FRIEDLAND, Martin L., 1932-, *Controlling Misconduct in the Military: a Study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, [Ottawa]: Minister of Public Works and Government Services Canada 1997, vi, 181 p., ISBN: 0660168685, cat. No. CP32-64/2-1997E;

CHAPTER SEVEN

Civil Control, Integration, and Oversight

CIVIL CONTROL

Civil control of the military is a fundamental principle of Canadian society. It does not by itself ensure that the military — individually or collectively — will not go astray, but it helps keep it on track.

United Kingdom

Civil control of the military in the United Kingdom can be traced to fear of a standing army arising from Cromwell's adventure in the seventeenth century.[1] Today, Parliament through the cabinet has the ultimate control of the military. During the Second World War, Winston Churchill and the war cabinet were in charge of military strategy.[2] Churchill was the minister of defence as well as the prime minister.[3] Direction of the military during peacetime is vested in the chief of defence staff, but *control* is the province of the secretary of state for defence.[4] Unlike the case in many other countries, the military has not interfered in British politics for the most part.[5] One recent commentator observed:

> British civil-military relations are rather boring... While the military has played a central role in British history, in the past 100 years, the British military, unlike other European nations, has not interfered in politics... In Modern British history, British officers have never challenged the primacy of politics. In fact, they have tended to remain rather distanced from debate and aloof from controversy.[6]

Canada

Canada has more or less followed England's lead. The military has not and cannot be involved in party politics.[7] What would have happened to the military if the sovereignists had won the November 1995 referendum

in Quebec, in view of the Bloc québécois letter to the Canadian Forces in Quebec to switch their allegiance to Quebec, is not known.[8] It had the potential to bring the military more directly into politics than they have ever been.

The *National Defence Act* makes it clear that the minister of national defence "has the management and direction of the Canadian Forces and of all matters relating to national defence."[9] The minister is, of course, subject to the control of the cabinet and, beyond that, Parliament. The chief of defence staff, on the other hand, is charged under the act with "the control and administration of the Canadian Forces", and all orders or instructions to the Canadian Forces "shall be issued by or through the Chief of the Defence Staff." But this is "subject to the regulations and under the direction of the Minister."[10]

The *National Defence Act* of 1951 was designed, in the words of Brooke Claxton, the defence minister of the day, to make clear "in plain words" that the military's authority was "subject to the Governor-in-Council and the direction of the minister."[11]

Douglas Bland has commented that the *National Defence Act* "is written with the clear intention of separating the authority of the minister over defence policy generally and the chief of the defence staff's responsibility to command the Canadian Forces." Cabinet has ultimate control over the chief of defence staff, however, because the chief is appointed by cabinet and serves at pleasure. Moreover, the minister has a veto over appointments to the rank of brigadier general or higher. The recommendation for appointment comes from the chief of defence staff, however, not the minister, thus helping to eliminate party politics from appointments.[12]

Cabinet can declare war without parliamentary approval, although, as in the Gulf War, it will if possible obtain the approval of Parliament as a matter of practice.[13] A cabinet declaration of an international or war emergency is covered by the 1988 *Emergencies Act*.[14] An "international emergency" is defined as "an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence that is so serious as to be a national emergency" (section 27). Such a cabinet declaration is good for 60 days unless revoked or continued by Parliament (sections 59-60, 28-29). Parliament is to meet within seven sitting days after the declaration is issued (section 58). A "war emergency" is defined to mean "war or other armed conflict, real or imminent, involving Canada or any of its

allies that is so serious as to be a national emergency" (section 37). If the cabinet "believes, on reasonable grounds, that a war emergency exists" it may by declaration so declare (section 38). In such a case the proclamation is good for 120 days, unless it is revoked or continued by Parliament (sections 39, 59-60).

United States

Civilians also have direction of the military in the United States. The president is the commander in-chief of military forces.[15] The secretaries of defence and of the various services must be civilians.[16] As Kemp and Hudlin comment in a recent article, "the ends of government policy are to be set by civilians; the military is limited to decisions about means." The commentators conclude: "The principle of civil supremacy over the military, and the subsidiary principle of civilian control, are important features of the American system of government."[17] General MacArthur, it will be recalled, was relieved of his command in the Korean War when he resisted President Truman's order that the war not be allowed to escalate.

Although civil control in the United States is clear, it is not entirely clear what the respective roles of Congress and the president are.[18] Under the constitution, Congress enjoys the exclusive authority to initiate an offensive war.[19] As Jean Smith has written, "The framers of the Constitution were realists. They divided the war powers along functional lines. The president, as commander-in-chief, possessed the necessary authority to repel sudden attacks, but the power to initiate war rested with Congress."[20] The line between the functions is not easy to draw. President Kennedy became involved in the Cuban Missile Crisis and Vietnam without congressional consent. In 1973, Congress passed a joint resolution, the War Powers Resolution — over President Nixon's opposition — requiring the president to "consult with Congress before introducing United States Armed Forces into hostilities", to submit a report in writing to Congress within 48 hours on action taken, and to terminate use of U.S. forces within 60 days without congressional approval.[21] The constitutionality of the resolution is doubtful, and all presidents since its passage have adhered to the position that the decision remains the responsibility of the president as commander in chief.[22] "Congress' ultimate military check on the president," Smith points out, "lies in the appropriations process."[23]

INTEGRATION AT NDHQ

In Canada, integration of the headquarters personnel of the military and the deputy minister took place in 1972 when the present National Defence Headquarters (NDHQ) was established. Harriet Critchley describes the background as follows:[24]

> In spite of consolidation into one department in 1946, creation of a chairman, Chiefs of Staff Committee, in 1953, integration of the armed services under the command of a chief of defence staff and reorganization of headquarters along functional lines in 1964, and reorganization of the armed forces into a single service in 1968, "there were still problems in the Department of National Defence management."[25] Those problems continued to be the need for better coordination of planning and budgeting, better accountability and control of capital acquisitions, elimination of costly duplication of effort and expense, and more effective relationships with other government departments that had an input into defence decision making. The persistence of these basic problems led to the appointment of the Management Review Group (MRG) — known as the Pennyfather Commission — in 1971.[26]

Among other concerns, the Pennyfather Commission wrote about the "lack of unity of purpose due to a high degree of parallelism and duplication of management responsibility among its three major divisions — the deputy minister's staff, the Canadian Armed Forces, and the Defence Research Board — and instead, the development of adversary relationships and undue compartmentalization."[27] There are now about 8,000 persons at NDHQ.

Scholars have taken different positions on the effectiveness of integration. Douglas Bland, for example, has a generally negative view:

> The integration of the NDHQ civilian and military staff has heightened, not lessened, the conflict between the two elements in headquarters and it has created institutional ambiguity where none need exist...people from "two distinctly different cultures and with different sets of values are required to work side by side."[28] The result of this dysfunctional dynamic is that the defence policy process can become seriously unbalanced.[29]

Harriet Critchley, on the other hand, sees integration as generally successful:

This integration did not result in an influx of civil servants into the organization. It merely brought together the two sets of people — in two hierarchies, working largely separately from one another. The aim of that integration and the organization of headquarters along functional lines was to provide for better coordination and management of defence in Canada. In the process, rather than allowing for increased civilianization, the military has — by virtue of its increased membership in each of the senior committees — *more influence*, over a broader range and at a higher level, on defence decision making than in the past. This is a fact that current commentators, particularly military personnel critical of the current organization of headquarters, would be wise to consider very carefully when entertaining ideas of returning to the Canadian headquarters system of 1963 or the adoption of the organizational systems of foreign headquarters.[30]

The issue was discussed by the Special Joint Committee on Canada's Defence Policy, which reported in 1994, but the committee could not reach a conclusion:

Since 1972, the military headquarters of the Canadian Forces has been integrated with the Department of National Defence in an effort to provide more efficient management of both resources and operations. The Committee heard conflicting testimony on whether this arrangement is appropriate for the needs of the Canadian Forces today. Some witnesses were strongly supportive; others favoured a return to an independent military headquarters.

The Committee was not able to reach a conclusion on this matter and *recommends instead that the issue be pursued by the new Standing Joint Committee*.[31]

This writer is not in a position to assess accurately the effect of integration on the effective functioning and oversight of the military. Having civilians integrated into military headquarters at a very senior level may act as a check on improper conduct — the focus of this paper. On the other hand, there is a danger that integration will cause co-option of the civilians into military values, rather than the other way around. Further, there is a concern that the military may pay too much heed to party political considerations. Having a more arm's-length relationship along with other forms of oversight may be more effective in helping assure civil control over the military. But this is not an area I have studied carefully. The question of integration of senior military and civil service personnel is an important one and one the Somalia Inquiry may wish to consider.

PARLIAMENTARY OVERSIGHT

A brief prepared by the Department of National Defence for the 1994 Joint Parliamentary Committee on Canada's Defence Policy briefly outlined the existing parliamentary oversight process:

> Some observers appear to believe that there is insufficient parliamentary oversight of the military. Clearly, control over the military is the prerogative of the Executive. It is just as clear, however, that the Minister — indeed, the Prime Minister and Cabinet — are accountable to Parliament for the directions they give the armed forces.
>
> Parliament has other oversight powers. It, or its committees, can call upon members of the government — or government officials — to provide a full explanation of government decisions. The Standing Committee on National Defence and Veterans Affairs (SCONDVA) already has the power to call witnesses and demand details on any matter dealing with the development or use of Canada's armed forces. In the past, SCONDVA and its Senate equivalent have used their access to government to produce thoughtful studies of specific military issues. Indeed, an important way in which both committees fulfil their oversight mandate is through keeping defence issues in the public eye. In recognition of this role, the Government asked that a Special Joint Committee of the House and Senate be the principal venue for public consultation during the defence policy review. Beyond this, the Government has deliberately taken other initiatives to involve Parliament in defence issues — as can be seen in the recent House of Commons debates on peacekeeping and cruise missile testing.[32]

There was unanimity among members of the Joint Committee that the parliamentary role should be strengthened. The committee stated: "whatever our individual views on particular issues of defence policy or operations, there was one matter on which we agreed almost from the beginning — that there is a need to strengthen the role of Parliament in the scrutiny and development of defence policy."[33]

Douglas Bland supports the committee's view and would go further: "An active parliamentary defence committee provided with adequate research support, could not only oversee defence policy, but it could also provide the counter-expert body ministers have sought for years."[34] "In Canada," he points out, "there have been remarkably few occasions since 1945 when Parliament has truly directed defence policy outcomes."[35]

It is difficult for Parliament to play much of a role in the actual operation of the military as distinct from overall defence policy. Much of military

information in the Anglo-Canadian system is classified, so there is a paucity of information available.[36] It is unlikely that more information will be made available while a significant proportion of Parliament is made up of members of a political party promoting the break-up of the country.[37]

As is well known, the U.S. Congress plays a more active role in relation to the military. "In no other country," one observer states,

> is parliamentary involvement in national security affairs as great as in the United States. In the Congress there are four major committees (the Appropriations and Armed Services Committees in each house) that review virtually the whole of the defence budget in a detailed manner, as well as a number of other committees (such as Government Operations) that wield significant power over parts of the Defense Department.[38]

The writer goes on to observe, however, that political considerations often come to the fore:

> The principal defect of the heightened congressional role is that it encourages the intrusion of narrow political considerations into the determination of matters that ought ideally to be resolved by professional experts.[39]

He cites as an example the endorsement of Senator Edward Kennedy and others from Massachusetts of the F-18, the engine of which is produced in that state. (Of course, similar political considerations may exist when the decision is made by cabinet.)

In Britain, MPs appear to play a less active role than in Canada in overseeing military activity. One study expresses a very pessimistic outlook on the British MP's role:

> MPs have many roles to fulfil and of these sitting on select committees is for many the least desirable aspect of their job. Furthermore, there is little compelling reason in an unreformed parliament for MPs to involve themselves in the detailed scrutiny of the minutiae of government business — especially when their actions rarely influence government policy directly. MPs prefer, therefore, to play the role of the political magpie and pursue issues which provide them with the opportunity to make a media or debating impact in the hope of preferment by their political leaders.[40]

There is considerable truth in this observation for Canada as well.

Parliament can, however, play a role in receiving reports from bodies that report to Parliament. The Auditor General, who has responsibility for examining the financial affairs of the Department of National Defence, reports direct to Parliament.[41] Similarly, as we will see, the various inspectors general in the U.S. report to Congress. There are now no annual reports to Parliament by the military or the Department of National Defence, although there are annual budget estimates. Nor is there an annual report to Parliament by a review group such as the Security Intelligence Review Committee in connection with the security service. Parliament has also given up an important area of review by not reviewing orders in council and other statutory instruments relating to the military.[42] Let us now examine some possible review mechanisms.

OTHER REVIEW BODIES

Summary Investigations and Boards of Inquiry

A "summary investigation" can be ordered by the chief of defence staff where "he requires to be informed on any matter connected with the control and administration of the Canadian Forces." It can also be ordered by a commanding officer where "he requires to be informed on any matter connected with his command...or affecting any officer or non-commissioned member under his command." The procedure for conducting such an investigation is not spelled out in the regulations. The investigation, the QR&O simply states, is to be conducted "in such manner as he sees fit."[43] There is no provision for anyone other than a member of the military to be involved in the investigation.

A more formal procedure is the board of inquiry, which, unlike summary investigations, is provided for in the *National Defence Act*:

> 45.(1) The Minister, and such other authorities as the minister may prescribe or appoint for that purpose, may, where it is expedient that the Minister or any such other authority should be informed on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non-commissioned member, convene a board of inquiry for the purpose of investigating and reporting on that matter.[44]

Chapter 21 of the QR&Os spells out in some detail how a board of inquiry is to be conducted.[45] In addition to those entitled to convene a

summary investigation, a board of inquiry can be convened by the minister of national defence. (The board that investigated the situation in Somalia was established by the chief of defence staff.[46]) A board consists of two or more officers. "Under exceptional circumstances", the QR&O states, the convening authority may appoint civilians as additional members of the board. Indeed, where a board is convened by the minister, "the Minister may, under exceptional circumstances, appoint a civilian as president of the board."[47] Two civilians were appointed to the Somalia Board of Inquiry, but at a later stage they became special advisers.[48] Further, cabinet can appoint a civilian commission of inquiry under the *Inquiries Act*,[49] as in the case of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia.

There is considerable discretion about whether a summary investigation or a board is to be ordered. Investigation of an injury or death, otherwise than in action, for example, is mandatory, but can be either a summary investigation or a board of inquiry. The same is true of "a fire, explosion or similar occurrence" that damages property. Death or serious injury in an aircraft accident, on the other hand, must be examined by a board of inquiry.[50] In Canada, therefore, there may "under exceptional circumstances" be non-military investigations of military problems, but the normal practice is for the military to conduct its own inquiries.

As in Canada, there are "investigations" and "boards of officers" for the U.S. military. Procedures for the army are set out in an Army Regulation, with — as is often the case — greater detail than is found in Canadian regulations and orders.[51] Again, civilians can join the investigating team to give credibility to the board. This was done in the Peers Inquiry, which investigated the My Lai incident in 1969. Two prominent New York lawyers joined the investigating team. "With these steps", Seymour Hersh wrote, "the military blunted the demand, from liberals and conservatives alike, that an outside panel be established to investigate the cover-up."[52]

The Auditor General of Canada examines the accounts of the Department of National Defence and also looks at specific areas from time to time. In 1992, for example, the Auditor General examined capital projects and reserves; in 1994 he looked at defence management systems, information technology, and infrastructure.[53] In the United States, as we will see, in addition to the auditor,[54] there is significantly greater civilian review of military conduct.

The U.S. Inspector General

There is nothing comparable in the Canadian or British military to the U.S. Inspector General.[55] The situation is relatively complex in the United States because there is both a civilian statutory inspector general for the department of defense (IG, DOD) and a purely military inspector general for each of the three services. The IG, DOD was established as recently as 1983, whereas the military inspector general positions are very much older.

George Washington appointed the first inspector general during the War of Independence in 1777. The inspector general was to superintend the training of the entire army in order to ensure troop proficiency in common tactics. A Prussian officer was appointed to the post. Apparently, the first inspector general in western culture was used in the French army in the seventeenth century. In 1668, an inspector general of infantry and an inspector general of calvary were appointed, with the principal duties of reviewing the troops and reporting to King Louis XIV. George Washington's inspector general, Baron von Steuben "is generally credited with developing the standardization, discipline, and concern for soldiers which allowed the moulding of militia remnants at Valley Forge into the victorious Continental Army of the American Revolution."[56] The inspector general's role has continued to evolve.[57] A recently retired army inspector general told the Senate:

> Army IGs continued to be active throughout the War of 1812, the Civil War, the Indian Wars, Spanish-American War, World Wars I and II, Korea, Vietnam and, most recently, Operations DESERT SHIELD/STORM. They have maintained a focus on discipline, training, morale, efficiency, economy, and overall readiness. The Army Inspector General's role has been defined in four functions: inspection, investigation, assistance, and teaching and training. IG inspections have sought and identified the underlying cause of systemic problems and deficiencies; determined responsibility for corrective action; followed up to ensure corrections were made; and spread innovative ideas. Inspectors General have investigated alleged violations of policy, regulation or law, mismanagement, unethical behavior, and misconduct.[58]

The army inspector general is appointed by the secretary of the army and confirmed by the Senate. Reports are made to the chief of staff, to the secretary of the army,[59] and, as we will see, to the IG, DOD.[60] The military inspector general usually serves for about 3 years.[61] The former inspector

general just quoted above served 4 years and then became the vice chief of staff for the army.[62]

Below the army inspector general are many other inspectors general. The system is decentralized, with policy and procedures initiated by the inspector general at the Pentagon and with field inspectors general working directly with their commanders.[63] At the end of the Second World War there were 3,000 U.S. army inspectors general.[64] Army inspectors general around the world today receive more than 40,000 complaints, allegations of impropriety, and requests for assistance each year from soldiers, family members, and civilians. Civilians account for about 15 per cent of the matters dealt with.[65] Inspectors general maintain toll-free hotlines to receive calls, which can, if the caller wishes, be dealt with anonymously. As discussed earlier, an attempt is made to protect whistleblowers.[66] The regulations include a sample notice that states: "All soldiers have the right to present complaints, grievances or requests for assistance to the inspector general. These may include what the soldiers reasonably believe evidences fraud, waste, and abuse."[67] The notice identifies the local inspector general, but then states that

> if you believe your local inspector general's response to you is not fair, complete, or in accordance with law and regulations; or if you believe your interests may be jeopardized by visiting your local inspector general, you may write to [a named more senior inspector general]. You may also call the Inspector General, Department of the Army or the Inspector General, Department of Defence (IG, DOD) hotline. Their [toll-free] telephone numbers are...

Superimposed on the army inspectors general is the centralized statutory inspector general for the department of defense.[68] Statutory inspectors general were introduced into the U.S. system of government post-Watergate by the *Inspector General Act, 1978*,[69] which established them in 12 federal departments and agencies. Like the military inspector general, the idea owed its origins to George Washington's colonial army.[70] The department of defense was not one of the initial departments but was added in 1983.[71] By 1989 the inspector general concept had been expanded to include the rest of the federal government, including 34 small agencies.[72] All statutory inspectors general are required to send semi-annual reports to Congress. These reports, in the words of Bernard Rosen, an expert on accountability of American government bureaucracies,

- describe significant problems, abuses, or deficiencies in agency operations and programs and the recommendations for corrective action;
- identify important recommendations described in previous semiannual reports on which corrective action has not been completed;
- identify matters referred to prosecutive authorities and resulting convictions; and
- list each audit report completed by the inspector general during the six-month period.[73]

In addition, special reports must be prepared and sent to the appropriate congressional committees when the inspector general is informed of particularly serious problems or abuses. Bernard Rosen continues: "This is the bedrock of the inspector general's independence — that the semiannual and special reports be sent by the agency head *without alteration* to the appropriate committees of Congress. The agency head is free to send comments along with each report."

After the 1978 law was enacted, the secretary of defense was directed to establish a task force to report to Congress on whether a department of defense statutory inspector general should be added. The task force recommended against a centralized statutory body. The military, it was argued, is not like any other department or agency of government, because the unique command and control structure suited to the conduct of war requires that decision-making authority and accountability for success or failure be delegated to commanders at every level. The task force recommended instead the establishment of an under secretary of defense for review and oversight who would report to the secretary and deputy secretary of defense.[74]

Congress did not accept the task force recommendations, however, and superimposed a department of defense inspector general on top of the military inspectors general. The new law gave the inspector general of the department of defense responsibilities that include (in the language of a former inspector general of the army),

> providing advice to the Secretary of Defense in the detection and prevention of fraud, waste, abuse and mismanagement; initiating audits and investigations within the Department of Defense; providing policy direction for audits and investigations; requesting assistance as needed from other audit, inspection and investigative units in the Department of Defense; and giving particular regard to the activities of the internal audit, inspection, and investigative units of the military

departments with a view toward avoiding duplication and insuring effective coordination and cooperation.[75]

The mission statement of the IG, DOD states that the office:

a. Conducts, supervises, monitors and initiates audits, investigations and inspections of DoD programs and operations.
b. Provides leadership and coordination and recommends policies for those activities whose mission is to promote economy, efficiency and effectiveness, and to detect and prevent fraud and abuse in the Department's programs and operations.
c. Keeps the Secretary of Defense and the Congress fully and currently informed about problems and deficiencies in the administration of such programs and operations and recommends corrective measures.[76]

The inspector general of the army is required to submit a semi-annual report to the IG, DOD, summarizing activities of army audit, inspection and investigation activities.[77] The IG, DOD in turn submits semi-annual reports to Congress through the secretary of defense.[78] The IG, DOD, the largest of the statutory IGs,[79] has offices outside the Pentagon.

The U.S. military thus has two layers of review by inspectors general, one within the command structure of the military, and the other entirely outside the military structure. Canada has neither.

The Military Ombudsman

An inspector general is more or less the equivalent of an ombudsman.[80] There are many different types of ombudsman around the world dealing with military matters. The federal government in Canada does not have an ombudsman for the military or a general federal ombudsman, although it does have a number of specialized bodies to deal with other areas of federal jurisdiction. Donald Rowat identifies five specialized complaints officers:[81] the Commissioner of Official Languages;[82] the Correctional Investigator;[83] the Privacy Commissioner;[84] the Information Commissioner;[85] and the Public Complaints Commissioner for the RCMP.[86]

A number of countries have an ombudsman with responsibility for dealing with complaints about the military. Sweden, Denmark, and Australia, for example, are in this category. From its establishment in 1809 until 1915, the Swedish ombudsman had authority over certain military matters, but

from 1915 to 1968 there was a separate military ombudsman. In 1968, however, the two bodies were merged, and now there are three ombudsman positions, one of which is responsible for the military. The Danish ombudsman has had responsibility for servicemen from its inception in 1955.[87]

The Australian commonwealth ombudsman, following a change in the governing statute, now has responsibility for some aspects of the armed forces.[88] A separate section of the ombudsman's report is devoted to the report of the defence force ombudsman. The most recent report states:

> The Defence Force Ombudsman (DFO) investigates complaints from current and former members of the Australian Defence Force and their dependants about the actions of Commonwealth agencies in relation to matters which arise during their service, or matters that have arisen as a consequence of their service. The most significant difference with this Ombudsman jurisdiction is that we investigate complaints about employment matters. Most DFO complaints are about members' employment in the Defence Force, particularly in relation to promotion, discharge, accommodation and other employment conditions.[89]

The jurisdiction of the Australian defence force ombudsman, while important, is thus relatively narrow in comparison with that of U.S. inspectors general. Moreover, the DFO system requires that the service person first exhaust the entire range of internal redress of grievance procedures.[90]

A number of countries, such as Norway and Germany, have a military ombudsman in addition to or in the absence of a general ombudsman. The Norwegian ombudsman for the armed forces was set up in 1952. The military was not included in the mandate of the regular ombudsman because the military ombudsman not only investigates complaints but is the head of the system of representative committees. These committees, which allow members of the armed forces to elect their own representatives to discuss issues with their superior officers, were established during the First World War.[91]

The German military ombudsman was established in 1956.[92] There is no civil ombudsman in Germany at the federal level.[93] The office was intended to assure parliamentary control over the military and safeguard the rights of the citizen-soldier in a military based officially on democratic principles but with deep authoritarian roots.[94] The aim of the 1956 legislation "was to create an army of 'citizens in uniform' with far greater rights, including the right to join a trade union, than German soldiers had ever enjoyed before."[95] The military ombudsman was to be the "eye of

Parliament."[96] The office was given the authority under the German constitution to oversee the conduct of the military generally and safeguard the rights of soldiers. The ombudsman can receive complaints direct from soldiers of the lowest ranks and has the authority to investigate them at any level of the military or department of defence, including the right of access to all relevant documents. Further, the military ombudsman makes a yearly report to parliament summarizing the complaints received and making appropriate recommendations for change.[97]

The impact of this office reached its zenith with the Heye affair. In 1964, Germany's second military ombudsman, Helmuth Heye, created controversy by publishing a series of articles in a popular magazine criticizing the German military and asking whether it might be returning to its "old authoritarian ways".[98] The fact that Heye was a vice-admiral known to be of independent mind and quite willing to speak out against his superiors — he had been a critic of the Nazi regime's buildup of the armed forces in the 1930s — lent credence to this fear and prompted a heated public debate. In the end, the government that had ignored Heye's first two reports was forced to re-examine its policy with respect to the military and appointed, in addition to a military ombudsman, an inspector general of the armed forces.[99] While the Heye affair illustrates the potential impact of a military ombudsman on government policy, it also reveals the potential for the office to become overtly political.[100]

CONCLUSION

Canada does not have a military ombudsman or a general ombudsman with jurisdiction over the military. Nor does it have an inspector general system, as in the United States, or a civilian complaints tribunal like the one for the RCMP.[101] The Somalia Inquiry may wish to explore whether some such body would be an important additional technique for controlling improper conduct in the military.

It is not realistic to expect Parliament to play a major supervisory role with regard to military conduct. It can do more than it has been doing, but it works most effectively when reports are prepared by independent non-political bodies such as the Auditor General or the Security Intelligence Review Committee. The deputy minister and others at National Defence Headquarters provide considerable control over military activities, but they are the "eye of the *executive*" on military matters, not the "eye of parliament". The press will undoubtedly continue to play an important investigatory role with respect to the military, using the *Access to*

Information Act and other sources of information.[102] In my opinion, more should be done.

What type of governmental structure could provide effective review? There is tension between two models: the internal military model, within the chain of command (this was the U.S. model before 1983); and the "eye of parliament" model, outside the chain of command, as in Germany and the U.S. inspector general of the department of defense. Both models have merit. The military will no doubt prefer the internal model. Such a model was advocated by Lieutenant Commander G.M. Aikins in a 1993 staff college paper, "An Ombudsman for the Canadian Forces":

> The CF Ombudsman would be a civilian familiar with the military, who would receive complaints from individuals and ensure they were investigated and rectified. He would act not as a champion for complainants, but as an impartial facilitator to assist the chain of command in resolving problems. Service members or DND civilians would have a toll-free line to provide anonymous (but detailed) information to commence investigations into allegations of any nature against military personnel, or request the advice or assistance of the Ombudsman in resolving personal harassment problems. All investigations would be turned over to the appropriate level within the chain of command for necessary action. The ombudsman also would make recommendations as appropriate to alter procedures or regulations.[103]

In my opinion, a better solution would be to have both an internal ombudsman or inspector general[104] and an independent body external to the military that can review the reports of the internal body and report to Parliament. The United States and Germany have both an internal and an external body. In the security field, Canada has both an internal inspector general (reporting to the solicitor general) and an external Security Intelligence Review Committee that prepares an annual report for Parliament and reviews the activities of the Canadian Security Intelligence Service and the inspector general.[105]

Both the internal and external bodies should, as in the United States, receive complaints from civilians as well as the military, provide anonymity to persons reporting, and have a toll-free hotline to make it easier for individuals to lodge complaints. There should be no requirement for military personnel to exhaust internal redress of grievance procedures before having their concerns dealt with.[106] The exhaustion of internal remedies may be desirable in many situations, but it should not be a bar to action.

CHAPTER EIGHT

Conclusion

This study has examined a wide range of techniques available for controlling misconduct in the military. Such control is imperative. Military personnel are, by the nature of their activity, aggressive. Although the present system contains many valuable features, it can be improved. What are some of the techniques used, and what changes should be made?

In Chapter 1 we described a number of techniques. Proper selection is an obvious first step in controlling subsequent behaviour, including using adequate background checks and possibly psychological fitness testing. Training was also discussed, including sensitivity training, which is obviously desirable for humanitarian missions such as the one to Somalia. The importance of effective leadership was also briefly discussed in the introductory chapter.

The experience of the United States contingent in Somalia and in other missions suggests that some problems can be avoided by banning alcohol on such missions, a step that Canada should consider taking. Alcohol continues to be a problem in the Canadian military. Further, about 12 per cent of the U.S. force in Somalia consisted of women, and a recent study indicates that this probably had a beneficial effect on the behaviour of U.S. forces there. Women are less likely to have negative stereotypes of the local inhabitants, for example. This also raises the question of whether aggressive combat forces such as the Airborne Regiment (now disbanded) are the right forces to send on peacekeeping or peacemaking missions. It is always better to find ways of preventing undesirable conduct in advance than to deal with it after the event.

Further, it is essential that the rules to be followed be known by those to whom they are directed. The military does fairly well in making its personnel aware of what is expected. Unfortunately, the rules of engagement, setting out when force can be used on a particular mission, were not brought out in time to be part of the members' ingrained knowledge.

The suggestion is made in Chapter 1 that rules of engagement should be part of a member's regular training. Similarly, the rules of war should be part of the member's basic training, and something similar to the nine-item U.S. "Soldier's Rules", set out in Chapter 1, should be considered for adoption by Canadian Forces.

This raises the issue whether a code of ethics would be desirable. Such a code — several examples are given in Chapter 1 — encourages discussion of ethical values. "It may not help," one writer states, "but it can't hurt."[1] The final issue discussed in the introductory chapter is civil liability. The technique has some potential for controlling improper conduct in the military, but will not be as potent a force as other techniques. Nevertheless, some of the possible restrictions now placed on bringing civil actions should be modified, in particular the rule that the government cannot be liable unless an individual can be held liable, and the statutory provision giving the Crown immunity from suit when the military activity is "for the purpose of the defence of Canada or of training or maintaining the efficiency of, the Canadian Forces."[2]

Rewards as a technique for influencing behaviour are discussed in Chapter 2. No other major institution in society makes such a display of rewards as the military does. They permeate all aspects of military life. As one writer states, "there is an emerging consensus that the effects of punishment on performance are not as strong as the influence of rewards."[3] Their use should be encouraged, but continuing study should be made by the military to find the appropriate balance between sanctions and rewards and to ensure that promotions, medals, and other forms of rewards are administered fairly.

The following chapter looks at reporting wrongdoing, which is required in part to ensure that problems in the military are dealt with adequately and in part to enable the military and the government to keep on top of issues that may become public. Just as it is important for regulations and information to flow down the chain of command, it is equally important for information to flow upward. Techniques should be developed to permit anonymous and easy reporting of incidents and to protect whistleblowers.

Chapter 4 examines administrative and informal sanctions. These are very important in shaping behaviour in the military. A great range of administrative sanctions can be applied. A noncommissioned member, for example, is subject to the following administrative sanctions: verbal warning, recorded warning, counselling and probation, suspension from duty, and compulsory release. These can be applied instead of or in addition to

disciplinary measures. Unlike the administrative sanctions, informal sanctions are not set out in rules or regulations. Yet, as discussed in the chapter, every member of the military knows that minor punishments, such as extra work or drill, are imposed, albeit within reasonably well understood limitations and boundaries. Their use should be regularized in the QR&Os.

The military police play a very important role in controlling misconduct in the military. Their function is similar to that performed by the civilian police: deterring wrongdoing, stopping improper conduct, and investigating and prosecuting wrongdoers. In addition, military police have other functions such as the movement of traffic in a battlefield and receiving prisoners of war. There are now about 1,300 security and military police out of a total regular force of about 65,000 members, that is, about one police member for every 50 members of the military. Yet only two military police went to Somalia with the 1,000 or so Canadian troops, an obviously inadequate number. One senior Canadian military official has written:

> if there had been a military police presence in theatre both of the Somalia incidents [4 and 16 March 1993] which brought such discredit on the Canadian forces in general and the Airborne Regiment in particular may have been avoided.[4]

The military police in fact wanted to have more members in Somalia, but the overall number of troops that could go to Somalia was set by cabinet. The suggestion is made in Chapter 5 that some flexibility should be built into the figures set by cabinet for future such missions.

It is clearly desirable to have an adequate number of military police in the armed services generally and on specific missions. It would probably be unwise to reduce their numbers significantly in the downsizing of the military that is now taking place. It should be noted that military police make up about three to four per cent of the U.S. army, whereas the military police account for only two per cent of Canadian military personnel. About seven to eight per cent of the U.S. force in the Gulf in 1990-91 consisted of military police, and it is likely that there was a similar percentage in Somalia. One reason for the higher U.S. numbers is that U.S military police have greater tactical responsibilities than the Canadian military police, a function that should be considered for Canadian MP to justify greater numbers. The numbers could also be increased by using reserves or civilian police such as the RCMP for special missions, in addition to the regular military police.

The chapter also looked at ways of obtaining greater independence from command influence for the military police. One change suggested is to have the career prospects of military police determined outside the regimental chain of command. Another is to permit the military police to bring charges for military offences without the consent of the commanding officer. Still another is to consider adopting something similar to the U.S. criminal investigation division, whereby all serious offences are investigated by a body outside the units to which accused persons belong. All three suggested changes are desirable.

Military justice is explored in detail in Chapter 6. The 1992 Supreme Court of Canada decision in *Généreux* settled the question of the constitutional legitimacy of a separate system of military justice. The relatively complex system of courts martial and summary proceedings is described in the chapter. The key constitutional question remaining is the validity of the system of summary proceedings before commanding officers and delegated officers. Summary proceedings are the most widely used form of proceedings, accounting for 98 per cent of military trials. There are about 4,000 summary trials each year and only about 100 courts martial. Summary trials are extremely important in shaping the conduct of military personnel, constituting a form of "reintegrative shaming". As John Braithwaite writes in *Crime, Shame and Reintegration*:

> Reintegrative shaming is superior to stigmatization because it minimizes risks of pushing those shamed into criminal subcultures, and because social disapproval is more effective when embedded in relationships overwhelmingly characterized by social approval.[5]

The suggestion is made in Chapter 6 that the substantial decline in the use of summary justice and military detention in the ten years preceding the events in Somalia may well have contributed to the events by not properly controlling disciplinary problems.

Summary proceedings before a commanding officer are vulnerable to constitutional challenge under the Charter because, among other things, it is difficult to argue that the proceeding is before an "independent and impartial" tribunal, as required by section 11(d) of the Charter. Moreover, the absence of a right to counsel would likely breach the "fair hearing" part of section 11(d). Two changes should be made and a third considered. The 90-day period of detention that can now be imposed by a commanding officer conducting a summary proceeding almost certainly brings such proceedings within section 11 ("charged with an offence").

The 90-day period is much longer than commanding officers could impose before the *National Defence Act* was enacted in the early 1950s and much longer than can be imposed by commanding officers in the U.S. or British military. It is therefore recommended that the period of detention be reduced substantially, to about a month, which may remove such proceedings from the purview of section 11 and leave it within the more flexible standards of section 7 of the Charter.

A further important recommended change is to ensure a genuine waiver of the right to a court martial, with full knowledge of the consequences of the waiver. As Justice Lamer stated in a pre-Charter case, waiver "is dependent upon it being *clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.*"[6] It is suggested that when it is reasonable, communication with military duty counsel — at least by telephone — should always be permitted without cost to the member. The member should be told of this right. Moreover, the right to consult a lawyer and the consequences of waiving trial by court martial should be set out clearly in a form signed by the accused, as is done in the U.S. military.

A further change that could be considered is to give a member sentenced to a period of detention over a determined amount the right to appeal as of right by way of trial *de novo* to a court martial. Such a procedure, which would likely be resorted to only rarely, would further strengthen the likelihood of the Supreme Court upholding the constitutionality of summary proceedings by commanding officers.

A number of other matters are discussed in the chapter, including the military nexus doctrine, which is probably no longer part of Canadian military law. A better solution than using the military nexus concept would be to give military and civilian courts concurrent jurisdiction over serving members of the military and to let civil and military authorities work out who should try the accused.

This leads to the issue of double jeopardy, also discussed in Chapter 6. A 1985 amendment to the *National Defence Act* goes too far. It provides that *any* military proceeding is a bar to a civilian proceeding.[7] This applies to summary trials for criminal offences before a commanding officer or delegated officer. It even applies "where, after investigation, a commanding officer considers that a charge should not be proceeded with."[8] Primary jurisdiction to try an accused for a criminal charge committed in Canada, if there is a desire to prosecute by both military and civil authorities, should be in the civil authority. A necessary result of asserting that the

civilian authority is paramount is to disregard a prior military judgement for an offence committed in Canada if, but only if, military jurisdiction was assumed without the express or implied consent of the civilian authorities. The civil authority would, however, take any punishment into account. It is possible that civilian courts would so construe the present legislation, but it would be better if it were clarified by a further amendment to the *National Defence Act*.

The chapter also discusses command influence, "the mortal enemy of military justice."[9] Canada has brought in some significant improvements in this area. Members serving on courts martial are chosen randomly, and the judge advocate conducting the proceedings has a fixed term of office of from 2 to 4 years. One further possible change that the Somalia Inquiry may wish to explore is the U.K. system of using independent civilian judges, with no career ambitions in the military, or military judges at the end of their careers, with no further career ambitions, to conduct proceedings.

Finally, Chapter 7 examines external systems of control. Civilian control of the military is a fundamental principle of Canadian, British, and U.S. society. Parliament, cabinet and the appropriate minister have ultimate control of military operations. One method of control used in Canada is to integrate in the same headquarters the top department of national defence civil servants and the most senior military personnel. The success of the integration is explored, but a firm conclusion on its desirability is not put forward by this writer.

The role of Parliament in overseeing military activities is then examined. The 1994 report of the Joint Committee on Canada's Defence Policy concluded unanimously that Parliament's role should be strengthened, stating:

> whatever our individual views on particular issues of defence policy or operations, there was one matter on which we agreed almost from the beginning — that there is a need to strengthen the role of Parliament in the scrutiny and development of defence policy.[10]

This is easier said than done, however. Nevertheless, Parliament should receive more reports on military matters. There are now no annual reports to Parliament by the military or the department. Nor is there an annual report to Parliament by a review group such as the Security Intelligence Review Committee in connection with the security service.

Parliament has also given up an important area of review by not examining orders in council and other statutory instruments relating to the military.

What type of governmental structure could provide effective review? The conclusion is reached that two types of review are desirable. One is a body internal to the military, comparable to the U.S. inspector general of the army. This is an important office within the military, with inspectors general of lesser rank throughout the army. They receive complaints, allegations of impropriety, and requests for assistance. The other type of review should be by a civilian body outside the military that reports to Parliament. This could be an office like the Security Intelligence Review Committee, an external military ombudsman, or a statutory civilian inspector general such as the position introduced in the United States in 1983. Both the internal and the external body should, as in the United States, receive complaints from civilians as well as the military, provide anonymity to persons reporting, and have toll-free lines to make it easier for persons to call. There should be no requirement for military personnel to exhaust internal redress of grievance procedures before their concerns are dealt with.

In the opening section of this study, I quoted senior U.S. army officials who told researchers for the Somalia Inquiry that as a result of changes introduced after My Lai, "they are sure that a situation such as the conduct of 2 Commando at Belet Uen could not occur in the U.S. army."[11] I commented that the task of the Somalia Inquiry is to set the stage so that the Canadian military will be able to say the same. It is my hope that this study will help the Somalia Inquiry with this important task.

Notes

CHAPTER ONE — INTRODUCTION

1 See Seymour Hersh, *Cover-Up* (New York: Random House, 1972); J.F. Addicott and W.A. Hudson, "The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons" (1993) 139 *Military Law Review* 153; Clifton D. Bryant, *Khaki-Collar Crime* (New York: Free Press, 1979), pp. 217-218.

2 For background on why Canadian troops were in Somalia, see the United Nations Reference Paper, *The United Nations and the Situation in Somalia*, April 1995, p. 6. On 3 December 1992, the Security Council unanimously adopted resolution 794 authorizing the use of "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia" and, acting under Chapter VII of the Charter (it was to have been a traditional peacekeeping operation under Chapter VI), the council authorized the secretary general and participating member states to make arrangements for "the unified command and control" of the military forces that would be involved. Canada contributed to that force. See also the military brief to the Somalia Inquiry, "Legal Basis for Chapter VI and Chapter VII UN Sanctioned Operations". See generally Chester A. Crocker, "The Lessons of Somalia, Not Everything Went Wrong" (1995) 74 *Foreign Affairs* 1; and Richard B. Lillich, "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World" (1994) 3 *Tulane J. of Int. & Comp. Law* 1.

3 Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Gilles Létourneau, chair, established by Order in Council, P.C. 1995-44, 20 March 1995.

4 See Appendix H to the internal document by Jim Simpson and François Lareau, "Report of Visit to U.S. Army Headquarters — Washington, D.C.", 18 September 1995, p. 1.

5 I was not asked to set out what should be treated as misconduct and who should define misconduct, both important questions. Further, I did not limit my analysis to peacekeeping and peacemaking activities, even though these will continue to be the predominant use of the Canadian military in the future. See Allen G. Sens' study for the Somalia Inquiry, "A Mandate Too Far: The Changing Nature of Peacekeeping and the Limits of Force: The Implications for Canada" (Ottawa, 1995).

6 See M.L. Friedland, *Securing Compliance: Seven Case Studies* (University of Toronto Press, 1990); M.L. Friedland, Michael Trebilcock, and Kent Roach, *Regulating Traffic Safety* (University of Toronto Press, 1990); Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995); Friedland, *National Security: The Legal Dimensions* (Ottawa, 1980); and Friedland, *Presidential Commission on Conflicts of Interest* (University of Toronto, 1991) *The Bulletin*, 13 January 1992.

7 See Friedland, Trebilcock, and Roach, *Regulating Traffic Safety*, p. 76ff; Robert Howse, "Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State" (1993) 31 *Alberta L. Rev.* 455; and Friedland, "Rewards in the Legal System: Tenure, Airbags, and Safety Bingo" (1993) 31 *Alberta L. Rev.* 493.

8 There are on average only about 135 prosecutions a year. See *Report of the Auditor General of Canada* (1994), volume 16, chapter 31-17. See generally Neil Brooks and Anthony Doob, "Tax Evasion: Searching for a Theory of Compliant Behaviour", in Friedland, *Securing Compliance*, p. 120ff.

9 Lawrence B. Radine, *The Taming of the Troops: Social Control in the United States Army* (Westport, Conn.: Greenwood Press, 1977), p. 156.

10 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989), pp. 68, 58. See also *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Government of Ontario, 1995), pp. 186-187, 419.

11 See, for example, Martin Edmonds, *Armed Services and Society* (Leicester University Press, 1988), p. 30.

12 Transcript of Policy Hearings, 21 June 1995, p. 442.

13 Queen's Regulations and Orders (QR&O) 19.10(a), (b), (c); and 19.38.

14 See generally Charles C. Moskos and Frank R. Wood, eds., *The Military: More Than Just a Job?* (Washington: Pergamon-Brassey's, 1988); and

Henning Sørensen, "New Perspectives on the Military Profession: The I/O Model and Esprit de Corps Reevaluated" (1994) 20 *Armed Forces and Society* 599.

15 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Chicago: Aldine Publishing, 1962), p. xiii.

16 For example, voting is now permitted in Canadian institutions (see *Sauvé* v. *Canada (Attorney General)*; *Belczowski* v. *Canada* [1993] 2 S.C.R. 438), and persons found not guilty by reason of insanity can refuse treatment (*Criminal Code*, s. 672.55(1)).

17 See Edmonds, *Armed Services and Society*, p. 34; and Deborah Harrison and Lucie Laliberté, *No Life Like It: Military Wives in Canada* (Toronto: Lorimer, 1994).

18 See Bernard Fleckenstein, "Federal Republic of Germany", in Moskos and Wood, *The Military: More Than Just a Job?*, p. 177ff; and Jurgen Oelrich, "The German Concept of the `Citizen in Uniform'", in Daniella Ashkenazy, *The Military in the Service of Society and Democracy* (Westport, Conn.: Greenwood, 1994), p. 136ff.

19 Reuven Gal, "Israel", in Moskos and Wood, *The Military: More Than Just a Job?*, p. 274; and Gal, *A Portrait of the Israeli Soldier* (New York: Greenwood Press, 1986).

20 R. Owen Parker, a Canadian sociologist with extensive military experience, recently studied the organizational culture of the Canadian military and concluded that it has "shifted from the institutional ideal to an occupational reality." See "The Influences of Organizational Culture on the Personnel Selection Process", Ph.D. thesis, York University, 1995, p. 186. See p. 86ff for a discussion of the institution/organization debate.

21 Moskos and Wood, "Introduction", in *The Military: More Than Just a Job?*, pp. 4-5 and p. 6, summarizing Moskos, "Institutional and Occupational Trends in Armed Forces", p. 15.

22 *Solorio* v. *U.S.* 483 U.S. 435 (1987).

23 *O'Callahan* v. *Parker* 395 U.S. 258 (1969).

24 Charles Cotton, "The Institutional Organization Model and the Military", in Moskos and Wood, *The Military: More than Just a Job?*, pp. 48, 47.

25 (1992) 70 C.C.C. (3d) 1; [1992] 1 S.C.R. 259.

26 (1980) 54 C.C.C. (2d) 129; [1980] 2 S.C.R. 370.

27 *Parker* v. *Levy* 417 U.S. 733 (1974).

28 See Anthony Kellett, *Combat Motivation: The Behavior of Soldiers in Battle* (Boston: Kluwer Nijhoff, 1982), p. 10.

29 Mobile Command Study, *A Report on Disciplinary Infractions and Antisocial Behaviour Within FMC with Particular Reference to the*

Special Service Force and the Canadian Airborne Regiment (DND, 1985), p. 26 [hereafter, the Hewson Report]; and technical report by Major K.W.J. Wenek, p. 178ff.

30 Hewson Report, pp. 17-18, 186-188. In 1979-1982, sexual offences were 54 per 100,000 population in the general population and 85 per 100,000 on DND establishments. On the other hand, robbery was 102 per 100,000 in the general population and 15 per 100,000 on DND establishments. No figures are given on theft, though the extent of theft in the military may be high, because "the abundance of materiel in the military means that its control and maintenance of security is difficult to effect" (Clifton D. Bryant, *Khaki-Collar Crime: Deviant Behavior in the Military Context* (New York: The Free Press, 1979), p. 47).

31 Hewson Report, pp. 187-188.

32 Kellett, *Combat Motivation*, p. 89.

33 See Harrison and Laliberté, *No Life Like It*, p. 44 and endnote 43, p. 247.

34 See subsequently issued CFAO 19-39 (1988) regarding personal harassment and CFAO 19-36 (1992) regarding sexual misconduct.

35 Bryant, *Khaki-Collar Crime*, p. 201.

36 Hewson Report, p. 19.

37 Hewson Report, pp. 18, 30. Assaults were also high for the Royal Canadian Regiment, a fact the authors of the report were at a loss to explain (p. 33).

38 See M.R Schwabe and F.W. Kaslow, "Violence in the Military Family", in *The Military Family: Dynamics and Treatment* (New York: Guilford Press, 1984), p. 129.

39 Harrison and Laliberté, *No Life Like It*, pp. 43-44.

40 *Board of Inquiry re Canadian Airborne Regiment Battle Group* (1993), pp. 3327, 3350ff (hereafter, *Board of Inquiry*).

41 Kellett, *Combat Motivation*, p. 75, citing W. Cockerham, "Selective Socialization: Airborne Training as Status Passage" (1973) 1 *J. of Political and Military Sociology* 215.

42 See the article by Major J.K. McCollum in *Military Review*, November 1976, quoted in Hewson Report, p. 159; see also p. 45.

43 M. Weiss, "Rebirth in the Airborne" (1967) 4 *Transaction* 23, cited in Bryant, *Khaki-Collar Crime*, p. 56.

44 Hewson Report, pp. 45-47.

45 Bryant, *Khaki-Collar Crime*, p. 235.

46 Henry Stanhope, *The Soldiers: An Anatomy of the British Army* (London: Hamish Hamilton, 1979), p. 201.

47 *Board of Inquiry*, pp. 3352, 3336.

48 Hewson Report, p. 20. See also Schwabe and Kaslow, "Violence in the Military Family", p. 133.
49 Hewson Report, p. 20.
50 Harrison and Laliberté, *No Life Like It*, p. 43.
51 Hewson Report, p. 20.
52 *Board of Inquiry*, pp. 3308, 3315.
53 *Board of Inquiry*, p. 3308. See the Standing Operating Procedures for the Canadian Joint Forces Somalia, dated 1 February 1993 (DND 004027):
1. **Alcohol**. Alcohol will only be consumed in the designated area within the HQ lines out of sight of the local population if and when it is authorized.
2. A member who appears to be under the influence of alcohol will not be permitted to leave the HQ premises. Alcohol shall not be served to those nations who are prohibited alcohol (U.S. Forces).
3. The consumption of alcohol by HQ personnel in transit is prohibited.
4. In the unit canteen, rationing and control systems will be established to preclude quantities of alcohol being sold to individuals which exceed their entitlements. Special requests may be made to Sig Ops for a particular social function. The basic ration will be no more than two beer a day.
5. **Drugs**. Under no circumstances will the use of any drug be tolerated. Possession for sale, use or smuggling will be seriously dealt with. This includes the drug known as "KHAT".
6. The chewing of "KHAT" is considered poor conduct by many Somalis, particularly by clan elders. As there is a risk of confusing Canadians use of chewing tobacco with the use of "KHAT", personnel should only chew tobacco out of sight of the local population.
54 See Simpson and Larcau, "Report of Visit to U.S. Army Headquarters", Appendix H. The soundness of the decision was no doubt confirmed in the eyes of the U.S. military after the extreme embarrassment caused by the events at Tailhook later that year in which alcohol was a major contributing factor. See the report by the Office of the Inspector General, Department of Defense, *The Tailhook Report: The Official Inquiry into the Events of Tailhook '91* (New York: St. Martin's, 1993). See also Laura Miller and Charles Moskos, "Humanitarians or Warriors?: Race, Gender, and Combat Status in Operation Restore Hope" (1995) 21 *Armed Forces and Society* 615, p. 620.
55 See QR&O 19.04 (no alcohol except as permitted); QR&O chapter 20 (various forms of drug testing): random testing, 20.08; re safety sensitive positions, 20.09; testing for cause, 20.11; CFAO 19-21 (1992) (drug

control program, including paragraph 17, mandatory urine testing); CFAO 34-36 (1990) (medical examination re drunkenness); CFAO 19-31 (1988) (helping persons overcome dependence); CFAO 56-36 (1977) (drug and alcohol program).

56 *Toronto Star*, 28 January 1996. See the court martial of Major Ross Wickware for allowing drinking while on duty in Bosnia (*Calgary Herald*, 12 April 1995). The Canadian rules prohibited drinking on duty and limited off-duty soldiers to two drinks.

57 Richard Holmes, *Firing Line* (London: Jonathan Cape, 1985), pp. 244, 246, 249. See also Robert Graves, *Goodbye to All That* (Hammondsworth: Penguin, 1973): "Our men looked forward to their tot of rum at dawn stand-to as the brightest moment of their twenty-four hours; when this was denied them, their resistance weakened", quoted in Holmes, p. 249. See also Bryant, *Khaki-Collar Crime*, p. 177.

58 Harrison and Laliberté, *No Life Like It*, p. 43. It may help horizontal bonding with one's buddies, but may detract from vertical bonding with one's superiors; see F.J. Manning "Morale, Cohesion, and Esprit de Corps", in Reuven Gal and A.D. Mangelsdorff, *Handbook of Military Psychology* (New York: John Wiley, 1991), p. 463.

59 Bryant, *Khaki-Collar Crime*, p. 175. See also p. 176: "Alcohol serves the function of relieving the tension of or blunting sexual drives, acting as a kind of sexual anesthetic."

60 Byrant *Khaki-Collar Crime*, pp. 181-182; Holmes, *Firing Line*, p. 251; and Richard A. Gabriel, *To Serve With Honor* (New York: Praeger, 1982), p. 1.

61 Gabriel, *To Serve With Honor*, p. 1. It should be noted, however, that many of these persons ceased to be addicted when they returned to the United States. See L.N. Robbins et al., "Vietnam Vets 3 Years After Vietnam", in L. Britt and C. Winnick, eds., *Yearbook of Substance Use and Abuse*, volume 2 (New York: Humanities Science Press, 1980).

62 T.G. Williams, "Substance Misuse and Alcoholism in the Military Family", in *The Military Family*, pp. 75-76. Alcohol and drug use have subsequently declined, although heavy drinking, which affected one in seven active-duty personnel in 1992, is still a serious problem. See R.M. Bray et al., "Trends in Alcohol, Illicit Drug, and Cigarette Use among U.S. Military Personnel: 1980-1992" (1995) 21 *Armed Forces and Society* 271. For a discussion of treatment programs, see Paul Harig, "Substance Abuse Programs in Military Settings", in Gal and Mangelsdorff, *Handbook of Military Psychology*, p. 635ff. The U.S.

Army is, in theory, dry. The Navy stopped giving rum on ships in 1913; see Holmes, *Firing Line*, pp. 245, 251.

63 See Harrison and Laliberté, *No Life Like It*, p. 43, citing a study by P.M. Hrabok, "The Pre-Adolescent in the Military Family", in *Proceedings of the Regional Social Work Conference on the Child in the Canadian Military Family* (CFB Trenton, 1978).

64 This paragraph is drawn from a study for the Somalia Inquiry by Eugene Oscapella, "Alcohol and Drug Policies Affecting the Canadian Forces" (February 1996). The 1989 study was prepared by the Directorate of Preventive Medicine, Surgeon General Branch (A-MD-007-162/JD-Z06). The 1994 study was done by the Directorate of Health Protection and Promotion, Surgeon General Branch (May 1995). A survey by the military shows a lower rate of drug use than for the civilian population. See "Operation Cascade II, An Anonymous Urinalysis Drug Survey Conducted Across the Canadian Forces, 8 December 1992" (39065D-100-041 (DG PCOR), 25 February 1993).

65 As cited in Oscapella, "Alcohol and Drug Policies", p. 5.

66 Hrabok, "The Pre-Adolescent in the Military Family", cited in Harrison and Laliberté, *No Life Like It*, p. 18.

67 Harrison and Laliberté, *No Life Like It*, p. 18.

68 Bryant, *Khaki-Collar Crime*, p. 352.

69 Gabriel, *To Serve With Honor*, "Foreword", p. xv.

70 Gabriel, *To Serve With Honor*, p. 6.

71 See Anthony Kellett, "Combat Motivation", paper presented to a conference on Psychological War, University of North Carolina, 21 April 1995, p. 3.

72 See also Parker, "The Influences of Organizational Culture".

73 Hewson Report, p. 37.

74 See F.H. Rath and J.E. McCarroll, "Clinical Psychological Assessment", in Gal and Mangelsdorff, *Handbook of Military Psychology*, p. 579ff.

75 Hewson Report, pp. 38, 192. There were 122 cases of schizophrenia per 100,000 in the general population in 1978 and 42 in the military in about the same period; but there were 116 cases per 100,000 of personality disorders in the military and 57 in the general population. See also Harrison and Laliberté, *No Life Like It*, p. 47.

76 See Sharon Smith and Linda Siegel, "War and Peace: The Socialization of Children", in R.A. Hinde and H.E. Watson, *War: A Cruel Necessity?* (London: Tauris, 1995), p. 107.

77 Bryant, *Khaki-Collar Crime*, p. 354.

78 The author's personal observation in a continuing study of the administration of criminal justice in Niagara, Ontario and Niagara, New York.
79 Miller and Moskos, "Humanitarians or Warriors?, pp. 637, 627, 625. The authors also found (p. 627) that blacks, who constituted one third of the U.S. force, had attitudes similar to women's with regard to the local population.
80 Holmes, *Firing Line*, p. 38; Kellett, *Combat Motivation*, p. 80.
81 See U.S. Army Regulation 350-41, *Training in Units* (Department of the Army, 1993), p. 14-3.
82 Addicott and Hudson, "The Twenty-Fifth Anniversary of My Lai", 164.
83 Bryant, *Khaki-Collar Crime*, p. 355.
84 *Board of Inquiry*, p. 3345.
85 CFAO 19-43, in particular paragraphs 25 and 26. See generally the military brief to the Somalia Inquiry, "Anti-Racism Policy of the Canadian Forces". The U.S. Secretary of the Army ordered an investigation in December 1995 into the "climate" throughout the army following the killing of two blacks by white soldiers of the 82nd Airborne Division (*Globe and Mail*, 13 December 1995).
86 Military brief to the Somalia Inquiry, "Leadership Development in the Canadian Forces", pp. 2, 14.
87 Kellett, *Combat Motivation*, pp. 158-159.
88 *International Military and Defense Encyclopedia*, volume 3 (Washington: Brassey's, 1993), p. 1460.
89 Military Training Manual, *Leadership in Land Combat* (DND, 1988) B-GL-318-015/PT-001, p. 1-3.
90 Kellett, *Combat Motivation*, p. 150.
91 See R.A. Gabriel and P.L. Savage, *Crisis in Command: Mismanagement in the Army* (New York: Hill and Wang, 1978), p. 56, cited in Kellett, *Combat Motivation*, p. 162.
92 S. Rolbant, *The Israeli Soldier: Profile of an Army* (Cranbury, N.J.: Yoseloff, 1970), p. 166, as cited by Kellett, *Combat Motivation*, p. 163. There is controversy over how many American officers were killed in Vietnam in relation to the total force. Compare Kellett, *Combat Motivation*, p. 159ff, with Gabriel and Savage, *Crisis in Command*. The latter think the numbers were low; the former argues that they were high for junior officers. As we will see later, a large number of these officers were killed by their own men.
93 Hewson Report, pp. 50, 20.
94 *Board of Inquiry*, p. 3306.

95 Kellett, *Combat Motivation*, p. 169.
96 Graves, *Goodbye to All That*, cited in Kellett, *Combat Motivation*, p. 169ff.
97 Kellett, *Combat Motivation*, pp. 23, 46-47, 112ff; Kellett, *Unit Autonomy*, DSEA Staff Note No. 5/85 (June 1985); Kellett, "The Influence of the Regimental System on Group and Unit Cohesion" (preliminary draft, 1991).
98 Kellett, "Combat Motivation", p. 7.
99 Kellett, *Combat Motivation*, p. 100; see also p. 97ff. See the reference to "buddies" in the Military Training Manual, *Leadership in Land Combat*, pp. 5-6.
100 S.L.A. Marshall, *Men Against Fire* (New York: Morrow, 1947), p. 42, cited in Kellett, *Combat Motivation*, p. 98.
101 Barry Broadfoot, *Six War Years, 1939-1945: Memories of Canadians at Home and Abroad* (Toronto: Doubleday, 1974), cited in Kellett, *Combat Motivation*, p. 99.
102 See P.T. Bartone and F.R. Kirland, "Optimal Leadership in Small Army Units", in Gal and Mangelsdorff, *Handbook of Military Psychology*, p. 396, where this is referred to as horizontal bonding and bonding between leaders and subordinates is referred to as vertical bonding.
103 See Holmes, *Firing Line*, p. 329, who cites Richard Gabriel's suggestion that as many as 20 per cent of U.S. officers killed in the war may have died at the hands of their own men.
104 Kellett, "Combat Motivation", p. 6.
105 See Morris Janowitz and Roger Little, *Sociology and the Military Establishment*, revised edition (New York: Russell Sage, 1965), p. 41.
106 Kellett, *Combat Motivation*, p. 202.
107 See QR&O 4.02(e) for the obligation of officers to report and QR&O 5.01(e) for non-commissioned members.
108 See United Nations Resolution 808 (1993); United Nations Resolution 955 (1994).
109 Ian Brownlie, *Principles of International Law*, fourth edition (Oxford: Clarendon Press, 1990), p. 562.
110 Germany had a large War Crimes Bureau throughout the war, in anticipation of a German victory. See A.M. deZayas, *The Wehrmacht War Crimes Bureau, 1939-1945*, translated from the German (University of Nebraska Press, 1989).
111 Draft Statute of the International Criminal Court, International Law Commission, 46th Session, U.N. Doc. A/CN.4/L/491/Rev. 2 (1994). See generally the fine LL.M. thesis by Bradley E. Berg, "World Criminals and

First Principles: The Jurisdiction of an International Criminal Court", University of Toronto, 1995.

112 See Berg, "World Criminals and First Principles", chapter 2.

113 See *Criminal Code*, s. 7(3.71)ff, upheld in *Finta* [1994] 1 S.C.R. 701, pp. 805-8; 88 C.C.C. (3d) 417.

114 Friedland, Trebilcock, and Roach, *Regulating Traffic Safety*. See also the work of William Haddon, especially "On the Escape of Tigers: An Ecologic Note" (1970) 60 *American J. of Public Health* 2229.

115 Friedland, Trebilcock, and Roach, *Regulating Traffic Safety*, p. 17. See generally R.V.G. Clarke and P. Mayhew, *Designing Out Crime* (London: H.M.S.O., 1980).

116 See M.L. Friedland, *Access to the Law* (Toronto: Carswell/Methuen, 1975).

117 *National Defence Act*, R.S.C. 1985, c. N-4 (hereafter, NDA). The federal government has exclusive legislative authority to pass legislation in relation to the "Militia, Military and Naval Service, and Defence" under section 91(7) of the *Constitution Act, 1867*.

118 See NDA, s. 12, authorizing regulations under the act by cabinet, the minister of national defence, and Treasury Board; and QR&O 1.23 and NDA, s. 18(2): "Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff."

119 QR&O 1.095 states that the notes "(a) are for guidance of members, and (b) shall not be construed as if they had the force and effect of law but should not be deviated from without good reason."

120 CFAO 1-1. See also Canadian Forces Supplementary Orders, described in CFAO 1-2.

121 See QR&O 4.12; QR&O 3.23 and 4.21; CFAO 4-8, paragraph 2, stating that routine orders "are means by which COs disseminate regulations, orders, instructions and general information to personnel under their command. COs of each unit of the Regular Force and Primary Reserve shall publish ROs"; and QR&O 19.015: "Every officer and non-commissioned member shall obey lawful commands and orders of a superior officer."

122 Pursuant to s. 18(2) of the NDA.

123 See, for example, Officer Professional Development Program, Student Study Guide, *Military Law 1993/94* (A-PD-050-ODI/PG-004); and *Military Police Procedures* (A-SJ-100-004/AG-000).

124 QR&O 4.02 and 5.01. See to the same effect QR&O 19.01.
125 QR&O 4.26(2). COs disseminate regulations, etc. through routine orders; see CFAO 4-8-2.
126 See *Rex* v. *Ross* (1944) 84 C.C.C. 107 (B.C. County Court).
127 See James B. Fay, "Canadian Military Criminal Law: An Examination of Military Justice", LL.M thesis, Dalhousie Law School, 1974. Fay argues that the words "received at the base, unit or element" in QR&O 1.21 do not by their language encompass orders that *originate* at the base, unit or element.
128 NDA, s. 83; QR&O 19.015.
129 QR&O 19.015, notes (b) and (c). See also *Finta* (1994) 1 C.C.C. (3d) 417; [1994] 1 S.C.R. 701; and M.L. Friedland, *National Security: The Legal Dimensions* (Ottawa, 1980) pp. 104-106.
130 QR&O 103.60, note (b).
131 I am indebted to Robert Brush, now completing his third year in the Faculty of Law, University of Toronto, for his thorough analysis of rules of engagement in a research paper, "Controlling the Use of Force by Canadian Soldiers: The Place of Rules of Engagement within the Military Justice System", prepared under my supervision and on file with the Somalia Inquiry.
132 See the military brief to the Somalia Inquiry, "Use of Force and Rules of Engagement", p. 8. This definition is based almost word for word on that adopted by the Joint Chiefs of Staff of the United States Armed Services. See Lieutenant Commander G.R. Philipps, "Rules of Engagement: A Primer" *The Army Lawyer*, July 1993 (Department of the Army Pamphlet 27-50-248), p. 6.
133 See Major Mark S. Martins, "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering" (1994) 143 *Military Law Review* 1, pp. 35-36.
134 See "Use of Force and Rules of Engagement."
135 Rules of Engagement, Operation Deliverance.
136 *Use of Force in CF, Joint and Combined Operations* (DND, 1995, B-GG-005-004/AF-005). For a discussion of rules of engagement in humanitarian missions, see Jonathan T. Dworken, *Rules of Engagement (ROE) for Humanitarian Intervention and Low-Intensity Conflict: Lessons from Restore Hope* (Alexandria, Va.: Center for Naval Analyses, 1993).
137 *Mathieu* [1995] C.M.A.C. file number 379, p. 13ff.
138 *Brocklebank* [1996] C.M.A.C. file number 383, pp. 20-21, 2 April 1996; (1996) 106 C.C.C. (3d) 234.

139 Martins, "Rules of Engagement for Land Forces", p. 61. See *U.S.* v. *McMonagle* 34 M.J. 825 (A.C.M.R., 1992); and *U.S.* v. *Finsel* 33 M.J. 739 (A.C.M.R., 1991). With respect to the rules of engagement (yellow cards) for British troops in Northern Ireland, see *Jones* (1975) 2 N.I.J.B. 22; and *Clegg* [1995] 1 All E.R. 334 (H.L.), p. 338 ("it is not suggested that the yellow card has any legal force").

140 Martins, "Rules of Engagement for Land Forces", p. 82.

141 *Board of Inquiry*, pp. 3322 and 3330. Note that the rules of engagement for the division that engaged in the My Lai massacre were not issued until the very day of the massacre: see Hersh, *Cover-Up*, pp. 34-35. Hersh also notes (p. 49) that training was poor with respect to the Geneva Convention and the treatment of prisoners of war.

142 See Friedland, *A Place Apart*.

143 See the extensive bibliography on military ethics prepared by C.E. Murphy for the Canadian Forces College, Toronto, 1994.

144 Gabriel, *To Serve With Honor*, pp. 9, 140. The proposed code reads as follows:

The Soldier's Code of Ethics

The nature of command and military service is a moral charge that places each soldier at the center of unavoidable ethical responsibility.

A soldier's sense of ethical integrity is at the center of his effectiveness as a soldier and a leader. Violating one's ethical sense of honor is never justified even at a cost to one's career.

Every soldier holds a special position of trust and responsibility. No soldier will ever violate that trust or avoid his responsibility by any of his actions, no matter the personal cost.

In faithfully executing the lawful orders of his superiors, a soldier's loyalty is to the welfare of his men and mission. While striving to carry out his mission, he will never allow his men to be misused in any way.

A soldier will never require his men to endure hardships or suffer dangers to which he is unwilling to expose himself. Every soldier must openly share the burden of risk and sacrifice to which his fellow soldiers are exposed.

A soldier is first and foremost a leader of men. He must lead his men by example and personal actions; he must always set the standard for personal bravery, courage, and leadership.

A soldier will never execute an order he regards to be morally wrong, and he will report all such orders, policies, or actions of which he is aware to appropriate authorities.

No soldier will ever willfully conceal any act of his superiors, subordinates, or peers that violates his sense of ethics. A soldier cannot avoid ethical judgments and must assume responsibility for them.

No soldier will punish, allow the punishment of, or in any way harm or discriminate against a subordinate or peer for telling the truth about any matter.

All soldiers are responsible for the actions of their comrades in arms. The unethical and dishonorable acts of one diminish us all. The honor of the military profession and military service is maintained by the acts of its members, and these actions must always be above reproach.

The nature of command and military service is a moral charge that places each soldier at the centre of unavoidable ethical responsibility.

145 C.A. Cotton, "A Canadian Military Ethos" (1982) 12 *Canadian Defence Quarterly* 10, p. 13. See also the proposal by General A.J.G.D. de Chastelain, "Canadian Military Ethos", in Department of National Defence, *The Canadian Forces Personnel Concept* (Ottawa, 1987). See generally Parker, "The Influences of Organizational Culture", p. 57ff.

146 "Military Ethics: A Code for the Canadian Forces" (Canadian Staff College, 1992), p. 20.

147 Hines, "Military Ethics", p. 21. The first official call for a published code or statement of the military ethos came in the "Review Group on the Unification Task Force" Ottawa, August 31, 1980 (the Vance Report). A paper, "The Ethics and Ethos of the Military Profession", prepared by SLT Craig Martin (now a law student and my research assistant) in 1988 for the Navy Commanding Officers' Conference in Halifax was subsequently distributed to all units of Maritime Command by Vice Admiral Charles Thomas to get officers thinking more about ethical issues of leadership. For a discussion of codes of ethics in other government departments and agencies, see Bernard Rosen, *Holding Government Bureaucracies Accountable*, second edition (New York: Praeger, 1989), p. 156ff.

148 I am grateful to my colleague, Kent Roach, for his help with this section.

149 *Globe and Mail*, 21 May 1996.

150 See J.R.S. Prichard, "A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law" (1988) 17 *J. of Legal Studies* 451.

151 But see QR&O chapter 38 and CFAO 38-1 relating to the liability of a member to the Crown by an administrative deduction for loss or damage to property.

152 See the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 4, 10 and 11, as amended by Stat. Can. 1990, c-8. See generally *Liebmann* v. *Canada (Minister of National Defence)* (1993) 69 F.T.R. 81 (Fed. Ct. Trial Div.).

153 See, for example, *Hendry* v. *The Queen* [1965] 1 Ex. C.R. 392 (T.D.); *Antcil* v. *The Queen* [1959] Ex. C.R. 229 (T.D.); and *The King* v. *Anthony* [1946] S.C.R. 569. There is also liability for the "escape" of dangerous objects from military testing grounds; see *Canadian Encyclopedic Digest*, third edition (Toronto: Carswell, 1991), Armed Forces, #95.

154 See section 10 of the *Crown Liability and Proceedings Act*. See also the seven-day notice period in section 12 and the six-month limitation period in section 287 of the *National Defence Act*.

155 See David Cohen, "Regulating Regulators: The Legal Environment of the State" (1990) 40 *U.T.L.J.* 213, p. 221. See also Sandra McCallum, "Personal Liability of Public Servants: An Anachronism" (1984) *Canadian Public Administration* 611.

156 Section 9 of the *Crown Liability and Proceedings Act*. Section 270 of the *National Defence Act* states: "No action or other proceeding lies against any officer or non-commissioned member in respect of anything done or omitted by the officer or non-commissioned member in the execution of his duty under the Code of Service Discipline, unless the officer or non-commissioned member acted, or omitted to act, maliciously and without reasonable and probable cause." I read this section as protecting those administering justice, not as a protection of military personnel generally.

157 See generally Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983).

158 *Liability of the Crown*, second edition (Toronto: Carswell, 1989), p. 135.

159 Hogg, *Liability of the Crown*, p. 135. There are differences that result. The U.S. Supreme Court, for example, has held that the United States is immune from tortious liability to members of the armed services ("where the injuries arise out of or are in the course of activity incident to service": *Feres* v. *U.S.* (1950) 340 U.S. 135, p. 146), whereas the Australian High Court has held there is no such immunity: see Hogg, *Liability of the Crown*, p. 137. The U.K. *Crown Proceedings Act 1947*, s. 10, had provided immunity in tort to a member of the armed forces and the Crown for acts committed by a member of the military against another member of the military while on duty. This section was repealed by the *Crown Proceedings (Armed Forces) Act 1987*, s. 1. See generally W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 14th edition (London: Sweet and Maxwell, 1994), p. 700ff.

160 The Australian courts draw a distinction between acts committed in peacetime and during "active operations against the enemy." See Hogg, *Liability of the Crown*, p. 136. See also the U.S. *Federal Tort Claims Act of 1946*, 28 U.S.C.A., s. 1346(b) which permits suits against the United States for injuries caused by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Section 2680(j) of 28 U.S.C.A. provides an exception for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." There is also a "discretionary function exception." See generally W.L. Prosser and W.P. Keeton, *The Law of Torts*, fifth edition (St. Paul, Minn.: West, 1984), chapter 25; Barry Kellman, "Judicial Abdication of Military Tort Accountability: But Who is to Guard the Guards Themselves?" [1989] *Duke L.J.* 1597; "Law of Damages Applicable to the Military Claims Act Outside the United States" *Army Lawyer*, November 1995, p. 55; O.M. Reynolds, "The Discretionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration" (1989) 42 *Oklahoma L. Rev.* 459; and D.N. Zillman, "Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act" (1985) 110 *Military Law Rev.* 115.

161 *Robitaille* v. *The Queen* [1981] 1 F.C. 90 at 93 (Trial Division) per Marceau J.

162 See Hogg, *Liability of the Crown*, pp. 143-144.

CHAPTER TWO — REWARDS

1 The recent suicide of the highest ranking naval officer in the U.S. military following allegations that he was wearing undeserved decorations is some indication of how seriously awards are taken by the military. See *Globe and Mail*, 18 May 1996.

2 See Hugh Arnold, "Sanctions and Rewards: an Organizational Perspective", in M.L.Friedland, *Sanctions and Rewards in the Legal System: A Multidisciplinary Approach* (University of Toronto Press, 1989), p. 152. See generally the entire volume and M.L. Friedland, "Rewards in the Legal System: Tenure, Airbags, and Safety Bingo" (1993) 31 *Alberta L. Rev.* 493.

3 Arnold, "Sanctions and Rewards", p. 142.

4 See Robert Howse, "Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State" (1993) 31 *Alberta L. Rev.* 455.

5 S.L.A. Marshall, *Men Against Fire* (New York: William Morrow, 1947), p. 22, as cited in Morris Janowitz and Roger Little, *Sociology and the Military Establishment*, revised edition (New York: Russell Sage, 1965), p. 41. For a description of important decision making by lower-level personnel on nuclear-powered aircraft carriers, see K.H. Roberts et al., "Decision Dynamics in Two High Reliability Military Organizations" (1994) 40 *Management Science* 614.

6 Janowitz and Little, *Sociology and the Military*, pp. 41-3. Military traditionalists, they point out (p. 47), are not entirely comfortable with "the use of group consensus procedures by lower commanders."

7 Richard Holmes, *Firing Line* (London: Jonathan Cape, 1985), p. 353. The author points out (pp. 354-355) that "looting was widespread in both World Wars, whatever military law-books may have to say about it" and that after the Falklands War "Argentinian binoculars and bayonets appeared with remarkable rapidity amongst the militaria dealers of [a large military base in England]."

8 See the excellent study by Anthony Kellett, *Combat Motivation: The Behavior of Soldiers in Battle* (The Hague: Kluwer Nijhoff, 1982), p. 203, which I have relied on for much of what follows.

9 Kellett, *Combat Motivation*, p. 204.

10 Kellett, *Combat Motivation*, pp. 204-205.

11 Kellett, *Combat Motivation*, p. 206.

12 See Holmes, *Firing Line*, pp. 356-357, and the studies cited in Kellett, *Combat Motivation*, p. 209.

13 Kellett, *Combat Motivation*, p. 207.

14 Holmes, *Firing Line*, pp. 357-358, 355.

15 See CFAO 49-4 (Career Policy Non-Commissioned Members Regular Force) and CFAO 11-6 (Commissioning and Promotion Policy — Officers — Regular Force). A long-serving member of the Canadian military is quoted as follows in Deborah Harrison and Lucie Laliberté, *No Life Like it: Military Wives in Canada* (Toronto: Lorimer, 1994), pp. 32-33: "The whole system has got clear steps and stages... We've got it laid out better than the civil service, and the kid sees this. We make a fuss about your promotion, okay? The responsibility we give you — we make a big deal out of it. And it works."

16 CFAO 61-8 (Military Honours and Gun Salutes).

17 Volume III (Financial) of QR&O, art. 204.015 (Pay of Officers and Non-Commissioned Members — Incentive Pay).
18 Art. 204.21.
19 CFAO 26-6 (Personnel Evaluation Reports — Officers); and CFAO 26-15 (Performance Evaluation Reports — Other Ranks...).
20 CFAO 26-6, sections 9, 25, and 13.
21 CFAO 26-15.
22 CFAO 26-15, s. 14.
23 See also CFAO 9-51 describing the issuing of a Certificate of Achievement for completing a course.
24 CFAO 26-16 (Conduct Sheets).
25 CFAO 26-16, s. 11.
26 See QR&O 114.55.
27 See Reuven Gal, "Israel", in C.C. Moskos and F.R. Wood, eds. *The Military: More Than Just a Job?* (Washington: Pergamon-Brassey's, 1988), p. 273: "Military service has become an entrance ticket to Israeli society in general and to the job market in particular. The first thing required of any young person who looks for a job is a certificate of discharge from the military."
28 For example, a person who is released (or who resigns) receives only a return of contributions if service has been less than ten years. See *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, s. 18(3).
29 In addition, the Treasury Board's Incentive Award Plan is applicable to the military; see CFAO 99-2 (Incentive Award Plan).
30 See CFAO 18-15 (Canadian Bravery Decorations — Cross of Valour, Star of Courage, and Medal of Bravery).
31 CFAO 18-22.
32 CFAO 18-17.
33 See *In the Line of Duty: Canadian Joint Forces in Somalia 1992-93* (DND, 1994), pp. 290-291, entered as an exhibit at the Somalia Inquiry hearings, 4 April 1996.
34 CFAO 18-11 (United Nations Medals).
35 CFAO 18-13.
36 See CFAO 18-9, (The Canadian Forces' Decoration). See generally F.J. Blatherwick, *Canadian Orders, Decorations, and Medals*, fourth edition (Toronto: Unitrade Press, 1994). For a comprehensive list of orders, decorations, and medals and the order of precedence in which they are worn, see CFAO 18-12.
37 CFAO 18-7 (Unit Awards).

38 See the discussion of peer pressure in Friedland, "Rewards in the Legal System".
39 See Kellett, *Combat Motivation*, pp. 211-213.
40 See Regulations for Service Prisons and Detention Barracks, QR&O, volume IV, Appendix 1.4. The following description is drawn from chapters 5.05 through 5.08, 6.11 and 6.13.
41 Supply and Services Canada, 1989, pp. ii, 14.
42 Kellett, *Combat Motivation*, pp. 202, 328.

CHAPTER THREE — REPORTING WRONGDOING

1 Canada eliminated felonies in 1892, so misprision of felony ceased to be part of Canadian law, assuming that it existed before then. It is no longer part of English or U.S. law. See J.C. Smith and Brian Hogan, *Criminal Law*, sixth edition (London: Butterworths, 1988), p. 763ff; and W.R. LaFave and A.W. Scott, *Criminal Law* (St. Paul, Minn.: West, 1986), pp. 600-601. Section 50(1)(b) of the *Criminal Code*, however, makes it an offence to omit to prevent treason.
2 See, for example, section 215 of the *Criminal Code*, "Duty of Persons to Provide Necessaries", which would include a duty to inform others of the situation, and section 252 with respect to the duty to stop at the scene of an accident.
3 Seymour M. Hersh, *Cover-Up* (New York: Random House, 1972), p. 37. See also L.C.West, *They Call It Justice: Command Influence and the Court Martial System* (New York: Viking, 1977), p. ix, in which a former member of the U.S. Judge Advocate General's Corps stated: "If the offense might prove embarrassing to the military or to the individual commander, it might never come to trial at all. The Green Beret assassination and the My Lai cover-up for over a year are examples of this type of case."
4 The act is replete with duties to act: section 74(c), for example, states that every person who "when ordered to carry out an operation of war, fails to use his utmost exertion to carry the orders into effect...is guilty of an offence and on conviction, if the person acted traitorously, shall suffer death."
5 See to the same effect, section 46 of RCMP Regulations 1988, SOR/88-361.
6 The following description draws on CFAO 4-13, paragraphs 2, 3, 5, 9 and 4.

7 CFAO 24-2, paragraph 2.
8 CFAO 114-3. This therefore expands on the QR&O requirement mentioned earlier that requires a report where a person above the rank of sergeant is "arrested". See also CFAO 114-2, requiring reporting to COs of summary proceedings.
9 CFAO 55-2, paragraph 1.
10 CFAO 71-9, paragraph 1.
11 CFAO 71-13, paragraph 1.
12 CFAO 71-4, paragraph 4.
13 CFAO 30-2, paragraph 4.
14 See the internal memo by Jim Simpson and François Lareau, "Notes on Sources of Military Law and Reporting Requirements", 27 September 1995, p. 11. The order signed by Colonel Labbé is found in exhibit E, vol. 6, pp. 1056-1096, of the Court Martial of Lt. Col. Mathieu under the heading "Reports and Returns", p. 1059.
15 *Security Orders for DND & CF Military Police Procedures*, A-SJ-100-004/AG-000, 1 April 1991. A revised volume, *Military Police Policies*, produced in late 1995, incorporated many of the Police Policy Bulletins. I have kept the references to the earlier documents that were applicable during the time Canadian troops were in Somalia. Moreover, the process of incorporating the bulletins is not yet complete.
16 Paragraph 14. See also the discussion in Chapter 5.
17 Paragraph 4.
18 Paragraph 5.
19 This is now found in the revised Military Police Procedures, chapter 4, in *very* abbreviated form.
20 A-SJ-100-004/AG-000, chapter 48, section 1-1. This is now in chapter 4 of Military Police Procedures.
21 Military Police Procedures, chapter 48, section 3-1.
22 Military Police Procedures, chapter 48, section 3-4.
23 This bulletin has not yet been incorporated into the revised volume on Military Police Policies.
24 As noted in Chapter 5, the new policy expands on chapter 12 of Military Police Procedures, "Military Police Procedures — International Peacekeeping Operations" and refers to the memo from Major J.M. Wilson, 8 December 1992 (document #019054) stating that "All reports other than 'local distribution' must be sent to NDHQ for D Police Ops."

25 See Army Regulation 20-1, "Inspector General Activities and Procedures", March 1994, s. 1-11:

1-11. Confidentiality

a. Persons who ask the IG for help, make a complaint, give evidence, contact or assist an IG during an inspection or investigation, or otherwise interact with an IG, often have an expectation of confidentiality. This expectation encompasses safeguarding their identity and the nature of their contact with the IG, and protection against reprisal. The IG has a duty to protect confidentiality to the maximum extent possible, particularly when it is specifically requested. While the need for confidentiality and the measures necessary to protect it will vary with the circumstances, the IG always gives this issue priority attention.

(1) When a person complains or provides information about impropriety or wrongdoing, the IG will not disclose the complainant's identity outside IG channels or to the directing authority without the complainant's consent, unless the IG determines such disclosure is unavoidable during the course of an inquiry or investigation. If the IG determines that disclosure is unavoidable, the IG will try to inform the person before disclosure. If the person objects, the IG will coordinate with the Legal Office, USAIGA (Defense Switched Network (DSN): 227-9734) before proceeding. Efforts to notify the person and the circumstances of any disclosure of the person's name will be made part of the record.

(2) When a person seeks assistance from the IG, it is often necessary to reveal the person's identity to obtain the help needed. The IG will inform the person of that necessity. The IG file will reflect that the person was informed.

b. When a person requests anonymity, the IG will take more extensive measures to protect the person's identity. The person's name will not be used as a file identifier or as a means to retrieve a file. The request for anonymity will be prominently stated and the use of the person's name will be minimized in any file or record created by the IG. This is most easily done by referring to the person as "complainant", "witness", or similar title, instead of by name.

c. The intent behind this emphasis on confidentiality is to protect individual privacy, maintain confidence in the IG system, and minimize the risk of reprisal. It is a key component of the IG system because it encourages voluntary cooperation and willingness to ask for help or to present a complaint for resolution.

d. While protecting confidentiality is a priority concern for the IG, it cannot be absolutely guaranteed. IGs will not unconditionally promise

confidentiality. It may be breached if required by law or regulation, or by direction of TIG. Persons who request anonymity or who express a concern about confidentiality will be told this.
e. All IGs and IG employees are obligated to protect confidentiality after their service with the IG system has ended.

See also the statement by Lieutenant-General R.H. Griffith, Inspector General, Department of the Army, before the Committee on Governmental Affairs, United States Senate, 26 February 1992, pp. 5, 10-12. With respect to the inspector general of the department of defense, see "Organization of Functions Guide", January 1994, IGDG 5106.1, s. 9.5, "DoD Hotline": "(a). Administers the DoD Hotline program in accordance with DoD Directive 7050.1, *DoD Hotline*... (d). Ensures that the confidentiality of the complainant is protected to the maximum extent possible."

26 See Bernard Rosen, *Holding Government Bureaucracies Accountable*, second edition (New York: Praeger, 1989), pp. 147-150. See *Pickering* v. *Board of Education* 88 S. Ct. 1731 (1968); cf. *Arnett* v. *Kennedy* 94 S. Ct. 3187 (1975).

27 See Ronald Daniels and Randall Morck, *Corporate Decision-Making in Canada* (University of Calgary Press, 1995).

28 Robert Howse and Ronald Daniels, "Rewarding Whistleblowers: The Costs and Benefits of Incentive-Based Compliance Strategy", in Daniels and Morck, *Corporate Decision-Making*, p. 525, citing R.J. Herrnstein and J.Q. Wilson, *Crime and Human Nature* (New York: Simon and Schuster, 1985), and p. 545. The U.S. False Claims Act, 31 USC 3730, provides for bounties for whistleblowers.

CHAPTER FOUR — ADMINISTRATIVE AND INFORMAL SANCTIONS

1 My understanding of these issues owes much to one of my research assistants, Craig Martin, a second-year student in the Faculty of Law who was a naval officer before entering law school. Craig Martin entered Collège Militaire Royal de St. Jean in August 1981, graduated from the Royal Military College of Canada in May 1986, and served as a naval officer until August 1990, having achieved the rank of naval lieutenant.

2 CFAO 19-21, paragraph 18, Canadian Forces Drug Control Program.

3 For a discussion of comparable administrative measures in the U.S. military, see David A. Schlueter, *Military Criminal Justice: Practise and Procedure*, third edition (Charlottesville, Va.: Michie, 1992), pp. 38-39.

4 CFAO 26-17, Recorded Warning and Counselling and Probation — Other Ranks. Note that this is only a general outline of the process. There are a considerable number of qualifications to the policy and procedures for the application of these mechanisms, and the process is complicated by the fact that there are specific Recorded Warnings for reasons relating to Alcohol, Drugs, Indebtedness, and Obesity, each with somewhat different procedures.

5 QR&O 19.75: "'suspend from duty' means to relieve an officer or non-commissioned member from the performance of all military duty." The person may be suspended "in any circumstances that, in the authority's opinion, render it undesirable in the interests of the service that the member remain on duty." See its use with respect to racist conduct set out in CFAO 19-43, paragraph 22.

6 CFAO 15-2 Annex A (Specific Release Policies) section 2. See also CFAO 49-10, annex E, appendix 2 — Recommendation for Compulsory Release. See also QR&O 15.01 (under item 2 or 5F).

7 It is not strictly necessary: CFAO 26-17, paragraph 7 states that "except for shortcomings related to drugs or alcohol, the following procedures apply to C&P: a. Prior to initiating C&P, the member should first be warned of the shortcomings, verbally or by means of an RW." Nonetheless, it is customary to apply a Recorded Warning first.

8 CFAO 26-17, paragraph 6 (a).

9 See CFAO 49-4 and 49-5 regarding promotion, and CFAO 204-2 regarding incentive pay.

10 CFAO 26-17, paragraph 7(b)(2).

11 QR&O 101.11, paragraph 3. Paragraph 2 states that "a reproof shall be reserved for conduct which although reprehensible is not of sufficiently serious nature, in the opinion of the officer administering the reproof, to warrant being made the subject of a charge and brought to trial." This seems clearly more disciplinary in tone than the Recorded Warning. See also CFAO 101-1 (Reproof — Officers and Warrant Officers) for amplification of QR&O 101.11.

12 While it is supposed to be destroyed, there is apparently considerable suspicion within the service that it is not, or in any event, even if the hard copy is destroyed, the memory and negative effects of it linger on. These suspicions were given some credence in the court martial of Major Seward, where a copy of his reproof was tendered as evidence long after it should have been destroyed. See *Transcripts of Court Martial of Maj. Seward, 7th Trial within a Trial.*

13 CFAO 26-21, paragraph 1(a).

14 Interestingly, in the context of the next section on organizational culture and tacitly understood procedures, CFAO 26-21, paragraph 8 simply stipulates that there must be prior counselling, stating that "the CO shall personally:
   a. inform the officer of the shortcomings;
   b. counsel him on ways and means to overcome the shortcomings;
   c. stipulate a specific period in which the officer must improve;
   d. advise him that failure to correct his shortcomings in the stipulated period will result in his being the subject of a Report of Shortcomings; and
   e. note appropriate details on the officer's file."

15 DPCO procedures for dealing with all of these administrative mechanisms can be found in CPCD-OPM/110-4, p. 110-46.

16 See documents 000197 and 000199 of the Board of Inquiry, Phase I.

17 *Transcripts of Court Martial of Maj. Seward.*

18 CFAO 26-21, paragraph 3.

19 CFAO 19-38, paragraph 17 (emphasis added).

20 While this is not the place to explore the issue, the procedures do raise some interesting issues in administrative law. The role of the commanding officer in both counselling and making the decision to take further action, including the final decision to recommend release, could arguably be sufficient to raise the question of there being a reasonable apprehension of bias. Furthermore, given the importance of the interest at stake (a continued career), the absence of a more formal hearing, together with there being no requirement to provide evidence, the lack of any formal requirement of disclosure, and the lack of any real opportunity to cross-examine or present a counter-argument, the process leading up to compulsory release could cumulatively amount to the denial of the party's right to the protection of procedural fairness. Would the redress of grievance procedure cure any defects? See generally on procedural fairness with respect to administrative action, *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311; D. Mullan, "Fairness: The New Natural Justice?" (1975) 25 *U.T.L.J.* 28; Martin Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28 *U.T.L.J.* 215; and Evans, Janisch, Mullan, and Risk, *Administrative Law: Cases, Text, and Materials*, fourth edition (Toronto: Emond Montgomery, 1995), p. 45ff. For Federal Court of Canada trial division cases imposing a duty of fairness in dismissal

from employment and similar cases, see *Miller* v. *Canada* [1994] F.C.J. No. 330; *Lecoupe* v. *Canada* [1994] F.C.J. No. 1967; and *Lee* v. *Canada* [1992] F.C.J. No. 145. Note that the U.S. Army has more written procedural safeguards. See "Procedure for Investigating Officers and Boards of Officers", Army Regulation 15-6.

21 QR&O 19.26 and 19.27; CFAO 19-32.

22 *National Defence Act*, R.S.C. 1985, c. N-4, s. 139(1).

23 See the oral presentation of the military brief to the Somalia Inquiry, 21 June 1995, pp. 10-11: "Informal sanctions may range from verbal reprimands to remedial additional training."

24 The testimony of Major Seward provided an example of informal sanctions having been applied on a large scale and also gave some insight into the implicit and tacit understanding within the military of where the appropriate limits to such sanctions lie (Transcript of Evidentiary Hearings, Somalia Inquiry, 20 December 1995, vol. 31, pp. 5891-93):

Q. Now, I want to turn to regimental Sergeant-Major Jardine. I understand, sir, it is uncomfortable for you to comment in public about someone else, although some other people haven't hesitated to do that about you.

But I understand Sergeant-Major Mills once told you about unjust punishment that was ordered?

A. Yes. Again, it was in regards to the October 3rd incidents. It was subsequent to our week of being in the field and there were a list of people who had possible involvements in that, including the regimental orderly corporal who some people thought had not come forward, readily forward with the identification of the person running from the Kyrenia Club.

The regimental sergeant-major ordered that they be employed at weekend general duty type of task. He gave that instruction to the commando sergeant-major, Sergeant-Major Mills. Sergeant-Major Mills explained to him that it was an unlawful punishment and that if he was to proceed he would like that order in writing.

Q. Why was it an unlawful punishment?

A. These men had not gone through the summary trial process.

Q. And those who committed offence subsequently did; is that correct?

A. That's correct.

Q. So Sergeant-Major Mills asked for confirmation of this in writing. I take it this was just a few days after these names came to light?

A. It was at the end of the week. So at the end of the week of the 5th of October and that punishment was effected on the Saturday and the Sunday of that week.

Q. I understand this order was, in fact, carried out by Sergeant-Major Mills?

A. It was, and with my knowledge.

Q. But what did this tell you about Mr. Jardine's approach to things? How did it differ from what you had experienced previously in your many years in the Forces?

A. To me it confirmed that the advice coming from the regimental sergeant-major regarding discipline was inappropriate.

The role of the regimental sergeant-major is to ensure the welfare of the men, and it's almost like a dichotomy. He is responsible for their welfare and yet he is very much responsible for good order and discipline within the battalion.

However, the two aren't incompatible as long as good order and discipline is effected through the due processes provided in military justice.

In my opinion, that due process was being violated.

25 The recent court martial of submarine commander Lieutenant Commander Dean Marshaw is perhaps an illustration of how this process would function in practice. See *Globe and Mail*, 3 November 1995.

26 Charles A. Cotton, "Military Mystique: Somalia Shows Dark Side of Elite Units", *Calgary Herald*, 3 September 1993. This is a reflection of what Cotton has called "beleaguered warrior syndrome", which is "characterized by a dominant focus on battle and a sense of alienation from a military that is perceived as having become too civilianized to perform its essential function of combat." See Cotton, "Institutional and Occupational Values in Canada's Army" (1981) 8 *Armed Forces and Society* 99, p. 108. This is of particular interest in light of the observations regarding "warrior strategies" and "humanitarian strategies" differing across gender and racial lines in the U.S. forces in Somalia. See Laura Miller and Charles Moskos, "Humanitarians or Warriors?: Race, Gender, and Combat Status in Operation Restore Hope" (1995) 21 *Armed Forces and Society* 615.

CHAPTER FIVE — MILITARY POLICE

1 Conversation with Commander Paul Jenkins, NDHQ, 14 May 1996. These figures do not include civilian employees or people working for the Communications Security Establishment.
2 Conversation with Colonel Marc Caron, Director of Force Concepts, NDHQ, 17 May 1996.
3 See Canadian Centre for Justice Statistics, *Juristat* 16/1 (January 1996), "Police Personnel and Expenditures in Canada — 1994".
4 See Appendix 1.4 of volume 4 of QR&O: "Regulations for Service Prisons and Detention Barracks", P.C. 1967-1703.
5 See the paper by Major M.R. McNamee prepared for the Naval War College, Newport, R.I., June 1992, "Military Police: A Multipurpose Force for Today and Tomorrow", p. 26.
6 See Canadian Forces School of Intelligence and Security, "Military Police: History" (1974), pp. 1, 8.
7 As quoted in Commander Paul Jenkins' paper, "Policing the Canadian Forces in the 21st Century", staff college paper, 1991, p. 1.
8 "Military Police", in *International Military and Defense Encyclopedia* (Washington: Brassey's, 1993), p. 1752.
9 McNamee, "Military Police", pp. 18-19.
10 This section is drawn from Canadian Forces School of Intelligence and Security, "Military Police: History"; and D.R. Johnson, ed., *On Guard for Thee: The Silver Anniversary of the Security Branch* (Winnipeg: Jostens, 1993).
11 Colonel A.R. Ritchie, "A Brief History of the Canadian Provost Corps", in *On Guard for Thee*, p. 11.
12 This section is drawn from Canadian Forces, "Military Police: History", p. 29ff; and *On Guard for Thee*, p. 43ff.
13 *Canadian Forces Reorganization Act*, Stat. Can. 1966-67, c-96.
14 See *On Guard for Thee*, p. 51, referring to the 1978 Craven Report and the 1981 DGIS Study. The Communications Security Establishment (CSE) is also outside the compass of the Security Branch.
15 A-SJ-100-004/AG-000, April 1991. Security procedures are published in A-SJ-100-001/AS-000, *Security Orders for DND & CF*.
16 A-SJ-100-004/AG-000, 31 October 1995, with additional changes on 28 February 1996.
17 S. 156 of the *National Defence Act*, R.S.C. 1985, c. N-4, provides that 156. Such officers and non-commissioned members as are appointed under regulations for the purposes of this section may

(a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the rank or status of that person, who has committed, is found committing, is believed on reasonable grounds to have committed a service offence or who is charged with having committed a service offence;
(b) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

QR&O 22.02(2) spells out who is included in section 156:
The following persons are appointed for the purposes of section 156 of the *National Defence Act*:
(a) every officer posted to an established position to be employed on military police duties, and
(b) every person posted to an established military police position and qualified in the military police trade, provided that such officer or person is in lawful possession of a Military Police Badge and an official Military Police Identification Card.
See also *Military Police Procedures*, chapter 2-2.

18 See QR&O 22.02 and Police Policy Bulletin 5.0/94. Section 3 of the bulletin contains the limitations on the power to arrest contained in s. 495 of the *Criminal Code*.

19 See Police Policy Bulletin 5.0/94. See also QR&O 101.12 which seems somewhat more generous than civilian procedures. Paragraphs 6 and 8 state that military police cannot read a fellow accused's statement to the accused and that the accused should not be cross-examined on a statement he or she has given.

20 See Police Policy Bulletin 7.0/94.

21 See *Military Police Procedures*, chapter 2-2. See also Police Policy Bulletin 3.11/94 (Specially Appointed Persons) and 3.2/95 (Specially Appointed Persons: Status and Discretion).

22 QR&O, section 22.01(2).

23 See *Courchene* (1989) 52 C.C.C. (3d) 375 (Ont. C.A.); and *Nolan* v. *The Queen* (1987) 34 C.C.C. (3d) 289, [1987] 1 S.C.R. 1212.

24 See M.L. Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969), p. 335ff: "the true rule [is] simply that the civilian courts have primary jurisdiction over civilian offences committed in England. A necessary result of asserting that the civilian authority is paramount is to disregard a prior military judgment if, but only if, military jurisdiction was assumed without the express or implied consent of the civilian

authorities" (p. 336). See also the discussion of double jeopardy in Chapter 6.

25 See Friedland, *Double Jeopardy*, pp. 351-353.

26 See Transcript of Evidentiary Hearings, 11 October 1995, volume 5, p. 974. See also Clifton D. Bryant, *Khaki-Collar Crime: Deviant Behavior in the Military Context* (New York: The Free Press, 1979), pp. 198-200: "the military usually attempts to assume jurisdiction over the serviceman who commits a civilian crime, rather than allow the civilian authorities to hold sway and provide the unfavorable publicity of a civilian trial... The military attempts to preserve the image of a system beyond the influence and control of a civilian society."

27 Conversation with Commander Paul Jenkins, NDHQ, 20 September 1995.

28 See McNamee, "Military Police", p. 10.

29 The cap was apparently set when cabinet passed an order in council on 7 December 1992, placing members of the Canadian Forces on active service in Somalia. See Order No. 2 Placing Members of the Canadian Forces on Active Service (Somalia), P.C. 1992-2519, *Canada Gazette* Part II, vol. 126, no. 27, p. 5378. The published document does not mention the cap. Caps are specifically provided for under section 16(2) of the *National Defence Act* for the creation of a special force, but apparently the Somalia force was created under section 31(1)(b) of the act, not under section 16.

30 Conversation with Lieutenant Colonel P. Cloutier, 10 August 1995.

31 See the recommendations of the *Board of Inquiry Canadian Airborne Regiment Battle Group*, Phase I, vol. XI, Annex H (1993), p. 3340: "The Board recommends that flexibility be provided to the Commander of any future Canadian contingent to adjust initial staff figures and structures of his force according to his detailed operational estimate." See also the military brief to the Somalia Inquiry on the Canadian Forces in Somalia, Operation Deliverance, p. 5: "It would have been better to have given only general guidelines for manning and allow the final numbers to be developed by the HQ tasked with the mission."

32 Canada Treaty Series, 1945, No. 7, Charter of the United Nations, Chapter VI, Pacific Settlement of Disputes.

33 See letter from Colonel A.R. Wells to Board of Inquiry, 12 October 1994, document #001871. See also memorandum from Major J.M. Wilson, 18 December 1992, document #019056.

34 Security Council Resolution 794, 3 December 1992, U.N. Doc. No.S/RES/794 (1992).

35 *Board of Inquiry*, p. 3337.

36 See the following documents from Major Wilson in Tab L of François Lareau's memo of 12 October 1995: documents dated 7, 11, 15 and 18 December 1992 (#019055, 006444, 019052, 019056). These four documents are also found in the Somalia Inquiry's document books on pre-deployment: book 20, tab 20, exhibit P-64; book 21, tab 11, exhibit P-70; book 21, tab 23, exhibit P-70; book 22, tab 11, exhibit P-71.
37 Memorandum of Major J.M. Wilson, 18 December 1992 (#019056).
38 Document #019055, 7 December 1992.
39 See Major Wilson's Operation Deliverance After Action Report — Military Police Operations, 17 May 1994 (Tab L of François Lareau's memo of 12 October 1995), pp. 2 and 6 (DND #130769 and 130773).
40 Wilson, p. 17 (DND #130784).
41 12 October 1994, #001871, p. 3.
42 12 October 1994, #001871, p. 3.
43 See René J. Marin, "Report of the External Review of the Canadian Forces Special Investigation Unit" (1990). See also the follow-up report, René J. Marin, "Audit of External Review of the Canadian Forces Special Investigation Unit" (1994).
44 Mr. Justice D.C. McDonald, chair, *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police* (Ottawa, 1981).
45 Marin, 1990 Report, p. 41.
46 Marin, 1990 Report, p. 56.
47 Marin, 1994 Report, p. 17.
48 Marin, 1994 Report, p. 17.
49 Marin, 1990 Report, p. 89.
50 Conversations with Commander Jenkins, 13 October 1995 and 14 May 1996. See Marin, 1994 Report, p. 6.
51 See Memorandum by Captain R.A. Beekhuizen, 25 August 1995, "National Investigation Service", Tab B of memo by François Lareau, 12 October 1995. This is more or less the language used in chapter 18, section 2 of the revised *Military Police Policies*, effective October 1995.
52 See Marin, 1994 Report, p. 14.
53 Marin, 1994 Report, p. 13. I understand that CFAO 22-3 dealing with the SIU and CFAO 22-4 dealing with the military police are in the process of being amalgamated: conversation with Commander Jenkins, 13 October 1995.
54 See Bulletin 3.2/95.
55 See Major Tony Battista, "The Credibility of the Security and Military Police (SAMP) Branch" (1995) 1 *Thunderbird* 6.
56 Marin, 1994 Report, p. 7.

57 Chapter 11-1, paragraph 1-10. Paragraph 11 provides that the appropriate commanders and COs should be informed of military police investigations "at the earliest practical moment". See also chapter 1-1, paragraph 10.

58 Bulletin 3.2/95: Special Appointed Persons: Status and Discretion, ss. 7, 8 and 18.

59 CFAO 22-4, paragraph 4, states that "Technical direction means the specific instruction on the performance of security and military police functions provided by security advisors (with the advice and direction of military and/or civil legal authorities as the circumstances warrant)." See also Joint Doctrine for Canadian Forces: Joint and Combined Operations (1995) B-GG-005-004/AF-000) paragraph 3(d).

60 Examination in chief of Sergeant Robert Martin in second court martial of Private K. Brown, exhibit P-22.4 (transcript of Court Martial of Private Brown, volume 4), pp. 644-645.

61 CFAO 22-4 reaffirms chapter 48 of volume 4 of *Military Police Procedures*, "Military Police Unusual Incident Report", described in Chapter 3.

62 The policy expands on chapter 12 of *Military Police Procedures*, "Military Police Procedures — International Peacekeeping Operations". See also the memo from Major J.M. Wilson, 8 December 1992 (document #019054, document book 20 — pre-deployment, tab 25, exhibit P-69), stating that "All reports other than 'local distribution' must be sent to NDHQ for D Police Ops".

63 CFAO 22-4, paragraph 13.

64 See paragraph 3 of Annex B, chapter 47 of vol. 4, *Military Police Procedures*: "MPIR are distributed...on a need-to-know basis within DND." See also s. 5: "Distribution/circulation of MPIR of local significance only are usually limited to the base/station."

65 Emphasis in original. See also chapter 15-1, paragraph 8 of vol. 4, *Military Police Procedures*: "MP police and security related investigations shall only be discontinued or cancelled with the concurrence of NDHQ/Director Police Operations."

66 *Military Police Procedures*, chapter 56-1, paragraph 1, deals with complaints against military police: "Complaints made by anyone concerning the acts, inaction or behaviour of MP, in respect of their MP duties and responsibilities, shall be fully and impartially investigated." See also Marin, 1994 Report, p. 8, which complains that the activities of the military police "are not subject to the same scrutiny as are the activities of civil police officers."

67 See Army Regulation 10-87, Major Army Commands in the Continental United States, 30 October 1992, chapter 4, s. 4-1. See also s. 4-2.
68 See document #022688, July 1994, p. 2 (DND #091070).
69 Army Regulations 195-2, Criminal Investigation Activities, 30 October 1985, paragraph 1-5 and Appendix B.
70 Army Regulation 190-30, Military Police Investigations, 1 August 1978, paragraph 1-5a.
71 See U.K. QR&O (Army), chapter 4, annex c, s. 25.
72 See Les Johnston, "An Unseen Force: The Ministry of Defence Police in the UK" (1992) 3 *Policing and Society* 23. See also F.E.C. Gregory, "The Concept of 'Police Primacy' and its Application in the Policing of the Protests Against Cruise Missiles in Great Britain" (1986) 9 *Police Studies* 59.
73 For a discussion of the independence of civilian police, see *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn* [1968] 1 All E.R. 763 (C.A.).
74 *National Defence Act*, s. 162.
75 See the suggestion by Major J.M. Wilson in his after action report of 17 May 1994, p. 16, that the various orders and rules "should clearly state the requirement for MP investigations" in spite of a summary investigation or board of inquiry (DND #130783).
76 See letter from Colonel Wells to NDHQ, July 1994 (DND #091070).
77 Conversation with Commander Paul Jenkins, 20 September 1995.
78 Officially designated Project Charter C-18, chaired by retired Brigadier General D. McKay, with Commander Paul Jenkins as the Deputy Team Leader. See document dated 31 July 1995, "Project Charter C-18: Security and Military Police". This is part of a larger group in the DND/CF, Management Command Control Reengineering Team (MCCRT).

The Thunderbird is the official emblem of SAMP. "The common feature of its attributes", the main historical document on the security branch states, "concerns its role as a protecting spirit, one who gives wise counsel and guards the tribe from evil and misfortune." (See preface to Canadian Forces School of Intelligence and Security, "Military Police History" (1974).)
79 Conversation with Commander Paul Jenkins, May 1996.
80 See Lieutenant Colonel M.A. Hodge, "Training Military Police for the 21st Century" *Military Police*, August 1994. See also U.S. Army Field Manual No. 19-4, *Military Police Battlefield Circulation Control, Area Security, and Enemy Prisoner of War Operations* (Washington: Department of the Army, 1993), chapters 7 and 8.

81 *Military Police Corps Regimental History* (U.S. Army Military Police School, Fort McClellan, Alabama, 36205-5030, no date). U.K. military police are not involved directly in combat and are therefore similar to the Canadian military police. See Captain R.O. Gienapp, "Exchange Officer with the Royal Military Police" *Military Police*, Spring 1995, p. 29.
82 See Hodge, "Training Military Police", p. 29ff.
83 Hodge, "Training Military Police", p. 30. I could not see any discussion of the military police in the recent Report of the Special Committee on the Restructuring of the Reserves, Hon. Brian Dickson, chair (DND, 1995).
84 See McNamee, "Military Police", pp. 7-8.
85 Michel Thivierge (assistant commissioner of the RCMP), "Police and Military Cooperation", in D.E. Code and C. Ursulak, *Leaner and Meaner: Armed Forces in the Post-Gulf War Era* (Ottawa: Conference of Defence Association Institute, 1992), p. 31ff.
86 *National Defence Act*, R.S.C. c. N-5, part XI, "Aid of the Civil Power".
87 Thivierge, "Police and Military Cooperation", p. 43.
88 Paul Jenkins, "Policing the Canadian Forces in the 21st Century" (unpublished, 1991), p. 22. Recruits and transfers receive four or five months' training at the Canadian Forces School of Intelligence and Security at Camp Borden, established during the Second World War. The schools of the three services were integrated in 1967; see Canadian Forces School of Intelligence and Security, "Military Police History", p. 29.
89 Marin, 1990 Report, p. 86.
90 Jenkins, "Policing the Canadian Forces", p. 22.
91 See the earlier discussion of the institution/occupation debate (Chapter 1).
92 Memorandum 1900-1 (D Police Services), 3 August 1995.
93 *Toronto Star*, 20 December 1995, stating that elements of 2 Military Police Platoon were sent.

CHAPTER SIX — MILITARY JUSTICE

1 Anthony Kellett, *Combat Motivation: The Behavior of Soldiers in Battle* (Boston: Kluwer Nijhoff, 1982), pp. 89, 93. See generally chapter 7, "A Historical Overview of Military Discipline".
2 See the evidence of Captain (N.) W.A. Reed before the Somalia Inquiry, transcript of policy hearings, 21 June 1995, p. 438.

3 Kellett, *Combat Motivation*, pp. 90, 137, 140. See generally, Desmond Morton, "The Supreme Penalty: Canadian Deaths by Firing Squad in the First World War" (1972) 79 *Queen's Quarterly* 345.
4 Kellett, *Combat Motivation*, pp. 137-140.
5 See Omer Bartov, *Hitler's Army: Soldiers, Nazis, and War in the Third Reich* (Oxford University Press, 1991). See also Kellett, *Combat Motivation*, p. 146, describing how the Germans placed minefields, barbed wire, and special guards behind their own lines.
6 *R.* v. *Généreux* (1992) 70 C.C.C. (3d) 1; [1992] 1 S.C.R. 259. See, to the same effect, the companion Supreme Court of Canada case, *Forster* (1992) 70 C.C.C. (3d) 59; [1992] 1 S.C.R. 339.
7 *Généreux*, p. 21 C.C.C. Section 11(d) states that "any person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."
8 *Généreux*, p. 25 C.C.C.
9 *R.* v. *MacKay* (1980) 54 C.C.C. (2d) 129; [1980] 2 S.C.R. 370.
10 *MacKay*, p. 151 C.C.C.
11 *MacKay*, p. 153 C.C.C.
12 *MacKay*, pp. 137-138 C.C.C.
13 E.F. Sherman, "Military Justice Without Military Control" (1973) 82 *Yale L.J.* 1398, pp. 1409-1410.
14 Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law* (New York: Charterhouse, 1974), p. 21. See also R.A. McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" (1985) 1 *Canadian Forces JAG J.* 1, p. 28: "An undisciplined military force is a greater danger to Canada than to any foreign enemy."
15 Stat. Can. 1950, c. 43. See also s. 129(5): "No person may be charged under this section with any offence for which special provision is made in sections 73 to 128 but the conviction of a person so charged is not invalid by reason only of the charge being in contravention of this subsection unless it appears that an injustice has been done to the person charged by reason of the contravention."
16 See *Lunn* (1993) 19 C.R.R. (2d) 291, pp. 297-298 per Mahoney C.J.: "I find no merit in the argument that this provision is so vague as to be unconstitutional... What is, or is not, conduct or neglect to the prejudice of good order and discipline in the context of the Canadian Armed Forces is eminently amenable to legal debate." See to the same effect the U.S. Supreme Court case, *Parker* v. *Levy* 417 U.S. 733 (1974), holding that the Uniform Code of Military Justice, articles 133 ("conduct unbecoming

an officer and a gentleman") and 134 ("all disorders and neglects to the prejudice of good order and discipline"), are not unconstitutionally vague under the due process clause of the Fifth Amendment.

17 G. Herfst, "Meeting the Needs of Military Justice: The Advantages and Disadvantages of Codified Rules of Evidence — An Examination of the Military Rules of Evidence", LL.M thesis, Dalhousie University, 1995, pp. 68-69.

18 *Criminal Code*, s. 235(1) and s. 269.1.

19 Brief for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia: Military Justice, p. 16 (hereafter, Military Justice Brief).

20 See also *National Defence Act*, s. 146.

21 *National Defence Act*, ss. 140(b), (c), (d) and (e).

22 *National Defence Act*, ss. 60(c), 60(f), 60(2), and 69.

23 See Military Justice Brief, p. 12. See also K.W. Watkin "Canadian Military Justice: Summary Proceedings and the Charter", LL.M thesis, Queen's University, 1990, p. 13: "In 1988, there were 4,245 summary trials and only 95 courts martial. Between 1986 and 1988, summary trials, on average, accounted for 98 per cent of the disciplinary proceedings conducted in the Canadian Forces." Data on summary awards of service tribunals are now collected under 1994 CFAO 114-2.

24 See generally L.B. Radine, *The Taming of the Troops: Social Control in the United States Army* (Westport, Conn.: Greenwood Press, 1977), p. 156.

25 Military Justice Brief, p. 12.

26 Military Justice Brief, p. 2.

27 *National Defence Act*, s. 167.

28 *National Defence Act*, s. 166; QR&O 111.16.

29 A general court martial cannot, however, pass a sentence that includes a minor punishment: QR&O 111.17.

30 Such a punishment requires the approval of cabinet. See *National Defence Act*, s. 206(1) and QR&O 114.07. In general, a superior officer is an officer of or above the rank of brigadier general who can try certain officers and NCOs who cannot be tried by a commanding officer.

31 See *National Defence Act*, s. 192(3); QR&O 112.06.

32 QR&O 111.22.

33 QR&O 111.60.

34 Military Justice Brief, p. 14.

35 See generally QR&O, chapter 112. QR&O provisions relating to the prosecutor can be found in QR&O 111.24, 111.43, 113.107 and 113.60.

See Rubson Ho, "A World That Has Walls: A *Charter* Analysis of Military Tribunals", (1996) 54 *U. of Toronto Faculty of Law Review* 149, for an argument that a simple majority decision by a court martial violates the Charter.

36 See QR&O 112.68. The rules are found in QR&O, volume 4, appendix 1.3.

37 QR&O 109.02. Will this procedure be found to be consistent with *Stinchcombe* (1991) 68 C.C.C. (3d); [1991] 3 S.C.R. 326?

38 A sentence of death, however, requires unanimity: *National Defence Act*, s. 193(1).

39 QR&O 112.41 and 112.50.

40 *National Defence Act*, s. 173.

41 QR&O 111.36.

42 QR&O 111.35.

43 QR&O, chapter 113.

44 *National Defence Act*, s. 177; QR&O 113.51.

45 QR&O 113.53.

46 See Memorandum from D Law/MJ, 15 November 1993, "Court Martial/ Appeal Statistics".

47 *National Defence Act*, s. 163(1); QR&O 108.25.

48 *National Defence Act*, s. 164(1); QR&O 110.01.

49 For summary trial of majors, see CFAO 110-2, "Summary Trial of Majors."

50 QR&O 102.19.

51 QR&O 110.03.

52 QR&O 108.27.

53 QR&O 108.33.

54 For summary trial by a superior commander, see QR&O 110.02ff.

55 QR&O 108.31. For Superior Commanders, see QR&O 110.055.

56 QR&O 108.31(2). The list also includes offences under s. 132 of the *National Defence Act*.

57 QR&O 108.31(3); CFAO 19-25, paragraph 18.

58 QR&O 108.03 and 108.29; CFAO 19-25, paragraph 3.

59 QR&O 108.03. See Watkin, "Canadian Military Justice", p. 20: "In practice the assisting officer is usually an officer holding the rank of lieutenant or captain and most often is the officer immediately in command of the accused."

60 QR&O 108.03, note (c). Legal duty counsel is available if the accused has been arrested or detained: CFAO 56-5-6(a).

61 QR&O 108.03(8). Redress of Grievance is, however, available for summary trials: *National Defence Act*, s. 29 and QR&O 19.26.
62 QR&O 108.32.
63 QR&O 108.30.
64 QR&O, chapter 108.
65 QR&O 108.10.
66 QR&O 108.11.
67 QR&O 108.12(2).
68 QR&O 108.12.
69 QR&O 108.10, note (b). A helpful document is Aide-Memoire on Conduct of Summary Trials for Commanding Officers and Delegated Officers Canadian Forces (DND, May 1991), revisions by Lt.-Col. D. Couture, office of the JAG.
70 See generally on U.S. military justice, David A. Schlueter, *Military Criminal Justice: Practice and Procedure*, third edition (Charlottesville, Va.: Michie, 1992); F.A. Gilligan and F.I. Lederer, *Court-Martial Procedure*, two volumes (Charlottesville, Va.: Michie, 1991); Army Regulation 27-10, Military Justice (Washington: Department of the Army, 1994); and Watkin, "Canadian Military Justice", p. 211ff.
71 Uniform Code of Military Justice (U.C.M.J.), Article 18; see Schlueter, *Military Criminal Justice*, p. 41.
72 Article 19; see Schlueter, *Military Criminal Justice*, p. 40.
73 Article 16; see Schlueter, *Military Criminal Justice*, pp. 39-40 and 599ff.
74 Article 15; see Schlueter, *Military Criminal Justice*, pp. 39 and 103ff.
75 Article 15(f): "The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty." See Schlueter, *Military Criminal Justice*, p. 108ff, setting out the various provisions that attempt to distinguish between major and minor offences: "In practice, the commanding officer's authority is not limited to imposing punishment for only minor military offences", but if it is "major" it will not bar a court martial.
76 Army Regulation 27-10, paragraph 3-18(c).
77 U.C.M.J., Article 64.
78 See Schlueter, *Military Criminal Justice*, p. 115.

79 See Schlueter, *Military Criminal Justice*, p. 111ff; Army Regulation 27-10, paragraph 3-16 and 3-17.
80 See Schlueter, *Military Criminal Justice*, Appendix 5, pp. 810-813.
81 Watkin, "Canadian Military Justice", p. 220.
82 (1985) 1 *Canadian Forces JAG Journal* 1.
83 Stat. Can. 1944-45, c. 23.
84 McDonald, "The Trail of Discipline", p. 10.
85 *An Act respecting the Militia and Defence of the Dominion of Canada*, Stat. Can. 1868, c. 40, s. 64.
86 See *Militia Act*, Stat. Can. 1904, c. 23, ss. 24 and 25.
87 See McDonald, "The Trail of Discipline", p. 19.
88 McDonald, "The Trail of Discipline", p. 20. See *Royal Canadian Air Force Act*, Stat. Can. 1940, c. 15.
89 *Naval Service Act*, Stat. Can. 1909-10, c. 43.
90 McDonald, "The Trail of Discipline", p. 10.
91 *Naval Discipline Act*, 1866, c. 109, building on *Naval Discipline Act*, 1860, c. 123.
92 *Naval Discipline Act*, 1860, c. 124, s. 38.
93 McDonald "The Trail of Discipline", p. 7.
94 McDonald, "The Trail of Discipline", p. 8, citing the 1661 act, c. 9.
95 S. 33 of 1661 act, c. 9.
96 See McDonald, "Trails of Discipline", p. 11; M.L. Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969), p. 343ff.
97 1 Wm. and Mary, c. 5.
98 See Friedland, *Double Jeopardy*, p. 342.
99 Friedland, *Double Jeopardy*, p. 343.
100 McDonald, "The Trail of Discipline", p. 16.
101 See generally W.J. Lawson, "Canadian Military Law" (1951) 29 *Can. Bar. Rev.* 241; NDHQ, *The National Defence Act: Explanatory Material* (November 1950).
102 Lawson, "Canadian Military Law", p. 249.
103 Andrew M. Ferris, "Military Justice: Removing the Probability of Unfairness" (1994) 63 *U. of Cincinnati L. Rev.* 439, p. 450. The committee, created by the secretary of defense in 1948, was chaired by Edmund H. Morgan, the distinguished Harvard professor of law. A similar commission was established in England; see J.H. Hollies, "Canadian Military Law" [1961] *Military Law Rev.* 69, p. 70.
104 McDonald, "The Trail of Discipline", p. 21. The navy, but not the other services, had "stoppage of grog" as a minor punishment, but this was removed from the regulations in 1982 (McDonald, p. 25).

105 McDonald, "The Trail of Discipline", p. 24. In the nineteenth century the commanding officer could order only seven days' imprisonment for all offences except absence without leave, in which case he could order 21 days (McDonald, p. 17).
106 McDonald, "The Trail of Discipline", p. 24.
107 S. 78(5) of the Army Act 1955.
108 *National Defence Act* 1950, s. 136(3).
109 *Canadian Forces Act*, 1952, Stat. Can. 1952, c. 6, ss. 2(8).
110 See Lawson, "Canadian Military Law", p. 253. At about this time, the United Kingdom, the United States, Australia and New Zealand established civilian courts of appeal from military tribunals. See Janet Walker, "Military Justice: From Oxymoron to Aspiration" (1994) 32 *Osgoode Hall L. J.* 1, p. 4ff. The board was replaced by the Court Martial Appeal Court in 1959; see Watkin, "Canadian Military Justice", p. 50. For a discussion of the Canadian Court Martial Appeal Court, see Walker, "Military Justice", p. 8ff.
111 Walker, "Military Justice", p. 4.
112 (1980) 54 C.C.C. (2d) 129; [1980] 2 S.C.R. 370.
113 See D.J. Corry, "Military Law under the Charter" (1986) 24 *Osgoode Hall L. J.* 67, p. 76. The three cases are *Platt* (1963) 2 C.M.A.R. 213; *Robinson* (1971) 3 C.M.A.R. 43; and *Nye* (1972) 3 C.M.A.R. 85.
114 The military also wanted, but did not get, an amendment to s. 10(b) of the Charter to make sure nothing in the section could be construed as giving the accused the right to counsel at a summary proceeding; see evidence before the National Defence Committee of the Senate, 19 May 1981, 17:12.
115 Judgement, 6 January 1995 (C.M.A.C. 372), p. 5.
116 1 June 1995 (Lamer C.J., Gonthier and Iacobucci JJ.).
117 See A.D. Heard, "Military Law and the Charter of Rights" (1988) 11 *Dalhousie L. J.* 514, p. 532.
118 See *Généreux* (1992) 70 C.C.C. (3d) 1; [1992] 1 S.C.R. 259.
119 Heard, "Military Law", p. 532.
120 See Watkin, "Canadian Military Justice", p. 53.
121 *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, Stat. Can. 1985, c. 31. Part III.
122 See General P.D. Manson, Notice of Amendments to QR&O Volumes I and II, Canadian Forces Supplementary Order 48/86 (DND, 19 September 1986), as cited in Major B. Bock, "Leadership, Command and the Canadian Charter of Rights and Freedoms" (Canadian Staff College, 1989).

123 See QR&O 108.31. See also Watkin, "Canadian Military Justice", p. 53; and McDonald, "The Trail of Discipline", p. 26.
124 See Watkin, "Canadian Military Justice", p. 52.
125 See McDonald, "The Trail of Discipline", p. 26: "This was done in order to better comply with the provisions of the Charter by expanding access to a lawyer in cases where detention or a substantial fine might be awarded as punishment." Only the CO could therefore impose these punishments, and the accused would have to be given an opportunity to elect a court martial. The delegated officer did not have the authority to offer the accused the right to elect trial by court martial. See also Watkin, "Canadian Military Justice", p. 53.
126 *Canadian Forces Act, 1952*, Stat. Can. 1952, c. 6.
127 Watkin, "Canadian Military Justice", p. 54.
128 See McDonald, "The Trail of Discipline", p. 26; and Heard "Military Law", p. 533.
129 *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, Stat. Can. 1985, c. 31.
130 House of Commons Debates, 27 March 1985, p. 3421.
131 Section 58, replacing subsections 252(2) and (3), and section 59, adding 273.1-273.5.
132 Section 48, replacing subsection 154(1); section 49, replacing paragraph 156(a); and section 50, replacing subsection 157(1).
133 Section 51, replacing section 158.
134 Section 57, adding sections 248.1-248.9.
135 Section 47, adding section 151.
136 Section 45, replacing section 66.
137 The *National Defence Act* was and is enabling; see s. 179: "In any proceedings before a service tribunal, the accused person has the right to be represented in such manner as is prescribed in regulations made by the Governor in Council." See QR&O 108.03(1), stating that "The accused has the right to be represented at a summary trial by an assisting officer."
138 Note (c) to QR&O 108.03 states: "An accused person does not have a right to be represented by legal counsel at a summary trial. However, if an accused requests such representation, the officer conducting the summary trial has the discretion to: (i) permit representation by legal counsel; (ii) proceed without representation by legal counsel; or (iii) apply for disposal of the charges against the accused by a court martial." See also QR&O 105.11, which provides that "a person who is arrested or detained shall, without delay, be informed:...(c) of the reason

for the arrest or detention; (d) that the person has the right to retain and instruct counsel without delay; (e) that the person has the right to have access to free and immediate advice from duty counsel; and (f) of the existence and availability of Legal Aid, where applicable." The latter two subsections were introduced after *Brydges* (1990) 53 C.C.C. (3d) 330; [1990] 1 S.C.R. 190.

139 Manson, Notice of Amendments, p. 4, as cited in Bock, "Leadership, Command and the Canadian Charter", p. 7.

140 R.S.C. 1950, c. 43, s. 57.

141 Section 45, replacing section 66.

142 "Service tribunal", as defined in section 2 of the *National Defence Act*, "means a court martial or a person presiding at a summary trial."

143 Section 162 of the *National Defence Act*. Note (c) to article 107.12 states: "Before dismissing any charge, the commanding officer should realize that if the charge is dismissed it cannot subsequently be preceded with by a service tribunal or a civil court since section 66 of the *National Defence Act* precludes a service tribunal or civil court from trying an accused upon a charge that has been dismissed." A delegated officer does not have the power to dismiss a charge (note (b) to 107.12).

144 *National Defence Act*, s. 230.1.

145 206 U.S. 333 (1907), p. 345 per Harlan J.: "If a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance."

146 See Friedland, *Double Jeopardy*, p. 337.

147 See Friedland, *Double Jeopardy*, p. 335ff. See also the High Court of Australia cases, *Re Tracey; Ex parte Ryan* (1989) 63 *Aust. L.J.R.* 250; and *McWaters* v. *Day* (1989) 64 *Aust. L.J.R.* 41. In *Re Tracey* the court expressed the opinion that common law double jeopardy principles would apply. See the judgement of Mason C.J., Wilson and Dawson JJ., p. 258, citing *Grafton* and Friedland, *Double Jeopardy*: "there are cogent arguments why those [double jeopardy] principles should apply given that a court martial exercises, as we think it does, judicial power." See also the judgement of Brennan and Toohey JJ., p. 272: "subject to any common law protection from double jeopardy." The court struck down the sections in the *Defence Force Discipline Act 1982* (Commonwealth), which provided (s. 190(5)) that "where a person has been acquitted or convicted of a service offence, the person is not liable to be tried by a civil court for a civil court offence that is substantially the same offence."

The section was held to exceed the Commonwealth's power to bar state proceedings. See generally R.A. Brown, "Military Justice in Australia" (1989) 13 *Criminal Law J.* 263; Symposium issue, "The Constitution and Military Justice" (1990) 20 *U. Western Aust. L.R.* 4; and Walker, "Military Justice", p. 11, note 34.

148 See section 62 of *National Defence Act*, R.S.C. 1950, c. 43. Section 71 of the present act says "subject to section 66".

149 Watkin, "Canadian Military Justice", pp. 104-105. See also the transcript of the oral presentation of the military brief to the Somalia Inquiry, 21 June 1995, p. 455.

150 *Re Tracey*, p. 262 per Brennan and Toohey JJ.

151 See Friedland, *Double Jeopardy*, p. 336.

152 (1985) 23 C.C.C. (3d) 193; [1985] 2 S.C.R. 673.

153 *Généreux*, p. 21 C.C.C.

154 (1990) 5 C.M.A.R. 87, p. 101; (1990) 61 C.C.C. (3d) 541.

155 *Ingebrigtson*, p. 108 C.M.A.R.

156 See Captain C.F. Blair, "Military Efficiency and Military Justice: Peaceful Co-Existence" (1993) 42 *U.N.B.L.J.* 237, pp. 239-240.

157 Walker, "Military Justice", p. 24.

158 Following the earlier Court Martial Appeal Court case, *Schick* (1987) 4 C.M.A.R. 540.

159 *Ingebrigtson*, pp. 91, 92, 96 C.M.A.R.

160 The changes are conveniently summarized in Walker, "Military Justice", p. 21.

161 QR&Os 4.09(2), (3), (4) and (6); 15.01(6); 101.13-16; and 111.22. On the latter, see Lamer C.J. in *Généreux*, p. 34 C.C.C.

162 QR&O 26.10-11, 204.218, and 204.22.

163 Lamer C.J. in *Généreux*, pp. 34-35, 37 C.C.C.

164 Mary Collins for the Minister of National Defence, House of Commons Debate, 6 May 1992, p. 10255.

165 Stat. Can. 1992, c. 16, s. 2, adding section 165.1 to the *National Defence Act*. See also section 9, replacing section 187, which now gives the prosecutor, as well as the accused, the right to object to members and the judge advocate of the court martial.

166 QR&O 111.051(5).

167 CFAO 4-1.

168 See 41 *Halsbury's Laws of England*, fourth edition (London: Butterworths, 1983), pp. 438-439; and Annex E to Chapter 6 of the U.K. QRs. See also Sherman, "Military Justice Without Military Control", pp. 1403-1404.

169 *Halsbury's*, p. 471ff.
170 *Halsbury's*, p. 473.
171 John Mackenzie, (1995) *New Law Journal* 1624.
172 Report of the Commission on Human Rights Application No. 22107/93, Alexander Findlay. See Mackenzie, (1995) *New Law Journal* 48 and 208. The Commission found that the role of the convening officer was unsatisfactory, expressed some unease about the ad hoc nature of the membership of the court martial, and was concerned that an appeal against sentence by the convicted person to the Court Martial Appeal Court is not permitted.
173 See the draft document on the case prepared by the U.K. Judge Advocate General, Hon. J.W. Rant.
174 See *Engel*, 1976 Council of Europe *Yearbook of the European Convention on Human Rights* (The Hague: Martinus Nijhoff, 1977), p. 490.
175 *U.S.* v. *Thomas* M.J. 388, p. 393 (C.M.A., 1986), as cited in Schlueter, *Military Criminal Justice*, p. 256. See the many articles on command influence cited in Schlueter, note 1, p. 255. See also L.C. West, *They Call it Justice: Command Influence and the Court-Martial System* (New York: Viking Press, 1977), p. x: a commanding officer "may well usurp the independent judicial functions of the court-martial, and 'influence' his court members to render a verdict and sentence designed to reflect his own wishes, regardless of the merits of the individual case."
176 Schlueter, *Military Criminal Justice*, p. 256. See also Major D.M.C. Willis, "The Road to Hell is Paved with Good Intentions: Finding and Fixing Unlawful Command Influence", *The Army Lawyer*, August 1992, p. 3: "Unlawful command influence — direct and indirect, real and perceived — is one of the most persistent problems in military law."
177 Article 25(d)(2) of the Uniform Code of Military Justice.
178 See Schlueter, *Military Criminal Justice*, p. 261.
179 U.C.M.J., Article 37(a).
180 See *Weiss* v. *U.S.* 114 S. Ct. 752 (1994), p. 756.
181 *Weiss*, p. 756, affirming the Court of Military Appeal, which had discussed but rejected *Généreux*. *Généreux* was not cited by the U.S. Supreme Court, a matter commented upon with regret by counsel for Généreux: see Guy Cournoyer and Tiphaine Dickson, "How Canadian constitutional law could have tipped the scales of an independent military justice system in the United States" (1994) 41 *Federal Bar News and Journal* 270.
182 *Weiss*, pp. 760-761 per Rehnquist C.J.: "Judicial deference thus 'is at its apogee' when reviewing congressional decision making in this area."

183 *Weiss*, p. 761.
184 *Weiss*, p. 762.
185 See also Chapter 8 of Army Regulation 27-10, Military Justice, 8 August 1994.
186 *Weiss*, p. 762.
187 Schlueter, *Military Criminal Justice*, p. 271. Cf. Ferris, "Military Justice: Removing the Probability of Unfairness", p. 491, who states: "At a minimum, Congress should act to provide for terms of office of no less than five years for military trial judges and no less than ten years for military appellate judges."
188 F.A. Gilligan and F.I. Lederer, *Court Martial Procedure* (Charlottesville, Va.: Michie, 1991), 1994 Cumulative Supplement, volume 1, p. 81. Army trial judges are rated by senior members of the United States Army Trial Judiciary (see "Legal Operations", FM 27-100, 1-7), but those who do the rating may also have further career ambitions.
189 Note, however, that in *Ingebrigtson*, p. 101 C.M.A.R., Mahoney C.J. referred to "command influence" in relation to courts martial.
190 Transcript of Policy Hearings, 21 June 1995, p. 456. See also, to the same effect, G. Herfst, "Meeting the Needs of Military Justice — the Advantages and Disadvantages of Codified Rules of Evidence", LL.M. thesis, Dalhousie University, 1995, p. 61.
191 Stat. Can. 1985, c. 27, s. 53, now s. 163(1.1) of the *National Defence Act*.
192 *MacKay* (1980) 54 C.C.C. (2d) 129, pp. 160-162; [1980] 2 S.C.R. 370.
193 *MacKay*, p. 162 C.C.C.
194 *Toth* v. *Quarles* 350 U.S. 11 (1955).
195 *Reid* v. *Covert* 354 U.S. 1 (1957).
196 *Grisham* v. *Hagan* 361 U.S. 278 (1960). See also *Billings* v. *Truesdell* 321 U.S. 542 (1944), holding that civilians could not be court martialled for resisting conscription.
197 395 U.S. 258 (1969), pp. 272, 265-266.
198 *Relford* v. *Commandant, U.S. Disciplinary Barracks* 401 U.S. 355 (1971).
199 *Solorio* v. *U.S.* 483 U.S. 435 (1987), pp. 449-450.
200 *Weiss* v. *U.S.* 114 S. Ct. 752 (1994).
201 Walker, "Military Justice: From Oxymoron to Aspiration", p. 12.
202 See Walker, "Military Justice", p. 13, note 43.
203 See the cases cited in Walker, "Military Justice", p. 14, note 44.
204 *Ionson* (1987) 4 C.M.A.C. number 432.
205 [1989] 2 S.C.R. 1073.

206 Judgement C.M.A.C. number 372, rendered 6 January 1995.

207 *Brown*, p. 6, citing *MacKay* (1980) 54 C.C.C. (2d) 129; *MacDonald* (1983) 4 C.M.A.R. 277; *Sullivan* (1986) 4 C.M.A.R. 414; and *Ionson* (1987) 4 C.M.A.R. 433.

208 *Brown*, p. 9.

209 Leave to appeal dismissed by Lamer C.J., Gonthier and Iacobucci JJ. on 1 June 1995.

210 Brief, p. 7; *National Defence Act*, s. 111(1)(b); QR&O 103.43.

211 Transcript of Policy Hearing, 21 June 1995, p. 455.

212 *National Defence Act*, ss. 60(2) and 69(1).

213 See Respondent's Factum (Mémoire de L'Intimée), p. 19.

214 Walker, "A Farewell Salute to the Military Nexus Doctrine" (1993) 2 *National J. of Constitutional Law* 366, published before, but probably written after, Walker, "Military Justice". Cf. R.D. Lunau, "Military Tribunals under the Charter" (1992) 2 *National J. of Constitutional Law* 197.

215 See *Rutherford* (1982) 4 C.M.A.R. 262.

216 See generally the affidavit by Captain (N.) C.F. Blair attached to Respondent's Factum in *Généreux*, p. 20:

> 61. The exercise of Canadian military jurisdiction over our troops and dependents outside Canada serves the interests of both Canada and the host nation. Where Canadian tribunals are conducted close in both time and place to the occurrence of the offence charged, and in compliance with Canadian law, then the Canadian individual who is accused benefits from a trial in a language and judicial system which he or she understands, and which affords the safeguards of Canadian law. At the same time, local authorities and inhabitants can observe the trial, and be reassured that offences committed in their territory will be dealt with in a formal, fair, and visible manner.

The U.K. established the Standing Civilian Court in 1976 to handle these situations (Respondent's Factum, p. 22).

217 The High Court of Australia could not agree on the solution in *Re Tracey; Ex parte Ryan*. Three members of the court adopted the *Solorio* approach (p. 257): "it is not possible to draw a clear and satisfactory line between offences committed by defence members which are of a military character and those which are not. The impossibility of doing so was recently accepted in the United States in *Solorio* v. *United States*." Two members of the court followed the *O'Callahan* approach, however (see pp. 267-270). Another member, Deane J. (p. 275) seems to support

O'Callahan, while the final member, Gaudron J., did not discuss the U.S. cases.

218 Military brief on Military Justice, p. 2.

219 Watkin, "Canadian Military Justice", p. 3.

220 Lockyer, "Charter Implications for Military Justice" (1993) 42 *U.N.B.L.J.* 243, p. 250.

221 Lockyer, "Charter Implications", p. 250.

222 Watkin, "Canadian Military Justice", pp. 285-289.

223 Conversations with JAG officers in Ottawa in August 1995 lead this writer to believe that Kenneth Watkin's thesis provides a good indication of the present thinking of the military.

224 See Major Barry Brock, "Leadership, Command and Canadian Charter of Rights and Freedoms" (Canadian Forces College, 1989), p. 12.

225 Brock, "Leadership, Command", p. 10, citing a paper by Major R. Jodoin, "The Code of Service Discipline after the Constitution" (Canadian Forces College, 1983).

226 See S.B. Flemming, *Civilianization Theory and Martial Discipline in the Canadian Forces in the Post-Korean War Period* (DND Operational Research and Analysis Establishment, Staff Note 2/89, 1989), pp. 7, 12.

227 See the preliminary draft of a study by Anthony Kellett for the military, "The Influence of the Regimental System on Group and Unit Cohesion", November 1991, p. 54, which shows a dramatic drop in detention barrack sentences from 1986 to 1991 in the Canadian land forces. The Royal Canadian Regiment had 232 days of detention per 1,000 members in 1986 and only 14 in 1991; the Princess Patricia's Canadian Light Infantry from which 2 Commando personnel were drawn went from 649 days detention per 1,000 persons in 1986 to 85 in 1991; and the Royal 22nd Regiment went from 660 days detention per 1,000 persons in 1986 to 178 in 1991. The Somalia Inquiry may want to update these figures, although it appears that current figures on summary proceedings are not kept by the military. Clearly, better statistics should be available to track trends in proceedings.

228 *Board of Inquiry*, p. 3309.

229 Hewson Report, p. 57.

230 Hewson Report, p. 21.

231 See QR&O 108.11, 108,12, 108.10 (note b), and 108.31(2).

232 See QR&O 108.03 and 108.13; CFAO 19-25-4, issued in 1994; QR&O 108.15; CFAO 114-2, issued in 1994; and QR&O 19.26.

233 *Shubley* v. *The Queen* (1990) 52 C.C.C. (3d) 481, pp. 494, 495; [1990] 1 S.C.R. 3.

234 *Wigglesworth* v. *The Queen* (1987) 37 C.C.C. (3d) 385; [1987] 2 S.C.R. 541. Both *Shubley* and *Wigglesworth* deal with the question of whether and when section 11(h) bars a prior disciplinary hearing. This is a different question from whether a particular disciplinary hearing comes within section 11 of the Charter. Nevertheless, the cases and the subsequent discussions treat the two questions as one.
235 *Wigglesworth*, p. 404 C.C.C.
236 *Shubley*, p. 500 C.C.C.
237 *Shubley*, p. 494 C.C.C.
238 *Shubley*, pp. 495-496 C.C.C.
239 *National Defence Act*, s. 66.
240 See *Oakes* (1986) 24 C.C.C. (3d) 321; [1986] 1 S.C.R. 103.
241 *Shubley*, p. 496 C.C.C.
242 Uniform Code of Military Justice, Article 20.
243 *Middendorf* v. *Henry*, 425 U.S. 25 (1976), p. 45. The court also held (p. 46) that a summary court martial is not a "criminal prosecution" within the meaning of the Sixth Amendment's right to counsel guarantee.
244 QR&O 108.03.
245 See Watkin, "Canadian Military Justice", p. 118, note 8 and Appendix III, showing that in 1988, for example, 674 elections were given by COs, but only 32 (or 5 per cent) of the accused exercised the election. In 1986 only 26 of 805 (2 per cent) exercised their right of election.
246 See Watkin, "Canadian Military Justice", p. 239. See also Schlueter, *Military Criminal Justice*, pp. 110-111, for the right to demand a court martial when faced with an Article 15 proceeding. Service members who are "attached to or embarked in a vessel" may not, however, demand trial. Summary courts martial also require the accused's consent; see Schlueter, p. 599. See also Watkin, p. 287.
247 Superior commanders can fine but cannot sentence a person to detention (QR&O 110.03).
248 *Généreux*, p. 17 C.C.C.
249 The potential penalty for the disciplinary offence in *Wigglesworth* was imprisonment for one year and as such was a "true penal consequence". A subsequent *Criminal Code* prosecution was permitted, however, because it was held to be for a different offence.
250 Cf. *Middendorf* v. *Henry*, p. 34, stating that "the summary court-martial...was not a 'criminal prosecution' within the meaning" of the Sixth Amendment.
251 (1985) 23 C.C.C. (3d) 193, [1985] 2 S.C.R. 673. See Corry, "Military Law under the Charter", pp. 88-89; and Heard, "Military Law and the

Charter of Rights", p. 526.

252 The CO has the discretion to permit counsel (QR&O 108.03, note (c)).

253 U.C.M.J., Article 20. See generally Schlueter, *Military Criminal Justice*, p. 599ff.

254 See 41 *Halsbury's Laws of England*, p. 436, note 5. Following a 1976 amendment, a field rank officer, under special procedures, can award 60 days' detention. See generally, Watkin, "Canadian Military Justice", p. 223ff. Naval COs, however, can award three months' detention.

255 See Watkin, "Canadian Military Justice", p. 42.

256 *National Defence Act 1950*, Stat. Can. 1950, s. 136(2).

257 Assuming that there can be a section 1 justification of a section 7 violation.

258 *National Defence Act*, s. 83. In the U.K., however, COs are limited to trying cases where the governing legislation imposes a penalty of two years or less; see Watkin, "Canadian Military Justice", p. 225.

259 *Narcotic Control Act*, R.S.C. 1985, c. N-1, s. 4.

260 QR&O 108.31(1)(b). The same applies to superior commanders; see QR&O 110.055.

261 *Korponey* v. *A.G. Canada* (1982) 65 C.C.C. (2d) 65; [1982] 1 S.C.R. 41.

262 (1986) 25 C.C.C. (3d) 207; [1986] 1 S.C.R. 383. There are a number of later Supreme Court of Canada cases on waiver: see, for example, on waiver of section 10(b) rights, *Manninen* (1987) 34 C.C.C. (3d) 385, [1987] 1 S.C.R. 1233; *Evans* (1991) 63 C.C.C. (3d) 289, [1991] 1 S.C.R. 869; on waiver under the *Young Offenders Act*, *Smith* (1991) 63 C.C.C. (3d) 313, [1991] 1 S.C.R. 714; *E.T.* v. *The Queen* (1993) 86 C.C.C. (3d) 289; [1993] 4 S.C.R. 504; and for the right to an interpreter under section 14 of the Charter, *Tran* v. *The Queen* (1994) 92 C.C.C. (3d) 218; [1994] 2 S.C.R. 951. The waiver requirement in *Tran* was very high and it had to be exercised personally by the accused. The standard seems to vary depending on the right involved.

263 *Korponey*, p. 74 C.C.C. (emphasis in original).

264 *Middendorf* v. *Henry*, pp. 46-48.

265 *Korponey*, p. 74 C.C.C.

266 QR&O 108.31(3); CFAO 19-25 paragraph 18.

267 See QR&O 105.11; CFAO 56-5 paragraph 6(a).

268 See the Summary Court-Martial Rights Notification/Waiver Statement in Army Regulation 27-10, *Military Justice* (1994).

269 See Flemming, *Civilianization Theory*, p. 12.

270 See the study by Kellett, "The Influence of the Regimental System on Group and Unit Cohesion", discussed earlier in the chapter.

271 Office of the Judge Advocate General Newsletter, January to June 1994, article 1.
272 Flemming, *Civilianization Theory*, p. 7.

CHAPTER SEVEN — CIVIL CONTROL, INTEGRATION, AND OVERSIGHT

1 See John Sweetman, ed., *Sword and Mace: Twentieth-century Civil-Military Relations in Britain* (London: Brassey's, 1986), p. xii. See also M.L. Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969), p. 345.
2 See F.A. Johnson, *Defence by Committee* (Oxford University Press, 1960).
3 See Alex Danchev, "The Central Direction of War, 1940-41", in Sweetman, *Sword and Mace*, p. 57ff.
4 See John Sweetman, "A Process of Evolution: Command and Control in Peacetime", in Sweetman, *Sword and Mace*, p. 52.
5 See generally S.E. Finer, *The Man on Horseback: The Role of the Military in Politics*, second edition (London: Pinter, 1988).
6 Stephen Deakin, "British Civil-Military Relations in the 1990s", in Daniella Ashkenazy, *The Military in the Service of Society and Democracy* (Westport, Conn.: Greenwood, 1994), p. 122.
7 See QR&O 19.44. In Germany, by contrast, military personnel can run for parliament and other office and then return to the military. This came about because of the German desire to emphasize that a soldier is a "citizen in uniform". See Jurgen Oelrich, "The German Concept of the 'Citizen in Uniform'", in Ashkenazy, *The Military in the Service of Society and Democracy*, p. 136.
8 *Toronto Star*, 4 November 1995.
9 R.S.C. 1985, c. N-5, s. 4. See generally, Douglas Bland, *Chiefs of Defence: Government and the Unified Command of the Canadian Armed Forces* (Toronto: Canadian Institute of Strategic Studies, 1995), p. 127ff. Technically, the governor general is the commander-inchief of the armed forces, just as the Queen is in the U.K. (see Bland, pp. 130-132), but this is now a formal ceremonial relationship.
10 *National Defence Act*, s. 18(1) and (2).
11 As cited in Bland, *Chiefs of Defence*, p. 45. There is, and has been, however, obvious tension between the military and civilian control. See Major R.J. Walker, "Poles Apart: Civil-Military Relations in the Pursuit of a Canadian National Army", M.A. thesis, Royal Military College, 1991, who states in his abstract: "The history of Canadian civil-military

relations is highlighted by the government's immutable rejection of the concept of exclusive army control and its evolution revolves around the army's attempts to circumvent that immovable obstacle throughout the trials of peace and war."

12 Walker, "Poles Apart", pp. 147, 129, 145.

13 See Bland, *Chiefs of Defence*, p. 203, who points out that in the Gulf War "many observers thought that Parliament would have to be recalled to allow the CF to go on 'active service'" but that General de Chastelain, the chief of defence staff, stated that the government "has no legal obligation to get Parliament's approval to put the CF on the offensive... In my opinion, the government has all the authority it needs to proceed with whatever action it wants."

14 Stat. Can. 1988, c. 29.

15 Article II, section 2.

16 K. Kemp and C. Hudlin, "Civil Supremacy Over the Military: Its Nature and Limits" (1992) 19 *Armed Forces and Society* 7, p. 23.

17 Kemp and Hudlin, "Civil Supremacy", pp. 8, 22. See also David Segal, "Civil-Military Relations in Democratic Societies", in proceedings of a conference on the Role of the Military in Democratic Societies, sponsored by York University Centre for International and Strategic Studies, 1992, p. 10ff.

18 See John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton University Press, 1993), and a review of that work by Peter D. Coffman, "Power and Duty: The Language of the War Power" (1995) 80 *Cornell L. Rev.* 1236.

19 Article I, section 9. See generally, Jean Smith, *The Constitution and American Foreign Policy* (St. Paul, Minn.: West, 1989), p. 227ff.

20 See Jean Smith, *George Bush's War* (New York: Henry Holt, 1992), p. 5.

21 Public Law 93-148; 87 Stat. 555, ss. 3, 4 and 5.

22 Smith, *The Constitution and American Foreign Policy*, p. 235; Kemp and Hudlin, "Civil Supremacy", p. 10.

23 Smith, *The Constitution and American Foreign Policy*, p. 236. See U.S. Constitution, Article I, section 8, clause 12.

24 Critchley, "Civilianization", pp. 127-128. See also the Report of the Special Joint Committee on Canada's Defence Policy, *Security in a Changing World* (Ottawa, 1994), p. 2ff; and OPDP 2 1994/95, p. 1-1-8 (A-PD-050-0D1/PG-002).

25 *Final Report, Task Force on Review of Unification of the Canadian Forces, March 15, 1980* (Ottawa, 1980), p. 31.

26 Critchley, "Civilianization", pp. 127-128.

27 Management Review Group (MRG), *Report to the Minister of National Defence on the Management of Defence in Canada* (July 1972), p. ii, cited in Critchley, "Civilianization", p. 128.
28 CDS General Gerald Theriault, 1992, quoted by Douglas Bland.
29 Douglas Bland, *Chiefs of Defence*, pp. 161-162. See also P.C. Kasurak, "Civilianization and the Military Ethos: Civil-Military Relations in Canada" (1982) 25 *Can. Public Administration* 108, who points out (p. 109) that "a significant number of the members of the armed services have come to believe that the Canadian Forces have adopted civilian norms and standards to an unacceptable degree and that civilian public servants exercise undue influence over matters that are (or should be) exclusively military in nature...". See also a recent course paper by Lieutenant Commander R.V. Marsh, "NDHQ: Headquarters or Head Office" (Staff College, 1992), pp. 23-24: "The analysis in this paper demonstrates that NDHQ serves both as a headquarters and head office, but not well in either capacity. One solution is evident, the CDS and DM functions, which truly conform to a Headquarters and Head Office organization, need to be split and downsized. In so doing the impact of civilians on operational efficiency and effectiveness will be removed."
30 Critchley, "Civilianization", pp. 133-134.
31 *Security in a Changing World*, p. 44.
32 "The Organization of Canadian Defence", p. 8.
33 *Security in a Changing World*, p. 57.
34 Bland, *Chiefs of Defence*, p. 287. C.E.S. Franks argues for greater parliamentary involvement in security matters; see *Parliament and Security Matters* (Ottawa: Supply and Services, 1980); and "Accountability for Security Intelligence Agencies", in P. Hanks and J.D. McCamus, *National Security: Surveillance and Accountability in a Democratic Society* (Cowansville, Quebec: Éditions Yvon Blais, 1989), p. 19.
35 Bland, *Chiefs of Defence*, p. 7.
36 See A. Cox and S. Kirby, *Congress, Parliament and Defense* (New York: St. Martin's, 1986), pp. 292-293: "The problem with defense, however, is that unlike all other areas of government activity it is a highly sensitive area in which calls of national security and executive privilege can be used." This is not a significant hindrance in the United States, where "the problem of information overload can be just as important a restraint as the lack of information."
37 The same consideration applies to the security service. See Stuart Farson, "Accountable and Prepared? Reorganizing Canada's Intelligence

Community for the 21st Century" (1993) 1 *Canadian Foreign Policy* 43, p. 65.

38 D.C. Hendrickson, *Reforming Defense: The State of American Civil-Military Relations* (Baltimore: Johns Hopkins, 1988), p. 30. See also J.M. Lindsay, "Congressional Oversight of the Department of Defense: Reconsidering the Conventional Wisdom" (1990) 17 *Armed Forces and Society* 7.

39 Hendrickson, *Reforming Defense*, p. 33.

40 Cox and Kirby, *Congress, Parliament and Defense*, pp. 308-309. "Adequate accountability," they argue, "can only be achieved through the development of proportional representation in Britain. Under such an electoral system coalition governments would have to be formed and this would immediately ensure that Parliament was more actively involved in decision-making."

41 *Auditor General Act*, R.S.C. 1985, A-17, s. 7(1). See the discussion of the independence of the auditor general in M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995), pp. 214-216.

42 See *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 20. The earlier *Regulations Act* (Stat. Can. 1950, c. 5, s. 9(2)) also allowed exemptions from the act; see *Third Report of the Special Committee on Statutory Instruments*, Mark MacGuigan, chair (1968-69), pp. 18-19. The Statutory Instruments Regulations, Consolidated Regulations of Canada, 1978, c. 1509, provides in section 7 that regulations made under the authority of section 12 of the *National Defence Act* are exempt from registration "due to the number of regulations". See also section 15(1) exempting the regulations from publication.

43 QR&O 21.01(2) and (3).

44 *National Defence Act*, R.S.C. 1985, s. 45(1).

45 QR&O 21.07ff.

46 See Terms of Reference of the Board of Inquiry, Appendix 4 to Annex A to the Statement by the BOI CARBG, Phase I, Vol. XI, 19 July 1993.

47 QR&O 21.08(4) and (5).

48 See Appendix 1 to Annex A to the Statement by the BOI CARBG, Phase I, Vol XI, 19 July 1993.

49 R.S.C. 1985, c. I-11.

50 QR&Os 21.46; 21.61; and 21.56(2).

51 Army Regulation 15-6, "Procedures for Investigating Officers and Boards of Officers", May 1988.

52 S.M. Hersh, *Cover-Up* (New York: Random House, 1972), p. 232.

53 *Report of the Auditor General of Canada to the House of Commons*, 1992, chapters 16, 17 and 18; and 1994, chapters 24, 25, 26 and 27.
54 See F.C. Mosher, *The G.A.O.: The Quest for Accountability in American Government* (Boulder, Colorado: Westview Press, 1979).
55 As we will see, there is an inspector general for the Canadian security service (*Canadian Security Intelligence Service Act, 1984*, c. 21, R.S.C. 1985, c. C-23). The closest Canada comes to a military inspector general is the chief, review services, set up in 1985. In the words of an official description (A-AE-D20-001/AG-001, 1993), the chief, review services, "is the Departmental advisor and functional authority on all aspects of review matters and is responsible and accountable for the planning and conduct of program evaluations, internal audits and examinations of all aspects of Departmental and military activities; and for providing independent, objective reports on the effectiveness, efficiency and economy of the Department of National Defence (DND) and the Canadian Forces." A description of the office was given in a private presentation to the Somalia Inquiry by a retired former chief, review services, Major General Marc Terreau (15 December 1995). It may be that this office could develop into a more full-fledged inspector general.
56 This historical material is drawn from the statement by Lieutenant-General R.H. Griffith, the inspector general, Department of the Army, before the Committee on Governmental Affairs, United States Senate, 26 February 1992, and from inspector general course material, "History of the IG" (Fort Belvoir, Virginia). See also W.M. Evan, "The Inspector-General in the U.S. Army", in D.C. Rowat, ed., *The Ombudsman: Citizen's Defender* (University of Toronto Press, 1965), p. 147ff.
57 See Army Regulation 20-1, "Inspector General Activities and Procedures", March 1994.
58 Griffith's statement to the Senate, p. 1.
59 OTIG Regulation 10-5, "Organizations and Functions", chapter 2.
60 Army Regulation 20-1, chapter 10-1.
61 "History of the IG", p. 8.
62 The Inspector General, "Information Bulletin", May 1995, p. III-6.
63 Griffith's statement to the Senate, p. 9.
64 "History of the IG", p. 4.
65 Griffith's statement to the Senate, p. 10.
66 See Army Regulation 20-1, set out in Chapter 3, note 25.
67 Army Regulation 20-1, figure 6-1.
68 See IG, DOD, "Organization and Functions Guide", January 1994.

69 *Inspector General Act*, 92 Stat. 1101 (1978). See generally P.C. Light, *Monitoring Government: Inspectors General and the Search for Accountability* (Washington, D.C.: Brookings Institution, 1993).
70 Light, *Monitoring Government*, p. 25.
71 Public Law 97-252, amending the *Inspector General Act of 1978*.
72 Light, *Monitoring Government*, p. 2.
73 Bernard Rosen, *Holding Government Bureaucracies Accountable*, second edition (New York: Praeger, 1989), p. 151.
74 Griffith's statement to the Senate, pp. 2, 3.
75 Griffith's statement to the Senate, p. 3.
76 "Organization and Functions Guide", p. 2-2.
77 Army Regulation 20-1, chapter 10-1.
78 "Organization and Functions Guide", 2.3 (s).
79 See Light, *Monitoring Government*, p. 97.
80 Rowat, *The Ombudsman*, includes a section on the U.S. military inspector general.
81 D.C. Rowat, "Time for a Federal Ombudsman", *Canadian Parliamentary Review*, forthcoming.
82 *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 49.
83 *Corrections and Conditional Release Act*, Stat. Can. 1992, c. 20, ss. 157-198.
84 *Privacy Act*, R.S.C. 1985, c. P-21, s. 53.
85 *Access to Information Act*, R.S.C. 1985, c. A-1, s. 54.
86 *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. 8 (2nd Supp.), s. 16, adding ss.45.29ff.
87 See Frank Stacey, *Ombudsmen Compared* (Oxford: Clarendon Press, 1978), pp. 45-46.
88 *Ombudsman Amendment Act* 1983, s. 20.
89 Australian Commonwealth Ombudsman, *Annual Report 1994-95*, p. 169.
90 *Annual Report 1994-95*, p. 176.
91 Stacey, *Ombudsmen Compared*, p. 40ff; and Rowat, *The Ombudsman*, p. 95ff.
92 D.C. Rowat, *The Ombudsman Plan* (Lanham, Md.: University Press of America, 1985), p. 41ff; and Stacey, *Ombudsmen Compared*, p. 46ff.
93 Stacey, *Ombudsmen Compared*, p. 46.
94 Rowat, *The Ombudsman Plan*, p. 42.
95 Stacey, *Ombudsmen Compared*, p. 47.
96 Rowat, *The Ombudsman Plan*, p. 119.
97 Rowat, *The Ombudsman Plan*, p. 43.
98 Rowat, *The Ombudsman Plan*, p. 43.

99 Rowat, *The Ombudsman Plan*, p. 45.

100 The next three people to hold the office after Heye were all civilians and significantly less controversial in performing their duties. Had the office become more accepted by the government of the day, or were Heye's successors chosen for their political discretion? See Stacey, *Ombudsmen Compared*, p. 47.

101 *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. 8 (2nd Supp.), s. 16.

102 The media and the military is an important subject not covered in this paper. See, for example, W.A. Wilcox, "Media Coverage of Military Operations: OPLAW Meets the First Amendment", *The Army Lawyer*, May 1995, p. 42; Jo Groebel, "The Role of the Mass Media in Modern Wars", in R.A. Hinde and H.E. Watson, eds., *War: A Cruel Necessity?* (New York: Tauris Academic Studies, 1995), p. 143; and A. Kellett, *Combat Motivation: The Behavior of Soldiers in Battle* (The Hague: Kluwer Nijhoff, 1982), pp. 185-188. See also QR&O 19.375.

103 Lieutenant Commander G.M. Aikins, "An Ombudsman for the Canadian Forces: Reestablishing an Ethical Framework" (Canadian Forces Command and Staff College, 1993), pp. 19-20.

104 As stated earlier in discussing the role of the U.S. inspector general, the existing office of chief, review services, could possibly be expanded to take on this function.

105 See Lawrence Lustgarten, "Security Services, Constitutional Structure, and Varieties of Accountability in Canada and Australia", in P.C. Stenning, *Accountability for Criminal Justice: Selected Essays* (University of Toronto Press, 1995), p. 172ff; R.G. Atkey, "Accountability for Security Intelligence Activities in Canada: The New Structure", in Hanks and McCamus, *National Security*, p. 37; Franks, "Accountability of the Canadian Security Intelligence Service", in Hanks and McCamus, p. 19; Philip Rosen, *The Canadian Security Intelligence Service* (Ottawa: Library of Parliament, 1984, revised 1994); Security Intelligence Review Committee, *Annual Report 1994-95*; and Canadian Security Intelligence Service, *Public Report and Program Outlook* (Ottawa: Supply and Services, 1994). Note that DND is planning to introduce an oversight mechanism for the highly secret Communications Security Establishment, which monitors foreign communications; see *Globe and Mail*, 26 January 1996.

106 See Rowat, *The Ombudsman Plan*, p. 46. Redress of grievance procedures for the Canadian military are contained in the *National*

Defence Act, R.S.C. 1985, ss. 29 and 96; QR&O 19.26 and 19.27; and CFAO 19-32.

CHAPTER EIGHT — CONCLUSION

1 Major A.G. Hines, "Military Ethics: A Code for the Canadian Forces" (Canadian Staff College, 1992), p. 21.
2 Section 8 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended.
3 Hugh Arnold, "Sanctions and Rewards: an Organizational Perspective", in M.L. Friedland, *Sanctions and Rewards in the Legal System: A Multidisciplinary Approach* (University of Toronto Press, 1989), p. 152.
4 Colonel A.R. Wells, DG Secur, 12 October 1994, #001871, p. 3.
5 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989), p. 68.
6 *Korponey* v. *A.G. Canada* (1982) 65 C.C.C. (2d) 65, p. 74; [1982] 1 S.C.R. 41.
7 Section 66 of the *National Defence Act*, R.S.C. 1985, c. N-4, as amended.
8 Section 162 of the *National Defence Act*.
9 *U.S.* v. *Thomas* M.J. 388, p. 393 (C.M.A. 1986).
10 *Security in a Changing World* (Ottawa, 1994), p. 57.
11 See appendix H in the internal document by Jim Simpson and François Lareau, "Report of Visit to U.S. Army Headquarters — Washington, D.C.", 18 September 1995, p. 1.

Controlling Misconduct in the Military

Martin L. Friedland

This study examines a wide range of techniques available to control misconduct in the military, with particular emphasis on events in Somalia. The techniques employed are looked at from an historical and comparative perspective and range from rewards and administrative sanctions to the use of military police and military justice. The author recommends a number of changes including that military police have greater independence in pursuing investigations, providing additional safeguards for persons proceeded against in military tribunals, and establishing greater civilian oversight of military misconduct.

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Commission of Inquiry
into the Deployment of
Canadian Forces to Somalia

ISBN 0-660-16868-5