presumably, base a decision on equity rather than law, and would thus make an administrative decision immune from judicial review.

Thus it appears that the grievance procedure is likely to be most difficult to break into with certiorari, as a challenge to a summary decision. If judicial review should ever be achieved, it will be a breakthrough and probably not nearly as disastrous as some service officers might think. The quality and uniformity of summary trials would be improved and a case law would be created for the guidance of CO and accused.

¹ QR&O, 108.28, Note (A).

² See V, 126.

Although there is a restriction on servicemen writing to "letters-to-the-editor" columns of newspapers and anonymous complaints are unlikely to get published, nothing is to prevent a serviceman's wife from sending in such a letter, even if it is "ghost-written" by her husband, which may often be the case. This may be the least effective method of airing complaints, for no remedial action is required by service authorities. Other channels sometimes resorted to for complaint include letters to the Minister of National Defence, which are usually referred back down the organizational pyramid for comment, possibly to the complainant's CO. This could have an effect quite different from that desired by the letter writer. Or the complainant could write to his MP. This would likely be more effective if the MP happened to be a member of the opposition, for the complaint might get recorded in Hansard at question time, and an answer on the government's intended course of action would also subsequently be recorded.

Although not intended as a channel for grievances each of the commands¹ is authorized to appoint a Command Chief Warrant Officer, who during his appointment, ranks ahead of all men in the command. All men

¹ See III, 69, footnote 2.

and women have access to him and among other things, he can advise them on procedures to be followed in the redress of grievance. He in turn, does have access to the Commander, so that serious problems of morale or discipline should quickly be brought to his attention. Among his several duties, he is required to conduct fact finding missions to units, as detailed by the Commander, and prepare periodic reports on conditions of service in the command.¹

The appeal procedure against court martial decisions is much more regularized and established. The Court Martial Appeal Board (in 1959 it became the Court Martial Appeal Court) was established in 1950 with the passing of the National Defence Act. Prior to this, appeals from court martial decisions had been through the regular courts. Part IX of the National Defence Act deals with appeal, review and petition.

To ensure that an accused person who has been found guilty at a court martial, or not guilty by reason of insanity, is made aware that an appeal procedure exists, a Statement of Appeal form is forwarded to him together with the minutes of proceedings at his trial.² Further,

¹ Interview, January 24, 1972.

² QR&O, 112.66, Note (A), amplified by CFAO 111-1 (39).

he is required to sign a receipt for these documents so that their delivery is ensured.¹ There can be little excuse for the accused not knowing that an appeal procedure exists.

The Court Martial Appeal Court consists of not less than four judges of the Federal Court of Canada and "such additional judges of a superior court of criminal jurisdiction",² all appointed by the Governor-in-Council. One of the judges is designated President by the Governor-in-Council.³ He presides when present at a sitting and when he cannot be present he is required to appoint another judge to preside. Three judges of the Court Martial Appeal Court constitute a quorum,⁴ and the Court may sit at any place.⁵

Detailed Rules of Appeal Procedure are provided⁶ but in general, an offender has fourteen days in which to file a Statement of Appeal from the findings and/or sentence of a court martial.⁶ He may appeal against the

¹ CFAO 111-1 (43).

² NDA, s.201(2).

³ NDA, s.201(3).

⁴ NDA, s.201(5).

⁵ NDA, s.201(4).

⁶ QR&O, Appendix XV.

severity of the sentence, the legality of the findings, or the legality of the sentence.¹

The Court Martial Appeal Court (CMAC) may dismiss the appeal, set aside a finding of guilty, direct that a new trial be held, substitute a conviction on a lesser included offence, or under certain circumstances, substitute a new punishment.² Where an appeal relates only to severity of a sentence, the Minister of National Defence may mitigate, commute or remit any or all such punishment.³

A final appeal to the Supreme Court of Canada lies to a person whose appeal has been wholly or partially dismissed by the Court Martial Appeal Court on any question of law on which there has been a dissenting opinion in the CMAC, or by leave of the Supreme Court if there has been no dissenting opinion. This leave to appeal must be granted by the Supreme Court of Canada within thirty days after the decision of the Court Martial

¹ NDA, s.197.

² NDA, s.202, 203.

³ NDA, s.200, 183. QR&O 114.27, gives definitions in Note (A): "Mitigation is awarding a less amount of the same punishment, as for example, by reducing the length of imprisonment to which an offender has been sentenced; and is in effect equivalent to a remission of part of the sentence. Note (B): Remission may be remission of the whole or part of a sentence; thus a sentence of imprisonment may be remitted altogether or a portion of the term may be remitted. Note (C): Commutation is changing the type of punishment by awarding a punishment lower in the scale."

Appeal Court.¹ Extensions to this time period can be granted for special reasons.

Although it is of interest that he cannot appeal the decision of a court martial, the Minister of National Defence may appeal to the Supreme Court of Canada against the decision of the CMAC under the same circumstances as an offender. As yet, no appeals have been made by an offender or by the Minister to the Supreme Court of Canada, although requests for leave to appeal have been considered and disallowed.²

As a further safeguard, after the expiry of fourteen days from the handing of the minutes of proceedings to the offender, in order to allow for an appeal to be registered, the Judge Advocate General is required to review the proceedings as to the legality of the findings or the sentence.³

And finally, every person found guilty by a court martial has one year after handing down of the decision, or from completion of the punishment if that is later, in which to petition for a new trial on grounds of new evidence discovered.⁴

¹ NDA, s.208.

² Interview, December 21, 1971.

³ NDA, s.209, 210.

⁴ NDA, s.211.

In sum, the person sentenced by a commanding officer at a summary trial, does not have a right to appeal, at least in the usual sense, through a separate court. The first step, in fact, goes through the same tribunal which made the finding and awarded punishment. The grievance procedure as it currently exists can be cumbersome and frustrating, and there has, as yet, been no judicial review of summary decisions.

The court martial procedure, on the other hand, allows for appeal by an offender as of right - an appeal which is denied the prosecution. Further to this, the decision of the Court Martial Appeal Court can be appealed by right to the Supreme Court of Canada on a point of law, if there has been a dissenting opinion in the CMAC. If there has been no dissenting opinion in the CMAC, appeal may be made to the Supreme Court by leave. The privilege of appeal to the Supreme Court is available to both the offender and the Minister.

If no appeal from a court martial decision has been made, the Judge Advocate General is required to review the legality of the sentence or findings. Further, the offender can petition for a new trial up to one year after the court martial which convicted him.

Thus it can be seen that a serviceman has automatically two channels of appeal or review from a court martial decision, and access by right under certain circumstances, to the Supreme Court of Canada. This degree of review is not normally open to a civilian.

(7) The Right to have the ordinary courts presided over by an independent judiciary.

This seventh basic freedom is available to every serviceman, just as it is to any Canadian citizen, and even though a member of the Canadian Armed Forces is subject to the Code of Service Discipline, he is also subject to the jurisdiction of the civil courts, and nothing in the Code affects that jurisdiction.¹ However, he cannot be tried by a service tribunal, ie, summary trial or court martial, for any offence for which he has been tried by a civil court, whether or not he was found guilty.² Nonetheless, he can be tried by a civil court for an offence for which he has already been convicted and sentenced under the Code of Service Discipline. The civil court is only required to "take into account" any punishment imposed by the service tribunal,³ when awarding punishment on conviction. However, if the civil court either acquits or convicts a service-

¹ NDA, s.61(1).

² NDA, s.56(1).

³ NDA, s.61(2).

man for an offence for which he has been imprisoned under the Code of Service Discipline, the unexpired portion of that punishment is remitted,¹ so that double punishment at least with regard to imprisonment, is not awarded. Upon conviction by the civil power, a commanding officer may recommend that an officer or man be administratively reverted in rank for misconduct,² thereby effectively punishing him twice for the same offence. Double jeopardy, in this sense, does exist, as a reduction in rank can have serious financial implications affecting pay and pension. Moreover, it is still possible for a serviceman to be acquitted by a service tribunal and to be subsequently tried for the same offense under the Criminal Code by a civil court.³

Double jeopardy, at least in theory, hangs as a threat over the head of every member of the CF. However, there is no record of a serviceman having been tried by a civil court after being acquitted by a service tribunal.⁴ This section of the NDA probably stems from the premise that the control of the civil authorities over the military must be paramount. In Canada the civil courts still have exclusive jurisdiction for the crimes

¹ NDA, s.61(3).

² QR&O, Vol I, 11.11.

³ NDA, s.61(1) states "nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court".

⁴ Interview, December 21, 1971.

of murder, rape and manslaughter, so there is no possibility of a service tribunal conniving to try and acquit a serviceman who has committed these crimes.¹ Intimidation of the populace by the armed forces, using these crimes as threats, is therefore, not possible.

Thus the serviceman not only has access to the ordinary courts, the ordinary courts have access to him.

This completes the measurement of the National Defence Act using the McRuer Report yardstick, which is a most accurate mensuration device. In his thorough examination of Ontario laws and regulations Mr. Justice McRuer found few proceedings which attained his standards. His proposal for a Statutory Powers Procedure Act, would establish eighteen rules of procedure,² which, if adopted, would give safeguards to the people of Ontario which, he claims, are an adaptation of the best of the systems of the United States and the United Kingdom.³ It is doubtful if proceedings under the National Defence Act and its regulations could ever be shaped to fit so fine a gauge, because of the peculiar circumstances under which the Act must sometimes be enforced. However, the NDA already satisfies many of McRuer's rules, and it is believed that the regulations can be changed to allow a few more, especially with regard to summary trials. Still others will require legislative amendment.

¹ NDA, s.60.

² Inquiry, 213.

³ Ibid., 212.

Before making proposals for change, it is appropriate to subject the National Defence Act to comparison with the Canadian Bill of Rights. This will be done in the next chapter.

IV

THE SECOND MEASURE

Let us now see how the National Defence Act measures up when the Canadian Bill of Rights is used as the second yardstick.

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex ...

- (i) Race. It is hoped to enlist more of Canada's "northern people" into the Canadian Armed Forces,¹ initially at least, for service in the north because of their environmental aptitude, and as an incentive for others. By definition "northern people" includes all persons who have lived more than five years north of 60° latitude, therefore this policy is discriminatory by geography, but not by race. The term obviously includes indigenous as well as non-indigenous peoples.²

The total number of Indians and Eskimos in the CF is not known. No record is made of racial origin - and there is no question asked about this on enrolment.³ There is

¹ Interview, December 21, 1971.

² The 1970-71 Canada Year Book yields figures of 11,185 Eskimos and 7,030 Indians out of a total population of 37,000 in the Yukon and Northwest Territories.

³ An examination of the Enrolment Application (Form CF 444) reveals that blocks to be filled in, include birthplace of applicant (block 14), birthplace of father (block 18) and birthplace of mother (block 19), but no other information which could possibly provide information as to racial origin.

no discrimination against them if they can meet the minimum standards of education, health and aptitude. Persons of other racial backgrounds are represented in the CF, but because this is not considered important, statistics are, likewise, not available.

- (ii) National origin. This has no bearing on enlistment, provided that the recruit is a Canadian citizen, although as stated above,¹ exceptions can be made in certain circumstances. Demographically, about 28% of our population is French Canadian, and 28% of the Canadian Armed Forces has been designated as francophone. It is intended to have the rank structure reflect this.² French speaking units have been in existence, or recently established, in all elements of the CF. The French speaking recruit is also being given the opportunity to learn or improve his English, and officers and men of English speaking background may take advantage of the numerous French courses being made available, on a full or part-time basis.
- (iii) Colour. Because no record is kept, it is not known how many blacks are in the Canadian Armed Forces, but it is obviously very few, probably because there are few black

¹ III, 19, footnote 4, supra.

² White Paper on Defence, 47.

people in Canada.¹ But provided that they can meet the minimum standards, discrimination based on colour has not been a factor at the recruiting office. Discussions with a black officer revealed that he had encountered some apparent discrimination early in his career, but after twenty years service, this was now seldom encountered within the Forces. In his opinion, there was far more discrimination against blacks outside the Armed Forces than within.²

(iv) Religion. Religion is not a discriminatory issue in the Canadian Armed Forces to-day, and it is not recorded on the enrolment application. There is complete freedom to practice any religion, or no religion, subject to the requirements of service duties. This subject was more fully covered in the previous chapter.³

(v) Sex. Discrimination on the basis of sex looms very large on the Canadian horizon these days. The Women's Liberation movement in the United States has spread into this

¹ R.W. Winks, "How many blacks in Canada?", Blacks in Canada (Montreal, 1971), 484, writes, "indeed, we do not know for any decade just how many Negroes there were; nor do we know today." He suggests that there may be more than double the 1961 census figure of 32,167, probably because many are "passing as white".

² Interview, January 21, 1972.

³ III, 21, supra.

country and the Royal Commission on the Status of Women¹ focused national attention on discriminatory practices against women in many fields of our society. Of the 167 recommendations made by the Commission, only six dealt with women in the Canadian Forces.² The Report recognized that "many of the trades open only to men are in the combat arms, or at sea,³ and it did not quarrel with this position, but did recommend "that all trades in the Canadian Forces be open to women",⁴ which seems somewhat of a contradiction. The Commissioners were vexed with the prohibition of the enlistment of married women.⁵ They were against the release of pregnant women, married or unmarried, and would institute maternity leave when (and if) this regulation changed.⁶ And the Commission would break into that last refuge of men, the Canadian Military Colleges operated by the Department of National Defence - The Royal Military College, Royal Roads, and College Militaire Royal

¹ Canada, Report of the Royal Commission on the Status of Women in Canada, (Ottawa, 1970).

² Specifically nos. 55, 56, 57, 58, 59, 70.

³ Report, 135.

⁴ Report, 136, para 488.

⁵ Married women may now enlist in the Canadian Armed Forces as of 1 January, 1972. Interview, 7 February, 1972.

⁶ Report, 136, paras 490, 495.

de Saint Jean.¹ The Report does admit that some women have received, and are receiving, training at universities under the Regular Officer Training Plan. In the United States, the first attempt to appoint women to the United States Naval Academy has been unsuccessful, but even Navy Secretary Chaffee, in turning down the nominations admitted that the possibility existed "somewhere down the road".² The Canadian Military Colleges may get the lead on their U.S. counterparts if the Commission on the Status of Women has its way.

That the Report has had some effect on the service regulations concerning women is evident from recent changes.

More trade opportunities will be made available to women in the future, and the ceiling on the numbers of women in the Forces has been raised from 1040 to approximately 3,000.³

A woman was previously released automatically on marriage, unless she applied to stay in, but it is now presumed that she wishes to stay in, unless she applies for release on marriage.⁴

¹ Report, 179, para 68.

² "U.S. Navy vetoes girls at Annapolis", Montreal Gazette, February 9, 1972.

³ Howard Wallace, "The Lid's Off", The Sentinel (Nov-Dec, 1971), 14.

⁴ In October, 1971, new release policy in this matter was announced in an amendment to CFAO 15.2 Annex D. "A change in policy concerning release of female members for reason of marriage was recently authorized. Under the new policy a female member who marries may continue to serve, as is

At present women, married or unmarried, are released when they are pregnant.¹ It is understood that regulations about release on pregnancy are being reviewed, with the view to making them more compatible with regulations in the Labour Code as guide. Public Service regulations provide up to two months unpaid maternity leave before the birth and six months afterwards.² Note, however, that the Commission on the Status of Women would have the prenatal leave period reduced to six weeks before confinement, if the woman so wishes.³ As of January 1, 1972, service personnel will become eligible for unemployment insurance benefits, and these will be payable in the event of a woman discharged because of pregnancy.

The discharge of an unmarried pregnant woman officer was recently contested in the US courts, but the appeal was dismissed on the grounds that the USAF regulation was

the case with men who marry, or alternatively such women may apply for voluntary release." (Canadian Forces General Message 112).

¹ In exceptional circumstances, the commanding officer of the woman concerned, can recommend her retention in the service if it would be "in the Service interest". (CFAO 56-29 (4)). However it is not clear whether she would be retained only up to, but not after the birth, but in most cases, under the present regulations, release is quickly achieved with a minimum of "red tape". If she wishes, she may apply to rejoin the service after the birth.

It is interesting to note that if a miscarriage occurs the woman is eligible for retention.

² Wallace, 15.

³ Report, 111, para 392.

"reasonable and constitutional".¹ If all of the recommendations of the Report on the Status of Women are instituted, the Canadian Forces will soon be more liberal than the US forces in dealing with pregnant servicewomen.

There have been few complaints by women about discrimination in the services, and these complaints generally dealt with previous discrimination against single people as compared to married ones.² This discrimination also applied to single men, in that the pay of single people in the services was less than that of married persons, and they were required to live on base, rather than having the option, now available, of living off base should they so choose.

Pay inequalities have since been rectified, single men and women receive the same pay as married persons, and members may live where they choose. On-base quarters are usually much more economical for single people, and married quarters have some advantages over those outside.

Where a serving woman marries a serviceman, efforts are made to post them together when a move for one or the other is contemplated. However, service requirements take priority and then they must decide if one of them is to resign, or they must be prepared to accept temporary separation.

¹ "Court upholds discharge rule for pregnancy", Globe and Mail, November 17, 1971.

² Wallace, 15.

Homosexuality between consenting adults in private is no longer an offence under the Criminal Code.¹ Homosexuality is a sensitive subject in any military force. The CF regulations provide that admitted or discovered homosexuals be quickly and quietly discharged "unsuitable for further service",² after an examination by a service psychiatrist, when available. Homosexuals are given the opportunity to resign and usually do so to avoid undue publicity. In a 1960 case in the United States,³ a female officer, accused of homosexuality, refused to resign, and was not given the court martial which she had demanded, but was summarily discharged with subsequent loss of reputation, rights and benefits. The right to a court martial had been refused when it became obvious that the evidence to convict her would be insubstantial and that a conviction would be unlikely. Madden, J. voided the discharge noting "... this remarkable arrangement ..." and awarded back pay.⁴

¹ RSC (1970), c. C-34, s.158.

² III, 31, supra. CFAO 19-20 provides detailed administrative instructions for the handling of cases.

³ Clackum v. United States, 296 F. 2d 226.

⁴ Ibid., 228. Her action took eight years to arrive before the Court of Claims, so presumably she was awarded a considerable sum of money.

Evidence which will stand up in court is difficult to acquire, if both parties were willing participants. Only an admitted homosexual can be released, and if the tendency is controlled it is not liable to be otherwise discovered. Nonetheless, this opens the possibility of a smear campaign being launched against an individual by rumour as a method of undermining morale and discipline.

Homosexuality in the CF is not an offence by itself, but it is a disturbing social problem which cannot be accommodated. Release, in proven cases, seems the only solution.

... the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by the process of law.

In time of peace, there is very little restriction placed on these rights of a member of the CF. Life in the forces is likely no more hazardous, than equivalent occupations in civilian life. Liberty off duty is without many restrictions, except as to establishments placed out-of-bounds, and with some restrictions on outside employment. The subjects of liberty and security of persons in the CF are more fully covered under the fourth freedom of McRuer.¹

¹ III, 32, supra.

The enjoyment of property, if it applies to owning real estate, is open to servicemen. Many members of the CF are property owners, subject to the same neighbours, taxes and problems as civilians. With regard to material possessions, there are obviously physical limitations on how many personal belongings a soldier can take into the field, a sailor can stow on board ship, or an airman can carry in an aircraft - and storage space on a base may be of limited availability. Nonetheless, when a man is being moved to a new posting within continental North America there is almost no restriction on the amount of household goods which will be moved at government expense. A posting overseas carries limitations on the movement of personal effects.¹

- (b) the right of the individual to equality before the law and the protection of the law. Servicemen are subject to civil laws and the Criminal Code the same as any other Canadian, but they are also subject to the Code of Service Discipline. For this reason, they are not equal to civilians before the law, and are "protected" by the National Defence Act in addition to the normal laws of the land. This theme has been partially developed under McRuer's sixth basic freedom.²

¹ In addition to his accompanied baggage, an officer is entitled to have 460 lbs of baggage sent unaccompanied, a man, 260 lbs, and appropriate allowances are given dependents. (CFAO 20-15). The remainder except for automobiles, boats and trailers, can be stored in Canada at government expense, until his return.

² III, 39, supra.

Within the Forces, there is inequality before the law between ranks, and between men and women. For instance, at a summary trial, the punishment of detention¹ may be awarded only to men below the rank of warrant officer.² Privates do not have the right to elect trial by court martial if a punishment of detention seems to be warranted, in the opinion of the officer conducting the summary trial,³ and only privates can be sentenced to confinement to ship or barracks. Officers cannot be tried at a summary trial by commanding officer, but officers below the rank of lieutenant-colonel can be tried by a superior commander.⁴ Three offences under the NDA are applicable only to officers.⁵ Also the Code of Service Discipline can be limited or modified in its application to women.⁶

Though the powers of the civil courts can be invoked

¹ "Detention" is a term implying confinement in special service detention barracks, which cannot exceed 90 days. Confinement for periods longer than this is termed "imprisonment" and is usually carried out in civilian prisons.

² Ranks in the Canadian Armed Forces are listed at Annex D.

³ QR&O, 108.27 (Table). The punishments which can be awarded at service tribunals are listed at Annex C to this thesis.

⁴ NDA, s.142. This was discussed at III, 41, supra.

⁵ These are sections 63, (offences by commanders when in action), 82 (scandalous conduct by officers), and 95 (offences in relation to convoys). A list of offences under the NDA is attached at Annex B.

⁶ NDA, s.55(11). QR&O, 104.08(2) states, "no female person may be sentenced to detention". QR&O, 105.25 gives details on special conditions of close custody of women.

against service tribunals, through the prerogative writs of mandamus, prohibition, certiorari and habeas corpus, unless there has been an apparent want or excess of authority exercised by the tribunal, the courts will usually insist on the exhaustion of existing remedies before intervening by way of these writs. The concept of jurisdiction is a difficult one. It can, according to McRuer, be extended beyond the doctrine of ultra vires.¹ There are a number of grounds on which the courts have reviewed decisions of judicial or administrative tribunals, including exceeding the power of the enabling statute, improper composition of the tribunal and failure to comply with proper procedural requirements. Willis would almost certainly agree that procedural decencies are paramount and that a decision should be judged ultra vires if there was no opportunity to be heard, if the tribunal was biased, or if the person aggrieved did not have a chance to prepare his best case.²

In a 1956 decision,³ the Supreme Court of Canada, on an appeal from a decision of the British Columbia Court of Appeal, restored the judgement of the Supreme Court of British Columbia in dismissing an application for review

¹ Inquiry, 246.

² See III, 71, supra.

³ Regina and Archer v. White (1956), 1 D.L.R. (2d) 305.

by way of certiorari on conviction on disciplinary charges under the Royal Canadian Mounted Police Act.¹ The Supreme Court of Canada was unanimous in allowing the appeal on the ground that the R.C.M.P. is analagous to the Army and, like military courts, the decisions of its tribunals are not ordinarily subject to review by the civil courts, because of special requirements for efficiency and discipline. There is a preponderance of evidence, especially in the United Kingdom, to support this approach to the review of decisions of military courts.

In this case, Locke, J. said "... where it is shown upon an application for a writ...there has been either a want of jurisdiction or an excess of jurisdiction...the right of the court to intervene by way of certiorari is undoubted. That this is equally so in the case of the proceedings of courts martial in the Army appears to me equally undoubted".²

In the same case, Rand, J. did not include the armed forces in his "open society" dictum,³ when he opined, "if, within the scope of authority granted, wrongs are done individuals, and that is not beyond possibility, the appeal must be to others than to civil tribunals, or, as in the

¹ RSC (1970), c. R-9.

² Op. cit., 315.

³ Perhaps best exemplified in his decision in Smith and Rhuland v. the Queen (1953), 2 S.C.R. 95.

case of the Army, they must be looked upon as a necessary price paid for the vital purposes of the Force ...¹ But he did agree that when authority was exceeded, the remedy of the ordinary courts would be available.

In the case of Rex. v. Thompson (No. 1),² the proceedings of the court martial of a soldier accused of theft, were interrupted by the application for a writ of habeas corpus. LeBel, J. granted the writ on the grounds that the accused had been held for two and one-half months without a preliminary investigation being held by his commanding officer in the presence of the accused. By his failure to exercise his discretion with regard to disposition of the case, the court martial was declared without jurisdiction, for the commanding officer should have, by regulations, dismissed the charge, tried the case summarily, referred it to superior authority, or applied for a court martial.

The accused was subsequently transferred and his new commanding officer had him arrested and charged him with the same offences. He applied for a writ of prohibition to prevent court martial proceedings from taking place.³

Urquhart, J. granted the writ on the grounds that jurisdic-

¹ Op. cit., 310. He was probably referring to a redress of grievance procedure as Corporal White had been tried and sentenced summarily by Superintendent Archer, in the first instance. For the application to the CF, see III, 69, supra.

² (1946), 4 D.L.R. 579 (Ont. High Court).

³ Rex. v. Thompson (No. 2) (1946), 4 D.L.R. 591 (Ont. Court of Appeal).

tion had already been lost as decided by LeBel, J., but added a further, rather extraordinary reason, "it is difficult to see how the discretion...could be exercised by other than the man's former commanding officer..."¹ This decision was appealed by the Attorney-General of Canada to the Ontario Court of Appeal. Robertson, CJO, denied the appeal on the even more extraordinary grounds that the appeal was not within the jurisdiction of his bench as it was "a criminal matter the procedure in respect of which is within the exclusive jurisdiction of the Dominion Parliament..."²

From the foregoing it can be fairly safely assumed that the civil courts will interfere where it can be shown jurisdiction of a military tribunal has been exceeded, or has not been exercised. The prerogative writs are available, under these circumstances, to members of the Canadian Forces.

For 133 years it was generally accepted that the civil courts could not under any circumstances interfere with a military tribunal acting within its jurisdiction. Lords Mansfield, C.J. and Loughborough, C.J., established this precedent in 1786, reversing the decision in the court below in Sutton v. Johnstone,³ when they asked, "what condition will a com-

¹ Ibid., 599.

² Ibid., 604.

³ Sutton v. Johnstone (1786), (1775-1802) All E.R. Rep. 170. Johnstone, a naval squadron commander, had ordered Sutton to take his damaged ship, Isis, into action against the French fleet, and he refused. Sutton was

mander be in if, on the exercising of his authority, he is liable to be tried by a common law judicature? If this action [for malicious damages] is admitted, every acquittal before a court martial will produce one."¹

McCardie, J., questioned this dictum, in Heddon v. Evans,² where he pointed out that "a man...who became a soldier did not cease to be a citizen",³ recalling Burdette v. Abbott.⁴ "It was for these [civil] Courts to determine the extent of the military jurisdiction given to military tribunals and officers by the Acts of Parliament."⁵ McCardie was tempted by the idea that once malice was proven, military jurisdiction is lost, however he did not come down firmly on whether or not an action would lie, but deferred to a "vast preponderance of authority on this point, whatever my own opinion may or can be in the matter."⁶

acquitted of disobedience at the subsequent court martial, and he then sued Johnstone for malicious action. Although Sutton was awarded damages in the courts below, the Exchequer Chamber reversed in favour of Johnstone.

¹ Ibid., 178

² (1919), 35 T.L.R. 642.

³ Ibid., 644.

⁴ (1812), see I, 10, footnote 1, supra.

⁵ Op. cit., 643.

⁶ Ibid., 645.

In Dawkins v. Paulet¹ an action for libel against a British soldier's CO was dismissed by Mellor, J., speaking for the majority, "...the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be..."² and he went on to remind that a redress of grievance procedure existed.

Starkman believes that the reasoning in Dawkins would be followed in Canada³ and this writer subscribes to that proposition. The Queen's Regulations and Orders do provide for a grievance procedure⁴ for any officer or man who believes that he has been maliciously prosecuted or wronged by his commanding officer.

From the foregoing it can be deduced that at a summary trial by commanding officer a serviceman has equality before Canadian military law only with fellow servicemen of equal rank. Furthermore, only non-commissioned officers (NCO's) have the privilege of electing trial by court martial in lieu of summary trial. Servicemen do not have equality with civilians before the law, for they are subject to the ordinary laws of the country plus the Code of Service

¹ (1869), L.R. 5 Q.B. 94.

² Ibid., 114.

³ Starkman, 451.

⁴ QR&O 19.26. The procedure is described at III, 69, supra.

Discipline.¹ As for invoking the protection of the law through the prerogative writs, the courts will almost invariably insist upon exhaustion of existing service remedies, and will only then apply these protections if there has been an excessive or a lack of exercise of authority.

- (c) freedom of religion. This was discussed under McRuer's first freedom.²
- (d) freedom of speech. This was discussed under McRuer's second freedom.³
- (e) freedom of assembly and association. This was discussed under McRuer's third freedom.⁴
- (f) freedom of the press. At first glance it might be expected that this freedom could hardly be applicable to the Canadian Armed Forces. Some good unit newspapers and a number of CFHQ publications are produced to keep interested persons inside and outside the CF informed on developments, changes and news in the Forces.⁵

¹ This aspect is discussed more fully at III, 79, supra.

² III, 21, supra.

³ III, 24, supra.

⁴ III, 29, supra.

⁵ CFAO 57-5 prescribes the policy for publishing unofficial service newspapers. Editorial opinion must reflect the policies of the command, and "political subjects" and "controversial subjects affecting other departments of the public service or pertaining to the Canadian Forces or public policy..." must not be published.

Of special note is The Sentinel, a monthly picture and newsmagazine which is of high quality and gets wide distribution. Nonetheless, all of these publications are edited by, or under the direction of the Department of National Defence. Service policy is promulgated in them, so that all "get the word". An issue which has often been discussed is the subject of trade unionism in the Canadian Armed Forces, advocated by the Public Service Alliance, but generally considered unfavourably by officers and men. There is some indication that direction has been given to suppress discussion of this subject in service newspapers.¹

2. Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared...

The National Defence Act has yet to be challenged in the courts. Prior to the Drybones case in 1969, the courts had generally held that section 2 does not apply to prior legislation, even where there may appear to be inconsistencies with the Canadian Bill of Rights in that legislation.²

¹ "Protecting Servicemen from Radical Thoughts", Ottawa Journal, editorial, December 16, 1971. A subsequent letter to the editor by the Director of Information Services, DND, quoted from this order and reminded the editor of the Journal that "in the past you have implied in your editorial columns that military men should remain silent on political and controversial matters". Ottawa Journal, December 20, 1971.

² See II, 15, footnote 1, supra.

But what it does mean, of course, is that future amendments to the NDA will have to be interpreted in light of the Bill of Rights, and draftsmen of these amendments will need to bear this in mind.

... and in particular, no law of Canada shall be construed or applied so as to:

- (a) Authorize or effect the arbitrary detention, imprisonment or exile of any person. Any member of the CF can be arrested if he is caught committing or is suspected of having committed an offence under the Code of Service Discipline.¹ Any officer of the Canadian Armed Forces can arrest, or order arrested without warrant any man, any officer of equal or lower rank, and any officer of higher rank "who is engaged in a quarrel, fray or disorder".² Similarly, any man of the CF can without warrant arrest or order arrested any man of lower rank, or any man of equal or higher rank involved in a quarrel, fray or disorder.³ Arrests with warrant can also be made of course, in a similar manner to arrests with warrant under a civilian authority, except that service warrants must be especially endorsed by the issuing authority if the person to be arrested is of higher rank than himself.⁴ Persons

¹ NDA, s.132.

² NDA, s.133(1).

³ NDA, s.133(2).

⁴ QR&O, 105.11.

arrested are either held in close custody (under guard), or open custody, which means curtailment of certain privileges but not under guard.¹

While a serviceman can be arbitrarily detained or imprisoned for up to 24 hours, he cannot be illegally imprisoned, a right often associated with Forret's Case,² in which a habeas corpus was obtained on the grounds that the imprisonment had not been confirmed by the convening authority.

A serviceman cannot be arbitrarily exiled, but that is not a recognized punishment under either the Criminal Code or the Code of Service Discipline, so he has the same right in this instance as a civilian.

- (b) impose or authorize the imposition of cruel and unusual treatment or punishment. Cruel and unusual punishments are certainly not authorized by the National Defence Act, nor are they expressly forbidden. In any event, the courts are not likely to intervene. In a 1919 case,³ a court martial sentenced a soldier to nine months imprisonment with hard labour after finding him guilty of drunkenness. An application for habeas corpus was denied even though the New Brunswick Superior Court thought the evidence questionable and the punishment too severe.

¹ QR&O, 105.01.

² (1844), 39 Eng. & Emp. Digest 430.

³ Ex Parte John Fagan, 32 C.C.C. 41.

Although cruel punishments outside of the authority of the NDA would be most unusual in this age, unofficial punishments are not unknown. Occasionally, an officer may be denied bar privileges, usually for a previous over-indulgence, or a squad of men may be "doubled" (required to run) for talking in the ranks on parade. Mention can also be made of "push-ups", which are a quick punishment common in training establishments, and other such minor but unofficial punishments.

Although not particularly cruel, but perhaps unusual, is the use of reproof. This is not a punishment, it is rather like a suspended sentence although it does not appear as part of an individual's permanent conduct record. It is a notation for "conduct which although reprehensible is not of sufficiently serious a motive in the opinion of the commanding officer administering a reproof to warrant being made the subject of a charge and being brought to trial".¹ The record is enclosed with a person's documents for twelve months, after which it is removed and destroyed. A reproof can be given to an officer, or a man above the rank of sergeant - a sort of paper Sword of Damocles.

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention. Under the Code of Service

¹ QR&O, 101.11(2).

Discipline, the committing authority is required to deliver an account in writing of the reason for the arrest at the time the person arrested is placed in custody, or at least within twenty four hours, to the guard or custodian.¹ The guard or custodian, if requested by the person arrested, is required to give him a copy of the statement showing the reason for his arrest.²

Therefore this clause of the Bill of Rights is satisfied.

(ii) of the right to retain and instruct counsel without delay. Whether a serviceman is given this right depends on whether he is to be tried summarily or tried by court martial. An "assisting officer" of his choice, if available, will be provided to assist him in preparing his case for a summary trial,³ but no provision is made for him to retain legal counsel at a summary trial, and in practice it is not allowed. However, it has been established that the accused can at a summary trial consult counsel about the legality of arrest or detention, or instruct counsel to apply for a writ of habeas corpus.⁴

¹ NDA, s.136(2).

² JR&O, 105.17.

³ JR&O, 108.26. Discussed under McRuer's sixth right in III, 52, supra.

⁴ Re Walsh and Jordan (1962), 132 C.C.C. 1.

An officer with legal qualifications may be supplied if the accused is to be tried by court martial, although he may, if he wishes, retain legal counsel.¹

(iii) of the remedy of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful. The NDA requires that a person held in custody must be tried by summary trial or court martial before the ninth day.² Otherwise a report must be made by his CO to the authority empowered to convene a court martial explaining the circumstances for the delay. This may be repeated until the twenty-eighth day, when the person being held may petition the Minister of National Defence to be released or accorded a trial. In any event if the Minister has taken no action within ninety days, he is entitled to be released "unless the Minister otherwise directs". Thus the remedy of habeas corpus is, ipso facto, provided to a serviceman without the necessity of application to the courts for the writ.

There is no reason why a serviceman can not seek a writ of habeas corpus for release from military custody, but this has so seldom been done in the history of Canadian military law that one case stands out as being remarkable. In a 1945 case, LeBel, J., granted the writ for the release of a sol-

¹ QR&O, 111.60. Discussed in III, 53, supra.

² NDA, s.137(1).

dier from military custody.¹ The judge decided that the military tribunal had lost its jurisdiction through having failed to hold the investigation for over two months while the applicant was held in close arrest.

Hence it appears that a member of the armed forces can exercise his common law right to the writ of habeas corpus. That the writ extends to civilians wrongfully tried before a court martial there can be little doubt since Wolfe Tone's Trial in 1798.² Tone, an Irishman, was found guilty of high treason and sentenced to death by a court martial in Dublin. Habeas corpus was issued on the grounds that he was not a member of His Majesty's Forces.

- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards. A serviceman cannot be compelled to give evidence against himself without the presence of counsel or advisor. Regulations require that he be given the following warning even before a charge is laid: "Before you say anything relating to any charge which has been or may be preferred against you, you are advised that you are not obliged to say anything, but anything you say

¹ Rex. v. Thompson (No. 1). See IV, 96, supra.

² 27 State Tr. 613.

May be taken down in writing and may be used as evidence.

Do you fully understand this warning?"¹

A person appearing as a witness before a summary trial or a court martial is required to answer questions put to him,² and if he refuses to do so is liable to imprisonment for up to two years. Witnesses at service tribunals are not specifically denied counsel, although it would be unusual for a witness to retain counsel, unless, of course, he happened to be the accused. There would probably be no objection to any other witness retaining counsel especially if he knew or anticipated that he, too, would be the accused at a subsequent court martial in the same case. Despite the foregoing, a witness at a court martial or a summary trial can be compelled to give evidence. Presumably the admissibility of his evidence on the grounds that it was self-incriminating could be argued before the court by his counsel or legal advisor.

- (e) deprive a person of a right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. This proposition has

¹ QR&O, 101.12(3).

² NDA, s.108(2)(d).

been examined in detail under McRuer's sixth freedom,¹ and will not be further investigated here.

- (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, or of the right to reasonable bail without just cause. Unless specifically denied, a man's common law rights persist under the National Defence Act. Under the Act, a person's guilt must be proved beyond a reasonable doubt.² The "fair and public hearing" requirement is met under the standard court martial procedure, with exclusion of the public under certain circumstances.³ The requirement is not necessarily met at a summary trial, where space limitation may be a factor. This concept of public attendance was more fully explored under McRuer's sixth freedom.⁴ The independence and impartiality of commanding officers at summary trials is probably less than

¹ III, 39, supra.

² At a summary trial, the CO is required to "consider whether it has been proved beyond a reasonable doubt that the accused committed the offence...". (QR&O 108.32). At a court martial, "the court shall...find the accused not guilty, unless it concludes that the evidence proves beyond reasonable doubt that the accused:

(a) committed the offence charged; or
 (b) attempted to commit the offence charged; or
 (c) committed a related or less serious offence..."
 (QR&O, 112.41).

³ NDA, s.157.

⁴ III, 57, supra.

the independent impartiality of the members of a court martial, but it is difficult, if not impossible to assess this difference because of lack of available information. The aspects of so-called "command influence" were examined earlier.¹ If the accused suspects bias or predisposition, he has a virtually unlimited challenge for cause, but court members will still always be military officers. There is, at least under existing regulations, no way that civilians can sit as members of a court martial. If, as proposed in this paper, the accused were to have at least some non-officers on the court, he might feel the court less predisposed toward his case. It is not until the appeal stage that his case will be reviewed by civilian judges.

Service tribunals, generally, will lack the experience and expertise of civilian judges, whereas the ordinary courts are expected to be independent and impartial. Nonetheless, lawyers may try to get civil or criminal cases before judges known to be favourable to cases similar to their clients', but, still, the independence of service tribunals is probably less than that of civil courts. Impartiality of either may be more a myth than a fact; no human is without prejudice and courts, as well as service tribunals, consist of humans.

As to bail, there is no provision for it under the National Defence Act, unless of course, the member is incarcerated

¹ III, 47, supra.

in a civil gaol, when he can be advanced the amount of his bail out of his own pay.¹ The granting of bail by a civil authority is usually at the discretion of the courts, and not usually considered to be a right.

In any event, for many minor offences under the NDA, the accused will not ordinarily be placed under arrest pending trial, or alternatively, he may be placed under "open custody", which implies restriction of privileges including leave, but not freedom of movement within his base or ship. He may be placed under arrest or "close custody", if in the opinion of the person investigating the offence, it appears necessary because of the man's condition, the seriousness of the offence, or it appears that he might attempt to escape.

In the service, a person may be discharged from "closed custody and placed in open custody, or released from custody", at the discretion of his commanding officer.² Although this is not bail, it does allow discretion to be applied as to custody. If a man should desert, or go absent without leave pending his trial, the penalties can be up to five year's imprisonment on conviction,³ besides forfeiting all of his

¹ CFAO 208-4 details payment of fines imposed by civil courts.

² QR20, 105.29.

³ NDA, s.78.

pay for the time he is absent.¹ This can be considered similar to forfeiting bail for failure to appear at a criminal trial.

- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted. In the CF, languages other than the two official languages, English and French, are not acceptable, as every person in the Forces must understand either French or English.²

Provision is made for the provision of an interpreter at court martial proceedings,³ and the accused has the right to object to the choice of interpreter. Although not stated, it is presumed that an interpreter would be provided for any language rather than just French and English, for instance if a civilian witness were to be called who spoke neither French nor English.

The right to an English or French interpreter is extended to summary trials as well as courts martial, for those giving evidence.⁴

¹ QR&O, 103.23, Note (A).

² CFAO 111-1(3) states, in part, "Court martial proceedings shall be conducted in the English or French language...".

³ QR&O, 112.18, 112.19.

⁴ CFAO 111-1(4) states, "any person giving evidence before a service tribunal shall be heard in the official language of his choice and interpreters shall be provided as necessary."

It is felt that this item in the Canadian Bill of Rights has been accommodated through CF regulations.

The second measurement of the National Defence Act, using the Canadian Bill of Rights as a yardstick, has exposed the Act to comparison with additional basic freedoms not included in the McRuer Report, despite the incisive nature of the Inquiry. The Bill does cover some areas not specifically included in McRuer's list, such as discrimination, access to habeas corpus, the right to property, freedom of the press, safeguards against exile, freedom from cruel and unusual punishment, and the right to bail and assistance of an interpreter. Despite this it gives specific emphasis to only one "principle of fundamental justice", i.e., right to a fair hearing.

The Inquiry into Civil Rights, devoted considerable space to defining the "principles of natural justice", and listed nine procedural criteria which should be followed at any inquiry, investigation, hearing or trial, and also provided eight characteristics of an ideal court, the emulation of which was urged on all bodies making administrative or judicial decisions.

The McRuer Report was specifically intended to improve the performance of statutory bodies acting under the laws of Ontario and, therefore, its application is much narrower than the Canadian Bill of Rights which is applicable to all federal legislation, although Part 1, Section 1 could apply to any person or body making decisions affecting the rights of other persons. Furthermore, the McRuer Commission does not dwell on the application of its rules to the Criminal Code, whereas Part 1, Section 2

of the Canadian Bill of Rights is particularly, although not exclusively, applicable in that regard.

Some sections of the Code of Service Discipline are administrative in nature, and others bear an almost exact similarity to sections of the Criminal Code. The summary trial is more an administrative tribunal than a court of justice, whereas the court martial has a strong resemblance to a criminal court. For these reasons it has been appropriate to use both the McRuer Report and the Bill of Rights as standards against which to judge the National Defence Act.

It is thus possible to make at this juncture a generalized evaluation of the NDA. The summary trial falls far short of the ideal court, although recent changes to the Act have improved its status by formalizing the procedural aspects.¹ Despite this, proper counsel for the accused is still denied, records are not kept, the rules of evidence need not be followed, public attendance is not usual and a review through a separate court has not yet been achieved. In the next chapter, a number of proposals are made respecting the summary trial and in limiting the scope of its application.

The court martial resembles much more closely the ideal court and, although it is different in some ways, does in fact guarantee the accused some safeguards not normally available before the criminal courts. For an instance, the offender receives a free copy of the transcript, and every conviction carries with it an automatic right of appeal to a separ-

¹ QR&O, 108.29 lists the general rules for summary trial by commanding officer. Similarly QR&O, 108.13 applies to trial by a delegated officer and QR&O, 110.05 applies to trial by a superior commander.

ate civilian court, and if there is a dissenting opinion on a point of law in that court, as of right to the Supreme Court of Canada. Even if there is no dissenting opinion, an appeal by leave of the Supreme Court is available, not dependant upon the nature of the offence or the severity of the punishment. In any event, if no appeal is made, an automatic review is made by the Judge Advocate General. Further advantages which a serviceman has over a civilian are that time spent in prison pending appeal must be counted towards fulfilment of punishment, and the appeal cannot result in a greater punishment being awarded.¹ Finally, not just the court, but the judge advocate as well as the prosecution are charged with ensuring that the accused is accorded fair and just treatment.²

Despite these additional safeguards which a military accused has over his civilian counterpart the court martial has some shortcomings which should be eliminated. For instance, the serviceman is not judged by his peers, he is sentenced by a court which lacks legal training, and he cannot be granted bail. It is this author's contention that the serviceman is in fact subject to two "criminal codes" and he should therefore have not only the same protection as a civilian, but should have additional safeguards as of right.

Some of the proposals made in the next chapter, if followed up and enacted into the NDA and reflected in the Queen's Regulations and Orders, provide those safeguards.

¹ NDA, s.184. One of the proposals made in this thesis is suspension of confinement pending appeal. See V, 141.

² See III, 55, supra.

Furthermore, a member of the forces may be inadequately paid, and has no means of negotiating an increase, his political activity is restricted and he can be summarily tried and punished by a partial authority without the right of appeal or of relief through the prerogative writs.

Proposed amendments to the NDA will at least partially correct these deficiencies.

V

PROPOSALS FOR CHANGE

Anyone who has read this far in hopeful anticipation that regulations concerning length of hair, wearing of uniform, drill and parades, saluting and other traditional customs of the service would be examined in a critical light, is sure to be disappointed. These are considered to be conditions of service, assumed under contract similar to contracts or conditions of employment in civilian life in many service industries such as food handling, public transportation, police forces, etc, which place restrictions on length of hair and require wearing of uniform under specific regulations.

Notwithstanding that some European countries allow servicemen to grow long hair - and require that they use hairnets¹ - it is pointed out that these servicemen are largely conscripts and, as reluctant soldiers, concessions have been made to them so that their "civil liberties" are as little affected as possible.²

Such "civil liberties" do not come within the scope of basic freedoms and rights as defined either by McRuer or the Canadian Bill of Rights and will not come out as specific proposals for change, except where, incidentally they may occur as fall-out from other proposals.

¹ Notably, Sweden and the Netherlands.

² Before leaving this subject, changes are nevertheless being made in the CF. The author can recall when only a shadow of hair was allowed to show below the cap. The latest regulations allow sideburns "which shall be straight-cut and shall not exceed mid-ear in length". (Canadian Forces General Message 271 of 31 December, 1971).

It is evident from the examination of the National Defence Act and its regulations which has been carried out in the previous two chapters that the shortcomings are mainly procedural and that most of these shortcomings are in the summary trial procedure. A number of proposals affecting summary trials will be made later in this chapter, but let us first look at the other freedoms and rights. Having measured twice, it is intended to "cut once" by gathering together related freedoms from both the McRuer Commission Report and the Canadian Bill of Rights, in order to show the extent to which a Canadian citizen gives up his rights and freedoms on enlistment in the Canadian Armed Forces and to equate that reduction in freedom to military need.¹

Freedom of religion in the Canadian Forces is subject to the exigencies of the service,² but perhaps servicemen are not more restricted than persons employed in police and fire services, public transportation and public utilities. Most religions allow for dispensations where employment interferes with religious obligations. Conscientious objection to military service on religious grounds cannot apply in a volunteer service, but could be tested in the courts during periods of obligatory service.

Thus, even though attendance at some parades in which religious observances form a part is compulsory, servicemen are considered to have reasonable freedom to practice, or not to practice, religion. No changes are proposed.

¹ As indicated in I, 11, supra.

² McRuer (1) and B of R.1, (iv) and 1., (c) as examined in III, 21 and IV, 85, supra.

Discrimination on the basis of race, national origin, colour, religion or sex does not appear, from information available, to be an issue in the Canadian Forces.¹ In fact, there is less discrimination after enrolment in the CF than in other sectors of Canadian society, and where discrimination has been known to exist in the CF steps are already being taken to act upon all, or almost all of the six recommendations made in the Report on the Status of Women.² No proposals are made herein concerning other forms of discrimination, as it is believed that the NDA or its regulations cannot be construed as to infer discrimination as to race, national origin, religion or colour.

Freedom of expression has some limitations, but only slightly more so than in the civilian sector.³ Civilians and servicemen alike are governed by the laws against obscenity, sedition and libel. Servicemen may have further restraints applied against freedom of speech concerning government policy, but so do public servants generally. As a parallel, an outspoken critic of company policy in the industrial sector would soon find himself without a job, and possibly the centre of union-management discussion.

Any constraints placed on the serviceman in this regard are considered acceptable and no recommendations for change are being put forward.

¹ B. of R, 1, as examined in IV, 83, supra.

² See IV, 86, supra.

³ McRuer (2) and B. of R.1., (d) and (f), as examined in III, 24 and IV, 100, supra.

Freedom of assembly and association is not denied any serviceman,¹ although he frequently is subject to some limitations during wartime, or in overseas postings. Freedom of assembly has restrictions, within the bounds of the law, when he is off duty; however he does not have freedom of assembly when he is on duty, as he is required to be in a given place at a given time, with sanctions if he is not. Moreover, unlawful assembly can be interpreted as conspiracy under the National Defence Act.²

Like a civilian, a serviceman is "known by the company he keeps" and anyone who associates with suspected or known subversives, criminals, sexual deviates or narcotics users is obviously suspect himself. The serviceman often has access to classified information and could find himself in the dilemma of being threatened with exposure by subversive elements unless he were to divulge information. This could be a danger to the state and its security.

It is not considered that any amendments be made to existing legislation or specifically, to the Official Secrets Act, and it is considered that the serviceman has freedom of assembly and association within the bounds of state security and public morality.

Security of person and freedom of movement³ are rights which the

¹ McRuer (3) and B. of R.l., (e), as examined in III, 29 and IV, 100, supra.

² QR&O, 103.14, Note (A) reads, "to constitute the offence of conspiracy under the Code of Service Discipline, there must be a combination of two or more persons who have agreed and intend to accomplish an unlawful purpose, or by unlawful means a purpose not in itself unlawful".

³ McRuer (4) and B. of R.l., (a) as examined in III, 32 and IV, 91, supra.

serviceman enjoys, although with some qualifications. Security from physical danger in peacetime is encouraged by active programs such as accident and fire prevention, and safe driving campaigns. The service has much more control of the safety of a serviceman while he is on duty than when he is off duty. It is believed that the safety record of persons on duty in the CF compares favourably with equivalent occupations in the civilian sector, but that even in peacetime, servicemen may be called upon to perform duties for the public good which involve personal danger. Such duties as aid to the civil power, search and rescue operations and forest fire fighting are examples of this. In wartime, security of the serviceman's person is obviously of second importance to military objectives - it cannot be otherwise, or the viability of a fighting force is in jeopardy. Changes in concept are difficult to envisage.

Financial security in the lower ranks is not good, and forces many to engage in "moonlighting", and in many instances wives also must find full or part time employment. Although the pay raises of October, 1971, helped considerably in raising Forces incomes closer to that in equivalent grades in the public service, it has not, in some instances, yet reached parity with that body, nor is there any guarantee that it will in the future. The concept of parity is a difficult one. On the plus side are the so-called military fringe benefits such as free medical care and early retirement. On the minus side are intangibles such as domestic instability because of the requirement for mobility, and at times, being involuntarily exposed to danger in line of duty. What results is really an "equivalent" income.

It is proposed that the equivalent income for anyone in the CF be at least above the poverty level as established by the Special Senate Committee on Poverty.¹

Freedom of movement is not really subject to any more constraints off-duty than those to which a civilian would be subject, when employed in public service. The entitlement to 30 days paid leave each year, with leave for travelling time provided in addition, is not accorded to public servants and to few, if any, employees in the private sector. This is considered ample compensation for leave on occasion being subject to recall, or being granted "subject to the exigencies of the service".

A serviceman's contracted period of service is restrictive,² but he can resign voluntarily, within certain conditions. These conditions may or may not involve some financial penalty with regard to pension, depending on years of service.

The right to vote and to be a candidate for elective office³ are really two facets of political participation. The serviceman not only is encouraged to vote, but, as with public servants, he is given time off, as requisite, to cast his vote. In federal elections, special

¹ The Committee's report, Poverty in Canada, set the poverty line for a single person at \$2,140. For a family of four, the figure is \$5,000.

² Currently, the initial engagement for a man is five years, after which he may, if mutually desirable to both himself and the service, acquire "career status" and engage for an indefinite period, which would be compulsory retirement age (CRA) unless terminated sooner. An officer engages for an indefinite period until CRA.

³ McRuer (5) as examined in III, 37, supra. The Canadian Bill of Rights does not specifically address itself to this right.

arrangements are made for a servicemen to vote in an advanced poll, and to choose the constituency in which he wishes to register his vote. The right to vote is considered to be safeguarded.

The right to be a candidate for elective public office is specifically denied to a serviceman.¹ The theory behind this is presumed to be the wish to separate policy making from policy enforcing, probably based on an instinctive, but seldom expressed, apprehension in a civilian oriented parliamentary system, that the military by democratic means, by influence, or by force, will usurp the civilian government. It is also conceivable that a political speech could criticize defence policy expressing dissent from within. Thus civilian control of the military is reinforced by denial of a basic democratic right.

A Federal public servant can run for elective office, on leave of absence without pay.² If elected, he "thereupon ceases to be an employee".³ If he fails to be elected he has a job to fall back on.

At the present time, members of the CF must resign before accepting a candidature for political office. It is recommended that the regulations which apply to civil servants be made to apply to members of the CF, ie, it is proposed that a member be allowed to run for political office on leave of absence, with the understanding, and requirement, that he must resign if elected.

¹ QR&O, 19.44.

² Public Service Employment Act, RSC (1970), c. P-32.

³ Ibid., s.32, (5).

The right to fair...procedures, in accordance with the principles of natural justice.¹ When McRuer's standards of natural justice and court characteristics are applied to military tribunals, summary trials come off second best to courts martial.

The summary trial is a necessary means of enforcing the National Defence Act, but the scope of punishment should be more restricted.

Imprisonment for even a few days is an infringement on the right of liberty and freedom of movement, and it should not be imposed by a non-judicial tribunal. Non-commissioned officers (NCO's), which means men of and above the rank of corporal, already have the right to elect trial by court martial if the offence is of such a nature that detention could be awarded.² It is proposed that all men have the right to elect trial by court martial if the offence is such that the punishment of detention or imprisonment could be awarded. Stoppage of leave is not considered to be in this category because the individual concerned still has freedom of movement within his base or ship. Punishments of fines, reprimands, extra work and drill, and caution would still remain a prerogative of the CO at a summary trial.³

The summary trial is certainly not an ideal court, but the realities of service life must be considered. Obviously courts martial could not

¹ McRuer (6), and, partly, B. of R, l., (b), 2(c)(i), 2(c)(ii), 2(d), 2(e), 2(f), as examined in III, 39 and IV, 92, 104, 105, 107, 108, 109, supra.

² QR&O, 108.31 (1)(b).

³ The punishments which a CO may award, and the restrictions placed on the award of these punishments, are detailed in QR&O, 108.27 and Table. A summary of all punishments which can be awarded under the NDA is provided at Annex C.

be convened for every minor infraction of the Code of Service Discipline, not the least reason being limitations on the numbers of available service legal officers.¹ Furthermore, the maintenance of discipline in isolated locations or on ships at sea would become most difficult without the authority of the summary trial to enforce the Code. Some procedural changes would improve the quality of summary trials, but these changes could never bring the process up to the standard of a court martial proceeding.

Reduction in rank² is a severe punishment, and in the long term can have serious financial implications affecting not only the man, but also his dependents. It is, of course, only applicable to NCO's, and its application is subject to approval by higher authority. Almost without exception this approval is given, which makes its award subject to a CO's discretion. In the interests of justice, this punishment should not be awarded at a summary trial, but only through court martial proceedings. It is recommended that the punishment of reduction in rank be deleted from the list of punishments which can be awarded at a summary trial.

McRuer, in his characteristics of courts of justice, stresses the independence and impartiality of the presiding judge.³ This can be lacking at a summary trial if the presiding officer is trying a case for which he is a witness. The regulations do not now even allow him to have

¹ See III, 53, footnote 2, supra. In 1971, there were 67 courts martial. Interview, January 24, 1972.

² QR&O, 108.27, Table, item 2.

³ Inquiry, 47, as examined in III, 49, supra.

the case tried before another authority under these circumstances, unless he considers his powers of punishment to be inadequate, or he lacks jurisdiction because of the rank of the accused.¹

It is proposed that a third qualification be added which will disqualify a CO from trying any case in which he is a witness.

When McRuer's standards of natural justice are applied to the summary trial, it appears to have several rectifiable shortcomings.²

First, the "assisting officer" at a summary trial assists the accused in the preparation of his defence and advises him about witnesses and evidence, but he is specifically precluded from participating in the trial,³ although the CO is required to "ask the assisting officer to state any fact that should be brought out in the interests of the accused".⁴ Although it would be unusual for the assisting office to have legal training, nonetheless he will almost invariably have a superior education to the accused, and will usually be more familiar with the regulations.⁵

¹ QR&O, 108.29(1) states "Before a commanding officer convenes a summary trial, he shall peruse the charge report to determine whether he is precluded from trying the accused:

- (a) by reason of the accused's rank or status; or
- (b) because the commanding officer considers his powers of punishment to be inadequate having regard to the gravity of the alleged offence."

² As examined in III, 39, supra.

³ QR&O, 108.26, Note (A) states, in part, "... the assisting officer is not normally permitted to take part in a summary trial ...".

⁴ QR&O, 108.29(h).

⁵ A knowledge of the National Defence Act and its regulations is normally part of an officer's training curriculum.

While it is not proposed that the assisting officer act as a defence counsel at a summary trial, it is proposed that he not be specifically precluded from participation at a summary trial. For example, the assisting officer should be able to question witnesses on behalf of the accused, although he would find himself in a difficult position if he wished to object to questions being asked by a prosecutor, who is also his commanding officer.

As part of his sixth right, McRuer emphasizes that "a right of appeal is well recognized as an essential part of every judicial system."¹ Little fault can be found with the court martial appeal system, as a service offender has a broader right of appeal than his civilian counterpart.

Perhaps the greatest shortcoming of the summary trial is its lack of a proper appeal procedure. The grievance procedure does allow a review,² but as records of the trial will in all likelihood be non-existent, a review of the reasons for the decision is most difficult, as is a review of fact or mixed fact and law.

Notes of the evidence given and reasons for the decision at summary trial should be required, to enable review of decisions to be properly made by the grievance procedure. Tape recordings of summary proceedings could be taken and kept for a specific period, of say, one year, after which review would not be available. Furthermore, an opening for judic-

¹ McRuer (6)(viii), as examined in III, 68, supra.

² Loc. cit.

ial review via certiorari should be possible, particularly in cases where jurisdiction had been exceeded.

It is therefore proposed that summary records be kept of the proceedings at summary trials.

The grievance procedure, as a means of redress, appears simple and straightforward, and the process is easily understood by the rank and file who may wish to use it. However, it is open to criticism in that the channel for review is not independent and, in fact, the first step is back through the authority which handed down the decision being contested. Furthermore, an authority responsible for making or implementing policy may not be the best judge of a complaint against that policy.

Application for redress of grievance can only be made by one person about an alleged injustice to himself.¹ He may not complain on behalf of any other person or persons, nor may any servicemen complain as a group, as this could, under certain circumstances, be construed as mutiny, or as an offence related to mutiny.² Therefore the redress of grievance procedure does not allow for collective complaints.

The grievance procedure, although apparently simple and readily available, is generally used only when a serviceman truly believes he has been aggrieved, as he may feel that its use carries with it a stigma which could have an adverse bearing on future postings and career prospects.³ However, this facet is probably more perceived than real.

¹ QR&O, 19.26(1) begins, "if an officer or man thinks that he has suffered any personal oppression, injustice, or other ill-treatment...".

² See III, 20, footnote 2, supra.

³ Interview, January 10, 1972.

Alternative systems for processing grievances have been used by other countries' armed forces. Chief among them is the appointment of a military ombudsman. Sweden is the pioneer in this field, having established her Militieombudsman in 1915.¹ He is an officer of Parliament and particularly appropriate in a country which has long had compulsory service and has no courts martial in times of peace, this latter function being carried out by the civil courts. He performs very much like the traditional ombudsman in that he investigates any matter which comes to his attention, and although he cannot alter decisions, he can bring pressure to bear by recommending action in his annual report to Parliament.

Norway followed, in 1962.² However, her military ombudsman is chairman of a seven-man board and although complaints can be considered from officers and men "which are not required by other regulations to go through service channels" the board deals largely through servicemen's "representative committees".

West Germany established a military ombudsman in 1957.³ He "acts for the protection of the basic rights [of servicemen]"; and as an auxiliary body of the Bundestag in the exercise of parliamentary control. He is governed by complicated and detailed procedures, but, generally

¹ Described more fully by Hugo Henkow, "The Ombudsman for Military Affairs", in Rowat, The Ombudsman (Toronto, 1968), 51.

² See Arthur Ruud, "The Military Ombudsman and his Board" in The Ombudsman, 51.

³ See Egon Lohse, "West Germany's Military Ombudsman" in The Ombudsman, 119.

speaking, he functions like his Scandinavian counterparts.

In Finland, servicemen have had access to the civil ombudsman since 1933, but this has not been an effective channel for complaint.¹ All Danes, military and civilian have access to their ombudsman.²

One thing which all of these countries have in common is that conscripts make up a large portion of their armed forces, and basic rights are thus not voluntarily given up on induction.

A second system of registering military grievances is through the inspector-general system. This is not a new idea to the Canadian Forces, as inspectors-general were introduced into the Canadian Army early in this century, and the RCAF instituted the office during World War II, but these systems were abandoned after the war. Currently, an inspector-general complaints system is operating in the US Army "for the basic purposes of correcting injustices affecting individuals and of eliminating conditions determined to be detrimental to the efficiency or reputation of the Army."³ Both military and civilian personnel on duty with the Army have access to the inspector-general at any time, without going through channels, although they are encouraged to first talk the problem over with their commanding officers. Disciplinary action against a complainant is expressly prohibited.⁴ Anonymous complaints are accepted

¹ Paaro Kastari, "Finland's Guardians of the Law", in The Ombudsman, 65.

² See Miss I.M. Pedersen, "Denmark's Ombudsman", in The Ombudsman, 78.

³ United States, "Inspector-General Activities and Procedures", U.S. Army Regulations (Washington, 1968), 20-1.

⁴ Ibid., para 3-3(d).

and acted upon, although not all complaints need be accepted, and they may be oral or written. There is, normally, an officer of the inspector-general branch on each base, and every man must have access to him at least once a quarter. An appeal can be made against action or inaction on the part of an inspector-general, by writing to an inspector-general of higher authority.¹

Although attractive, the military ombudsman system is not considered suitable for the Canadian Forces. In the first place, in view of the reluctance of the federal government to appoint a civilian ombudsman, it seems unlikely that the necessary amendment to the NDA allowing a military ombudsman would be possible, at least for a considerable time. In the second place, a military ombudsman would further undermine the chain of command so that senior officers would become out of touch with problems and developments at the lower levels.

The inspector-general system would not be an innovation and could be re-established within existing legislation. Besides hearing complaints, he would inspect units and bases and contribute to the overall efficiency of the CF by making independent recommendations for improving procedures and methods, and evaluating results by comparison with the uniform standard. He would take up complaints with the commanding officer, or higher authorities as necessary, and would not necessarily by-pass the chain of command. This would provide a satisfactory alternative to the redress of grievance procedure. Critics of the inspector-general system in the United States have pointed out that it tends to by-pass the traditional

¹ Ibid., para. 3-11.

grievance procedure through the chain of command,¹ but that its mere existence has a purgative effect in getting action on complaints fed into the more usual channels, for lack of action could be the basis for a complaint to the inspector-general. Further, commanding officers are well aware that the number of complaints to the inspector-general is often used as a gauge of performance.

It is therefore proposed that an inspector-general system be re-established within the Canadian Armed Forces as an alternative and in addition to the grievance procedure.

Perhaps it would be appropriate to embark at this point on a short aside about trade unions.

The existence of unions in the armed forces of six European countries,² has aroused the interest of other nations, including Canada. Although negotiations about pay scales and establishments are the prime purpose of unions, grievances about conditions of service and matters of discipline are also matters in which unions have become involved on behalf of members. Thus, if unions should ever be accepted for the Canadian Armed Forces, it is difficult to imagine that matters of service discipline would not, at least, become a matter for discussion.

Two countries which have unions in the armed services will serve as examples. Sweden has separate unions for officers, NCO's and men and

¹ William M. Evan, "The Inspector General in the US Army" in The Ombudsman, 147.

² Sweden, West Germany, Austria, Netherlands, Denmark and Norway, according to Colonel H.A. Carswell, The Application of Collective Bargaining to the Canadian Armed Forces. Unpublished National Defence College Paper, April, 1971.

these unions safeguard not only financial interests but also general welfare.¹ Members have the right to strike, and the government has the right to lock-out.

The German Federal Armed Forces Association was organized in 1956, and 80% of service personnel now belong to it. It is concerned about the ideological, social and professional interests of its members. It does not interfere in purely military matters and has rejected the right to strike. Ten years later, the Public Service and Transport Workers Union gained the right to represent servicemen, in addition to the Association.² This union is dedicated to reforms in professional officers' careers, promotion procedures for officers and men, and pension, financial and social benefits, and has a grievance procedure with respect to these matters.

Trade unions for the armed forces have some advocates in Canada, particularly Claude Edwards, President of the Public Service Alliance, who seems determined to gather the Forces into his union.³ It seems difficult to imagine the legal right to strike being extended to the Canadian Armed Forces, as in Sweden. More likely, the members of the CF would have to be "designated", which is a euphemism applied to certain public servants categorized as essential in an emergency and denied strike.

¹ Ibid., 7.

² Ibid., 6.

³ In January, 1970, he said, "We must seek amendments to the Public Service Staff Relations Act that would extend the right of collective bargaining to members of the Armed Forces of Canada." 42 Civil Service Review (March, 1970), 12.

rights.¹ This could make a union, or unions, an attractive proposition for Canadian servicemen who, at the present time, depend somewhat on the benevolence of Treasury Board for pay increases. One of the traditional weapons which unions hold as a threat to employers is the right to strike but this right could never be allowed in a credible armed force because of the requirement that it be always available with predictable reliability.

If unions were to be introduced, a form of compulsory arbitration would be needed, instead of the threat of work stoppage through strike action. Furthermore, only pay and allowances could be made such a union's responsibility. Conditions of service including grievances and personal matters, would have to remain a service responsibility.

In this author's opinion a better alternative to unions in the Canadian Forces would be to follow the lead of the United States where pay (and benefits) of the armed forces is tied by legislation to that of the public service. Thus, when the public service unions negotiate a pay increase, they are in effect acting for the armed services. Such a system if adopted in Canada, would ipso facto provide pay equity with the federal public service, although special legislation would be required.

It is therefore recommended that the pay of the Canadian Armed Forces be tied directly to that of the public service.

If this were to be done, grievance procedures would remain within the

¹ Public Service Staff Relations Act, RSC (1970), c.P-35, s.79 defines "designated employees" as those "whose duties consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public".

military, unless, as at present, the prerogative writs allowed judicial interference after exhaustion of remedies or through loss of military jurisdiction.

Court martial proceedings come much closer to McRuer's ideal than do summary trial proceedings. A civilian legal counsel who was unfamiliar with military trials, would have little trouble adapting to court martial procedure. He would find the swearing of the members of the court to be unusual. Furthermore, at the close of the case for the prosecution, the accused may submit a motion that no prima facie case exists.¹ If the motion is denied, the accused proceeds to call witnesses in his defence,² and he will still have the opportunity to address the court after the prosecution, unlike a civilian proceeding. He also may address the court as to finding whether or not he has called any witnesses or produced any evidence,³ before the summing up by the judge advocate.

In addition to the foregoing, several other safeguards are given to an accused at a court martial proceeding. At a minimum, all rules of the civil courts are, by law, assured the accused.⁴ Before any oral question is put to him or written statement is accepted, he must be warned about his right to remain silent. This right has been part of

¹ QR&O, 112.05, (10).

² QR&O, 112.05, (12).

³ QR&O, 112.05, (18)(d).

⁴ NDA, s.129, says, in part, "all rules and principles from time to time followed in the civil courts in proceedings under the Criminal Code...are applicable to any defence to a charge under the Code of Service Discipline...".

the NDA for many years. There will have been a pre-trial investigation and a summary of the evidence against the accused will have been given to him in a "synopsis", so that he will be aware of the case which the prosecutor will present at his trial. This synopsis is not subsequently admissible as evidence by either the prosecution or the accused.¹

The judge advocate on the staff of the convening authority will determine if in his opinion a prima facie case can be made against the accused. Only then will the convening authority decide whether or not to go ahead with the trial.² The accused has the right to object to the president or any member of the court,³ although this does not assure removal, as it is subject to the decision of the court.

In any case, he is entitled to a trial within eight days after having been placed under arrest, or a report is required every eight days stating why it has not been possible to bring him to trial.⁴

After the trial an offender is entitled to a free copy of the transcript and he will be given a Statement of Appeal form,⁵ to appeal the severity of the sentence, the legality of the findings, or the legality of any or all of the sentence.

¹ QR&O, 109.02, Note (D).

² QR&O, 109.05.

³ NDA, s.163.

⁴ NDA, s.137.

⁵ He must receipt for the form, and the officer delivering the form must give him an explanation of his rights to appeal and method of entry. QR&O, 115.01, 115.02. CFAO 111-1 (43).

An offender has one year in which to petition for a new trial on the grounds of new evidence being discovered.¹

If the accused is found not guilty, the Minister of National Defence cannot appeal the finding to the Court Martial Appeal Court, but an offender can appeal a finding of guilty. Nor can the Minister request a new trial on the basis of new evidence being discovered which it is believed would convict an accused previously found not guilty.²

An offender under the National Defence Act can as of right appeal to the Supreme Court of Canada against the decision of the Court Martial Appeal Court, on any question of law on which there has been a dissenting opinion in that court, or by leave if there has been no dissenting opinion.³ This appeal to the Supreme Court of Canada does not depend on the nature of the offence or the severity of the punishment.

If no appeal from the decision of a court martial has been made before the expiry of the fourteen day period, the proceedings of the court martial are automatically reviewed by the Judge Advocate General, or an officer on his staff, to determine the legality of the findings and legality of the sentence.⁴

In any case, the Minister, the Chief of Defence Staff, and the convening authority may quash any finding of guilty, substitute a new find-

¹ NDA, s.211.

² NDA, s.56(1).

³ NDA, s.208.

⁴ NDA, s.211.

ing, or mitigate, commute or remit punishment,¹ but any new punishment cannot be higher in the scale than the previous punishment.

If the offender should be sentenced to death, the finding and sentencing of the court must be unanimous.² And a punishment of death cannot be carried out unless specifically approved by the Governor-in-Council.³

The punishment of dismissal with disgrace, or dismissal, requires the expressed approval of the Minister of National Defence, although when the offender is not an officer, and the punishment is dismissal, approval may be given by the Chief of Defence Staff.⁴

With all of the above safeguards available to an accused before, during and after a court martial it can be seen that he has some protections not ordinarily available to a civilian under the Criminal Code; however, some suggestions are proposed which it is believed would further improve the quality of Canadian military justice.

The right to have counsel present at pre-trial interrogation is not normally available to an accused person under the Code of Service Discipline. A 1967 decision by the United States Court of Military Appeals⁵ established that an accused person, under the Uniform Code of Military Justice (UCMJ), in addition to receiving the usual warning about his right to remain silent, and that anything he says may be used against

¹ QR&O, 114.15, NDA, s.180, QR&O 114.17, QR&O 114.27, NDA, s.184.

² NDA, s.168(5), (6).

³ NDA, s.178(1).

⁴ NDA, s.178(1).

⁵ United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967).

him, must also be warned of his right to counsel. In the United States Armed Forces, every suspect is provided with a military lawyer free of charge, or he may retain civilian counsel at his own expense¹ and the lawyer may be present during the pre-trial investigation.² Although legal aid can be provided to Canadian servicemen from within the Forces, it is under existing regulations specifically denied "in cases involving service discipline".³

Because a serviceman is not only subject to the ordinary laws of the land, but also to the Code of Service Discipline, it seems reasonable to provide him with additional safeguards when he is accused of violating the Code. Therefore, two proposals are made.

First, it is proposed that suspects under the National Defence Act should have the right to counsel during pre-trial investigation of charges which could lead to court martial.

Second, every accused person at a court martial should be provided free of charge with his choice of a defending officer, who has legal qualifications, if the prosecutor has legal qualifications.⁴ The accused's choice would be subject to the reasonable availability of the officer chosen. The convening authority would have the option of providing an alternative defending officer. The accused would have the alternative, as at present, of retaining civilian legal counsel at his

¹ UCMJ, art. 38(b).

² UCMJ, art. 32(b).

³ CFAO 56-5, 3a.

⁴ QR&O, 111.60 provides for a "defending officer", but does not specify whether or not he need have legal qualifications.

own expense,¹ and he is required to be advised whether or not the prosecutor is an officer having legal qualifications.² This proposal would not rule out disciplinary court martials being held in isolated locations, where a prosecutor need not have legal qualifications, and a judge advocate need not be appointed.³

Under the UCMJ, when an appeal is made before the United States Court of Military Appeals, the accused is provided with free legal counsel.⁴ This is a laudable safeguard and Canadian servicemen should have a similar right. It is therefore proposed that a legal officer, preferably of the offender's choice, be provided free of charge to appeal a case before the Court Martial Appeal Court, and also be provided if the decision of the CMAC should be appealed to the Supreme Court of Canada.

Under the UCMJ, all expenses of witnesses for the accused, both military and civilian, are paid for by the US government. Defence is only required to furnish a showing of materiality.⁵ Under the NDA, the attendance of witnesses for the accused whose presence is considered "frivolous or vexatious" can only be achieved if the accused agrees to pay all expenses "in advance".⁶ If at the trial the evidence of such

¹ Ibid., (6).

² QR&O, 111.51(d).

³ QR&O, 111.42, 111.41.

⁴ UCMJ, art. 70(c).

⁵ UCMJ, art. 46.

⁶ NDA, s.160.

a witness "proves to be relevant and material", then the president or convening authority is required to reimburse the accused for such expenses. This is considered a denial of right to witness, particularly for an accused who is impoverished. Determination of materiality of evidence to be given by witnesses should be ruled on beforehand, and all expenses for all witnesses should be assumed by the government.

Bail pending trial or appeal is not provided for under the NDA. Under the UCMJ, a sentence of imprisonment may under certain circumstances, be deferred pending appellate review,¹ and the decision to defer confinement is a discretionary one. The accused is not required to post any bail bond, but can be released on his own cognizance.

Under the NDA, an accused may be placed under close custody, open custody, or not be placed under custody, pending trial.² However, after being sentenced to detention or imprisonment such punishment "shall commence on the date upon which the service tribunal pronounces sentence upon the offender,"³ unless the Minister or an authority authorized by him, suspends the sentence.⁴ Thus, suspension of a sentence of imprisonment is discretionary and not necessarily connected with appeal.

It is proposed that suspension of confinement pending appeal be considered in every case, and that such suspension be at the discretion of the commanding officer of the accused. The commanding officer is the

¹ UCMJ, art. 57(d), art. 71.

² QR&O, 105.29.

³ NDA, s.176(1).

⁴ NDA, s.186.

person best able to judge whether the accused is likely to flee to avoid his sentence, or whether he is likely to repeat the offence if not confined.

Under the NDA,¹ a person tried and found guilty by court martial has up to one year to petition for a new trial on the grounds that new evidence has been uncovered. United States servicemen have up to two years to petition for a new trial on the grounds of newly discovered evidence or fraud on the court.² It is proposed that the period during which a new trial can be petitioned for on the basis of new evidence, be extended from one year to two.

The accused may raise objections to the president or other members of a court,³ and the court martial itself decides whether or not the objection shall be allowed, although the member objected to is not allowed to vote on the issue. Nonetheless, this is not the same as challenging members of a civilian jury, and the court martial can decide to overrule the accused's objection. If they allow his objection, an alternate member is provided from the list of alternate members.

Under the UCMJ, the accused has an unlimited challenge for cause,⁴ and he can demand that at least one-third of the court be enlisted men.⁵

¹ NDA, s.211.

² UCMJ, art. 73.

³ NDA, s.163.

⁴ UCMJ, art. 41(a).

⁵ UCMJ, art. 25(c)(1).

Furthermore, an accused can waive all members of the court and elect to be tried by a military judge alone.¹

Inasmuch as judgement of a man by his peers is as old as Magna Carta, this right should be extended to military law, and members of a court should include enlisted men if the accused so wishes. The UCMJ apportionment of one-third seems arbitrary, but so long as courts martial are to perform as both judge and jury, this may be a desirable limitation. It is proposed that when the accused is a man (not an officer), up to one third of the members of the court be men, if he so wishes. Starkman advocates that the judge advocate sit as president of the court,² which is an interesting proposal, except that, as presently constituted, he could be out-voted by the other members of his court, even though he might be right in law. But going on from this suggestion, it is proposed that the court martial sit as a jury, and that regulations be changed so that sentencing is done by the judge advocate.

This proposal could be achieved with a slight change to existing regulations. At present, the judge advocate may be directed by the president of the court martial to hear questions of law or of mixed law and fact either in the presence or absence of himself and the other members of the court.³ These questions include applications for adjournment, pleas in bar of trial, and all matter respecting the admissibility or

¹ UCMJ, art. 16(1)(b).

² Starkman, 442.

³ GR&O, 112.06(2)

inadmissibility of evidence. When sitting alone, the ruling of the judge advocate becomes, in fact, the ruling of the court,¹ thus a simple change to the regulations could exclude the president and members of the court from these determinations, by giving the president no option as to whether or not they would be present.

With regard to sentencing, under the existing regulations, the court closes to determine sentence, but the judge advocate is retained, "... to advise the court as to the legality of the sentence it has decided to pass and to guide the court as to the form in which that sentence is to be expressed."² Nothing about the sentencing is formalized, except the voting on the sentence, which starts with the junior member,³ and any statutory limitations on the severity of the sentence for any particular offence. In determining the severity of the punishment, the court is enjoined to consider the indirect consequences, the gravity of the offence and the offender's previous character.⁴ Having had some experience on courts martial, this author believes that sentencing is the most difficult part of the whole procedure, and is not a job which should be decided by amateurs voting, but rather should be done by expert deliberation. Therefore, sentencing should be done by the

¹ QR&O, 112.06(5).

² QR&O, 112.49 (Note A).

³ QR&O, 112.49(2).

⁴ QR&O, 112.50.

legally trained judge advocate alone.¹ If necessary he could remand the offender until all of the factors could be considered which would provide a suitable punishment within the statutory limitations.

The members of the court would thus more closely resemble a civilian jury, by limiting their duties to examining evidence and hearing arguments of both prosecution and defence, and determining guilt or innocence.

This proposal has received strong support in the United States where there are many more courts martial in a typical year than in Canada - in the order of about 82,000 in the US to 60 or so in our country. One writer is concerned that "first and foremost among the suggested deficiencies in the present sentencing system [under the UCMJ] is the fact that laymen are called upon to perform a function which veteran jurists admit they find to be one of the most vexing problems in the criminal law today."² He suggests that the law officer (equivalent to a judge advocate under Canadian procedure) be designated as the sentencing authority, and would have him preside at a separate pre-sentence hearing, subsequent to the court martial which determined the offender's guilt, and would give him wide discretion in tailoring a sentence to an individual's needs.

In the United States Forces, an accused may elect to be tried by a

¹ CFAO 111-1 (13) directs that, "the judge advocate appointed for any General Court Martial must be an officer of the legal classification". Officers of the legal classification are required for disciplinary courts martial, if available.

² Robert D. Byers, "The Court Martial as a Sentencing Agency: Milestone or Millstone?", 41 Military Law Review (July, 1968), 84.

single military judge. Under Canadian military law, such a court does exist, and it is called a Standing Court Martial,¹ although an accused does not have the option of election to be tried by such a court, nor is this being proposed because the summary trial, despite its drawbacks, still fulfils a useful purpose. The court consists of one military officer "who is or has been a barrister or advocate of more than three years standing". He may not try an officer who is senior in rank to him² nor award a punishment greater than imprisonment for less than two years.³ Unfortunately, his jurisdiction is severely restricted by the regulations at present to those offences which do not come under the jurisdiction of a summary trial.⁴

If, as proposed earlier, punishments of detention and reduction in rank were to be removed from the list of those which can be awarded by a commanding officer,⁵ then the number of disciplinary courts martial is bound to increase, and, unless changes to the regulations are made, minor punishments cannot be awarded.⁶

In order to provide an alternative to summary trial by a commanding officer, in cases where a CO is, or adjudges himself to be ineligible because of jurisdiction, power of punishment, or partiality, it is

¹ NDA, s.154.

² QR&O, 113.52.

³ NDA, s.154(2).

⁴ QR&O, 113.565.

⁵ V,124, supra.

⁶ QR&O, 111.36.

proposed that standing courts martial be given concurrent jurisdiction with commanding officers over offences heretofore denied. This will relieve disciplinary courts martial of much time-consuming work and be a step towards establishing a more uniform standard of justice. In addition a case law will be built up to which CO's, prosecutors and accused persons can refer. The regulations authorize eight standing courts martial,¹ which can hear cases whenever required and perform much like travelling circuit courts. It is felt that these will be much more useful and effective if jurisdiction is increased as proposed.

As has been described earlier it is possible and legal for a man who has been tried and acquitted by a service tribunal, to be subsequently tried for the same offence by a civil court, for the offences which are simultaneously covered by the Code of Service Discipline and the Criminal Code.² The risk of double jeopardy is inherently present. Further, should the serviceman be convicted by the service tribunal, and subsequently be convicted by the civil court for the same offence, the civil court is only required to "take into account"³ the punishment awarded by the service tribunal.

¹ QR&O, 113.54(2).

² NDA, s.61(1).reads, "nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court". It is to be hoped that we will follow the lead of the United Kingdom, where, since 1966, a civil court is debarred from trying a serviceman for an offence substantially the same as the offence for which he has previously been tried by service authorities. See Gordon Borrie, "Courts-martial, civilians, and civil liberties", 32 Modern Law Review (January, 1969), 41.

³ NDA, s.61(2).

Autrefois acquit and autrefois convict are established principles of common law, denied to members of the CF. Surely, civil control over the military in Canada is no longer a concern, particularly as the common courts have exclusive jurisdiction over murder, rape and manslaughter.¹ Therefore, it is proposed that section 61 (1) of the NDA be amended to remove the implications of double jeopardy.²

Conversely it is within the regulations to reduce a man in rank administratively upon conviction by the civil power,³ without trial, and without regard to the nature or seriousness of the conviction by the civil authorities, but only that the nature of the offence of which he has been convicted indicates that he is not fit to hold and exercise the authority of his rank.⁴ Furthermore, he is required to inform his commanding officer that he has been convicted by the civil power, effectively incriminating himself. Any reduction in rank can have serious implications on the professional and financial future of a man. This article is seldom invoked,⁵ and should be deleted as constituting double jeopardy. No man should be reduced in rank for an offence unless found guilty at a service

¹ NDA, s.60.

² See V, 147, footnote 2. Words such as the following could be added, "unless he has been previously tried by a service tribunal for an offence which is substantially the same as that for which it is proposed to try him in the civil court".

³ QR&O, 11.11.

⁴ QR&O, 11.11(2).

⁵ Interview, January 10, 1972.

tribunal, and therefore QR20 11.11 concerning administrative reduction in rank after conviction by the civil power, should be deleted.

Reversion and remustering for inefficiency is another matter¹ considered to be within the competency of service authorities, but at least in this case, regulations allow for him to be examined and reported on as to his lack of competence.

McRuer's seventh basic freedom is the right to have the ordinary courts presided over by an independent judiciary.² This right is available to every member of the Canadian Armed Forces and no changes are proposed.

¹ QR20, 11.10.

² McRuer (7), as examined in III, 79, supra.

CONCLUSIONS

This examination of the National Defence Act and its regulations, using the criteria of the McRuer Report and the Canadian Bill of Rights, has revealed twenty propositions which the author believes would add to the basic freedoms which a serviceman already enjoys, without jeopardizing military efficiency.¹ While an attempt has been made to be objective, it has been difficult to prevent twenty-six years of service as man and officer in Canada's armed forces from colouring judgement in the application of the chosen criteria. But perhaps a view from within by someone who has been both enforcer and enforced under the Code of Service Discipline, will establish an air of credibility to the manner in which the criteria have been balanced against the reality of everyday life in Canada's armed forces.

The proposals are each in need of further study, a task which rightfully belongs to the lawyers of the Judge Advocate General Division of the Department of National Defence. The National Defence Act is continually under review by these officers, who are our country's experts in Canadian military law. The NDA is an act of the Canadian Parliament, and like any legislation, it can be amended as the need arises; in fact it has had at least six major amendments since it was promulgated in 1950.

As advances are made in the justice of Canadian society, liberalization of our laws occurs, as exemplified by the extensive revision to the Criminal Code which took place in 1970. Military society and military

¹ For convenience, these proposals have been extracted from Chapter V and assembled at Annex A.

law must eventually follow the trend set by the civilian sector. This being the case, it seems likely that the proposals made in the previous chapter will eventually be incorporated in amendments to the National Defence Act and its regulations.

It is appropriate to speculate about the anticipated effects of these changes. First and most important would be the improvement in the quality of summary trials, by allowing a presiding officer to disqualify himself in cases in which he might be biased, by allowing participation by the defending officer and by requiring summary records. Further, reduction in rank would be deleted from the list of summary punishments and all men would have the right to elect court martial trial if detention could be awarded.

Even with these changes incorporated, the summary trial will not measure up to the ideals of justice as defined by McRuer, but it will continue to fulfill a necessary function in the management of a large well-disciplined force where effective controls must be available to punish minor breaches of discipline. The summary trial will remain, in this author's opinion, a reasonable balance between justice and expediency. Without it, the National Defence Act would be unworkable. Instituting the proposals which affect summary trials will make them no less effective, but will make them more consonant with contemporary standards than they are at present.

Second, since the Canadian Armed Forces has shown itself to be keenly interested in modern concepts of organization and management it should also demonstrate that it is interested in modern concepts of law. By programs of management improvement and the adoption of techniques such

as "management by objectives", planning programming and budgeting (PPB), and computerized information handling systems, the Department of National Defence has been a harbinger of the new techniques adopted by other departments of the federal government. In the field of management, the traditional authoritarian concept of military organization has moved towards acceptance of management by group consensus. This consensus is arrived at through persuasion and explanation (and even manipulation) because the individual's contribution to achieving the overall objective has been recognized. Commanders have become military managers and are now less concerned with the rigid enforcement of discipline than with maintaining morale and encouraging initiative. As Janowitz puts it, "the technology of warfare is so complex that the coordination of a complex group of specialists cannot be guaranteed simply by authoritarian discipline."¹ Management by fear of punishment has given way to management by common objectives. There is a less frequent need for punishment as a means of enforcing discipline because armed forces management has become more akin to management of a large corporation outside of the service. Updating the Code of Service Discipline would follow this progressive trend in management techniques by adopting measures to bring courts martial more in line with the ordinary courts. Removing the implications of double jeopardy, changing the role of the members of a court martial, and allowing for a broader membership in the composition of a court are some of the features which would exemplify this modernization. Thus, the CF would demonstrate that its concept of military law is in keeping with its concept of management.

¹ Morris Janowitz, The Professional Soldier (New York, 1960) 41.

Third, the proposed changes would anticipate public demand for revision of the National Defence Act. The differences between life inside and life outside the Forces is diminishing because of the technological explosion and more frequent contact between civilians and the military.

The growth of the requirement for technical and managerial skills in the military has greatly increased the range of skills common to both military and civilian society. This has been a great advantage by enabling the forces to profit through advances made in techniques by the civilian sector, but it also makes military skills acquired inside the service more transferable to the civilian sector with its attractions of higher salaries and more stable domestic life. This transferability is both a disadvantage to the service because of the lure of outside jobs, and an advantage in providing common ground between the civilian and military sectors.

Civilian control of the military in Canada is inherited from the British tradition of the supremacy of the elected parliament. One cannot imagine a Canadian Cromwell beheading the Governor General and establishing a military government but the reasons for assured civilian control are based partly on this inherent concern about military ascendancy, and partly on a misbelief that military society is somehow different from the world outside and therefore must have its own separate standards. As we move towards more military involvement in the national life of the country, contacts between military men and civilians will increase. Civilians will see that servicemen have the same hopes and aspirations for their country as themselves. Further they will become more aware of the similarities between life in the service and life outside, as well as

the differences, and public opinion could be a strong weapon in enforcing changes in Canadian military law and its regulations. It would augur well for the military to propose changes to its own laws before outmoded practices become a public issue.

Fourth, the changes would encourage public patronage of the Armed Forces. The Canadian Armed Forces must continue to attract and retain adequate numbers of superior personnel, and maintain favour with the Canadian public. The transition of a man from civilian to military life must not be accompanied by a loss of basic rights and freedoms, but rather by the acquisition of additional safeguards commensurate with the additional law to which he has become liable in his duties as a protector of the Canadian way of life.

The balance between individuality and authoritarianism is a dilemma facing the Canadian Armed Forces at the present time. Emphasis on individuality tends to undermine authority, while emphasis on authority discourages individuality. Only the most naive would anticipate that discipline could ever be dispensed with in the armed forces. But maintaining discipline does not mean that basic freedoms should be unnecessarily suppressed. Where they are not equal to those possessed by other Canadian citizens, they must be made so, unless there are valid and defensible military reasons for the inequality. At that point the true professional will perform with pride and high morale, satisfied that his value is appreciated by his fellow Canadian citizens.

After a prolonged period of peace, it is easy for Canadians to forget that the basic expertise of the Forces remains unchanged; even though

it may be unpalatable to some, it is the organized use of violence. Nonetheless, the concept of armed forces is changing, as conventional warfare becomes less likely under the unstable equilibrium of the nuclear deterrent. Armed Forces of the future will bear little resemblance to their predecessors. Janowitz speaks of "constabulary forces" a concept which "provides a continuity with past military experiences and traditions, but...also offers a basis for the radical adaptation of the profession."¹ Constabulary forces would occupy the whole continuum from managing the weapons of mass destruction, down through conventional warfare, peacekeeping, military aid and national development.

With this trend in the direction of increased flexibility, officers and men of the future will obviously have to be of high quality. If the differences in basic freedoms between the inside and the outside of the service can be reduced to a minimum, the service will benefit because the type of person who values his freedom highly is likely to be the type most adaptable to the new challenges. What is equally or perhaps even more important, is that the traditional civilian image of the military will be updated and given an honourable place in Canadian society. However, the honourable place will only be accorded to an essential ingredient, not to an expensive luxury. Changes to the National Defence Act must be accompanied by a program of publicity which would emphasize the modernization of the Act, in keeping with the modernization of the Forces. The transition from civilian to soldier would likely become less traumatic and public acceptance would be assured.

¹ Janowitz, 418.

Although sixteen of the twenty proposals concern military trials, and if implemented would increase basic freedoms in the Canadian Armed Forces, adoption of these proposals would not, in itself, be enough to attract and retain recruits of high calibre. Morale will certainly be maintained if conditions of service are attractive and discipline is meted out by just military law, but officers are no longer expected to have independent means, and neither they nor the men can be retained if service life becomes an economic hardship. If the CF is to remain an honourable profession, then the pay, especially of junior ranks, must be sufficient, and moreover, increases must be made on a regular basis, in accordance with established standards. Two of the proposals would ensure that serving in the Forces will not become an economic disadvantage.

Other proposals, on running for political office, and the establishment of an inspector-general system, would further increase basic freedoms and contribute to morale.

The cumulative effect of all these freedoms would, in the long term, counter any tendency on the part of the public to downgrade the status of a serviceman or his role. Membership in the Canadian Armed Forces would continue to be accepted as an honourable profession, alluring to the recruit and admired by the public.

Finally, since unification in 1968, the Canadian Armed Forces has been looked on as an example by a number of countries. In organization and equipment it is among the most modern in the world and it has demonstrated that it is not afraid of innovation or comparison. The revised National Defence Act has been studied and used as a model by at least

one other country.¹ Amendments to the Act should also be progressive in nature and could provide an example for the liberalization of foreign military law.

Despite the apparent attractiveness of the results, liberalization should not be allowed to go too far. Heint considers this has already happened in some of the United States services,² but the parallel is not exact. The United States' armed forces still contain large numbers of draftees, whereas Canada has an all-volunteer force, which at least implies better motivation and acceptance of discipline. Carried to its extreme, civilianization of the armed forces could transform them into a type of police force, but with equipment and training unsuited to the task. Janowitz warns, "to deny or destroy the difference between the military and the civilian cannot produce genuine similarity, but runs the risk of creating new forms of tension and unanticipated militarism."³

By the nature of his duty, the Canadian serviceman will always have less freedom than his civilian counterpart; it cannot be otherwise, but it is contended that the proposals made above will not be detrimental to the enforcement of military discipline. It should be stressed that it has not been advocated in this paper that any of the offences under the Code of Service Discipline, or any of the punishments under the NDA, be deleted or restricted. Only the means of administering justice has been

¹ Singapore. Personal knowledge of the author.

² Robert D. Heint, Jr., "The Collapse of the Armed Forces", Armed Forces Journal (June 7, 1971), 30.

³ Janowitz, 440.

criticized and the proposals made are mainly procedural, although structural and administrative changes have also been suggested. Their adoption would increase the likelihood of fair and equal treatment of all breaches of discipline, one result of which can be improved morale. Morale is an important ingredient in motivation which in turn is a factor in efficiency. Thus, the adoption of the proposals will not only ensure the maintenance of discipline in the Forces, it will also improve efficiency.

Naval discipline has been frequently considered, at least by navy men, to be the most severe of the three services. But in military law the severity of the discipline is not as important as uniform standards of punishment, for then a would-be offender can weigh the consequences of his contemplated crime. There is a lot of wisdom in the old naval maxim, "a taut ship is a happy ship."

This has not been intended to be an indictment of the National Defence Act; on the contrary, Canadian military law has been quite progressive in the twenty-two years since the enactment of the statute. Compared to some countries, the restrictions placed on established basic freedoms on becoming a member of the forces are small.¹

The military stereotype is fading. Change is no longer resisted; it is encouraged. The old image is still retained by some individuals both inside and outside the service, but their numbers are dwindling in this rapidly changing world. There seems little doubt that the Canadian

¹ For example, see Hikmet Sener, "A Comparison of the Turkish and American Systems of Non-judicial Punishment", 27 Military Law Review (January, 1965), 111.

Armed Forces will adapt to change in the future, as it has in the past. A 1954 study showed that "...the Canadian Army...is above all a dynamic institution, seeking to adapt rapidly to changing conditions largely outside its control. It constantly exhibits an amazing flexibility and versatility."¹ There seems no reason to believe that the Canadian Armed Forces of 1972 is any less resistant to change. Canadian military law will undoubtedly follow the new image into the future so that it will reflect the desires of Canadians both inside and outside the boundaries of the National Defence Act.

¹ David N. Solomon, "Sociological Research in a Military Organization", in Blishen et al, eds., Canadian Society (Toronto, 1964), 252.

ANNEX A

PROPOSALS FOR CHANGE

- (i) the equivalent income for anyone in the Canadian Forces be at least above the poverty level as established by the Special Senate Committee on Poverty.
- (ii) a member be allowed to run for political office on leave of absence, with the understanding and requirement that he must resign if elected.
- (iii) all men have the right to elect trial by court martial if the offence is such that the punishment of detention or imprisonment could be imposed.
- (iv) the punishment of reduction in rank be deleted from the list of punishments which can be awarded at a summary trial.
- (v) a commanding officer be disqualified from trying any case in which he is a witness.
- (vi) the "assisting officer" not be specifically precluded from participating at a summary trial.
- (vii) summary records be kept of the proceedings at summary trials.
- (viii) an inspector-general system be re-established within the Canadian Armed Forces as an alternative and in addition to the grievance procedure.
- (ix) pay of the Canadian Armed Forces be tied directly to that of the public service.
- (x) suspects under the National Defence Act should have the right to counsel during pre-trial investigation of charges which could lead to court martial.
- (xi) every accused person at a court martial should be provided free of charge with his choice of a defending officer, who has legal qualifications, if the prosecutor has legal qualifications.

- (xii) a legal officer, preferably of the offender's choice be provided free of charge to appeal a case before the Court Martial Appeal Court, and also be provided if the decision of the CMAAC should be further appealed to the Supreme Court of Canada.
- (xiii) determination of materiality should be determined beforehand and all expenses for all witnesses should be assumed by the government.
- (xvi) suspension of confinement pending appeal be considered in every case, and that such suspension be at the discretion of the commanding officer of the accused.
- (xv) the period during which a new trial can be petitioned for on the basis of new evidence be extended from one year to two.
- (xvi) when the accused is a man (not an officer) up to one-third of the members of the court be men, if he so wishes.
- (xvii) the court sit as a jury and that regulations be changed so that sentencing is done by the judge advocate.
- (xviii) standing courts martial be given concurrent jurisdiction with commanding officers over offences heretofore denied.
- (xix) that section 61 of the National Defence Act be amended to remove the implications of double jeopardy.
- (xx) no man should be reduced in rank for an offence unless found guilty before a service tribunal and therefore QR&O 11.11 concerning administrative reduction in rank after conviction by the civil power should be deleted.

ANNEX B

LIST OF OFFENCES UNDER THE NATIONAL DEFENCE ACT

<u>Section</u>	<u>Nature of the offence</u>	<u>Maximum punishment</u>
63	Offences by commanders in action (i) if he acted traitorously (ii) if he acted from cowardice (iii) in any other case	mandatory death death dismissal with disgrace
64	Offences by any person in presence of enemy (i) if he acted traitorously (ii) if the offence committed in action (iii) otherwise	mandatory death death life imprisonment
65	Offences related to security (i) if he acted traitorously (ii) in any other case	mandatory death life imprisonment
66	Offences related to prisoners of war (i) if he acted traitorously (ii) in any other case	mandatory death life imprisonment
67	Offences related to operations (i) if committed on active service (ii) in any other case	life imprisonment dismissal with disgrace
68	Spies for the enemy	death
69	Mutiny with violence	death
70	Mutiny without violence (i) if a ringleader	life imprisonment death
71	Offences related to mutiny	life imprisonment
72	Advocating governmental change by force	life imprisonment
73	Disobedience of lawful command	life imprisonment
74	Striking or offering violence to a superior officer	life imprisonment

<u>Section</u>	<u>Nature of the offence</u>	<u>Maximum punishment</u>
75	Insubordinate behaviour	dismissal with disgrace
76	Quarrels and disturbances	imprisonment for less than two years
77	Disorders	imprisonment for less than two years
78	Desertion (i) on active service (ii) in any other case	life imprisonment imprisonment not exceeding five years
79	Connivance at desertion	imprisonment for less than two years
80	Absence without leave	imprisonment for less than two years
81	False statement in respect of leave	imprisonment for less than two years
82	Scandalous conduct by officers	dismissal with disgrace
83	Cruel or disgraceful conduct	imprisonment not exceeding five years
84	Traitorous utterances	imprisonment not exceeding seven years
85	Abuse of inferiors	imprisonment for less than two years
86	False accusations or statements	imprisonment for less than two years
87	Drunkenness (i) if not on active service or not on duty, or not warned for duty	imprisonment for less than two years ninety days detention
88	Malingering or maiming (i) on active service or on orders for active service (ii) in any other case	life imprisonment imprisonment not exceeding five years

<u>Section</u>	<u>Nature of the offence</u>	<u>Maximum punishment</u>
89	Ill-treatment of person in custody	imprisonment for less than two years
90	Negligent or wilful interference with lawful custody (i) if he acted wilfully (ii) in any other case	imprisonment not exceeding seven years imprisonment for less than two years
91	Escape from custody	imprisonment for less than two years
92	Obstruction - military police duties	imprisonment for less than two years
93	Obstruction of civil power	imprisonment for less than two years
94	Losing, stranding or hazarding vessels	dismissal with disgrace
95	Offences in relation to convoys	death
96	Command in ships	life imprisonment
97	Wrongful acts in relation to aircraft or aircraft material (i) if he acted wilfully (ii) in any other case	life imprisonment imprisonment for less than two years
98	Inaccurate certificate	imprisonment for less than two years
99	Low flying	imprisonment for less than two years
100	Command in aircraft	life imprisonment
101	Improper driving	imprisonment not exceeding five years
102	Unauthorized use of a vehicle	imprisonment for less than two years

<u>Section</u>	<u>Nature of the offence</u>	<u>Maximum punishment</u>
103	Causing fires (i) if he acted wilfully (ii) in any other case	life imprisonment imprisonment for less than two years
104	Stealing (i) if entrusted with the custody, control or distribution of the thing stolen (ii) in any other case	imprisonment not exceeding fourteen years imprisonment not exceeding seven years
105	Receiving	imprisonment not exceeding seven years
106	Destruction, loss or improper disposal	imprisonment for less than two years
107	Miscellaneous offences	imprisonment for less than two years
108	Offences in relation to service tribunals (i) if committed at or in relation to a court martial	imprisonment for less than two years imprisonment or detention not exceeding thirty days
109	False evidence	imprisonment not exceeding seven years
110	Disturbances, etc in billets	imprisonment for less than two years
111	Fraudulent enrolment	imprisonment for less than two years
112	False answers on enrolment	imprisonment for less than two years
113	Assisting unlawful enrolment	imprisonment for less than two years
114	Negligent performance of duties	dismissal with disgrace

<u>Section</u>	<u>Nature of the offence</u>	<u>Maximum punishment</u>
115	Offences in relation to documents	imprisonment not exceeding three years
116	Refusing vaccination, etc	imprisonment for less than two years
117	Negligent handling of dangerous substances (i) if he acted wilfully (ii) in any other case	life imprisonment imprisonment for less than two years
118	Conspiracy	imprisonment not exceeding seven years
119	Conduct to the prejudice of good order and discipline	dismissal with disgrace
120	Offences against other Canadian law	unless a minimum penalty is prescribed impose the penalty prescribed or dismissal with disgrace
121	Offences against foreign law	penalty considered appropriate

ANNEX C

SCALE OF PUNISHMENTS

Section 125 of the National Defence Act lists the punishments which may be awarded by service tribunals:

- (a) Death.
- (b) Imprisonment for two years or more.
- (c) Dismissal with disgrace from Her Majesty's service.
- (d) Imprisonment for less than two years.
- (e) Dismissal from Her Majesty's service.
- (f) Detention.
- (g) Reduction in rank.
- (h) Forfeiture of seniority.
- (i) Severe reprimand.
- (j) Reprimand.
- (k) Fine.
- (l) Minor punishments.

The table to QR&O 108.27 shows that "minor punishments" include punishments (f) to (k) above, plus the following:

- (m) Confinement to ship or barracks.
- (n) Extra work and drill.
- (o) Stoppage of leave.
- (p) Stoppage of grog.
- (q) Extra work and drill not exceeding two hours a day.
- (r) Caution.

NOTE 1

Punishments of detention (f) down to caution (r) may be awarded at a summary trial, but minor punishments may not be awarded at a court martial trial.¹

NOTE 2

The punishment of detention when awarded at a summary trial (f), requires the approval of higher authority when 30 days or more is awarded to a private, or when any amount is awarded to an NCO. The punishment of reduction in rank (g) at a summary trial, always requires the approval of higher authority.² The punishment of death requires the approval of the Governor-in-Council.³

¹ QR&O 111.17, 111.36.

² QR&O 108, 27 (Table), column F.

³ NDA, s. 178(1)

ANNEX D

RANKS IN THE CANADIAN ARMED FORCES¹

Officers

1. General
2. Lieutenant-General
3. Major-General
4. Brigadier-General
5. Colonel
6. Lieutenant-Colonel
7. Major
8. Captain
9. Lieutenant
10. Second Lieutenant
11. Officer Cadet

Men

12. Chief Warrant Officer
13. Master Warrant Officer
14. Warrant Officer
15. Sergeant
16. Corporal
17. Private

¹ Column 1 of Schedule 21 to the National Defence Act lists the unified ranks of the Canadian Armed Forces.

ANNEX E

INTERVIEWS

<u>Date</u>	<u>Name</u>	<u>Position</u>	<u>Page</u>
Nov 19, 1971	Capt W.P. Lawrence	Staff of Director of Armed Forces Program, Dept. of National Defence (DND).	32
Dec 21, 1971	Cdr M.A. Bisal	Head of Advisory Section, office of Judge Advocate General, DND.	77, 80
Dec 21, 1971	Cdr W.H. Northey	Director of Personnel Applied Research, DND.	83
Jan 10, 1972	Capt H.C. Ferne	Director of Personnel Legal Services, DND.	128, 148
Jan 21, 1972	Major C.M. Knight	Staff of Director of Intelligence Production, DND.	85
Jan 24, 1972	LCol J.B. Fay	Office of Chief Judge Advocate, DND.	53, 125
Jan 24, 1972	Dr. R.B. Bromiley	Scientific Assistant for Chief of Personnel, DND.	74
Feb 3, 1972	Dr. R.B. Bromiley	"	36
Feb 4, 1972	Dr. R.B. Bromiley	"	70
Feb 7, 1972	Cdr W.H. Northey	Director of Personnel Applied Research, DND.	86
Feb 9, 1972	Cdr M.A. Bisal	Head of Advisory Section, office of Judge Advocate General, DND.	29

ANNEX F

LIST OF CASES CITED

<u>Anderson v. Laird</u> , 316 F. Supp. 1081 (1970).	23
<u>Bounty Ship Mutineers Case</u> (1791), 102 All England Reports (E.R.) 121	60
<u>Burdette v. Abbott</u> (1812), 4 Taunt 401, 128 E.R. 384 (Ex.Ch.), 403	10, 98
<u>Carroll v. the Queen</u> (1956), C.M.A.R. 25	51
<u>Clackum v. United States</u> , 296 F.2d 226 (1961)	90
<u>Dawkins v. Paulet</u> (1869), L.R. 5 Q.B. 94.	99
<u>Doutre v. the Queen</u> (1953), 1 C.M.A.R. 155.	50
<u>Edwards v. the Queen</u> (1958), 2 C.M.A.R. 75.	62
<u>Ex Parte John Fagan</u> (1919), 32 C.C.C. 41.	103
<u>Heddon v. Evans</u> , 35 Times Law Reports (T.L.R.) (1919), 642	98
<u>O'Callahan v. Parker</u> , 395 U.S. 258 (1969)	42
<u>Owen v. the Queen</u> (1959), 2 C.M.A.R. 103.	63
<u>Porret's Case</u> (1844), 39 Eng. & Emp. Digest 430.	103
<u>Regina and Archer v. White</u> (1956), 1 D.L.R. (2d), 305.	94
<u>Regina v. Drybones</u> (1969) 64 D.L.R. (2d) & 260, 9 D.L.R. (3d) 473	15
<u>Regina v. Gonzales</u> (1962) 32 D.L.R. (2d) 290, 37 C.R. 56	15
<u>Rex v. Thompson</u> (No. 1) (1946), 4 D.L.R. 579 (Ont. High Court).	96, 107
<u>Rex v. Thompson</u> (No. 2) (1946), 4 D.L.R. 591 (Ont. Court of Appeal).	96
<u>Robertson and Rosetanni v. The Queen</u> , 41 D.L.R. (2d) 485 (1963) S.C.R. 651	15
<u>Schenck v. United States</u> , 249 U.S. 47 (1919)	25
<u>Smith and Rhuland v. the Queen</u> (1953), 2 S.C.R. 95.	95
<u>Sutton v. Johnstone</u> (1786), (1775-1802) All E.R. Rep. 170	97
<u>United States v. Howe</u> , 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967)	26

<u>United States v. Nation</u> , 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958)	30
<u>United States v. Tempia</u> , 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967)	138
<u>United States v. Wheeler</u> , 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961)	30
<u>Re Walsh and Jordan</u> (1962), 132 C.C.C. 1.	105
<u>Weiner v. the Queen</u> (1957), 2 C.M.A.R. 27.	47
<u>Wolfe Tone's Trial</u> (1798), 27 State Tr. 613.	107

BIBLIOGRAPHY

i

Alkema, Eugene. "Constitutional Law - Due Process - Scope of Inquiry in Habeas Corpus Petitions from Military Prisoners." 52 Michigan Law Review (1954), 602.

The All England Law Reports Reprints (All E.R. Rep.) London: Butterworth

Army, E.A.C. "Do Our New Soldiers Know What They're Getting Into?" Ottawa Citizen, September 30, 1971.

Annual Digest of the Times Law Reports (T.L.R.), Vol. 35. London: The Times Publishing Co., Ltd., 1918-19.

Berry, B.H. "Pathway for the Summary Court Martial," US Navy JAG Journal (November-December, 1969), 59.

Borrie, Gordon. "Courts-martial, Civilians and Civil Liberties," 32 Modern Law Review, January, 1969, 35.

Brett, P. "Reflections on the Canadian Bill of Rights," Alberta Law Review (1969), 294.

Brown, M.A. "Must the Soldier be a Silent Member of Our Society?" 43 Military Law Review (January, 1969), 71.

Byers, Robert D. "The Court Martial as a Sentencing Agency - Milestone or Millstone?" 42 Military Law Review (July, 1968), 81.

Camarinos, A.E. "Command Influence," US Navy, JAG Journal (January, 1955), 3.

Canada. Canada Law Reports. Supreme Court of Canada (S.C.R.) Ottawa: Queen's Printer.

- A Canadian Charter of Human Rights. Ottawa: Queen's Printer, 1968.

- Court Martial Appeal Reports (C.M.A.R.). Vol 1, 1957, Vol 2, 1966.

- Department of National Defence. Canadian Forces Administrative Orders (CFAO's). Ottawa: Queen's Printer. n.d.

BIBLIOGRAPHY

i

Alkema, Eugene. "Constitutional Law - Due Process - Scope of Inquiry in Habeas Corpus Petitions from Military Prisoners." 52 Michigan Law Review (1954), 602.

The All England Law Reports Reprints (All E.R. Rep.) London: Butterworth

Army, E.A.C. "Do Our New Soldiers Know What They're Getting Into?" Ottawa Citizen, September 30, 1971.

Annual Digest of the Times Law Reports (T.L.R.), Vol. 35. London: The Times Publishing Co., Ltd., 1918-19.

Berry, B.H. "Pathway for the Summary Court Martial," US Navy JAG Journal (November-December, 1969), 59.

Borrie, Gordon. "Courts-martial, Civilians and Civil Liberties," 32 Modern Law Review, January, 1969, 35.

Brett, P. "Reflections on the Canadian Bill of Rights," Alberta Law Review (1969), 294.

Brown, M.A. "Must the Soldier be a Silent Member of Our Society?" 43 Military Law Review (January, 1969), 71.

Byers, Robert D. "The Court Martial as a Sentencing Agency - Milestone or Millstone?" 42 Military Law Review (July, 1968), 81.

Camarinos, A.E. "Command Influence," US Navy, JAG Journal (January, 1955), 3.

Canada. Canada Law Reports. Supreme Court of Canada (S.C.R.) Ottawa: Queen's Printer.

- A Canadian Charter of Human Rights. Ottawa: Queen's Printer, 1968.

- Court Martial Appeal Reports (C.M.A.R.). Vol 1, 1957, Vol 2, 1966.

- Department of National Defence. Canadian Forces Administrative Orders (CFAO's). Ottawa: Queen's Printer. n.d.

Canada. Department of National Defence. Canadian Forces Publication 237 (CFP 237). Ottawa: Queen's Printer, n.d.

- Department of National Defence. The Queen's Regulations and Orders for the Canadian Forces (QR&O). Vols I (Administrative), II (Disciplinary), III (Financial). Ottawa: Queen's Printer, n.d.
- Estimates for the Fiscal Year Ending 31 March, 1972. Ottawa: Queen's Printer, 1971.
- Dominion Bureau of Statistics. 1970-71 Canada Year Book. Ottawa: Information Canada, 1971.
- Senate. Proverty in Canada. Report of the Special Senate Committee on Proverty. Ottawa: Information Canada, 1971.
- Report of the Royal Commission on the Status of Women in Canada. Ottawa: Queen's Printer, 1970.
- The Revised Statutes of Canada (R.S.C.) Ottawa: Queen's Printer, 1970.
- White Paper on Defence. Ottawa: Queen's Printer, 1971.

Canadian Criminal Cases (C.C.C.). Toronto: Canada Law Book.

Cappello, Henry J. "Captain's Mast," US Navy JAG Journal (October, 1955), 3.

Carswell, H.A. The Application of Collective Bargaining to the Canadian Armed Forces. Unpublished National Defence College Paper. April, 1971.

"Court Upholds Discharge Rule for Pregnancy". Globe and Mail, November 7, 1971.

Crawford, W.A. "The Ambit of O'Callahan," 12 US Air Force JAG Law Review (Spring, 1970), 100.

Cushman, C.A. "Custody Requirement for Habeas Corpus," 50 Military Law Review (October, 1970), 1.

Department of National Defence (DND). Papers from Contributors to the Study of Professionalism in the Canadian Forces. Unpublished, 1971.

Dominion Law Reports (D.L.R.). Toronto: Canada Law Book.

Eayrs, James. Northern Approaches: Canada and the Search for Peace. Toronto: Macmillan, 1961.

- In Defence of Canada: From the Great War to the Great Depression. Toronto: University of Toronto Press 1964.

Edwards C.A. "Presidential Address", in 42 Civil Service Review (March, 1970).

Enderley, K.E. "Court Martial Appeals in Australia," 33 Military Law Review (July, 1966), 65.

The English and Empire Digest (Eng. and Emp. Digest). London: Butterworth, 1964.

Evan, William M. "The Inspector-General in the US Army," in Rowat, The Ombudsman. Toronto: University of Toronto Press, 1968, 147.

Everett, R.O. "Military Justice is to Justice as ..." 12 US Air Force JAG Law Review (Summer, 1970), 202.

Farrell, T.D. and Barrett, M.H. Jr. "Injunctive Relief Against the Military Services," 21 US Navy JAG Journal (July-August, 1966), 11.

Federal Reporter, Second Series (F.2d). St. Paul, Minn: West Publishing Co.

Federal Supplement (F. Supp). St. Paul, Minn: West Publishing Co.

Foreman, LeRoy F. "Religion, Conscience and Military Discipline," 52 Military Law Review (Spring, 1971), 77.

Griffith, J.A.G. "Justice and the Military," 10 Modern Law Review (1947), 292.

Graftman, S.W. "Extraordinary Relief and the US Court of Military Appeals," 24 US Navy JAG Journal (September-October-November, 1969), 61.

Heinl, Robert D. "The Collapse of the Armed Forces," in Armed Forces Journal, June 7, 1971, 30.

Henkow, Hugo. "The Ombudsman for Military Affairs," in Rowat, The Ombudsman. Toronto: University of Toronto Press, 1968, 51.

Hollies, J.H. "Canadian Military Law," Military Law Review (July, 1961), 69.

- "Courts Martial in the Canadian Forces," 2 Criminal Law Quarterly (1967), 67.

"Homosexuals in the Military," 37 Fordham Law Review (March, 1969), 465.

Howell, T.B. A Complete Collection of State Trials (State Tr.). London, 1820.

Janowitz, Morris. The Professional Soldier. New York: Free Press of Glencoe, 1960.

Karlen, Delmar. "Civilian and Military Justice at the Appellate Level," 1968 Wisconsin Law Review, 786

- "Court Martial Appeals in England," Military Law Review (April, 1963), 65.

Kastari, Paavo. "Finland's Guardians of the Law," in Rowat, The Ombudsman. Toronto: University of Toronto Press, 1968, 58.

Lawson, W.J. "Canadian Military Law," 29 Canadian Bar Review (March, 1951), 241.

Lewis, J.X., II. "Freedom of Speech - An Examination of the Civilian Test for Constitutionality and Its Application to the Military." 41. Military Law Review (July, 1968), 55.

Lohse, Egan. "West Germany's Military Ombudsman," in Rowat, The Ombudsman. Toronto: University of Toronto Press, 1968, 119.

Mason J.A.R. "Military Tribunals - Restraint of by Civil Courts - Habeas Corpus and Prohibition - Case and Comment in 24 Canadian Bar Review 210.

McGregor, D.M. The Human Side of Enterprise. New York: McGraw-Hill 1960.

Moyer, H.E. Jr. "Procedural Rights of the Military Accused: Advantages over a Civilian Defendant," 51 Military Law Review (Jan 71), 1.

Murphy, Arthur A. "The Soldier's Right to a Private Life," 24 Military Law Review (April, 1964), 97.

Nichols, D.B. "The Compatibility of Military and Legal Values: mens rea - A Case in Point," 28 Military Law Review (April, 1965), 169.

Obermayer, Klaus. "The Situation of the Armed Forces in a Constitutional Democracy," 42 Military Law Review (October, 1968), 41.

O'Malley, Parker, Birnbaum, Fairbanks. "Is There Justice in the Armed Forces?" 24 Record of the Association of the Bar of the City of New York (Feb. '69), 77.

Ontario. Royal Commission Inquiry into Civil Rights. Report No. 1, 1968. Report No. 2, 1969. Toronto: Queen's Printer.

Pearl, Melvin E. "Applicability of the Bill of Rights to a Court Martial Proceeding," 50 Journal of Criminal Law (Mar. Apr. 1960), 559.

Pedersen, I.M. "Denmark's Ombudsman," in Rowat, The Ombudsman. Toronto: University of Toronto Press, 1968, 75.

Preston, Adrian. "The Profession of Arms in Postwar Canada, 1945-1970," 23 World Politics (January, 1971), 189.

Preston, R.A. "The Military Profession in the Seventies; Its Potential for Contribution to Conventional Deterrence," in Papers from Contributors to the Study of Professionalism in the Canadian Forces. Unpublished.

"Protecting Servicemen from Radical Thoughts," Ottawa Journal, editorial, December 16, 1971.

Quinn, R.E. "Some Comparisons Between Courts-Martial and Civilian Practice," 46 Military Law Review (October, 1969), 77.

Rice, Paul J. "O'Callahan v. Parker, Court Martial Jurisdiction. Service Connection, Confusion and the Serviceman," 51 Military Law Review (Jan 1971), 41.

Rollman, Robert O. "Of Crimes, Courts Martial and Punishment - A Short History of Military Justice," 11 US Air Force JAG Law Review (Spring, 1969), 212.

Rowat, D.C. The Ombudsman, 2nd edition. Toronto: University of Toronto Press, 1968.

Rund. "The Military Ombudsman and his Board," in Rowat, The Ombudsman. Toronto: University of Toronto Press, 1968, 51.

- Schmeiser, D.A. Civil Liberties in Canada. London: Oxford University Press, 1964.
- Scott, F.R. Civil Liberties and Canadian Federalism. Toronto: University of Toronto Press, 1959.
- Seldes, George. The Great Quotations. New York: Lyle Stuart, 1960.
- Sener, Hikmet. "A Comparison of the Turkish and American System of Nonjudicial Punishment," 27 Military Law Review (January, 1965), 111.
- "Servicemen in Civilian Courts," 76 Yale Law Journal (December, 1960), 380.
- Sherman, E.F. "Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement," 48 Military Law Review (April, 1970), 91.
- Sherrill, Robert. Military Justice is to Justice as Military Music is to Music. New York: Harper & Row, 1970.
- Snedeker, James. "Habeas Corpus and Court Martial Prisoners," 6 Vanderbilt Law Review (February, 1963), 161.
- Soloman, D.N. "Sociological Research in a Military Organization," in Blishen et al, eds., Canadian Society, revised edition. Toronto: Macmillan, 1964, 250.
- Starkman, Bernard. "Canadian Military Law: The Citizen as Soldier," 43 Canadian Bar Review (1965), 414.
- Sullivan, D.P. "Soldiers in Unions? - Protected First Amendment Right?" 20 Labor Law Journal (September, 1969), 581.
- United States. Court of Military Review (C.M.R.)
- Uniform Code of Military Justice (UCMJ). 64 Stat. 108 (1950), as amended by Military Justice Act, 82 Stat. 1335 (1968).
 - United States Court of Military Appeals (U.S.C.M.A.).
 - United States Reports (U.S.) Washington: U.S. Government Printing Office.
 - "Inspector General Activities and Procedures," U.S. Army Regulations 20-1 Washington: U.S. Government Printing Office, 1968.

"U.S. Navy vetoes girls at Annapolis," Montreal Gazette February 9, 1972.

Wallace, Howard. "The Lid's Off," The Sentinel (November-December, 1971), 14.

Weisz, Herman. Administrative Law and the Protection of the Individual MA Thesis. Carleton, 1956.

Willet, T.C. "The Military Profession in the 1970's," in Papers from Contributors to the Study of Professionalism in the Canadian Forces. Unpublished.

Willis, John "Administrative Law and the British North America Act," 53 Harvard Law Review (1939), 278.

Winks, R.W. Blacks in Canada. Montreal: McGraw-Hill, 1971.