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CHAPTER 6

FAIRNESS

> As the preacher knows [the] Bible, as the lawyer knows [the] statutes, every general should know the regulations and articles of war.
>
> Brigadier General C.F. Smith: To Colonel Lew Wallace, September 1861[1]

1. INTRODUCTION

"Fairness" as a legal doctrine existed prior to the enactment of the Charter. Procedural fairness has traditionally been expressed in terms of two common law rules: audi alteram partem (hear the other side; the parties are to be given a fair hearing) and nemo judex in causa sua (nobody is to be judge in his own cause).[2] The audi alteram partem rule has also been described as the "rules of natural justice" and, since 1979, in Canada, has included a more limited application of that rule known as the "duty of fairness".[3] However, the terms "natural justice" and "fairness" are often used interchangeably.

Since the principles of nemo judex in causa sua were dealt with at length in Chapter 5, in relation to independence and impartiality, this chapter will only address the principles associated with audi alteram partem.

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis: United States Naval Institute, 1966) at 270.

[2] S.A. de Smith, Constitutional and Administrative Law 2ed. (Middlesex: Penguin Books, 1974) at 575.

[3] See Re Nicholson and Haldimand-Norfolk, [1979] S.C.R. 311 (S.C.C.) and Martineau v. Mastsqui Institution Disciplinary Board (No. 2) (1979), 50 C.C.C. (3d) 353 (S.C.C.). For a review of the history of the fairness doctrine in Canada see A.W. MacKay, "Fairness After the Charter: A Rose By Any Other Name" (1988) 10 Queen's L. J. 263, at 267-272.

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Fairness is an issue which can be addressed in a number of sections in the Charter. Those sections include s. 7 (principles of fundamental justice), s. 11(a) (notice) and s. 11(d) (fair hearing). While each of these sections will be dealt with, this Chapter will concentrate on the general protection provided by s. 7 of the Charter. That section states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The principles associated with audi alteram partem will be used to provide the framework for the assessment of the constitutional fairness of the summary trial. Those principles are expressed in terms of right to counsel, adequate notice of the charges, pre-trial disclosure, oral or written submissions, rules of evidence and the requirement for reasons.[4] A similar framework for assessing fairness under the Charter has been adopted by courts in other contexts as can be seen in R v. Cohn[5], R v. Ayres[6] and Gallant v. Can. (Dep. Commr., Pac. Region, Correctional Service Can.)[7]

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[4] D.J. Mullen, Administrative Law (Toronto: Carswell, 1979) at 3-97 to 3-128. See also de Smith, Constitutional and Administrative Law, **supra**, note 2 at 584-585, and D.J. Jones & A.S. de Villars, Principles of Administrative Law (Toronto: Carswell, 1985) at 197-241.

[5] (1984), 42 C.R. (3d) 1 (Ont. C.A.) (contempt).

[6] (1984), 42 C.R. (3d) 33 (Ont. C.A.) (contempt).

[7] (1989) 68 C.R. (3d) 173 (F.C.A.) (prison discipline).

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2. APPLICATION OF SECTION 7

a. Two Part Test

Ref Re Section 94(2) Motor Vehicle Act[8] clearly established that an analysis of s. 7 involves a two part test. First, there must be a finding that there has been a denial of a right to "life, liberty and security of the person". The second part of the test involves a determination of whether the deprivation of that right is contrary to the principles of fundamental justice.

b. Right to Life Liberty and Security of the Person

i) General Principles

Initially there was some attempt to treat the three elements (life, liberty and security) of the right set out in s. 7 of the Charter as a single entity.[9] However, it is evident now that each of the elements are "independent interests, each of which can be given independent significance by the Court".[10] Therefore each element of the right can be assessed on its own and a breach of any of the elements can necessitate a determination of whether that breach accords with the principles of fundamental justice.

In assessing the meaning of each of the elements in s. 7 of the Charter the interpretation must be given "generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's

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[8] (1983), 23 C.C.C. (3d) 289 (S.C.C.) [hereinafter S. 94(2) Motor Vehicle Act].

[9] Canada v. Operation Dismantle Inc. [1983] 1 F.C. 745 (F.C.A.).

[10] Morgentaler v. The Queen, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter Morgentaler].

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protection".[11] However, the assessment of the meaning of "life, liberty and security of the person" cannot be done in a vacuum. The section must be placed in its proper "linguistic, philosophic and historical contexts".[12] Therefore, while each element has its own independent existence, its meaning must, in part at least, be assessed in reference to the other elements of s. 7 and the rest of the sections of the Charter. Such references will be seen to be instrumental in determining whether elements such as "liberty" and "security of the person" are to be given a broad or narrow interpretation.

ii) Right to Liberty

At this point in the history of the Charter it is difficult to state with any certainty the scope of the right to liberty under s. 7. Courts, including the Supreme Court of Canada, have demonstrated a reluctance "to attempt an all encompassing explication of so important a provision as s. 7 so early in the history of the Charter".[13] It is evident, however, that the right to "liberty" in s. 7 of the Charter has a more narrow scope than "liberty" has in either the Canadian Bill of Rights, or the Fifth and Fourteenth amendments of the American Bill

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[11] R v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (S.C.C.) at 344.

[12] Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 (S.C.C.).

[13] **Supra**, note 11.

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of Rights.[14] Liberty in s. 7 of the Charter is specifically related to the "person".

As was held in S. 94(2) Motor Vehicle Act[15], s. 7 encompasses the rights contained in ss. 8 to 14 of the Charter. Those latter rights therefore "illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated...."[16] A review of ss. 8 to 14 of the Charter demonstrates that "liberty" could at least entail freedom from physical constraint (ss. 9, 10 or 12), psychological compulsion (s. 10) or a right to privacy (s. 8). In Morgentaler v. R[17] Madame Justice Wilson enlarged the concept of liberty of the person to include "the respect for human dignity" and the right to make "fundamental personal decisions without interference".[18] Whatever, the final determination is concerning the scope of the right to liberty enshrined in s. 7 of the Charter its greatest impact in relation to summary trials will be in terms of the manner in which "physical liberty" and "freedom of movement" are affected by the punishments which can be awarded by those service tribunals.

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[14] For an analysis of the scope of liberty under s. 7 see Patrice Garant, "Fundamental Rights and Fundamental Justice", G.A. Beaudouin & E. Ratushny, ed. The Canadian Charter of Rights and Freedoms 2 ed. (Toronto: Carswell, 1989), Chapter 10.

[15] **Supra**, note 4.

[16] Ibid. at 301.

[17] **Supra**, note 10 [hereinafter Morgentaler].

[18] Ibid. at 166.

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In S. 94(2) Motor Vehicle Act[19] the Supreme Court of Canada held that imprisonment deprives a person of their liberty. It was not a requirement that imprisonment actually be imposed but rather that there was potential for imprisonment. Mr. Justice Lamer stated:

> A law enacting an absolute liability offence will violate s.7 of the Charter if and only if and to the extent that it has the potential of depriving life, liberty and security of the person.
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> Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory.[20]

The obiter reference to probation orders demonstrates that liberty need not be limited to cases of actual physical restraint. Liberty also includes circumstances where compulsion to cause a person to act against their own will is included. In R v. Beare[21] the Supreme Court of Canada held that the legislated requirement to undergo fingerprinting under the Identification of Criminals Act[22] infringed the right to liberty because the Act requires "a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply.[23]

That liberty would be seen to be affected by the coercive action of the state is consistent with the broad definition which has been given to the word "detention" in s. 10(b) of the Charter by the

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[19] **Supra**, note 4.

[20] Ibid. at 311.

[21] (1988), 45 C.C.C. (3d) 57 (S.C.C.).

[22] Identification of Criminals Act R.S.C. 1970, c. I-1.

[23] **Supra**, note 21 at 69.

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Supreme Court of Canada.[24] Even in R v. Neale[25], where the Alberta Court of Appeal took a very narrow interpretation of the word "liberty", there was an element of compulsion controlling the person affected. Mr Justice Lieberman stated:

> "Liberty" of the person in the Canadian Charter is directed to, or has as its purpose, the protection of persons in a physical sense. The particular function of liberty in the trilogy of life, liberty and security of the person touches on the right of free movement. A person chained in a prison is subject to what a Queen's Bench judge would describe as "actual physical restraint", clearly a deprivation of liberty under s. 7. But equally, a person ordered not to leave his home would be deprived of liberty under s. 7 because the right of free movement is restricted. He is denied the use of his physical ability to move himself. Whether by chains or by threat of legal sanction, the deprivation occurs.[26]

This interpretation of "liberty" as involving not only physical restraint, but also freedom of movement, could have a considerable impact in respect of summary proceedings under the National Defence Act. The range of available punishments not only include actual physical restraint, as in the case of detention, but also involve a loss of freedom of movement on the part of the accused. The punishments of confinement to ship or barracks, extra work and drill, and stoppage of leave all entail a restriction on the freedom of movement of the offender. Failure to comply with the restrictions leaves the offender open to further legal sanction.

The punishment of stoppage of leave might not, at first glance, be seen to be a restriction on the freedom of movement, however, QR&O

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[24] see R v. Therens (1985), 18 C.C.C. (3d) 481 (S.C.C.).

[25] (1987), 28 C.C.C. (3d) 345 (Alta. C.A.); leave to appeal to Supreme Court of Canada refused (15 January, 1987).

[26] Ibid. at 351-352.

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art. 108.49(3) specifically states that a person undergoing that punishment shall not, without the permission of the commanding officer, "during the hours he is not on duty go beyond the limits prescribed by the commanding officer in standing orders". That regulation provides the commanding officer with a broad power to limit the movement of the offender.

The power to award a punishment at summary trial which affects the liberty of an accused is limited to commanding officers and delegated officers. The availability of those punishments is dependant upon the rank of the accused. For example, a non-commissioned member above the rank of private cannot be awarded detention. However, a non-commissioned member below the rank of sergeant can receive the punishment of stoppage of leave. Therefore all accused who are tried before a delegated officer and every accused, except a subordinate officer (officer cadet), who is tried by a commanding officer is subject to a punishment which can affect their liberty.

On the basis of the punishments available to a superior officer (fine, reprimand and severe reprimand) the liberty interests of an accused are not directly affected by the summary trial. However, while an accused being tried by a superior commander does not face a direct threat to "liberty" in terms of the punishment which can be awarded by that service tribunal, the accused is still confronted with a potential loss of liberty. The superior commander has the power to refer the case to higher authority at any point during the trial prior to making a finding of guilty or not guilty.[27] That referral could

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[27] QR&O, art. 110.05(2)(b)(ii), 110.06.

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result in the convening of a court martial all of which have the power to award the punishment of imprisonment.

The question of how remote the potential for the loss of liberty has to be to come within s. 7 of the Charter was left open by Mr. Justice Lamer in S. 94(2) Motor Vehicle Act[28], however, it has been addressed in R v. Burt.[29] In finding that the imprisonment in default of payment of a fine was a potential loss of liberty Chief Justice Bayda of the Saskatchewan Court of Appeal in Burt[30] stated that potential was "a possibility which could develop into an actuality" and that potential "should be thought of as a continuum with actuality as its point of culmination"[31]. The existence of conditions precedent such as pronouncement of sentence and non-payment of a fine were "extraneous factors which speak not to the existence of potential but to its place on the continuum".[32]

While the Supreme Court of Canada has not pronounced on this issue the judgment in Burt[33] could be used as the basis of a strong argument that the powers of referral of the superior commander result in a potential loss of liberty for the accused. That argument is supported by QR&O, art. 110.06 which specifically provides for the convening of a court martial (if the superior commander has that power), or a referral to higher authority in any other case, when the

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[28] **Supra**, note 4.

[29] R v. Burt (1987), 38 C.C.C. (3d) 299 (Sask. C.A.) [hereinafter Burt].

[30] Ibid.

[31] Ibid. at 303.

[32] Ibid. at 304.

[33] Ibid.

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superior commander considers that the available powers of punishment may not be sufficient. Both commanding officers and delegated officers have similar powers to refer cases to higher authority.[34]

This power of referral by trying officers to higher authority provides a more remote threat to liberty than the actual punishment which might be awarded at the summary trial level. This remoteness is enhanced by the possibility that a court martial might not be convened or directed.[35] However, even though more remote, it serves to highlight the interconnection between summary trials and courts martial. While the summary trial is a different type of service tribunal it is not "divorced" from the court martial process. Therefore, even though a summary trial may have no power (trial by superior commander) or a limited power (trial by delegated officer) to affect the liberty of an accused an argument could be made that the person charged with a service offence has their right to liberty placed in jeopardy regardless of the type of service tribunal before which proceedings are commenced.

One way to avoid the argument that "liberty" is significantly at risk at a summary trial is to remove the power of the trying officer to refer a case to higher authority (other than when the accused elects court martial) once the trial commences. Assuming that a proper investigation was done prior to the laying of a charge the matter should be able to be properly dealt within the forum selected by the trying officer. If the trying officer has misjudged whether the summary trial is the appropriate tribunal that mistake should not

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[34] QR&O, art. 108.13(2)(a), 108.14, 108.29(2)(b)(ii) and 108.30.

[35] QR&O, art. 109.05.

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be to the detriment of the accused (eg. by referring the case to higher authority).

iii) Security of the Person

Like "liberty" the phrase "security of the person" has yet to be fully defined by the courts. In Singh v. The Minister of Employment and Immigration[36] Madame Justice Wilson indicated that even in adopting a narrow approach to "security of the person" it "must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself".[37] While identification of "security of the person" with physical threats is readily apparent its association with the psychological side of human beings is still being developed.

In Morgentaler [38] five of the Supreme Court of Canada justices held that security of the person involved a psychological as well as physical component. Mr. Justice Dickson also referred to the psychological compulsion relating to "detention" in s. 10(b) of the Charter, and the concern over "state imposed psychological trauma" in s. 11(b) of the Charter, in deciding that serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of the security of the person".[39]

To date the cases dealing with the psychological dimension of "security of the person" have involved criminal matters. In light of the conclusions reached earlier in this chapter that service offences are public or criminal in nature the psychological dimension would

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[36] [1985] 1 S.C.R. 177 (S.C.C.) [hereinafter Singh].

[37] Ibid. at 207.

[38] **Supra**, note 10.

[39] **Supra**, note 10 at 56.

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also apply in assessing whether a person being tried by summary trial is being denied "security of the person". Such a conclusion is consistent with the equal constitutional status of the military and criminal justice systems and the provision in s. 130 of the National Defence Act for the incorporation of criminal offences into military law.

Even if the summary trial system is seen as a private disciplinary system the "security" of an accused charged with a service offence is affected by the psychological impact of that state action. One author, Patrice Garant, has suggested that the "extension of the concept of security to all forms of psychological trauma caused by state action is extremely dangerous...unless confined to the field of criminal law."[40] However, such a limitation is too artificial. It does not provide for the situation, such as in Wigglesworth v.R[41] where a disciplinary tribunal could award a "true penal consequence". Certainly a punishment of imprisonment (or detention) awarded by a disciplinary tribunal is equally as traumatic as imprisonment awarded by a criminal court. A strong argument can also be made that concern over psychological stress should not be limited to instances where it is caused by state action. The decisions of many "private" disciplinary and administrative tribunals (such as professional governing bodies) can cause considerable stress and anxiety for the individuals involved. However, since summary trials are "state" action the need for a broader review of the psychological impact of private disciplinary tribunals is not necessary.

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[40] **Supra**, note 14 at 351.

[41] (1987), 37 C.C.C. (3d) 385 (S.C.C.).

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In terms of summary proceedings the concern over the psychological impact of a trial should not be limited to cases where there might be a loss of liberty or a punishment which closely approximates the punishments available to a civilian court. The potential award of even a small fine, a reprimand or a severe reprimand by a superior commander can have considerable psychological impact on a senior non-commissioned member. In such a case the laying of charges, the trial and the award of a punishment, if found guilty, can seriously affect the reputation of the non-commissioned member. The effect of such action will not only be felt with respect to that non-commissioned member's peers, but also with the personnel over which the non-commissioned member has authority. It is a reputation which is developed over a number of years and one which is often essential to the performance of the person's duties, and ultimately to the maintenance of a livelihood.

The protection offered by s. 7 of the Charter should be given a broad interpretation and application. It is not only the traditional "criminal" matters which can adversely impact on a person's right to security. Therefore, regardless of whether summary proceedings are seen to be "criminal" or "disciplinary", whenever the decision is made to formally lay a charge under the Code of Service Discipline, and bring that accused to trial before any service tribunal, the accused's right to security of the person within the meaning of s. 7 of the Charter has the potential to be breached.

iv) Right to Life

The limited powers of punishment available to trying officers negates any direct denial of an accused's right to life by a summary trial. However, as with the right to liberty, the power of the trying officers to refer a charge to higher authority leaves open the

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possibility that the trial of an offence which might attract the death penalty could commence before a commanding officer or superior commander (the delegated officer has no jurisdiction over such offences), but end up at a General Court Martial.

The endangerment of the accused's right to life at the commencement of a summary trial is considerably more remote than in the case where the potential is for a loss of liberty as a result of referral to court martial. This remoteness is enhanced by the limited number of offences which attract the death penalty, the rarity with which such a punishment is awarded[42] and the likelihood that such a charge would be referred directly to higher authority rather than be dealt with at summary trial. However, the potential for a denial of the right to life serves to highlight the interconnection between summary trials and courts martial and adds emphasis to the argument set out in Chapter 4 that the jurisdiction over offences which attract the death penalty should be removed from commanding officers and superior commanders

b. Principles of Fundamental Justice

Having determined that summary proceedings prescribed by the National Defence Act can affect an accused's right to life, liberty and security of the person the inquiry must then turn first to what constitutes the principles of fundamental justice. According to S. 94(2) Motor Vehicle Act[43] the principles of fundamental justice are "found in the basic tenets and principles, not only of our judicial

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[42] The last time the death penalty was carried out was in 1944. The case involved the offence of murder.

[43] **Supra**, note 4.

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process, but also of other components of our legal system"[44]. Consistent with that approach the Supreme Court of Canada indicated in R v. Lyons[45] and Beare[46] that to determine whether a legislative scheme violated the principles of fundamental justice it was relevant to examine that scheme in light of the applicable principles of penal policy that animated legislative and judicial practice in the field. Such examinations usually have included a historical review of the common law principles or legislation involved.

c. Principles of Fundamental Justice and Procedural Fairness

The early years of the Charter saw considerable debate over the scope of the "principles of fundamental justice", particularly, with regard to how that term related to the common law doctrine of "natural justice". At the forefront of the debate was the question of whether "fundamental justice " was to include a substantive as well as a procedural content. This debate, at least in so far as the proponents of a purely procedural content for "fundamental justice" were concerned, was brought to a close in S. 94(2) Motor Vehicle Act.[47] Mr. Justice Lamer, in writing for the majority, indicated that the task of the court was not to choose between a substantive or procedural content, but rather to apply the "purposive" approach which had been set out by Mr. Justice Dickson in Hunter v. Southam Inc.[48]. Mr. Justice Lamer specifically indicated that fundamental justice was

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[44] Ibid. at 309.

[45] (1987), 37 C.C.C. (3d) 1 at 21 (S.S.C.) [hereinafter Lyons].

[46] **Supra**, note 21.

[47] **Supra**, note 4.

[48] Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at 155 (S.C.C.) [hereinafter Hunter].

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not the same as "natural justice" and it was not limited to matters of procedure.

The question remains as to whether the new "purposive" approach means that the pre-Charter principles of "natural justice" are no longer relevant in determining if a person has a "fair" hearing. Mr. Justice Lamer does not appear to have gone that far. In fact, while trying to avoid the classification of procedural or substantive content the effect of his decision appears to have been that, at a minimum, fundamental justice includes procedural guarantees. Mr. Justice Lamer stated:

> We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and, as Frankfurter J. wrote in Mcnabb v. US (1942), 318 U.S. 332 at 347, "the history of liberty has largely been the history of observance of procedural safeguards." This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees.[49]

In light of these comments it would appear that an analysis of the fairness of a trial or hearing under the Charter could commence with a review of the procedural safeguards which have been developed under the law.

The view that procedural fairness is a minimum requirement of fundamental justice was confirmed by Mr. Justice La Forest in Lyons[50] where he stated:

> It is clear that as a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness: see, e.g. the comments to this effect of Wilson J. in Re Singh and Minister of Employment and Immigration....[51]

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[49] Ibid. at 309-310.

[50] **Supra**, note 45.

[51] Ibid. at 45.

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In order to apply a minimum procedural fairness test to the Charter right or freedom in question it is first necessary to determine what level of procedural fairness is applicable. In Lyons[52] Mr. Justice La Forest indicated that fundamental justice is not limited to one standard of procedural protection. He stated:

> It is also not clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus certain procedural protection might be constitutionally mandated in one context but not in another.[53]

The standard of procedural protection required for summary proceedings can be derived from the "criminal" nature of those proceedings and the "penal consequences" which can result upon conviction of a service offence. As was indicated by Madame Justice Wilson in Wigglesworth[54]:

> If an individual is to be subject to penal consequences such as imprisonment--the most severe deprivation of liberty known to our law--then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.[55]

Therefore, a "fair" hearing for summary proceedings requires the highest level of procedural protection.

The final issue to be addressed in assessing the fairness of a summary trial is whether the fairness of the trial depends upon the accused being provided with the most favourable procedures which can be enacted. This issue was addressed by Mr. Justice La Forest in

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[52] Ibid.

[53] Ibid. at 45.

[54] (1987), 37 C.C.C. (3d) 385 (S.C.C.).

[55] Ibid. at 403.

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Lyons[56] in relation to the s. 7 guarantee to a fair trial. He stated as follows:

> It seems to me that s. 7 of the Charter entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures which could be imagined.[57]

It would appear that an element of reasonableness must be addressed when determining if the procedure in question affects the fairness of the trial. A fair hearing does not require that it be perfect.

3. SUMMARY TRIAL AND FAIRNESS

a. Procedural Fairness: Common Law vs. The Charter

While the constitutional concept of fairness has a largely procedural content it has not replaced the rules of natural justice. However, as Professor Manson points out the Charter has affected the way courts apply the concept of fairness.[58] First, the Charter carries with it the remedial powers of ss. 24(1) and 52 of the Constitution Act, 1982. Secondly the connection of a "fair" hearing with "criminal and penal matters" (s. 11) and "fundamental justice" to life, liberty and security of the person (s. 7) have caused courts to resort to the Charter as a way of emphasizing the seriousness of the issues involved. As Professor Manson indicates courts are using the Charter as a vehicle for "enhancing" existing rights in situations where such enhancement might not be necessary. In many cases the courts could have resolved the issues with the common law principles

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[56] **Supra**, note 48.

[57] Ibid. at 46.

[58] A. Manson (Text on Prison Law presently untitled).

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of procedural fairness without resorting to the Charter.[59] As Manson states:

> The Charter, however, focuses the judicial mandate when liberty is in issue. It is not so much that the content of fundamental justice is different than fairness but rather the constitutional entrenchment has impressed the need for careful scrutiny and non-deferential application when a liberty interest is involved.[60]

In a military context, Duncan v. R[61] provides an example of a case where a court used the Charter to assess procedural fairness under circumstances where the application of the common law rules would have sufficed. In Duncan[62] the "ad hoc" procedures for staffing severity appeals from courts martial were challenged under s. 7 of the Charter. Mr. Justice Muldoon of the Federal Court Trial Division decided as follows:

> The appellant/applicant's right to fair procedure, to fundamental justice to the benefit of audi alteram partem are simply denied in this procedure, in which he is obliged to make his submissions to the decision maker through the offices and judgment of the decision maker's assistant official.[63]

That case could have been decided under the common law standards of procedural fairness. However, the potential for a loss of liberty resulted in the elevation of the common law principle to one having constitutional status.

The willingness of the courts to scrutinize the procedural safeguards available at a trial could have a considerable impact on

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[59] Ibid.

[60] Ibid.

[61] (16 March 1990) T-2094-89 (F.C.T.D.) [hereinafter Duncan].

[62] Ibid.

[63] Ibid. at 16-17.

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summary proceedings. In assessing the constitutionality of summary proceedings a reviewing court will undoubtedly compare the procedures available at a summary trial with those procedures applicable to courts martial and civilian criminal courts. In making that comparison the reviewing court will be confronted with a virtual procedural void at summary proceedings. The limited trial procedures outlined in Chapter 1 indicate that the procedural protection available to an accused at a summary trial is largely left to the discretion of the trying officer.

When confronted with a lack of legislated procedural safeguards the reviewing court may feel compelled to find a breach of the constitutional standards of fairness in situations where a similar conclusion would not be reached in relation to courts martial or civilian criminal courts.

b. A Fair Proceeding?

i) Right to Counsel

It was not until 1836 that the English Parliament and the Legislative Assembly of the Province of Upper Canada enacted legislation which permitted an accused to have the assistance of counsel at trial.[64] It is from this legislation that the present day s. 650(3) of the Criminal Code is derived. That section entitles an accused "to make full answer and defence personally or by counsel".

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[64] Ibid. The English act was the Trials for Felony Act, 1836 6&7 Will. 4, c. 114) while the act of the Legislature of Upper Canada was entitled An Act to Allow Persons Indicted for Felony a Full Defence by Counsel and for Other Purposes Therein Mentioned, 6 th Wm. IV, Chap 44 (1836). As Bruce A. MacFarlane notes in a paper entitled "The Right to Counsel at Trial and on Appeal" (March 1989), the Ontario Court of Appeal in R v. Rowbotham (1988), C.R. (3d) 113 mistakenly suggested that the latter legislation was first passed in Canada in 1841.

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Similarly, the right of an accused to be represented by counsel when tried by court martial has been a fixture of British, and by incorporation, Canadian military law, since 1879.[65] That the right did not extend to summary trials can be seen in the 1975 judgment of Lord Denning in Frazer v. Mudge[66]. In deciding that the rules of natural justice did not require that a prisoner undergoing a trial by a prison tribunal have the right to legal representation, Lord Denning stated:

> ...it seems to me that disciplinary cases fall into a very different category. We all know that, when a man is brought up before his commanding officer for a breach of discipline, whether in the armed forces or in ships at sea, it has never been the practice to allow legal representation. It is of the first importance that the cases should be decided quickly. If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear cases must, of course act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation.[67]

Interestingly, while Lord Denning was prepared to allow legal representation in Pett v. Greyhound Racing Ass'n Ltd[68], a case involving a potential loss of a dog racing licence, he was not willing to extend the same rights to prison and military cases, which potentially involved a loss of liberty. This was another example of the "disciplinary exception" which was to trouble Mr. Justice Dickson

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[65] See above, Chap. 2, at 41-42.

[66] [1975] 1 W.W.R. 1132 (C.A.).

[67] Ibid. at 1133-1134.

[68] [1969] 1 Q.B. 12.

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(as he then was) in Martineau v. Matsqui Institution Disciplinary Board (No. 2)[69].

While the judgment of Lord Denning in Fraser v. Mudge[70] represented the traditional view of the right to legal representation by legal counsel at disciplinary hearings (military, police and prison) the law in Canada had already begun to change. Starting with the case, Re Bachinsky et al. and Sawyer[71], Canadian courts began to erode the "disciplinary exception" with respect to the right to counsel. As was developed in cases such as Bachinsky[72], Chisholm v. Jamieson et al.[73], Re Husted and Ridley and the Queen[74], Re Davidson and Disciplinary Board of Prison for Women and King[75], Minott v. Inmate Disciplinary Court of Stony Mountain Penitentiary.[76] and Joplin v. Chief Constable of Vancouver Police Department et al.[77] the participation of counsel was seen to be discretionary, although in cases where livelihood was at stake the threshold for the exercise of that discretion was held to be a low one.

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69 (1979), 50 C.C.C. (2d) 353 (S.C.C.).

70 **Supra**, note 66.

71 (1973), 14 C.C.C. (2d) 401 (Alta S.C.T.D.)[hereinafter Bachinsky].

72 Ibid.

73 (1974), 47 D.L.R. (3d) 754 (B.C.S.C.).

74 (1985), 19 C.C.C. (3d) 195 (F.C.T.D.).

75 [1983] 2 W.W.R. 52 (B.C.S.C.).

76 [1982] 1 F.C. 322 (F.C.T.D.).

77 [1983] 2 W.W.R. 52 (B.C.S.C.) This case was decided after the enactment of the Charter, however, the court decided the case on the basis of common law principles.

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Re Pollard and Young[78] went even farther than the general trend in finding that two prison warders being tried by a prison disciplinary tribunal were entitled to be represented by legal counsel because the tribunal was "public" in nature, and was acting judicially. However, that case does not appear to have been widely followed.

To the extent that the basic tenets of our judicial system can be determined from an analysis of common law principles it appears that an outright denial of the right to counsel cannot be justified at law. The courts prior to the enactment of the Charter increasingly recognized the need for accused being tried at disciplinary hearings to have the assistance of legal counsel in order to fairly present their case.

The main post-Charter case dealing with the right to counsel at prison disciplinary hearings is Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution[79]. In that case an inmate was charged with disciplinary offences under the prison regulations, and was facing a possible punishment of loss of earned remission. In two separate judgments the court held that s. 7 of the Charter had not created an absolute right to counsel in all prison disciplinary proceedings. Chief Justice Thurlow (Mr. Justice Pratte concurring) stated:

> I am of the opinion that the enactment of s. 7 has not created any absolute right to counsel in all such

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[78] (1980), 26 Nfld. and P.E.I.R. 410 at 425 (Nfld S.C.T.D.).

[79] (1985), 19 C.C.C. (3d) 195 (F.C.A.). [hereinafter Howard]. See also Latham v. Solicitor General of Canada, [1984] 2 F.C. 734 (F.C.T.D.). For an application of Howard, ibid, see Engen v. Kingston Penitentiary (1987), 60 C.R. (3d) 109 (F.C.T.D.).

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> proceedings. It is undoubtedly of the greatest importance to a person whose life, liberty or security of the person are at stake to have the opportunity to present his case as fully and adequately as possible. The advantages of having the assistance of counsel for that purpose are not in doubt. But what is required is an opportunity to present the case adequately and I do not think it can be affirmed that in one case can such an opportunity be afforded without also as part of it affording the right to representation by counsel at the hearing.[80]

The decision on whether to allow representation by counsel was left in the hands of the presiding officer. However, it was no longer characterized as the exercise of a discretion, but rather "a matter of right where the circumstances are such that the opportunity to present the case adequately calls for representation by counsel".[81] The presiding officer still had to take a position on whether to allow the participation of counsel, but that decision was not to be seen as an adjudication of a right, and could not prevent a superior court in the exercise of supervisory jurisdiction from determining the question on its own. Among the factors which were to be considered in deciding if counsel could participate were "the circumstances of the particular case, its nature, its gravity, its complexity, the capacity of the inmate to understand the case and present his defence".[82] The inmates right to liberty was potentially at risk (267 days of earned remission) and that alone "suggests a need for counsel".[83] Chief Justice Thurlow also considered that the type of charges (including three charges of an act to the prejudice of good order and discipline) were notoriously difficult to defend and that the accused, while

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[80] Ibid. at 210.

[81] Ibid. at 211.

[82] Ibid. at 211.

[83] Ibid. at 212.

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capable of conducting a defence, obviously felt the need for counsel because he had contacted legal aid. The accused's right to counsel as guaranteed under s. 7 of the Charter had been denied.

In a separate judgment Mr. Justice MacGuigan agreed with Mr. Justice Thurlow that the presiding officer was not exercising a discretion when determining if legal counsel could participate in the proceedings. However, he disapproved of the suggestion that the accused's capacity should be a factor in deciding if counsel was necessary. Mr. Justice MacGuigan also stated:

> In sum, other than, perhaps, in fact situations of unique simplicity, I cannot imagine cases where a possible forfeiture of earned remission would not bring into play the necessity for counsel. Indeed, in my view, the probability that counsel will be required for an adequate hearing on charges with such consequences is so strong as to amount effectively to a presumption in favour of counsel, a departure from which a presiding officer would have to justify. The right-enhancing effect of the Charter thus greatly increases the ambit of protection afforded.[84]

In Howard[85] the Federal Court of Appeal continued the common law position on the right to legal representation at disciplinary hearings to the extent that it was decided that there was no absolute right to counsel. The Federal Court of Appeal did alter the nature of the decision on whether counsel should be allowed to participate from a "discretion" to a matter of a "right under certain circumstances". Undoubtedly the concept of a limited right gives greater weight to the argument that counsel should be involved, however, it does nothing to change the fact that the decision, initially at least, still rests in the hands of the presiding officer. Therefore, there was still no

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[84] Ibid. at 230-231.

[85] **Supra**, note 79.

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guarantee that an accused could get representation by counsel when it is needed.

The decision in Howard[86] is unsatisfactory for three reasons. First, in practical terms, the accused's right to legal representation is still dependent upon the decision of the presiding officer. Certainly the accused can seek prerogative review from a superior court, however, such action is dependent upon the accused having knowledge that such review is available and the resources to seek that relief.

Secondly, in terms of protecting the rights of the accused the Federal Court of Appeal has clung to the same ill-defined criteria set out prior to the Charter for determining if counsel should be allowed to participate in a hearing. The right to be represented by counsel should not be dependent upon whether the accused is sufficiently sophisticated to know about legal aid, or has the initiative to ask to be represented. Finally, the finding that "simple" disciplinary proceedings might not require the participation of counsel indicates that the "disciplinary exception" has survived the enactment of the Charter. In effect a "limit" was placed on the accused's right to counsel. That limit should have been justified under s. 1 of the Charter rather than be allowed to exist as a qualification on the right to counsel as protected by s. 7 of the Charter.

A better approach would have been to provide an absolute right to counsel under s. 7 of the Charter. Having granted this broad right to counsel then s. 1 of the Charter could be used to isolate those cases in which a more expeditious and less formal procedure is required thereby justifying a limit on the right to counsel.

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[86] Ibid.

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In analyzing summary proceedings under the National Defence Act, according to the Howard[87] criteria, it does not appear that the failure to provide for an absolute right to counsel at summary trial breaches an accused's rights under s. 7 of the Charter. Instead of an absolute right to counsel the Federal Court of Appeal has only insisted on a qualified right to counsel as a principle of fundamental justice. However, when the procedures applicable to summary proceedings are assessed in terms of this qualified right it becomes apparent that the accused's right under s. 7 of the Charter is still denied under the regulations.

Neither the National Defence Act nor QR&O make reference to any right to counsel in respect of summary proceedings. The participation of counsel is still addressed in terms of being discretionary.[88] In addition, there is no attempt to set out the criteria for which the right must be invoked.

In terms of the potential severity of sentence, the loss of liberty which can result from the imposition of the punishments such as detention, confinement to barracks or stoppage of leave should all be considered serious enough to require that the accused be represented by counsel. It might be argued that "minor" punishments, such as confinement to barracks, do not involve a sufficiently serious loss of liberty so as to require the participation of a lawyer at trial. Such an argument could be supported by reference to Mr. Justice MacGuigan's judgment in Howard[89] where he referred to fundamental justice as constituting "a sliding standard of adequacy

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[87] Ibid.

[88] QR&O, art. 108.03, Note C.

[89] **Supra**, note 79.

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which can be defined only in reference to the particular degree of liberty at stake and the particular procedural safeguard in question"[90]. However, in light of the importance which is placed on the protection of liberty in our society, its specific protection in ss. 7 and 11(e) of the Charter and the fact that military personnel are "free" members of society, the courts should recognize punishments such as confinement to the person's home (barracks) as a deprivation of liberty under the Charter. In rebuttal, it may be argued that such a loss of liberty in military society is not as serious as a similar loss in civilian society. However, in terms of assessing a Canadian's rights under s. 7 of the Charter such a special military limitation on the right to liberty should be required to be justified under s. 1 of the Charter.

The potential that any offence tried by summary trial can be referred to higher authority (and ultimately to court martial) prior to the completion of the summary proceedings enhances the requirement for representation by counsel.

The seriousness of the offence should also not be limited to whether there is a loss of liberty. The potential harm to the security of the person also raises the question of whether the principles of fundamental justice would require a right to representation by counsel to be invoked. A senior non-commissioned member faced with disciplinary action before superior commander, which could seriously affect that person's career, might be justified in feeling they need the assistance of counsel.

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[90] Ibid. at 225.

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One of the criteria about which the court in Howard[91] was particularly concerned was the vagueness of the charges. Charges such as "an act to the prejudice of good order and discipline" are often used under military law to try a whole range of offences. Many of those charges involve the most minor breaches of discipline and therefore often end up being tried at summary trial. While the Federal Court of Appeal did not indicate that such offences could never be tried without legal representation the concern which was voiced over that type of offence does raise the question as to whether there can ever be a "simple" service offence for which counsel would be held to be not required.

Perhaps one of the most telling indications that an accused being tried by summary trial requires the assistance of counsel can be found in QR&O, art. 108.03 which provides for the right to an assisting officer. It is an acknowledgment that an accused may not be able to appear alone before the trying officer and present their own case. It is difficult to see why, when assessed solely on the basis of offering assistance at trial, that a non-legally trained assisting officer is better qualified than a lawyer to perform that function. There may be other reasons, such as the availability of counsel in the area of military operations, which makes the use of assisting officers necessary, however, such a limit on the right to counsel should only be justified in an analysis under s. 1 of the Charter.

Therefore a strong argument can be made that the nature of military disciplinary proceedings are such that one of the criteria which mandates a right to counsel will always be present in respect of summary proceedings under the National Defence Act. As a result, the

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[91] Ibid.

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failure to provide for a right to counsel in the Code of Service Discipline could be determined by a court to be a denial of an accused's rights under s. 7 of the Charter.

Even if its is accepted that minor service offences, such as "dirty boot and haircut" offences, are sufficiently uncomplicated so as to not give rise to a right to counsel the procedure under military law for assessing whether legal representation will be allowed can be seen to breach s. 7 of the Charter. Neither the National Defence Act nor the regulations provide for the qualified right to counsel. The decision to allow the participation of counsel is still left to the discretion of the trying officer.[92] As was set out in Howard[93] the decision on the participation of counsel is no longer a "discretion". Therefore, the failure to provide for the right to legal representation or set out the criteria on which that right is to be granted could also be seen as a breach of the accused's rights under s. 7 of the Charter.

ii) Notice

While also protected under s. 7 the requirement for notice is specifically guaranteed in s. 11(a) of the Charter. That section states:

> 11. Any person charged with an offence has the right
> (a) to be informed without unreasonable delay of the specific offence.

The test for adequate notice set out by the courts has not been a particularly onerous one. In R v. Lucas[94] the Nova Scotia Supreme

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[92] QR&O, art. 108.03, Note C.

[93] **Supra**, note 86.

[94] (1983), 6 C.C.C. (3d) 147 (N.S.C.A.).

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Court Appeal Division held that s. 11(a) of the Charter enshrined the rights contained in (then) s. 510(3) (now s. 581) of the Criminal Code requiring that the charge contain sufficient detail of the circumstances to identify the transaction and provide reasonable information concerning the alleged offence. In R v. Goreham[95] that court held that an abbreviated form of a charge provided sufficient information concerning the offence charged. Similarly, in Re Warren and the Queen[96] it was held that an accused only had the right to be informed "of the substantive offence and the acts or conduct which allegedly form the basis of the charge".[97]

Based on these criteria, it appears that the information provided on the charge report (particulars of the accused, section number, statement of the offence, particulars of the offence and the list of witnesses to be called), combined with the briefing provided to the assisting officer after the charge is laid, is sufficient to avoid a determination of a Charter breach for a lack of adequate notice.

iii) Pre-Trial Disclosure

The purpose of pre-trial disclosure is primarily to assist the accused to prepare for trial. In the criminal courts the practice of disclosure have varied considerably throughout the country and there has been little legislative guidance.[98] The general view prior to the

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[95] (1984), 12 C.C.C. (3d) 348 (N.S.C.A.).

[96] (1983), 35 C.R. (3d) 173 (H.C.J.).

[97] Ibid. at 177.

[98] R.J. Delisle & D. Stuart Learning Criminal Procedure (Toronto: Carswell, 1986) at 473.

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enactment of the Charter has been that there is no general rule compelling the Crown to disclose information to the defence, but out of a sense of fairness such disclosure should be carried out.[99] On occasion, however, courts have held that they have the power to order the production of documents in order to ensure fundamental fairness to the accused.[100]

Under the military justice system the requirements for pre-trial disclosure vary depending on whether the trial is by summary trial or court martial. At a summary trial the accused receives a list of witnesses with the charge report[101] and the assisting officer is "informed of the evidence relating to the charge".[102] There is no guidance provided as to the manner in which the assisting officer is to be informed of the evidence (eg. orally, summaries of the evidence, written statements etc.). In a case proceeding to court martial the accused receives a synopsis of the evidence prior to the referral of the charge to higher authority.[103] In addition, when a prosecutor determines prior to the commencement of the court martial that additional witnesses will be called the accused must be informed of those witnesses and be provided with a written summary of the evidence.[104]

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[99] R v. Barnes (1980), 12 C.R. (3d) (Nfld Dist. Ct.).

[100] Savion v. R (1980), 13 C.R. (3d) 259 (Ont C.A.) and R. v. Arviv (1985), 45 C.R. (3d) 354 (Ont C.A.).

[101] QR&O, art. 106.09.

[102] QR&O, art. 108.03(6).

[103] QR&O, art. 109.02, 109.03

[104] QR&O, art. 111.64.

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While offering less in terms of disclosure than is provided at court martial, the mandatory provision of pre-trial information at summary trials appears to exceed the basic disclosure requirements of the common law ("rules of natural justice").

Both R v. Wood[105] and R v. Bourget[106] addressed the Charter requirements of disclosure. In Wood[107] Mr. Justice Griffiths of the Ontario Court of Appeal rejected an argument that the accused should have wholesale access to police operational files. However, he did determine that the accused had a constitutional right to disclosure sufficient to make full answer and defence. Such disclosure "should be sufficient to fairly apprise the accused of the case to be met in sufficient time and substance to enable the accused to prepare and defend the case."[108] Appropriate disclosure in that case involved liberal access to statements, forensic reports, post-mortem reports and other information from the police file.

In Bourget[109], Mr. Justice Tallis of the Saskatchewan Court of Appeal, in deciding that the refusal of the Crown to provide representative ampoules from a breathalyser test to an accused breached s. 7 of the Charter, discussed the advantages of disclosure as follows:

> Furthermore, pre-trial disclosure and discovery have societal benefits which should not be overlooked. If such procedures work effectively, they should promote an expeditious as well as a fair disposition of charges

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105 (1989), 51 C.C.C.(3d) 201 (Ont. C.A.) [hereinafter Wood].

106 (1987), 56 C.R. (3d) 97 [hereinafter Bourget].

107 **Supra**, note 105.

108 Ibid. at 236.

109 **Supra**, note 106.

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> whether by plea or trial, they should provide the defendant with sufficient information to make an informed plea; they should permit thorough preparation for trial can minimize the potential for surprise or delay; they should eliminate as much as possible the procedural and substantive inequities among similarly-situated defendants. In this way, not only are the immediate concerns of the judiciary, the state, the community and the litigants served, so are the longer-range concerns about the overall operation of the criminal justice system.[110]

The requirements for disclosure set out in Wood[111] and Bourget[112] appear to be more stringent than is presently required at summary proceedings (although the disclosure requirements for courts martial may be sufficient). The disclosure provisions applied at summary proceedings, while mandatory, are so vaguely drafted that only a sparse outline of information need be provided. In addition that information need not be in writing and there is no requirement to provided copies of documentary evidence to be used at the trial. For many cases, particularly minor "hair cut and dirty boot" cases, this limited information might be sufficient. In addition, the assisting officer can always help the accused in interviewing the witnesses listed on the charge report. However, for many alleged offences there will be written investigations, boards of inquiry, police reports, written statements, search warrants and other documentary evidence. A proper pre-trial preparation of the case may depend upon a timely disclosure of such evidence.

To the extent that the present regulations do not provide for the disclosure of information which might assist the accused in preparing for a summary trial it would be open for a court to conclude

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[110] Ibid. at 106.

[111] **Supra**, note 105.

[112] **Supra**, note 106.

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that the present disclosure provisions deny the accused a fair summary trial.

iv) Oral or Written Submissions

The purpose of providing for an oral hearing is to allow the accused to directly confront the witnesses providing adverse evidence. In addition, an oral hearing allows the credibility of the evidence to be more accurately assessed than is provided by written submissions. In Singh[113] Madame Justice Wilson determined that an oral hearing was not required in all cases. However, after indicating that written submissions might be an adequate substitute in appropriate cases where the life, liberty and security of the person was at stake Madame Justice Wilson went on to indicate it would be difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.[114]

Since QR&O require that all summary trials be conducted "in the presence of the accused"[115] the present procedures, which in effect require an oral hearing, provide a "fair" hearing for that accused.

v) Rules of Evidence

One of the ways in which a fair trial can be secured for an accused is by the application of rules of evidence. The purpose of the law of criminal evidence was summarized by P. McWilliams in

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[113] **Supra**, note 36.

[114] Ibid. at 213-214.

[115] QR&O, art. 108.13(1), 108.29(1) and 110.05(1).

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Canadian Criminal Evidence[116] as follows:

> Ultimately the law of criminal evidence should be effective in discovering the truth. Admissibility should be based on relevancy and conversely on an avoidance of irrelevant and collateral issues which are likely to distract and confuse the jury and consume the time of the court. But the law of criminal evidence is also concerned with fairness.[117]

Included in the law of evidence are rules governing the examination, cross-examination and re-examination of witnesses; the competence and compellability of witnesses; the admissibility of evidence (eg. the hearsay rules); and the classification of evidence.[118]

Despite the "resemblance" of summary trials to "criminal and penal matters" there are few rules associated with the law of evidence applied at summary trials. Beyond the requirement that the trying officer "receive such evidence as he considers will assist him"[119] and "any other further facts that should be brought out in the interest of the accused and any relevant submissions by or on behalf of the accused"[120] there is little guidance in the regulations on what evidence should be admissible at trial. In addition, although the accused can testify and call witnesses there is little guidance provided with respect to the cross-examination of witnesses, or on challenging the admissibility of evidence. This situation can be contrasted with the extensive common law and statutory rules of

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[116] P. McWilliams, Canadian Criminal Evidence (Aurora: Canada Law Book Company Inc., 1989).

[117] Ibid. at 1-4.

[118] Ibid. at 1-10 - 1-13.

[119] QR&O, art. 108.13(e), 108.29(1)(f) and 110.05(1)(f).

[120] QR&O, art. 108.13(g), 108.29(1)(h) and 110.05(1)(h).

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evidence applicable at criminal trials and with the Military Rules of Evidence[121] applied at courts martial.

The lack of evidentiary rules can be linked to the special status which was traditionally given to disciplinary tribunals (the disciplinary exception). In Re Whitelaw and Vancouver Board of Police Commissioners[122] it was held that a prohibition on the participation of counsel was an indication that strict rules of evidence were not intended to be applied in a disciplinary hearing before the Chief Constable. A serious criticism of Whitelaw[123] is that it failed to recognize it is the presiding officer, and not counsel, who is ultimately responsible for ensuring the trial is fair. It is not the participation of counsel which should trigger whether rules of evidence should apply.[124] In any event, the erosion of the "disciplinary exception" casts into doubt the continued applicability of that decision for public disciplinary tribunals.

At present the ability of trying officers to ensure that an accused gets a "fair" trial in terms of the evidentiary basis upon which an adjudication is made is severely limited. Trying officers are not provided with the training necessary to rule on evidentiary

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[121] QR&O, Vol. II, Appendix XVII.

[122] (1972), 29 D.L.R. (3d) 781 (B.C.S.C.) [hereinafter Whitelaw].

[123] Ibid.

[124] In criminal trials it has been held it is the duty of the court to ensure the accused has a fair trial, especially when the accused is not represented by counsel. See Caccamo v. R (1975), 21 C.C.C. (2d) 257 (S.C.C.), R v. Deacon (1947), 87 C.C.C. 257 (Man. C.A.) and R v. German (1947), 89 C.C.C. 90 (Ont. C.A.).

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matters[125] and the regulations do not provide sufficient procedural guidance to help make up for that lack of training. The lack of training in the conduct of summary trials is particularly surprising in light of the importance which is placed on maintaining discipline in the armed forces.

There are also no aide-memoires or training manuals dealing with the conduct of summary trials beyond what has been produced on an ad hoc basis at the base or unit level. The general disinterest in providing guidance to trying officers is reflected in CFAO 25-6. That administration order contains checklists for the conduct of summary trials, however, those lists are presently seriously outdated. They have not been amended since the 1970s and therefore do not include the amendments made to summary trial procedures in 1986.[126]

The result of this lack of training on evidentiary matters is that an accused at a summary trial can be convicted on virtually any evidence which the trying officer is willing to admit. The admissibility of evidence and the weight given to that evidence is dependent upon the attitude of each individual trying officer. Under the present procedures outlined in the regulations an accused can be convicted on the basis of an unsigned and unsworn document without being given the opportunity to cross-examine the maker of that

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[125] While there is a rudimentary introduction to the National Defence Act and QR&O in basic training, and many officers follow a self study professional development programme, which includes a segment on military law, there is no training on summary trial procedures, evidentiary matters or the conduct of summary trials.

[126] See CFAO 19-25 Annex A (Summary Trial Before Delegated Officer-Checklist) issued 10 March, 1972, Annex B (Summary Trial By Commanding Officer-Checklist) issued 10 March, 1972 and Annex C (Summary Trial Before Superior Commander-Checklist) issued 3 February, 1978.

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document. A conviction at a summary trial can be made on the basis of evidence which would not be admissible (because of the Military Rules of Evidence) had the same offence been dealt with by a court martial.

The regulations provide little or no guidance on what evidence is relevant, which witnesses are competent or compellable (although an accused testifies only "if he desires to be heard"[127]), the sequence of examination or cross-examination, or the standards of admissibility. The procedure which is set out in the regulations is so broadly drafted that the manner in which the trial is conducted is virtually left to the decision of the individual trying officer. While such a broad discretion enhances the "portability" of the summary trial it inevitably means that there is no standard procedure applicable to all summary trials.[128]

The courts have yet to deal with the issue of whether the application of formal rules of evidence is required at proceedings that are criminal or penal in nature or otherwise affect the life, liberty or security of the person. This situation is not surprising in light of the extensive evidentiary rules applicable to courts martial and civilian criminal proceedings. However, there has been an indication that the admissibility of evidence is a constitutionally protected matter.

In R v. Seaboyer[129], Mr. Justice Grange of the Ontario Court of Appeal, in writing for the majority, held that the provisions of the

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[127] QR&O, art. 108.13(1)(f), 108.29(1)(g), 110.05(1)(g).

[128] For an example of unusual summary trial procedure see Andrew v. R (27 February, 1986) C.M.A.C. 241 (C.M.A.C.) at 3, where Mr. Justice Hall commented on the manner in which the commanding officer conducted a summary trial.

[129] (1987), 58 C.R. (3d) 289 (Ont. C.A.)

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Criminal Code limiting the accused's ability to adduce evidence of the complainant's sexual history in cases alleging sexual misconduct "could operate to deprive an accused person of a fair trial".[130] A similar result was reached in R v. Wald.[131]

In R v. Potvin[132] Madame Justice Wilson indicated that the right to cross-examine a witness when the accused's liberty and security of the person was at stake was a principle of fundamental justice. Madame Justice Wilson stated:

> When evidence is sought to be introduced in order to obtain a criminal conviction which could result in imprisonment, the accused is threatened with a deprivation of his or her liberty and security of the person and this can only be done in accordance with the principles of fundamental justice. It is as I have said, a principle of fundamental justice that the accused have had a full opportunity to cross-examine the adverse witness.[133]

The regulations provide the trying officer "shall permit the accused to put or have put to any witness such questions as are relevant to the charge...."[134] In light of the limited training for all summary trial participants this general right to frame questions only offers limited protection to the accused. The present legislation provides no guidance on what might be "relevant to the charge". Summary trial participants should be informed that the right to cross-examine extends to questions concerning the opportunity and powers of observation, memory, accuracy and powers of expression, or to matters showing bias, bad character, reputation, previous

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130 Ibid. at 306.

131 (1989), 68 C.R. (3d) 289 (Alta. C.A.).

132 (1989), 47 C.C.C. (3d) 289 (S.C.C.).

133 Ibid. at 301-302.

134 QR&O, art. 108.29 (2)(d).

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convictions or prior contradictory statements. The ability to question witnesses may also ring hollow when a trial can be conducted with few exclusionary rules concerning documentary evidence.

While none of these cases can be used to support the broad proposition that formal rules of evidence must be applied at summary trials, they do indicate a readiness by courts to protect an accused's rights in terms of evidentiary matters. This is one area where the limited procedural safeguards presently applicable to summary trials may attract the scrutiny of a review court. In effect, the court may be drawn to the conclusion that there is a Charter breach because they are provided no basis upon which to rule some reasonable attempt has been made to legislatively safeguard the accused's rights.

vi) Requirement for Reasons or a Record of the Trial

At common law there is no requirement to give reasons.[135] The leading case in relation to criminal law is MacDonald v. R[136]. In that case the Supreme Court of Canada rejected an appeal that the failure of a President of a Special General Court Martial to give reasons supported an argument that the judge had not adequately considered the issue of intent. In addressing the requirement to give reasons Chief Justice Laskin stated:

> There is no such statutory obligation under the National Defence Act nor under the Criminal Code, nor can I find, or be justified in fashioning, a common law rule applicable to all criminal trials. The desirability of giving reasons is unquestionable. As was said in a Note in (1970), 48 Can. Bar Rev. 584 by Professor Hooper,
>
> The arguments in favour of reasoned judgments

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[135] Les Supermarches Jean Labreque Inc. v. Labour Court and Judge Bernard Lesage, [1987] 2 S.C.R. 219 at 233 (S.C.C.) and Mullan, Administrative Law, **supra**, note 5.

[136] [1977] 2 S.C.R. 665 (S.C.C.) [hereinafter MacDonald]. Followed in R v. Baumet (1986), 54 C.R. (3d) 176 (Alta C.A.).

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> are obvious. The process of publicly formulating his reasons may lead the judge to a conclusion other than that reached upon the basis of "intuition". The parties to the case, both the Crown and defence, will want to assure themselves that the judge properly understood the issues before him and will want to know whether he reached any conclusions of law or fact that could be challenged at the appellate level. The general public, or at least the victim if there was one, may have an interest in knowing why a certain verdict was reached.
>
> These considerations and others that could be mustered go to show what is the preferable practice, but the volume of criminal work makes an indiscriminate requirement of reasons impractical, especially in provincial criminal courts, and the risk of ending up with a ritual formula makes it undesirable to fetter the discretion of trial judges.[137]

In respect of summary trials neither the National Defence Act nor QR&O impose a direct obligation on trying officers at summary trial to give reasons for their decisions. Although such an obligation might possibly be implied in the requirement that a commanding officer explain the circumstances surrounding the commission of an offence on those limited occasions for which approval of a punishment warrant provides must be obtained.[138]

While there may be no common law requirement for reasons the question remains as to whether such a requirement exists under the Charter. As was indicated in the Hooper article[139] the provision of reasons appears to fulfil a two fold purpose. First, reasons inform the accused and the general public why a particular decision was reached. Such information can be essential in resolving any conflict which may have led up to the offence. In terms of the "corrective" aspect of disciplinary proceedings reasons can help explain to an

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[137] Ibid. at 672.

[138] QR&O, art. 108.39 and 108.40.

[139] Supra, note 142.

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offender where they went wrong. Secondly, the reasons can provide the basis upon which the accused may challenge the decision of the trying officer.

The argument for reasons may gain support when it is considered in terms of the presumption of innocence as protected in ss. 7 and 11(d) of the Charter. The Supreme Court of Canada has held in a number of cases (Oakes[140], R v. Holmes[141] and R v. Whyte[142]) that there are three components to the presumption of innocence. First, an individual must be proven guilty beyond a reasonable doubt. Secondly, the Crown bears the onus of proof. Finally, criminal prosecutions must be carried out in accordance with lawful procedures and the principles of fairness.

In terms of the requirement for reasons it is the first component, the need for proof beyond a reasonable doubt, which has particular relevance. Insight into that requirement was provided in R v. Vaillancourt[143] where Mr. Justice Lamer, in writing for the majority, confirmed that the trier of fact must be convinced beyond a reasonable doubt of all the essential elements of the offence.[144] The provision of reasons provides a major, albeit not the sole, method of confirming that the accused was convicted on each essential element of the charge. The existence of a record of the proceedings provides another avenue with which to confirm that the presumption of innocence has been maintained.

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[140] Supra, note 40.

[141] (1988), 64 C.R. (3d) 97 (S.C.C.).

[142] (1988), 64 C.R. (3d) 123 (S.C.C.).

[143] (1988), 60 C.R. (3d) 289 (S.C.C.).

[144] Ibid. at 327.

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During both criminal courts and military courts martial there is an obligation to maintain a record of the proceedings.[145] There is no similar requirement in respect of summary trials, although in the limited number of cases where an accused being tried by a superior commander has agreed to have the synopsis read at the trial there is a record of the evidence relied on by the trying officer. The importance of having a record to rely on when the reasons of the presiding officer are not available was addressed by Chief Justice Laskin in MacDonald[146]:

> It does not follow, however, that failure of a trial judge to give reasons, not challengeable per se as an error of law, will be equally unchallengeable if having regard to the record, there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue or in appreciation of evidence that would affect the propriety of his verdict.[147]

When there are neither reasons for judgment, nor a record of the proceedings, there can be no adequate assurance that the presiding officer has addressed all the essential elements of the offence in determining guilt.

As was indicated in MacDonald[148] a general requirement for reasons could put considerable stress on provincial court judges. However, the comments of the court must be viewed in the light of the statutory requirement for a record of the proceedings. The record of the proceedings still provided a basis to review the decisions of

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[145] Under military law see QR&O, art. 112.66, 113.16, 112.54(1)(c) and 112.55(4). The requirement for a record proceedings in the civilian justice system can be found in sections 540-542, 557, 646 and 801(3) of the Criminal Code.

[146] **Supra**, note 142.

[147] Ibid. at 673.

[148] Ibid.

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those provincial court judges even if there were no reasons. In addition, the question of the work load of the presiding officers appears to be a factor which should be addressed under s. 1 of the Charter and not in respect of whether an accused can receive a "fair" trial.

In light of the importance placed by courts on the presumption of innocence ("a hallowed principle lying at the heart of criminal law"[149]) a strong argument can be made that there is a constitutional requirement that either a record of the proceedings, or reasons for judgment be provided for a summary trial. Since a record of trial is provided at both courts martial and civilian criminal trials this constitutional requirement would have little impact on those proceedings. The same cannot be said for summary trials prescribed by the National Defence Act. This possible breach of the Charter is again a direct result of the wide gap existing between procedures applicable to summary trials and those applying to courts martial and civilian criminal courts.

In addition, support for a Charter requirement for reasons can be found in Re D & H Holdings Ltd. and City of Vancouver[150] where Mr. Justice McKay of the British Columbia Supreme Court determined that it would be contrary to fundamental justice for the Vancouver City Council to decline to give reasons concerning a business licence application.[151] If reasons are required for a licensing application

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[149] R v. Oakes (1986), 24 C.C.C. (3d) 321 at 333 (S.C.C.).

[150] (1985), 21 D.L.R. (4th) 230 (B.C.S.C.).

[151] Ibid. at 237-238.

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then they should also be required were the accused could be placed in detention.

4. SUMMARY

In summary, the trial procedures applicable to summary trials do guarantee an accused a fair trial under the Charter in terms of adequate notice and the right to make oral representations. However, the accused's right to a fair trial could be in jeopardy in respect of the right to counsel, pre-trial disclosure, the application of rules of evidence and the requirement to provide a record or reasons. An adverse ruling on these procedural requirements is by no means certain. However, the direction courts have taken in these areas combined with the procedural void presently found a summary trials should cause some concern for proponents of the military justice system.

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CHAPTER 7

REVIEW/APPEAL

Sorting out the muddles is really the chief job of the commander.

Sir A.P. Wavell, February, 1933[1]

1. INTRODUCTION

As was set out in Chapter 1, once a finding of guilt is made and a sentence is awarded by a summary trial there are four possible ways in which the results of that tribunal may be reviewed. Those options are redress of grievance, punishment warrants (in limited cases), review by officers in the chain of command and judicial review. There is no legislated right of appeal.

Does this review process meet Charter standards? Since the majority of the Supreme Court of Canada in R v.Lyons[2], through Mr. Justice La Forest, held that s. 11 of the Charter did not apply to post conviction proceedings these two issues will be addressed solely in terms of s. 7 of the Charter.

With a determination of guilt and an awarding of a punishment the threat to a person's life (under the limited circumstances the punishment of death is available) and the potential of imprisonment arising from a referral to higher authority no longer exists. However, the offender's right to liberty (detention, confinement to ship or barracks, stoppage of leave and extra work and drill) and security of the person (physical and psychological effects of the

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations, (Annapolis: United States Naval Institute, 1966) at 61.

[2] (1987), 37 C.C.C. (3d) 1 (S.C.C.) at 40.

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proceedings) remains in jeopardy. As a result the first stage of the s. 7 test is met and the inquiry must then shift to a review of whether the post-summary trial proceedings comply with the principles of fundamental justice.

Two issues will be addressed. The first issue to be explored is whether the Charter requires that on offender have a right of appeal. Secondly, the sufficiency of the review procedures presently in place will be assessed.

2. THE RIGHT TO APPEAL

A review of the history of appeal proceedings reveals that both military and civilian justice systems appeals are creatures of statute.[3] As was outlined in Chapter 2, an appellate body for courts martial was brought into being with the passage of the National Defence Act in 1950. However, there was no similar right of appeal developed for summary proceedings.

Instead, the amalgamation of the various systems of military law in Canada in 1950 resulted in a heavier reliance on the review of summary proceedings by means of punishment warrants. The right to elect court martial, which had been the primary method of supervising summary proceedings under army and air force law was changed in 1959 to a form of waiver where the accused could avoid summary proceedings altogether.

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[3] For a history of the development of early appellate tribunals in England see Sir J.F. Stephen, A History of the Criminal Law of England, vol. 1 (London: MacMillan and Co., 1883) at 308-318. The history of Canadian appeal courts is outlined in Salhany, Canadian Criminal Procedure, 5th ed. (Aurora: Canada Law Book Inc., 1989) at 402-403.

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The status of appeals as "creatures of statute" lends considerable support to the argument that there is no constitutional right of appeal from a summary trial. In R v. Metzler[4], the Supreme Court of Canada dealt with the question of whether the Charter provided a right of appeal from the decision of a judge who refused to review wiretap authorizations. There was no appeal procedure available under the Criminal Code or any other legislation. In writing the judgment for the court Mr. Justice McIntyre held that the Charter did not provide a right of appeal. He relied on a previous statement of his views in Mills v. R[5]:

> Again it must be observed that the Charter is silent on the question of appeals and the conclusion must therefore be that the existing appeal structure must be employed in the resolution of s. 24(1) claims. Since the Charter has conferred a right to seek a remedy under the provisions of s. 24(1) and since claims for remedy will involve claims alleging the infringement of basic rights and fundamental freedoms, it is essential that an appellate procedure exist. Here is no provision in the Code which provides a specific right to appeal against the granting, or the refusal, of a Charter remedy under s. 24(1), but appeals are provided for which involve questions of law and fact. The Charter, forming part of the fundamental law of Canada, is therefore covered and the refusal of a claim for Charter relief will be appealable by a person aggrieved as a question of law, as will be the granting of such relief by the Crown. The appeal will follow the normal, established procedure. When the trial is completed, the appeal may be taken against the decision or verdict reached and the alleged error in respect of the claim for Charter relief will be a ground of appeal.[6]
> (emphasis in original text)

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[4] (1989), 49 C.C.C. (3d) 453 (S.C.C.).

[5] (1986), 26 C.C.C. (3d) 481 (S.C.C.).

[6] Ibid. at 496.

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The decision in Metzler[7] that an appeal must have a statutory basis could be used to support the argument that there is no principle of fundamental justice that an offender, convicted by a summary trial, must be provided the right to appeal. However, the judgment in Metzler[8] could be distinguished on the ground that the Supreme Court of Canada was only dealing with interlocutory appeals and not the question of whether there is a constitutional right of appeal after conviction. As was stated by Mr. Justice McIntyre in Mills v. R[9]:

> Since the Charter has conferred a right to seek a remedy under the provisions of s. 24(1) and since claims for remedy will involve claims alleging the infringement of basic rights and fundamental freedoms, it is essential that an appellate procedure exist.[10]
>
> (emphasis added)

In addition, the provision in the Criminal Code for a right of appeal from all levels of courts could be seen as a strong indication that the principles of fundamental justice require an appeal procedure to enable an offender to make use of the provisions of s. 24(1) or s. 52 of the Charter. The existence of an appeal procedure may be particularly important where there is a serious breach of the right to liberty and security of the person.

In comparing the civilian and military justice systems a civilian appellate judge may have difficulty in accepting that a military offender who receives 90 days detention at a summary trial

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[7] **Supra**, note 4.

[8] Ibid.

[9] (1986) 26 C.C.C.) 481 (S.C.C.).

[10] Ibid. at 496. However, see R v. Robinson (1989), 73 C.R. (3d) 81 at 102 (Alta C.A.) where it is ruled there is no right of appeal provided by the Charter.

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should be denied a right of appeal. The lack of a right of appeal from a summary trial is all the more troublesome in light of the appeal procedure which is available if that offender received the same punishment at a court martial. The failure to provide for a right of appeal also means that the majority of disciplinary offences tried by service tribunals escape the regular supervision of civilian appellate courts.

This is yet another area where the lack of procedural safeguards provided for summary trials, in comparison with more formal trial systems, could result in a determination by a court that there is a Charter breach.

It might be argued that review by a civilian judicial tribunal is available by means of seeking prerogative relief. However, the obtaining of such relief requires that the offender step outside the military justice system to bring an application in the Federal Court of Canada or a provincial superior court. Apart from the problem of being aware of this non-military review process the seeking of that review would probably be beyond the financial resources of many members of the armed forces. There is a further problem with respect to service members serving outside of Canada. Although s. 17(6) of the Federal Court Act gives the Federal Court Trial Division jurisdiction over writs of habeas corpus, writs of certiorari, writs of prohibition and writs of mandamus "in relation to any member serving outside of Canada" such judicial review may not realistically be available to someone convicted by a summary trial beyond Canada's shores. Both administrative problems and problems of access to Canadian courts while serving overseas could severely limit the usefulness of that remedy.

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Judicial review could be made more readily available by giving the Judges of the Court Martial Appeal Court the power to grant prerogative relief. Since all the judges of the military appellate court are judges of the Federal Court of Canada or a provincial superior court they would be exercising a power that they already have in relation to the duties they perform as members of their primary courts. An additional advantage can be derived from transferring the power to grant prerogative relief to the Court Martial Appeal Court. The judges of that court should have a better understanding of military law than other judges who have had no experience in that area. Therefore, the decision to grant prerogative relief should more accurately reflect the needs of both the military and the service member. However, even if the power to grant prerogative relief is given to the Court Martial Appeal Court problems of accessibility and affordability will remain.

In terms of a service member's rights under the Charter the existence of a right of appeal for offenders under the Criminal Code and a similar right for service personnel convicted by court martial could arguably be seen as being demonstrative of the requirements of the principles of fundamental justice.

In addition, as was evidenced in MacKay v. R[11] and Mohammed v. Canada (Minister of Employment and Immigration)[12] courts have placed importance on the existence of a right of appeal in ensuring that the adjudicating tribunal is sufficiently independent and impartial. Therefore, even if there is found to be no constitutional right of appeal the failure to provide for that right removes any chance to

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[11] (1980), 54 C.C.C. (2d) 129 (S.C.C.)

[12] (1988), 50 D.L.R. (4th) 394 (F.C.T.D.).

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argue that the summary trial system as a whole provides for an independent and impartial adjudication of a service offence.

3. REVIEW PROCEDURES

a. General Considerations

It is clear from the history of summary proceedings provided in Chapter 2 that the non-judicial review of the decisions of military tribunals has long been an integral part of the military justice system. Presently, in respect of summary trials that review is provided by means of the approval of certain punishments by an approving authority[13] and the redress of grievance procedures under the National Defence Act.[14] The importance of these review proceedings, particularly in light of the lack of a legislated right of appeal from a summary trial, cannot be overstated. Since the decision of the reviewing authority could affect the offender's right to liberty or security of the person the question of whether such a review is carried out in accordance with the principles of fundamental justice must be addressed.

The relationship of procedural fairness to post-conviction non-judicial review was addressed by Mr. Justice La Forest in Lyons[15], concerning the review of a decision that an offender was a "dangerous offender" under the Criminal Code. He stated as follows:

> Furthermore, it is clear from my earlier comments that the fairness of the process by which the deprivation of liberty is occasioned cannot, in the case of a dangerous offender, be considered in isolation from the process by which that deprivation of liberty is reviewed. Given the

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[13] QR&O, art. 108.40.

[14] National Defence Act, s. 29.

[15] **Supra**, note 2.

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> severity of the impact of such review on a dangerous offender's liberty interests, at least as opposed to those of an "ordinary" offender, it seems to me that considerations of fundamental justice might require correspondingly enhanced procedural protection at such a review. In this regard, I note that the Ouimet Commission recommended that dangerous offenders be given a right to judicial review of their status every three years, with the court having the power to release the offender.... I agree that this would afford the convict greater safeguards, but I do not view it to be constitutionally required. Indeed, as was pointed out by the court in both Moore and Langevin, supra, the parole board is supposedly more expert in determining whether release is warranted, and its decisions are subject to judicial review, including review on Charter grounds. However, the fairness of certain procedural aspects of a parole hearing may well be the subject of constitutional challenge, at least when the review is of the continued incarceration of a dangerous offender. The fairness of the review procedure, however, is not an issue in the present case.[16]

While the designation as a "dangerous offender" under the Criminal Code has a significantly greater effect on a person's liberty than a punishment inflicted by a summary trial the effect of the latter punishment also cannot be assessed "in isolation from the process by which that deprivation is reviewed". The constitutionality of the review process impacts directly on the degree to which the service offender's right to liberty and security of the person is affected by summary proceedings under the National Defence Act. Like the original summary trial both the punishment warrant process and the redress occur under circumstances which require a high standard of procedural protection. Therefore, once again the rules of procedural fairness provide a useful bench mark against which to assess if the review is carried out in accordance with the principles of fundamental justice.

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[16] Ibid. at 46.

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b. Independence and Impartiality in the Review Process

Both the punishment approval process and the redress of grievance procedures run afoul of the requirement that the adjudicator be independent and impartial. With respect to punishment warrants the "approving authority" is an officer not below the rank of brigadier general or an officer holding the rank of colonel who has been designated to act as an approving authority by the Minister.[17] Like the trying officer at the summary trial, the approving authority gains that status by virtue of the officer's position within the chain of command.

The approving authority is not, by virtue of rank and position in the military hierarchy, as personally involved with an accused as a commanding officer or a delegated officer. However, the approving authority still has an interest in the outcome of the proceedings and is subject to command influence in the same manner as the trying officer. Similarly, the approving authority lacks security of tenure, financial security and institutional independence.

The adjudicators in the grievance procedure are also neither independent nor impartial. As provided for in QR&O a grievance must first be submitted to the offender's commanding officer. Assuming that the grievance is not redressed at any stage it can then be forwarded to the formation commander, the officer commanding a command, the Chief of Defence Staff, the Minister and ultimately to the Governor in Council. All of the adjudicators may, by virtue of their place in the chain of command, have an interest in the outcome of the grievance. The Minister and ultimately the Governor in Council are significantly removed from the trial level, however, they still

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[17] QR&O, art. 108.41.

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form the "executive" arm of the nation's military hierarchy. Instead of being influenced by the military command structure their decisions may be affected by political considerations.

The redress of grievance procedure offers a flexible, portable and responsive process by which many minor wrongs affecting service members can be addressed. However, in terms of the right of the individual not to be denied life, liberty and security of the person except in accordance with the principles of fundamental justice a strong argument can be made that those grievance procedures do not meet the constitutional standards for independence and impartiality.

c. The Right to be Heard

The right to be heard is the foundation of the audi alteram partem rule. We have seen that rule has been incorportated in s. 7 of the Charter as is a principle of fundamental justice.

With respect to the punishment approval process there is an outright denial of the offender's right to be heard. The procedure provided in the regulations does not allow for any input from the accused. All the information which is passed to the approving authority is provided by the commanding officer. Included in that information is the commanding officer's assessment of the factors which should be considered in determining the severity of the sentence. Undoubtedly the concentration of the submission process in the hands of the commanding officer was a reflection of the confidence placed in that officer to fully state the case for the offender. However, since it is the approval of the commanding officer's decision which is being sought from the approving authority the commanding officer also has a direct interest in the outcome of the review. That direct interest does not make the commanding officer a suitable

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advocate for the offender. In Duncan v. R[18] Mr. Justice Muldoon of the Federal Court Trial Division dealt with a similar problem with respect to the appeal of severity of sentence procedures adopted by the Canadian Forces. Those procedures involved the channelling of all representations on behalf of the accused through a senior legal officer who prepared a final submission for the decision maker. Mr. Justice Muldoon stated:

> The appellant/applicant's right to fair procedure, to fundamental justice to the benefit of audi alteram partem are simply denied in this procedure, in which he is obliged to make his submissions to the decision maker through the offices and judgment of the decision maker's assistant official. Honourable as the DPLS of the day may be, as one would surely expect, at least most of the time, he or she is distinctly not the appellant's advocate. In acting as the DPLS does in such matters, he or she effectively obstructs the appellant from direct access to the ADM (Per) who is, in turn, blocked from "hearing" from the appellant, although designated to make the ultimate decision on severity.[19]

The denial of the offender's right to be heard in the punishment approval process is even more pronounced than was the case in Duncan.[20] Not only does the commanding officer have a direct interest in the outcome of the review, but there is also no procedure provided, as is done for severity appeals, to seek submissions from the accused. As was indicated in Duncan[21] it is not enough to state that the accused could send submissions directly to the approving authority. It is only when there is a requirement that the decision maker

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18 (16 March 1990) T-2094-89 (F.C.T.D.).

19 Ibid. at 16-17.

20 Ibid.

21 Ibid.

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consider the submissions that the accused's right to be heard is meaningfully fulfilled.[22]

Concern over the punishment approval process should not be limited to the offender's position in getting the submissions before the approval authority. The punishment approval process is designed as a method of supervision of the actions of the commanding officer. While the creation of a supervisory body to oversee commanding officers can be seen as a positive step to protect the rights of an offender, the carrying out of that supervision prior to the final decision being made should raise some concern. It could be argued that a system requiring the approval of the trying officer's decision prior to the taking of effect of that decision does not indicate complete confidence in the abilities of that officer. It is legitimate question to ask if commanding officers should be given broad powers to award punishments of detention or reduction in rank if those officers cannot be trusted to make the decision on their own. The summary trial would be better protected from criticism if the approval system was developed into a true post trial review of the summary proceedings. Commanding officers should be left to make the decision of what punishment should be awarded without input from higher authority. The decision of the commanding officer can always be reviewed by the higher authority after sentence has been passed.

The right of the offender to be heard is also placed in issue regarding the redress of grievance procedures set out under military law. However, the question is not whether the offender has an opportunity to make submissions, but rather, whether the offender has adequate notice of the review process itself. There is nothing in

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[22] Ibid. at 16.

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either the National Defence Act or QR&O which ties the redress of grievance procedures to the summary trial process. Its application must be read into the legislation since a grievance is only prohibited "in respect of a matter that would properly be the subject of an appeal or petition under Part IX or an application under Part IX.I"[23] of the National Defence Act. Since a grievance from a summary trial is not excluded it must therefore be included, as a method of reviewing summary proceedings. However, it is not clear that either the accused or the assisting officer will necessarily make that deduction. If an offender does not know of the review process then that person cannot exercise the right to be heard.

The relatively low number of grievances which annually make it beyond the level of the commander of a command (approximately five to ten per year since 1985) could be interpreted in two ways. On the one hand it could be seen as an indication of a general satisfaction with the summary trial process. It could also indicate that grievances are adequately resolved at the unit, formation or command level. On the other hand, the paucity of grievances in relation to the actual number of summary trials (4,245 in 1988) might be viewed as evidence that offenders are unaware of their right to grieve.[24]

The failure to directly link the grievance procedure to the summary trial process provides considerable support for the view that service personnel do not know of the right to submit a redress of grievance in relation to summary proceedings. It might be argued that the lack of notice of this avenue of review is itself a denial of an offender's right to be heard. That in turn could be seen as a failure

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[23] National Defence Act, s. 29.

[24] Statistics on grievances provided by the Directorate of Personnel Legal Services, Canadian Forces.

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to comply with the principles of fundamental justice since the purpose of providing the review process would be negated by the lack of notice.

It appears that there is nothing to lose by specifically referring in both the National Defence Act and QR&O to the redress of grievance procedures as a method of review for summary trials. Such a step would enhance the procedural fairness of the post-conviction summary trial review process by removing any doubt about whether the offender is advised of that process.

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CHAPTER 8

OTHER FREE AND DEMOCRATIC SOCIETIES

> The presence of one of our regular civilian judge-advocates in an army in the field would be a first-class nuisance.
>
> W.T. Sherman: Memoirs, II, 1875[1]

1. INTRODUCTION

It was determined in Chapters 5, 6 and 7 that summary proceedings prescribed by the National Defence Act result in a number of possible Charter breaches. The inquiry now turns to whether those alleged breaches can be justified under s. 1 of the Charter. Section 1 of the Charter states:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> (emphasis added)

One method of assessing whether a proposed limit is justifiable is to consider "the legislative approaches taken in similar fields by other acknowledged free and democratic societies."[2] Such an approach was followed by the Supreme Court of Canada in Ladouceur v. R[3]. The legislative approaches followed by other countries cannot be adopted as being definitive of the limits which should be justified under the Charter. As Mr. Justice McDonald states in Legal Rights in the

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations, (Annapolis: United States Naval Institute, 1966) at 168.

[2] Re Southam Inc. and R (No.1) (1983), 3 C.C.C. (3d) 515 at 531 (Ont. C.A.).

[3] (31 May, 1990) 20408 (S.C.C.).

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Canadian Charter of Rights and Freedoms[4]: "foreign legislation cannot be "determinative" because it has not been and never will be scrutinized as to whether it offends that Charter right".[5] However, an assessment of the use of summary proceedings by other free and democratic societies will provide considerable insight into the necessity of those proceedings and the extent to which they are used in the military forces of those countries. It will also point to reform possibilities for the Canadian summary trial system.

The two countries which will be analyzed for comparative purposes are the United States of America and the United Kingdom. It is significant that the military justice system in the United States, like that of Canada, has its roots in British military law. The assessment of the military justice system in the United States will indicate whether constitutionally guaranteed rights in that country have mandated a restricted or altered use of summary proceedings.

2. AMERICAN SUMMARY PROCEEDINGS

a. Background

The constitutional basis for the American military justice system is found in Article I, section 8 of the Constitution of the United States. That section authorizes Congress to "make Rules for the Government of the land and naval Forces". In a fashion similar to that adopted by the Supreme Court of Canada in MacKay v. R[6] the United

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[4] D.C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms (Toronto: The Carswell Co. Ltd., 1989).

[5] Ibid.

[6] (1980), 54 C.C.C. (2d) 129 (S.C.C.)

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States Supreme Court interpreted the general grant of constitutional authority over military forces to include the power to set up a system of justice for the trial of military offenders which is independent of the judicial power found in the United States Constitution. In Parker v Levy[7] the United States Supreme Court stated:

> This Court has long recognized that the military is, by necessity a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." United States ex rel. Toth v Quarles, 350 U.S. 11, 17 (1955).[8]

Like the Canadian Forces the disciplinary process of all the armed services of the United States of America (eg. Army, Navy , Air Force, Marines and Coast Guard) are governed primarily by one statute: the Uniform Code of Military Justice [hereinafter the U.C.M.J.]. The U.C.M.J. includes offences which are the same or similar to offences under the ordinary criminal law as well as offences which are unique to military society.

Disciplinary infractions can be dealt with by means of non-punitive measures, non-judicial punishment and courts martial. Non-punitive measures are administrative in nature and closely parallel the administrative procedures available to Canadian military commanders.[9] Non-judicial punishment and courts martial are

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[7] 417 U.S. 733 (1974).

[8] Ibid. at 743.

[9] Manual for Courts Martial, United States, 1984, Part II, Rule 306 (c)(2) [hereinafter M.C.M.]. Administrative actions include corrective measures such as counselling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction or the ad-

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specifically provided for in the U.C.M.J. as the forums for the trial of breaches of that Code. The are three types of courts martial: the summary court martial, the special court martial and the general court martial.

The non-judicial punishment and summary court martial combined constitute the "summary" proceedings under the U.C.M.J. The special court martial and the general court martial represent the "formal" courts of the American military justice system. While there is no requirement that a military judge or legal counsel be appointed for a special court martial, they are invariably present at such a proceeding.[10] A military judge and legal counsel must be appointed for a general court martial.[11] In addition, there is an elaborate system of non-judicial review[12] and an appeal[13] process for the supervision of courts martial.

b. Non-judicial Punishment

Article 15 of the U.C.M.J. empowers military commanders to impose "non-judicial punishment". The basic framework for "non-judicial punishment" is provided in U.C.M.J., Article 15 and the Manual for Courts Martial, 1984, Part V. Each of the armed services

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ministrative withholding of privileges.

[10] U.C.M.J. art. 26,27.

[11] Ibid.

[12] The U.C.M.J. provides for review of courts martial by the convening authority (art. 66), a judge advocate (military lawyer)(art. 64) and in special circumstances by the Judge Advocate General of the service involved (art. 69).

[13] There are two levels of appeal in the United States military appeal system. Those appellate courts are the Court of Military Review (U.C.M.J., art. 66) and the Court of Military Appeals (U.C.M.J., art. 67).

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have also exercised the discretion granted in the governing legislation to enact regulations providing procedures specifically tailored to the needs of that service. There are two basic types of Article 15 proceedings. All armed services use a "formal" Article 15 hearing, while the United States Army also uses a "summarized" Article 15 hearing. All Article 15 hearings are summary in nature and can be conducted by a commissioned officer or warrant officer who by virtue of that officer's grade (rank) and assignment exercises command over a military organization or prescribed territorial area. For example in the United States Army such command authority can include companies, troops, batteries, detachments, service schools, etc..[14] The commander's discretion to impose an Article 15 punishment is personal and cannot be hampered by command influence. However, a superior commander can totally withhold or restrict the grant of authority to impose such punishments.[15]

As a general rule Article 15 punishment is only imposed for "minor" offences. The is no exact definition of a minor offence, however, it was held in United States v Moore[16] that an offence carrying a penalty of confinement for more than one year or which permits imposition of discharge would equate to a felony and therefore usually would not be considered to be a minor offence. The imposition

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[14] Army Regulation 27-10, Chap. 3, Sect. II, para. 3-7(2). [hereinafter AR 27-10].

[15] M.C.M., Part V, 2a.

[16] 18 C.M.R. 311, 316-317 (1955). See also United States v Fretwell 29 C.M.R. 193 (1960). Guidance on what constitutes a minor offence is contained in M.C.M., Part V, 1.e.

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of non-judicial punishment for any offence does not bar subsequent trial by court martial on that same offence.[17]

Unless an individual is attached or embarked on a vessel they may demand trial by court martial in lieu of Article 15 proceedings. This demand is the equivalent of a right to elect court martial under the Canadian military justice system. The demand for a trial can be made at any time prior to the imposition of punishment although the commander normally provides the opportunity to demand court martial at the beginning of the Article 15 hearing.[18]

The Commander is not bound by the rules of evidence and can consider any relevant evidence including unsworn statements and hearsay evidence. All Article 15 hearings are considered to be informal and non-adversarial.[19]

The "formal" Article 15 hearing differs from the "summarized" Article 15 hearing in terms of the persons who are subject to those hearings, the punishments which can be imposed and the rights available during the hearing. "Formal" Article 15 hearings can deal with cases involving commissioned officers, warrant officers and enlisted personnel. The punishments which can be awarded to officers

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[17] U.C.M.J. art. 15(f). See also United States v Fretwell, **supra**, note 16, and United States v Mahoney 27 C.M.R. 898 (1958).

[18] For example see AR 27-10 Chap. 3, Sect. II, para. 3-18 d. The demand for court martial must be made within a reasonable time after notice of the right is given. M.C.M., Part V 3 b.(2).

[19] For example see AR 27-10, Chap. 3, Sect. II, para. 3-18 g (2). Article 15 hearings can be oral or written [see M.C.M., Part V, 4.c.(2)].

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and warrant officers are restrictions (similar to stoppage of leave[20]), arrest in quarters[21] and forfeiture of pay. The punishments which can be awarded to enlisted personnel are restriction, extra duty, correctional custody (similar to confinement to ship or barracks[22]), confinement on bread and water while embarked on a vessel, forfeiture of pay and reduction in grade. The amount of punishment which can be awarded to enlisted personnel depends upon the rank of the presiding officer. For example in the army a commander who has field grade (major or above) can award the punishment of correctional custody for a period of 30 days.

The rights which must be provided to the accused include the right to remain silent[23], the right to demand trial, the right to consult counsel[24], the right to request an open hearing, the right to

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[20] Restriction is the least severe form of deprivation of liberty. The individual must remain within a specified area. Senior Officers Legal Orientation: Criminal Law Text (Charlottesville: The Judge Advocate General's School, 1990) at 4-8.

[21] Arrest in quarters is reserved for commissioned officers and warrant officers. While on that status the individual may not exercise command authority. See Senior Officer's Legal Orientation, **supra**, note 20, at 4-9.

[22] Correctional Custody is the physical restraint of a person under close supervision, however, it is not considered to be confinement (equivalent of detention). Correctional Custody was "copied" from the punishment of confinement to ship or barracks found in Canadian military law. See Captain H.L. Miller, "A Long Look at Article 15" (1965) 28 Mil. Law Rev. 37 at 50. M.C.M. Part V 5(4).

[23] U.C.M.J., art. 31(b).

[24] United States Navy Regulations- Implementing and Supplementary Manual for Courts Martial, para 104a. does not provide for the right to consult counsel. If a lawyer is not involved then the non-judicial punishment cannot be entered at a subsequent court martial in order to obtain a higher punishment. AFR 111-9 6(j)(1) indicates the member should be encouraged to

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a spokesperson, the right to call witnesses and the right to appeal. The record of proceeding for an Article 15 hearing (there is no transcript of the evidence) includes space to record that the accused acknowledges having been advised of those rights. There is no right to be represented by counsel at the hearing. An individual may be assisted by a spokesperson who can be an officer, warrant officer, enlisted person or a civilian lawyer. The involvement of the spokesperson is limited to the extent allowed by the commander.[25]

The United States Army "summarized" Article 15 hearing is limited in jurisdiction to enlisted personnel. The punishments which can be imposed are extra duty, restrictions, oral reprimand and admonition. The rights of the person undergoing "summarized" Article 15 proceedings are limited in that there is no right to consult counsel or to be assisted by a spokesperson.[26]

c. Summary Court Martial

The second type of summary proceeding is the summary court martial. It is the lowest level of trial court and is designed to dispose of less serious offences. The summary court martial may be convened by any person who has authority to convene a general or special court martial, the commanding officer of a detached company, squadron or any other detachment of the army or air force or any commanding officer or other officer empowered by the Secretary of the service concerned.[27] The summary court martial presiding officer is not usually legally trained.

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consult counsel.

[25] M.C.M., Part V 4. c.

[26] AR 27-10, Chap. 3, Sect II, para 3-16.

[27] U.C.M.J., art. 24.

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A summary court martial can only try enlisted personnel and only has jurisdiction over non-capital offences. The punishments which can be imposed are confinement for a period of one month (only to personnel in the grade E-4 and below), forfeiture of two-thirds of one month's pay and reduction in grade. The accused can object to any trial by summary court martial at which time the matter can be referred for trial by a special court martial or general court martial.[28] The opportunity to object to the summary court martial is usually provided to the accused prior to trial.[29]

An accused is not entitled to be represented by counsel, however, the summary court officer may permit counsel to participate in the proceedings.[30] Like the Article 15 hearing the summary court martial is considered to be non-adversarial.[31]

d. Review and Appeal

Both Article 15 proceedings and summary courts martial are only subject to non-judicial review. Although the review of an Article 15 proceeding is called an "appeal" it is made to an officer within the chain of command. The person punished by an Article 15 hearing is advised the right to appeal to the presiding officer's next superior officer. Unlike a grievance under s. 29 of the National Defence Act this "appeal" does not go any higher up the chain of command. The person making the appeal can submit documents in support of the appeal. In certain cases the superior commander must forward the

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[28] U.C.M.J., art. 20.

[29] Senior Officers Legal Orientation, **supra**, note 20, Chap. 2 at 2-7.

[30] Ibid.

[31] Middendorf v. Henry 425 U.S. 25, 40 (1976).

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appeal for review by a legal officer.[32] The superior authority may suspend, remit, mitigate or set aside the punishment in whole or in part.[33]

The findings and sentence of a summary court martial must be "reported" to the convening authority. The accused may also submit matters for consideration to that authority. The convening authority (or someone acting on behalf of the convening authority) can approve, disapprove, commute or suspend the sentence in whole or in part. In addition, that authority can dismiss any charge or specification or substitute a finding of guilty for a lesser offence.[34] The record of the court martial must also be reviewed by a judge advocate (legal officer).[35] It can also be reviewed, under limited circumstances, by the Judge Advocate General.[36]

e. General Considerations

Two other matters will be considered in respect of summary proceedings under American military law. Those matters are the legislated prohibition against command influence and the reliance placed on summary proceedings.

A unique feature to the American military justice system is the existence of a codified prohibition against command influence. Article 37 of the U.C.M.J. specifically prohibits any attempt to "coerce or by any unauthorized means, influence the action of a court

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[32] U.C.M.J., art. 15 .

[33] U.C.M.J., art. 15(d) and (e).

[34] U.C.M.J., art. 60.

[35] U.C.M.J., art. 64. There is no transcript of the proceedings.

[36] U.C.M.J. art. 69(b).

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martial or any other military tribunal or any member thereof...."[37] A breach of that article is punishable under military law.[38]

In a manner similar to the Canadian Forces, the American military justice system relies heavily on summary proceedings to deal with disciplinary problems. For example, statistics published by the United States Army show that, in 1989, 95.4% of all disciplinary proceedings were Article 15 hearings while summary courts martial comprised 1.5% of those proceedings. Therefore it is evident that summary proceedings (Article 15 and summary courts martial) are an essential part of the justice system in the United States Army.[39]

f. Judicial Support for Summary Proceedings

The United States Supreme Court has dealt with one constitutional challenge to the summary proceedings authorized under American military law. In Middendorf v. Secretary of the Navy et al. v Henry et al.[40] that court ruled that five marines were not denied their constitutionally protected rights under the Fifth and Sixth Amendments to the Constitution of the United States (the right to due process and the right to counsel respectively) because they were not allowed to be represented by counsel at their summary courts martial.

It is not intended to enter into a detailed analysis of the Middendorf[41] decision. While Mr. Justice LaForest, in R v. Rahey[42]

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[37] U.C.M.J., art. 37.

[38] U.C.M.J., art. 98.

[39] Senior Legal Officers Orientation, **supra**, note 20 at 1-13. In 1989 there were 3985 courts martial of which 1365 were summary courts martial. During that same period there were 83,413 Article 15 hearings in the United States Army.

[40] **Supra**, note 31 [hereinafter Middendorf].

[41] Ibid.

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acknowledged that "it is natural and even desirable for Canadian Courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees"[43] the Supreme Court of Canada has repeatedly warned that too close a comparison should not be drawn to the American constitutional experience.[44] Concerns over a comparison between the Charter and its American counterpart have centred primarily over the lack of a parallel in the American Constitution to ss. 1 and 24 of the Charter. In the United States Constitution the lack of a provision similar to s. 1 means that "the balancing of the protection of rights and freedoms with the larger interests of the community, therefore must be done in the context of defining the right or freedom itself."[45] This is contrasted with the approach under the Charter of analyzing the right in question and then balancing that right separately with the "community" interests.[46]

However, a common theme to both the American and Canadian approaches to analyzing rights under the respective constitutions is the application of "community standards" or "limits" which are balanced to ultimately determine if there has been a breach of a constitutionally guaranteed right. The requirements of the military,

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[42] [1987] 1 S.C.R. 1045 (S.C.C.).

[43] Ibid. at 1075.

[44] See Ref re S. 94(2) Motor Vehicle Act, **supra**, note , Videoflicks, **supra**, note, R v Smith, [1987] 1 S.C.R. 313 at 345 (S.C.C.), and Rahey, **supra**, note 42.

[45] Ref re Pub. Service Employee Rel. Act, [1987] 1 S.C.R. 313 at 345 (S.C.C.).

[46] For a complete review of the use of foreign constitutions and legislation in interpreting the Charter see McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms, **supra**, note 4, at 89-90.

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acknowledged by the United States Supreme Court in Middendorf[47], are also relevant to the question of the constitutionality of Canadian summary proceedings under the Charter. Mr. Justice Rhenquist stated as follows:

> In short, presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.[48]

Mr. Justice Rehnquist also referred to Toth v. Quarles[49] where the United States had previously stated:

> "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.... [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."[50]

In acknowledging the need for a simple and expeditious form of justice, without the procedural complications of the civilian justice system, the United States Supreme Court recognized the very essence of the need in the military for "summary" proceedings.

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[47] **Supra**, note 31.

[48] Ibid. at 45-46.

[49] 350 U.S. 11, 17 (1955).

[50] **Supra**, note 31 at 46.

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2. BRITISH SUMMARY PROCEEDINGS

a. Legislative Basis

The structure of the British military justice system has changed little since it constituted the disciplinary system applicable to the armed forces of Canada (prior to 1950). The principle legislation governing British military disciplinary proceedings are the Army Act 1955[51], the Air Force Act 1955[52] and the Naval Disciplinary Act 1957[53]. In keeping with its historical roots British military law has developed along two distinct paths. The law applicable to the Army and Royal Air Force has remained virtually identical, while naval law has continued to develop separately from those two services. Since the law applicable to the army and air force is practically identical reference will only be made to the Army Act 1955 and its subordinate legislation.

Both the army and naval law will be reviewed in general terms with respect to the overall structure of the disciplinary systems and more specifically in relation to those aspects of the summary proceedings which may potentially impact on Canadian military law.

b. Army Summary Proceedings

The legislation governing disciplinary proceedings in the Army provides for a two tiered system of military justice consisting of summary investigations[54] and courts martials. There are three types

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[51] (U.K.), 1955, 3 and 4 Eliz. 2, c. 18.

[52] (U.K.), 1955, 3 and 4 Eliz. 2, c. 19.

[53] (U.K.), 1957, 5 and 6 Eliz. 2, c. 53.

[54] In a fashion similar to the American hearing, the non-judicial punishment, the British legislation scrupulously avoids referring to summary proceedings as a trial.

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of summary investigations: investigations by subordinate commander[55], by commanding officer[56] and by an appropriate superior authority.[57] The types of courts martial which can try military personnel are the district court martial[58], general court martial[59] and field general court martial.[60] There is a system of both non-judicial and judicial review which applies to court martial proceedings. The system of non-judicial review consists of confirmation[61] and review proceedings[62], while judicial review is carried out in the form of an appeal to the Court Martial Appeal Court.[63]

The features of army summary proceedings, which could impact on Canadian military law, will be assessed in terms of jurisdiction (over the person and the offence), the extended powers of punishment of commanding officers, the record of trial, the right to elect court martial and the grievance procedures.

Summary proceedings in the British Army are directed primarily towards enlisted personnel. A commanding officer can exercise summary powers over a non-commissioned officer or soldier[64], while a subor-

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55 Army Act 1955, s. 82(3).

56 Army Act 1955, s. 78.

57 Army Act 1955, s. 79.

58 Army Act 1955, s. 84.

59 Ibid.

60 Ibid.

61 Army Act 1955, s. 97.

62 Ibid.

63 Court Marital (Appeals) Act 1968, (U.K.), 1968, c. 20, s. 8.

64 Army Act 1955, s. 77(2).

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dinate commander may try anyone below the rank of corporal[65]. The only trying officer who has summary jurisdiction over officers is an appropriate superior authority who can try officers below the rank of lieutenant-colonel, and warrant officers.[66]

Trying officers at summary proceedings are restricted primarily to hearing offences for which the maximum punishment provided in the governing legislation is imprisonment for two years or less.[67] Their jurisdiction over offences which are also offences under the civil law is restricted to less serious criminal offences.[68]

As part of the pre-trial procedure a commanding officer has the power to order that the evidence be reduced in writing as a summary of evidence or an abstract of evidence. The summary of evidence is prepared during a separate hearing where a written record of the evidence is prepared. A summary of evidence is ordered where the maximum punishment for the offence is death, the commanding officer considers it necessary in the interests of justice or where the accused requires in writing that a summary of evidence be taken.[69] In complicated cases the summary of evidence is prepared by a legal

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[65] Army Summary Jurisdiction Regulations, 1972., reg. 16(1) [hereinafter A.S.J.R.].

[66] Army Act 1955, s. 77(1).

[67] A.S.J.R., reg. 11 and 18.

[68] A.S.J.R., Schedule 1. eg. common assault, theft, destroying or damaging property, possession of a controlled drug, impaired driving, careless driving, etc..

[69] Rules of Procedure (Army), 1972., Rule. 7(2) [hereinafter R.P.(Army)].

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officer of the Army Legal Corps.[70] The involvement of the legal officer usually occurs when it is considered that the matter may ultimately be dealt with by court martial. During the hearing the evidence against the accused is presented and the accused is given an opportunity to cross-examine any prosecution witness.[71] The accused may call any witness in defence of testify in their own behalf. An accused or a defence witness cannot be cross-examined.[72] The record of the evidence may be in narrative form, however, any question put to a witness by the accused in cross-examination must be recorded verbatim.[73]

An abstract of evidence consists of a signed statement, or a precis of the evidence of each witness necessary to prove the charge. The statements are provided to the accused who is then given an opportunity to make a statement and provide an abstract of the statements of defence witnesses.[74]

A summary or abstract of the evidence must be provided on any charge against an officer or warrant officer (for an investigation of the case by an appropriate superior authority) or in any other case remanded for trial by court martial.[75] If after the receipt of the summary or abstract of evidence the commanding officer decides to deal

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[70] R.P. (Army), Rule 9, Note 4 and E.J.D. McBrien, "An Outline of British Military Law", (1983) 22 Mil. Law and Law of War Rev. 10 at 33.

[71] R.P.(Army), Rule 9(b).

[72] R.P.(Army), Rule 9(e)and (f).

[73] R.P.(Army), Rule 9(h).

[74] R.P.(Army), Rule 10.

[75] R.P.(Army), Rule 13.

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with the case summarily those documents can be used at the trial.[76] The summary of evidence appears to rarely requested by an accused or used as the basis of a trial by a commanding officer or subordinate commander.[77]

The powers of punishment available to trying officers are restricted by both the Army Act 1955 and its subordinate legislation. A commanding officer can award the punishments of detention, a fine, severe reprimand, reprimand, reversion from acting rank, reversion to the ranks (for Lance Corporals only), stoppages of pay, an admonition, restriction of privileges and extra guard or piquet. The maximum power of punishment normally available to a commanding officer is 28 days detention. Detention can only be awarded to private soldiers. If the commanding officer does not hold field rank (major) then the punishment of detention cannot, except under special circumstances exceed 7 days detention.

In 1976, provision was made for an extension of the powers of punishment of a commanding officer from a maximum of 28 days to 60 days detention. This was done specifically to reduce the number of courts martial, ensure a speedier disposal of cases and allow the accused to avoid the stigma of being convicted by court martial.[78] A request for the use of these extended powers is made to higher authority prior to the commencement of the trial. Included with that request is a summary or abstract of the evidence where the accused has

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[76] R.P.(Army), Rule 11.

[77] Information provided in conversations with legal officers at the Directorate of Army Legal Services, United Kingdom.

[78] U.K., "Special Report from the Select Committee on the Armed Forces Bill" (1976), at vi, para. 10.

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had an opportunity to put forward their case.[79] Even if approval for the use of the extended powers is granted the accused may veto the use of those powers if the accused indicates an intention to dispute "the material facts against him".[80]

There is no requirement for rules of evidence to be applied at a summary investigation. There is also no right to representation by legal counsel or an assisting officer. Regulations do provide that all soldiers be made aware of their rights as explained in a pamphlet "The Rights of a Soldier Charged with an Offence under the Army Act 1955". That pamphlet is also "to be made available to them in case of need."[81] The information provided in the pamphlet sets out the pre-trial, trial and post-trial procedures in a plain language format.

The right to elect court martial is provided by the commanding officer, subordinate commander and superior commander in every case where a finding of guilty will result in a financial loss or detention.[82] A right to elect court martial does not have to be given for a minor punishment such as restriction of privileges.[83] The punishment of restriction of privileges is similar to confinement to ship or barracks under Canadian military law.

As Professor P.J. Rowe noted in "Military Justice Within the British Army"[84] it is rare for a soldier to elect trial by court

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[79] R.P.(Army), Rules 9 and 10.

[80] R.P.(Army), Rule 11A(9). If the material facts are not disputed then the accused in effect pleads guilty.

[81] Queen's Regulations, Reg. 5.203.

[82] Army Act 1955, s. 78 and s.79.

[83] Manual of Military Law, Army Act 1955, s. 78, note 21, at 368.

[84] (1981) 94 Mil. Law Rev. 99.

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martial. That fact may not be particularly surprising since published statistics show that the lowest level of court martial, the district court martial, only has legal counsel or a judge advocate take part in the proceedings in about one third of the cases.[85] Regimental officers act as the prosecutor and defence counsel and the President of the court is often a serving officer who is assigned as a permanent president for a posting.[86] Legally trained personnel are only involved in the most serious cases with the participation of civilian lawyers being controlled to a large extent by the power of the Directorate of Army Legal Services to authorize legal aid certificates.[87] Therefore, in electing court martial the accused may in effect be opting for a more formal "summary" proceeding which has greater powers of punishment than a presiding officer at a summary investigation.

The right to elect court martial is given after the presiding officer has heard the evidence, but before the finding and sentence is pronounced. The procedures for the conduct of summary proceedings are not significantly more detailed than those set out under Canadian military law. However, the Rules of Procedure (Army) 1972 specifically

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[85] In 1979 out of a total of 1068 general and district courts martial only 310 Judges Advocate were appointed to advise the president of the court. Since a judge advocate had to be appointed for the 32 general courts martial that means there were judges advocate present at only 26% of the district courts martial held in that year (see Mc Brien, "British Military Law", **supra**, note 70 at 43). In 1985, in the British Army, accused were represented by lawyers funded by the legal aid scheme (the primary means of paying for legal counsel) in 36% of all courts martial (P.J. Rowe, Defence: The Legal Implications (London: Brassey's Defence Publishers, 1987) at 20.

[86] See McBrien, "British Military Law", **supra**, note 70, at 21-22.

[87] Ibid. at 35-36.

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state that "the accused shall be allowed to cross-examine any prosecution witness".[88] A summary investigation having permission to award extended detention and an investigation by an appropriate superior authority require a record of proceeding outlining the procedural steps taken during the conduct of the hearing.[89] If an appropriate superior authority hears any evidence which was not included in the summary or abstract of evidence then it must be reduced to writing and appended to the record of trial.[90] Therefore, any accused who is an officer or warrant officer dealt with by an appropriate superior authority or a private soldier who may receive more than 28 days detention will have some record of the evidence relied on by the trying officer.

Finally, there is no appeal from summary proceedings. The route of "appeal" is by way of a redress of grievance.[91] Section 115 of the Army Act 1955 provides for the review of summary proceedings. That review can be done as a result of a grievance, a periodic administrative review of unit records or automatically in the case of the use of the Extended Powers Procedure.[92]

c. Naval Summary Proceedings

The Naval Discipline Act 1957 also provides for a two tiered system of justice: summary trials and courts martial. Summary jurisdiction is centred in the hands of the commanding officer[93] with

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88 R.P.(Army), Rule 8(b).

89 R.P.(Army), Sch. 2A and 3.

90 R.P.(Army), Sch. 3, para. 5.

91 Army Act 1955, s. 180 and s. 181.

92 McBrien, "British Military Law", **supra**, note 70, at 32.

93 Naval Discipline Act 1957, s. 49.

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varying degrees of delegated powers given to the executive officer[94], delegated officers[95], officers of the Day or Watch and other officers.[96] There are two types of courts martial: the disciplinary court[97] and the court martial.[98] For courts martial there is provision for non-judicial review[99] and an appeal to the Court Martial Appeal Court.[100]

Summary proceedings under naval law differ significantly from those provided for in the army legislation. The difference is primarily in terms of jurisdiction and powers of punishment available to the commanding officer. Only enlisted personnel (ratings) can be tried by summary trial. The powers of punishment available to a commanding officer include the power to award a sentence of dismissal with disgrace from Her Majesty's Service or a sentence of imprisonment or detention for any term not exceeding three months.[101] A summary trial can try any offence under the Naval Discipline Act 1957 other than an offence punishable by a sentence of death or murder.[102]

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[94] Naval Disciplinary Regulations 1981, Reg. 5 [hereinafter N.D.R.].

[95] N.D.R., Reg. 4.

[96] N.D.R., Reg. 11.

[97] Naval Discipline Act 1957, s. 50. This court is only used "in time of war."

[98] Naval Discipline Act 1957, s. 53.

[99] Naval Discipline Act 1957, s. 70.

[100] Courts Martial (Appeals) Act 1968, s. 8.

[101] Naval Discipline Act, s. 49(3).

[102] Ibid.

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There is no requirement for a record of the trial beyond the charging document and the recorded results of the trial (finding and sentence). The accused has no right to be represented by a lawyer. However, the accused may request the assistance of "any officer or other person in the offender's ship or establishment who is reasonably available."[103] There is no requirement that formal rules of evidence be applied at a summary trial. The procedure to be followed at a summary trial is not set out in detail, however, the accused "is to be given the opportunity to cross-examine all witnesses" called by the complainant.[104] Any rating (enlisted person) who might receive the punishment of imprisonment, dismissal, detention or disrating has the right to elect court martial.[105]

There is provision for the approval of some punishments by means of a punishment warrant.[106]In addition, the accused can get a review of summary proceedings by submitting a complaint.[107]

d. General Considerations

There are two general considerations which will be addressed with respect to the British military justice system. The first matter relates to the manner in which the punishment of detention is served. The second consideration involves the potential effect of the European

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[103] N.D.R., Reg. 42.

[104] N.D.R., Reg. 43.

[105] N.D.R., Reg. 24.

[106] N.D.R., Reg 28, 29, 30. There is also provision for the Officer of the Watch, or Day to find an accused guilty and then refer the offender to the Executive Officer for punishment. The Executive Officer in exercising summary powers can also find an accused guilty and then refer the case to the commanding officer for punishment.

[107] Naval Discipline Act 1957, s. 70.

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Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter European Convention on Human Rights].

Unlike Canadian military law the British armed forces have maintained a distinction between detention and imprisonment. As was intended when detention was introduced in 1929 that punishment has continued to be regarded as a largely remedial sentence rather than a punitive one. As is indicated by H. Stanhope in The Soldiers: An Anatomy of the British Army[108] the emphasis for detention has been on retraining soldiers. In discussing the Military Corrective Training Centre at Colchester, England, Stanhope states:

> There are two wings at Colchester. At "A" Wing the emphasis is on military training to prepare servicemen for their eventual return to their regiment or RAF station (the Royal Navy has a place of its own). The training is organized in three stages, each one easier than the last. Progress from one to the other depends upon good conduct. 'D' Wing takes all members of the Forces who are being discharged after release, and the idea is to rehabilitate them for civilian life.[109]

The Royal Navy has not been as involved in a rehabilitative programme, however, personnel receiving detention, and who are also going to be discharged, are sent to 'D' Wing at Colchester.[110]

Although British law is not subject to a domestic written constitution, however, that does not mean it is free from the constraints of human rights legislation. The European Convention on Human Rights has the potential to have considerable impact on the

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108 (London: Hamish Hamilton Ltd., 1979).

109 Ibid. at 234. See also Q.R. Art 5.202 b(1), where it states that detention "served at a military corrective centre is intended to be remedial".

110 Royal Navy Detainees are only sent to the Military Corrective Training Centre, Colchester if they are over 17 1/2 years of age and are sentenced to dismissal. All other detainees serve their sentence at the Royal Navy Detention Quarters, Portsmouth, England.

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manner in which summary proceedings are conducted in the British armed forces.

The European Convention on Human Rights has many provisions similar to those found in the Charter. In particular, Article 5 of that convention guarantees the right to liberty and security of the person, while Article 6 guarantees the right to a fair trial within a reasonable time. Unlike the Charter there is no limitation clause similar to s. 1. The limitations on each right are incorporated directly into the article setting out that right. In addition Article 15 of the Convention provides that in "time of war or other public emergency threatening the life of the nation" measures can be taken derogating from the obligations of the convention. However, since declarations of war have not, in recent history, been used on an international level, and the declaration of a "public emergency" carries with it considerable political baggage, it is unlikely that Article 15 will be used with any frequency. France is the only country that has entered a reservation concerning the non-application of Articles 5 and 6 of the European Convention on Human Rights to French military law dealing with discipline.[111] As a result the provisions of the European Convention on Human Rights apply to the British military justice system.[112] At the present time, however, no one subject to British military law has filed a complaint concerning their treatment under that law.

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[111] Rowe, "British Military Justice", **supra**, note 84, at 120, note 92.

[112] It appears that no one in the British government referred the Convention to the Ministry of Defence for consideration of a reservation similar to that entered by France. The United Kingdom ratified the convention on March 8, 1951. See Rowe, "British Military Justice", ibid.

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The European Court of Human Rights in Engel and others Case[113] provides insight into the potential effect of that Convention on British summary proceedings. It also serves as an indication of how the Canadian Charter might impact on the Canadian military justice system.

The Engel[114] case involved a challenge to Dutch military law that it breached the accused's rights under Articles 5, 6, 10 (freedom of expression), 11 (freedom of association) and 14 (equality). There were five applicants, all non-commissioned personnel, who were tried by their respective commanding officers. The penalties imposed were light arrest, aggravated arrest, strict arrest and committal to a disciplinary unit. Light and aggravated arrest were similar to the Canadian punishment of confinement to ship or barracks while strict arrest and committal to a disciplinary unit were much like detention. The applicants appealed to a "complaints" officer and then to the Supreme Military Court which confirmed the decision of the commanding officer.[115] In its judgment the European Court of Human Rights found that there was no breach of Articles 10, 11 or 14 of the convention. With respect to the deprivation of liberty (Article 5) the court held that the notion of liberty had to be analyzed in the context of military service. Light and aggravated arrest were not a deprivation of liberty when imposed on a member of the armed forces even though a similar punishment might be a deprivation of liberty when imposed on a civilian. Strict arrest and committal to a disciplinary unit were

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[113] 1976 Council of Europe Yearbook of the European Convention on Human Rights (The Hague: Martinus Nijhoff, 1977) at 490.

[114] Ibid.

[115] Ibid. at 498.

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held to be a deprivation of liberty.[116] However, Article 5(1)(a) of the European Convention of Human Rights permits detention if it results from a conviction by a competent court. The confirmation of the punishment of committal to a disciplinary unit by the Supreme Military Court was considered to be the imposition of the punishment de novo. Therefore, there was no breach of the Convention with respect to that punishment. The punishment of strict arrest was not saved by the appeal to the Supreme Military Court because, unlike committal to a disciplinary unit, there was no suspension of the operation of strict arrest on appeal. Therefore, the Supreme Military Court did not impose a "new" punishment with respect to strict arrest.[117]

In determining whether the applicant's right to a fair trial (Article 6) was breached the court embarked on an effort to distinguish a "criminal" charge from a purely "disciplinary" charge. The court had problems, similar to those outlined in Chapter 4, in determining what constituted a criminal as opposed to a disciplinary offence. It was finally determined that criminal charges are those which by their nature, duration or manner of execution are appreciably detrimental to an accused.[118] The final determination of the fairness of the military proceedings rested on the hearing held by the Supreme Military Court. Those proceedings met the requirements of Article 6 except that they were held as in camera proceedings.

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[116] Ibid. at 494.

[117] Rowe, "British Military Justice", **supra**, note 84, at 123-124.

[118] Engel, **supra**, note 119 at 496.

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The significance of Engel[119], in terms of assessing potential deficiencies under Canadian and British law, rests primarily in the need which the European Court on Human Rights saw for a supervisory court in cases where detention is imposed. Rowe indicates that it may be necessary to withdraw all "criminal" jurisdiction from the commanding officer and remove the power to award detention at summary proceedings. Alternatively, a service member could "have the right of appeal, by the way of rehearing, to a court martial."[120] Engel[121] also indicates that minor deprivations of liberty may be more easily justified in military society than is tolerated in civilian society. Barring any major changes to the British military justice system (eg. development of an appeal by trial de novo) the defence to a challenge under the European Convention on Human Rights may have rely primarily on the right to elect court martial as a form waiver of rights under the Convention.

4. LESSONS LEARNED FROM FOREIGN LEGISLATION

The review of the legislation governing American and British summary proceedings provides considerable insight into the role, structure and procedures of such proceedings in the military forces of a free and democratic society.

It is evident that summary proceedings in both Britain and the United States of America are an essential part of the military justice systems of those two countries. In terms of jurisdiction, summary proceedings are directed at disciplinary problems involving junior

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119 Ibid.

120 Rowe, "British Military Justice", **supra**, note 84 at 133.

121 **Supra**, note 114.

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officers (in the United States of America, Article 15 hearings apply to officers below the rank of the commander) and enlisted personnel. There are restrictions on the offences which can be dealt with by summary proceedings. Even in the Royal Navy, where the commanding officer has a broad jurisdiction over service offences, the summary trial cannot try offences with a maximum penalty of death.

Summary proceedings are conducted primarily by officers who are positioned directly within the chain of command. The procedure for the conduct of summary proceedings is largely left to the discretion of the trying officer. There is no requirement for the application of rules of evidence, however, the accused is generally provided the right in the governing regulations to cross-examine adverse witnesses. There is no right to be represented by legal counsel at any summary proceeding. Instead, in all summary proceedings, except those employed by the British Army (and RAF), there is assistance provided by a commissioned officer or other member of the forces. In the British Army (and RAF) there is a regulatory requirement that an accused be informed of their rights and a pamphlet outlining those rights is made available to the accused.

In terms of powers of punishment the power to inflict a punishment involving a significant loss of liberty (detention or confinement[122]) is restricted primarily to 30 days. The significant

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[122] The American legislation does not provide for a punishment similar to detention. However, the United States armed forces have also used remedial programmes as part of their confinement process (see S. Brodsky & N. Eggleston ed., The Military Prison (Carbondale: Southern Illinois Press, 1970) although the United States Army changed the mission of its "Retraining Brigade" from one of primarily rehabilitating prisoners for return to military duty to preparation of inmates for transition to civilian life (see Senior Officers Legal Orientation, **supra**, note 20 at 7-11).

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exception to this general rule is found in the Royal Navy (maximum punishment of 90 days imprisonment) and the British Army with the extended powers of punishment for commanding officers. It is interesting to note that the United States Navy does not seem to require similarly large powers of punishment to be exercised summarily by its commanders in order to maintain discipline. The disciplinary legislation of Britain and the United States of America also provides for punishments similar to confinement to ship or barracks (eg. restriction of privileges and corrective custody).

The right to elect court martial is an integral part of the summary proceedings of the armed forces of both countries. Unlike Canadian military law the right to elect court martial is generally provided to an accused at all levels of summary hearings. The American legislation provides the broadest right to opt for court martial, however, even the more restrictive approach under British military law provides the right to elect court martial when there is a potential financial penalty.

The governing legislation of neither country provides for a right of appeal to an independent and impartial court. Instead the review of summary proceedings is conducted by personnel within the military chain of command. The "appeal" process from Article 15 hearings is unique in that it is directly linked to the summary proceeding and is therefore easily identifiable and accessible to the offender. It also provides for an expeditious resolution of the review process in that the "appeal" is decided by the commander's next superior officer.

Finally, with respect to the challenges to summary proceedings, based on the Constitution of the United States and the European Convention on Human Rights, there has been a judicial recognition that

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the maintenance of discipline in military forces requires a separate type of legal proceeding which cannot guarantee the same liberties available to civilians.

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CHAPTER 9

JUSTIFICATION: THE CONFLICT BETWEEN INDIVIDUAL RIGHTS AND THE REQUIREMENTS OF DISCIPLINE

> Each nation that is organized democratically is not organized militarily; it is, as opposed to the other, in at state of inferiority for war.
>
> Ardant Du Picq, 1821-1870, Battle Studies[1]

1. INTRODUCTION

In s. 1, the Charter expressly provides that the guaranteed rights and freedoms may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It is this section of the Charter which provides the means for a reconciliation of the two often diverse themes identified in this thesis. On the one hand members of the Canadian Forces, like their civilian counterparts, are guaranteed rights and freedoms aimed at protecting individual interests. On the other hand the maintenance of disciplined military forces requires that members of the military subjugate some of those individual rights. This analysis of s. 1 of the Charter will determine the degree and manner by which a limitation of individual rights and freedoms can be constitutionally justified in order to maintain disciplined and effective military forces in a free and democratic society.

While some of the identified Charter challenges have a greater likelihood for success than others, all the alleged Charter breaches will be treated as potentially viable challenges for the purpose of the s. 1 analysis. The seven Charter breaches addressed in this

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis: United States Naval Institute, 1966) at 83.

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Chapter are those based on the right to a hearing by an independent and impartial tribunal, the right to counsel, pre-trial disclosure, application of rules of evidence, a requirement of a record or reasons, the right to be heard on review and the right to appeal.

2. THE TEST

The test to be used in determining whether laws which breach the Charter can be justified was set out by Chief Justice Dickson in R v. Oakes[2] and restated by him in R v. Edwards Books and Art Ltd.[3] as follows:

> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed and rationally connected to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless out weighed by the abridgement of rights. The court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the court has been careful to avoid rigid and inflexible standards.[4]

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[2] (1986), 24 C.C.C. (3d) 321 (S.C.C.) [hereinafter Oakes].

[3] (1986), 55 C.R. (3d) 193 (S.C.C.) [hereinafter Edwards Books].

[4] Ibid. at 234.

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This test sets up a "two stage analysis".[5] The onus of proving that a limit on a Charter right is reasonable and demonstrably justified in a free and democratic society rests on the party seeking to uphold the limit. In this case the onus will rest on the Government of Canada. The standard of proof under s. 1 is proof by a preponderance of probability.[6] However, having regard to the fact that s. 1 is invoked to limit constitutional rights and freedoms the standard of proof is a high degree of probability.[7]

The Edwards Books[8] case, which dealt with the constitutionality of Sunday closing laws, marked a departure from Oakes[9] in terms of the "impair as little as possible" portion of the second stage of the s. 1 test. In Edwards Books[10] Chief Justice Dickson indicated that the legislation should impair the protected right "as little as is reasonably necessary" (emphasis added).[11] What had to be decided was whether there was "some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects" (emphasis added).[12]

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5 As termed by D.C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms, 2 ed. (Calgary: The Carswell Co. Ltd., 1989) at 62.

6 Oakes **supra**, note 2 at 346.

7 Ibid. at 347.

8 **Supra**, note 3.

9 **Supra**, note 2.

10 **Supra**, note 3.

11 Ibid. at 237.

12 Ibid.

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The inclusion of a reasonableness standard to be used when assessing a legislative scheme was, in effect, an acknowledgement that courts had to defer, to a certain degree, to legislatures concerning the choices which are made to govern a nation or province. The need for such deferential treatment was expanded on by Mr. Justice La Forest in Edwards Books[13] as follows:

> Let me first underline what is mentioned in the Chief Justice's judgment, that, in describing the criteria comprising the proportionality requirement, the court has been careful to avoid rigid and inflexible standards. That seems to me to be essential. Given that the objective is of pressing and substantial concern, the legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis, having regard to the nature of the particular area sought to be regulated, and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in McGowan, supra, at p. 524 calls "the practical living facts" to which a legislature must respond. That is especially so in a field of so many competing pressures as the one here in question.[14]

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[13] Ibid.

[14] Ibid. at 259. Professor Stuart indicates in "Zig Zags on Reversing the Onus", (1988) 64 C.R. (3d) 143, that initial concern that Edwards Books, **supra**, note 3, had watered down Oakes, **supra**, note 2, may have been justified in light of Supreme Court of Canada rulings related to impaired driving: R v Thomsen, (1988) 63 C.R. (3d) 1, R v Hufsky, (1988) 63 (3d) 14 and R v. Whyte (1988), 64 C.R. (3d) 123 (S.C.C.). His criticism of the Supreme Court of Canada was based primarily on a failure by that court to acknowledge the different nature of the competing interests in Edwards Books, **supra,** (a variety of laws governing the operation on businesses) in comparison to the more limited interests to be weighed in a criminal matter (individual rights verses the state). The Supreme Court of Canada has since acknowledged that courts will be able to assess "with greater certainty" competing interests relating to ss. 7 to 14 of the Charter (Irwin Toy Ltd. v Quebec (A.G.), [1989] 1 S.C.R. 927 at 993-994), however, the ease with which that court justified the random stopping of vehicles by police in Ladoucer v R (31 May 1990), 20408, (S.C.C.) causes some concern over whether that greater certainty will result in a rigorous protection of an

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Finally, there has arisen the question of whether s. 1 has a special relationship with s. 7 of the Charter. Although in Ref re S. 94(2) of Motor Vehicle Act[15] Mr. Justice Lamer clearly indicated that a breach of s. 7 of the Charter could be "salvaged" under s. 1 at least one court has indicated that it would be a "rare case indeed that a breach of s. 7 of the Charter could be justified under s. 1."[16]

3. PRESCRIBED BY LAW

a. Tests

It is a requirement of s. 1 of the Charter that any limit on the rights and freedoms contained therein be "prescribed by law". If the limitation is not prescribed by law then there can be no justification of the Charter breach.

As was set out by Mr. Justice LeDain in R v Therens[17] the limit can be prescribed by statute, delegated legislation or by a common law rule. That limit may also be express or implied. The implication can be derived from the terms of the statute or from its operating requirements.[18]

As was noted in Chapter 1 that the Federal Court of Appeal ruled in Weatherall v. Can. (A.G.)[19] that codified law for the purposes of determining justifiable limits under s. 1 of the Charter only included

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individual's right.

[15] (198) 23 C.C.C. (3d)289 (S.C.C.) [hereinafter S. 94(2) Motor Vehicle Act].

[16] R v Seaboyer (1987), 58 C.R. (3d) 289 (Ont. C.A.).

[17] (1985), 18 C.C.C. (3d) 481 at 506 (S.C.C.).

[18] Ibid.

[19] (1988), 65 C.R. (3d) 27 (F.C.A.) [hereinafter Weatherall].

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provisions which have been put through a "recognized legislative process". While it is clear that the National Defence Act and QR&O would pass this the test, the similarity between the Commissioner's Directives authorized under the Penitentiary Act[20] and orders and instructions, such as CFAOs, authorized under the National Defence Act, casts considerable doubt on whether these latter orders can prescribe a limit on a guaranteed right or freedom under the Charter.

Another factor to be considered in assessing what constitutes a limit prescribed by law is whether the proposed limit is void for vagueness. The issue of vagueness is particularly important in assessing whether there are adequate limits on the broad discretionary powers given to trying officers concerning procedural and other matters relating to the conduct of the trial.

The requirement for certainty in limiting constitutionally guaranteed rights and freedoms was addressed by Mr. Justice Hugessen in Luscher v. Deputy Minister, Revenue Canada, Customs and Excise[21] as follows:

> In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is , by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is in fact lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally-protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right

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20 Penitentiary Act, R.S.C. 1970, c. P-6, s. 29.

21 [1985] 1 F.C. 85 (F.C.A.) [hereinafter Luscher].

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> must be such as to allow a very high degree of predictability of the legal consequences.[22]

Although obiter, Mr. Justice Lamer quoted this portion of the Luscher[23] judgment with approval, in Ref re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)[24], in analyzing whether "prostitution" related offences were void for vagueness under s. 7 of the Charter.

The existence of a discretion is therefore one of the indicators of vagueness. However, it is not the existence of any discretion which will result in a determination that a law is void for vagueness. As Chief Justice Dickson stated in Irwin Toy Ltd. v Quebec (Attorney General)[25]

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".[26]

Therefore, the question of whether any limitations based on a discretion can be "prescribed by law" could depend upon the degree of discretion given to the judicial, or other authority, and the

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22 Ibid. at 89-90.

23 Ibid.

24 (31 May 1990) 20581 (S.C.C.).

25 [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter Irwin Toy Ltd.].

26 Ibid. at 983.

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existence of an intelligible standard upon which that discretion is to be based.[27]

Although the Supreme Court of Canada indicated in Irwin Toy Ltd[28] that where there was no intelligible standard to guide the exercise of a broad discretion there is no "limit prescribed by law" it has in other cases upheld limits involving the exercise of a broad discretion. In R v Hufsky[29], and more recently in Ladouceur v. R[30], the exercise of an absolute discretion by police officers when randomly stopping vehicle pursuant to s. 189a of the Ontario Highway Traffic Act[31] was held to be a reasonable limit prescribed by law under s. 1 of the Charter. However, since the Supreme Court of Canada did not address the issue of vagueness in Hufsky[32] or Ladouceur[33] the

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[27] It should be noted that the void for vagueness argument has had mixed success, particularly in relation to obscenity laws (see Luscher, **supra**, note 21, Ontario Film and Video Appreciation Society v. Ontario Board of Censors (1983), 34 C.R. (3d) 73 (Ont. Div. Ct.] [hereinafter Ontario Board of Censors], R v. Robson (1985), 19 C.C.C.(3d) 137 and D. Stuart, "Annotation", (1983) 34 C.R. (3d) 73 at 73-74). However, in Ontario Board of Censors ibid, at 83, the Divisional Court made an obiter statement that the Board of Censors had been given too wide a discretion and any "limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.

[28] **Supra**, note 25.

[29] (1988), 63 C.R. (3d) 14 (S.C.C.) [hereinafter Hufsky].

[30] (31 May 1990) 20408 (S.C.C.) [hereinafter Ladouceur].

[31] R.S.O. 1980, c. 198, enacted as s.2 of the Highway Traffic Amendment Act S.O. 1981, c. 72.

[32] **Supra**, note 29.

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usefulness of those two cases in terms of understanding the permissible level of discretion to avoid a vague for voidness argument is limited.

b. Application

In respect of independence and impartiality the provision in the National Defence Act for summary trials by commanding officers[34], delegated officers[35] and superior commanders[36] directly limits the rights of an accused under s. 11(d) of the Charter.

The limit on the accused's right to be heard when the punishment warrant is forwarded to an approving authority is found in the regulations where the commanding officer is directed to "cause a punishment warrant to be prepared"[37] in which that officer provided the information which "should be considered in determining the severity of the sentence."[38] A further indication that the responsibility for advising the approving authority of the circumstances supporting the recommended punishment rests solely with the commanding officer is found in the authority which that officer has to "seek the approval of the approving authority in such manner as the commanding officer considers appropriate".[39] Such approval is regularly sought and granted by means of a telephone call.

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[33] **Supra**, note 30.

[34] National Defence Act, s. 163, QR&O, art. 101.01 and 108.25.

[35] National Defence Act, s. 163(4), QR&O, art. 108.10.

[36] National Defence Act, s. 164, QR&O, art. 110.10 and 110.02.

[37] QR&O, art. 108.40(1).

[38] QR&O, art. 108.40(4).

[39] QR&O art. 108.40 (2).

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The prescribed limits with respect to a right of appeal and the requirement for reasons of judgment or record of the trial are also identifiable, although not as readily apparent as the trial structure itself. In terms of the right to appeal the limit prescribed by law is found s. 29 of the National Defence Act which provides for a redress of grievance. As was discussed in Chapter 7 there is no express reference to the grievance procedure as a means of "appealing" from a summary trial. The connection between summary trials and the grievance procedure must be implied from the fact that the accused, when submitting a grievance, would be alleging "personal oppression, injustice or other ill-treatment"[40] which is not the subject of an "appeal or petition under Part IX"[41] of the National Defence Act. The failure to make a direct reference to the grievance process in the legislation governing summary proceedings could adversely affect an argument that the redress of grievance procedure impliedly operates as a limit on a right to appeal from a summary trial.

A portion of the review process for which it may not be possible to identify a limit prescribed by law is the mandatory review of charge reports by the "next superior officer" of the trying officer.[42] Since that review process is prescribed by CFAO rather than by statute or regulation it would not appear to meet the test set out in Weatherall.[43]

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[40] National Defence Act, s. 29.

[41] Ibid.

[42] CFAO 114-2.

[43] **Supra**, note 19.

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Except perhaps in the case where a superior commander has, with the consent of the accused, used the synopsis of evidence as the basis for conducting a summary trial, or by implication where the commanding officer explains the circumstances surrounding an offence in seeking approval of a punishment, there is no reference in the National Defence Act to the requirement to give reasons or provide a complete record of the trial. The only requirement to complete some form of record is that a charge report must be prepared for each charge laid under the Code of Service Discipline[44]. To the extent that the charge report provides a record of the charges and the outcome of the trial, it could be argued that there is a limitation on the right to provide reasons or a record of trial.

While limits have been identified concerning the right of appeal and the right to reasons or a record of the trial, those limits are not always (except perhaps where a synopsis of the evidence is used as the basis of the trial) readily connected to the right in question. Such tenuous connections could provide the basis for an argument that those limits, as they are presently constituted, are so uncertain as to be impermissibly vague.

The final limits prescribed by law are those which involve an element of discretion. The alleged breaches to which these limits apply are the right to counsel, pre-trial discovery and the requirement for rules of evidence. In respect of the right to counsel it can be argued that, since the only right to representation at a summary trial is by an assisting officer, there is an implied limit on the right to be represented by counsel. However, the strength of that argument is reduced because of the existence of an absolute

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[44] QR&O, art. 106.02.

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discretion which trying officers can exercise to permit the participation of counsel.

It could be argued that the factors (set out in QR&O, art. 108.03, Note C) for the exercise of that discretion: the nature of the offence, complexity of the offence, the interests of justice, the interest of the accused and the exigencies of the service are an "intelligible standard" on which the trying officer can base a decision. However, since those factors are set out in the notes to the regulations, and not in the regulations themselves, they cannot be considered to be limits prescribed by "law". The existence of an absolute discretion to permit representation by counsel, combined with a lack of prescribed standards upon which to exercise that discretion, calls into doubt the argument that a limitation on the right to counsel is prescribed by law.

The limits on the right to pre-trial disclosure are found in the requirement that the assisting officer be "informed of the evidence relating to the charge"[45]and the charge contain a "list of witnesses expected to be called at the trial."[46] However, the officer informing the assisting officer of the evidence retains a considerable discretion over the amount and type of material which is to passed to the accused. The regulations fail to provide any guidance on how that discretion is to be exercised. Similarly, a trying officer has a broad discretion to admit evidence at the summary trial. The only restrictions are that the trying officer "receive such evidence as he considers will assist him"[47] and "any other further facts that should

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[45] QR&O art. 108.03.

[46] QR&O, art. 106.04(9).

[47] QR&O, art. 108.13(1)(e), 108.29(1)(f), 110.05(1)(f).

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be brought out in the interests of the accused and any relevant submission by or on behalf of the accused."[48] There is no specific guidance provided on how the trying officer should determine what evidence is relevant or how the accused should be allowed to present further facts (eg. by cross-examination). In each of these cases (pre-trial discovery and the requirement to apply rules of evidence) the existence of a broad discretion combined with a lack of legislative guidance on how that discretion is to be exercised (intelligible standard) leaves the prescribed limits open to challenges that they are too vague to be limits prescribed by law.

c. Conclusions

It would appear that under the present summary trial procedures many of the identified Charter breaches may not be salvageable under s. 1 either because they are not "prescribed by law", or are too vague to be limits prescribed by law. This hurdle of proving limits are prescribed by law would be overcome if greater procedural guidance was provided in the National Defence Act or QR&O. In particular, amendments to the regulations linking the proposed limits more closely to the alleged breaches (right to appeal and requirement for reasons or a record of the trial), the provision of legislated guidance on the exercise of the discretion (right to counsel, pre-trial disclosure and rules of evidence) or even partially removing the discretion altogether (eg. greater pre-trial disclosure and requiring cross-examination) would greatly enhance the argument that each of the rights are subject to limits prescribed by law.

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[48] QR&O, art. 108.13(1)(g), 108.29(1)(h), 110.05(1)(h).

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4. APPLYING THE "OAKES" TEST

a. Stage One: The Legislative Objective

As was set out by Chief Justice Dickson in Oakes[49] the objective which the limit is designed to serve must be sufficiently important to warrant overriding a constitutionally protected right. The standard for assessing the objective must be high and at a minimum that objective must relate "to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important".[50]

There would appear to be little doubt that the seven limits meet this first stage, and each for the same reason. They are all designed to served the same objective. That objective (as we have seen in Chapter 3) is the maintenance of discipline, and with it, the operational effectiveness of the military forces of Canada. In obtaining that objective there is a requirement for a service tribunal with sufficient flexibility and responsiveness to be able to address the myriad of operational, societal, disciplinary and geographical factors affecting the deployment of the Canadian Forces in its assigned roles.

The objective of maintaining a disciplined armed force is an extremely pressing and substantial concern in Canada and other free and democratic societies. It is difficult to see how the rights and freedoms enshrined in the Charter can be enjoyed unless the framework in which those rights exist is protected form threats both at home and abroad. A similar sentiment was expressed by Mr. Justice Dubé in

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49 **Supra**, note 2.

50 Ibid. at 348.

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Généreux[51] in discussing the importance of maintaining the court martial system as an objective under the Oakes[52] criteria:

> ...as I mentioned earlier, the purpose is of capital importance since it is connected with discipline within the Armed Forces and, in the imperfect world in which we live, those forces are essential in keeping the peace and ensuring the survival of a democratic society.[53]

Not all threats to free and democratic societies will be in a form which can be addressed by the use of military force. However, the ability to use force remains one essential method by which democracies can protect themselves from both external and internal threats. In addition, the need to maintain armed forces itself poses a potential threat to free and democratic societies. An undisciplined, and therefore uncontrolled, armed force can threaten the existence of the very society that it is designed to protect. The requirement to create and control an armed force highlights the "pressing and substantial" nature of the objective of maintaining a disciplined armed force.

The connection between the protection of Canadian society, the maintenance of discipline and the need for a flexible response by the Canadian Forces was directly recognized by the Court Martial Appeal Court in Rutherford v. R[54]. In writing for the majority Chief Justice Mahoney referred to MacKay v. R[55] where Mr. Justice Ritchie had acknowledged the need for a separate Code of Service Discipline to

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51 (1989), 59 D.L.R. (4th) 644 (F.C.T.D.)

52 **Supra**, note 2.

53 **Supra**, note at 655.

54 (1983), 4 C.M.A.R. 262 (C.M.A.C.) [hereinafter Rutherford].

55 (1980), 54 C.C.C. (2d) 129 (S.C.C.).

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administer military justice. Chief Justice Mahoney then continued:

> In summary then, the Canadian Armed Forces have the mission to defend Canada at home and abroad and to aid the civil authority in stipulated circumstances. They must be ready to execute their mission immediately they are called upon. Preparedness and morale depend on discipline. Military law comprises the rules of that discipline.[56]

It is the particular objective of summary proceedings to provide a disciplinary tribunal which can be used by military commanders to maintain discipline regardless of when or where Canada's armed forces are deployed.

A recognition that the circumstances under which the Canadian Forces carries out its duties may result in the s. 1 justification of a breach of a Charter right can be found in S.94(2) Motor Vehicle Act[57] where Mr. Justice Lamer stated:

> Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the

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[56] **Supra**, note 56 at 268.

[57] **Supra**, note 15.

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> outbreak of war, epidemics and the like.[58] (emphasis added)

That exceptional circumstances, such as the outbreak of war, would justify the limit of a Charter right is particularly relevant to the objective of maintaining a disciplined armed force by means of summary proceedings. At first glance, such a statement might be seen as somewhat exaggerated in light of the relatively peaceful existence Canadians appear to enjoy. However, Mr. Justice Lamer's judgment in S. 94(2) Motor Vehicle Act[59] is, in effect, simply an acknowledgement that a free and democratic society may have to surrender some of its valued rights and freedoms when confronted with threats to the society, or members of that society.

The importance of administrative expediency to the maintenance of disciplined armed forces can be seen not only in the historical review of summary proceedings (Chapter 2), but also more recently in the development of extended powers of punishment for commanding officers in the British Army (Chapter 8). The difficulty in accepting that the objective of maintaining a disciplined armed force is presently so important that administrative expediency, as a part of the summary trial system, could be viewed as a justifiable limit under s. 1, arises primarily when the deployment of the armed forces in their assigned roles is linked soley to the concept of "war". In

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[58] Ibid. at 313. In Re Andrews and Law Society, B.C. (1986), 27 D.L.R. (4th) 600 at 610 (B.C.C.A.) Madame Justice McLachlin (now of the Supreme Court of Canada) indicated that discriminatory measures breaching an accused's Charter rights might be justified under s. 1 in "times of war". Mr. Justice McIntyre in the Supreme Court of Canada decision, Andrews v. Law Society of B.C. (1989), 56 D.L.R. (4th) 1 at 22 rejected Madame Justice McLachlin's narrow approach to s. 1, however, he did not comment on the use of the limit in time of war, emergency or other crisis.

[59] Ibid.

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light of the decreasing tensions in Europe, the involvement of Canada in a traditional "war" (itself an outmoded term), or a more minor conventional armed conflict, seem somewhat remote, although Canada's membership and involvement in alliances such as NATO will probably continue, even if only as part of the price of being a "player" on the world stage.

However, as was outlined in Chapter 3, Canada's armed forces are not maintained soley to repel, or deter, an aggressor in a large scale conflict. The threat of international terrorism, internal security problems, and the requirement for peacekeeping and national sovereignity operations all involve threats to Canada as a free and democratic society. All of these threats exist in times of "peace". Military forces are maintained to counter those threats for the very same reasons that they are deployed in times of large scale armed conflict. Those forces provide a unique mix of discipline, training and equipment that enables them to be used as a force of "last resort" in protecting the country. Of these factors it is discipline which is of primary importance in setting the armed forces apart from civilian society, and the police and other agencies that protect that society under "normal" situations.

As was discussed in length in Chapter 3, the control and use of armed force requires the development and maintenance of a "habit of obedience". As the word "habit" suggests, discipline is not something that can be turned on, or turned off, depending on the perceived level of threat. It may be that the intensity and level of the threat to a free and democratic society will affect the extent to which the civilian parts of that society will have to reassess whether factors such a administrative expediency should be given greater emphasis under a s. 1 analysis. Unlike the civilian segment of society, the

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armed forces exists soley to deal with the threats to that society. It is completely, and permanently, involved in the preparation for, and deployment in, armed conflict.

In effect, the armed forces are always immersed in the exceptional circumstances that may only periodically have to be considered in the civilian sphere of a free and democratic society. If they are not involved in the preparation for armed conflict (whatever its form), then those forces are of no use to the free and democratic society as an "armed" force. A strong argument can be made that the development, maintenance and deployment of armed forces itself constitutes an "exceptional condition" in a free and democratic society that requires increased emphasis to be placed on factors such as administrative expediency. It is the unique and essential roles for which the Canadian Forces is maintained and deployed that makes the objective of maintaining discipline by means of service tribunals, such as summary trials, a pressing and substantial one.

b. Stage Two: Proportionality

The proportionality test is set out in terms of whether the limiting measures are carefully designed and rationally connected to the objective; they impair the right as little as possible; and their impairment of individual rights does not outweigh the importance of the legislative objective.

i) "Rationally Connected"

With the exception of some concerns relating to independence and impartiality there would seem to be little difficulty in establishing each limit is rationally connected to a common objective. They all relate to maintenance of an uncomplicated, intrusive and responsive trial process that reinforces the habit of obedience regardless of when or where the Canadian Forces are employed.

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The goal of developing a "habit of obedience", through socialization of members of the military (primarily non-commissioned members and junior officers) , the reinforcement of personal control by the officers responsible for the conduct of military operations and the existence of a portable and uncomplicated trial process is uniquely attained by concentrating the summary trial process in the hands of officers at the delegated officer, commanding officer and superior commander level.

The "rational" connection between the limits that are part of the design of the summary trial system, and the objective of maintaining a disciplined armed force, can be seen in the long and effective use of summary proceedings throughout history (Chapter 2), and the present use of similar proceedings by both the United States of America and the United Kingdom (Chapter 8).

That is not to say that all components of the limits forming part of the summary trial system are rationally connected to the objective in question. As was noted in Chapter 4 it is not clear that summary trials presided over by officers, who are not independent or impartial, should have jurisdiction over the most serious disciplinary offences under military law. Offences providing for a penalty of death or life imprisonment, or indictable offences under the civilian criminal code do not appear to be the type of offences requiring the largely corrective action for which summary proceedings are designed.

A second area of concern is whether the punishments involving a significant loss of liberty should be awarded by a tribunal that is not independent or impartial. The concern is centred primarily on whether the punishments of confinement to ship or barracks, and detention, are sufficiently remedial in nature to fulfil the corrective role of summary proceedings.

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There is a strong argument that confinement to ship or barracks is a punishment that is properly placed in the hands of trying officers at summary trials. As Kellet points out the use of drill and other military training has proven to be the most effective method to reassert discipline among personnel who have "relaxed" in combat.[60] Similarly, the remedial nature of extra military training as a summary punishment is consistent with the corrective purpose of summary proceedings. An argument can be made that the punishment of confinement to ship or barracks is a remedial punishment because it incorporates a sentence of extra work and drill.[61] The need for such a punishment in military society is evident from the use of similar punishments under British and American military law. In addition, the unique nature of such a punishment in military society was recognized by the European Court of Human Rights in Engel and Others Case.[62]

In contrast, the punishment of detention under Canadian law does not have a largely remedial content. That does not mean that there is not some remedial training, however, the identical treatment of service detainees and service prisoners makes the punishment of detention more punitive than remedial. Detention as it is presently served in the Canadian Forces does not appear to have a rational connection to the corrective purpose of summary punishments and therefore may not be properly placed in the hands of a trying officer who lacks independence and impartiality.

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[60] A. Kellet, Combat Motivation: The Behaviour of Soldiers in Battle (The Hague: Klwer Nijhoff Publishing, 1982) at 143-144.

[61] QR&O, art. 108.50(3).

[62] 1976 Council of Europe Yearbook of the European Convention on Human Rights (The Hague: Martinus Nijhoff, 1977) at 490 [hereinafter Engel].

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However, other than these two questionable areas relating to independence and impartiality, the identified limits represent an integral part of a service tribunal that is uniquely designed and rationally connected to the objective of maintaining a disciplined armed force in Canada.

ii) Impair as Little as Reasonably Necessary

a. Background

As Mr. Justice LaForest indicated in Edwards Books[63] the determination of whether the legislature has reasonably limited an accused's rights under the Charter must be based on practical considerations. The practical considerations which have a considerable influence on the structure of summary trials and the procedures applied at those proceedings relate directly to the circumstances under which the discipline of the armed forces of Canada must be maintained. There is a need to maintain a flexible, portable and uncomplicated system of justice that can be administered by officers of the armed forces under a variety of geographical and environmental (including armed conflicts) conditions.

The choice taken by Parliament to meet those practical considerations was to maximize the flexibility and limit the complexity of the summary trial process by providing a minimum of legislative guidance. Nearly all the procedural and evidentiary decisions are left to the discretion of the trying officer. The problem with granting such a broad discretion to trying officers is that it leaves open the opportunity for a total limit on an accused's rights under the Charter, rather than simply a reasonable limit on that right.

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[63] **Supra**, note 3.

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In Rutherford[64] Chief Justice Mahoney indicated the basis of a test to be used in determining if the application of military law is justified in a free and democratic society. He stated:

> Military law comprised the rules of that discipline. Its application is demonstrably justified in a free and democratic society if the morale and readiness of the armed forces require it and not otherwise.[65]

The question to be addressed is whether the "readiness" of the armed forces is dependent upon a summary trial process that is largely unstructured in terms of the legislated procedural protection provided to an accused. The answer to that question is found by assessing each of the potential Charter breaches to determine whether additional procedural guidelines could be enacted, which would either guarantee or significantly enhance the rights and freedoms of the accused, while not unduly or unreasonably complicating the summary trial process. The issue once again becomes centred on procedural fairness.

b. Independent and Impartial Tribunal

The need to have officers directly responsible for the conduct of military operations administer the summary justice system, regardless of the conditions and location of deployment of the Canadian Forces, means that the right to an independent and impartial tribunal can never be met. A court will undoubtedly find that the right to trial by an independent and impartial tribunal is such an important tenet of our justice system that it should only be limited under s. 1 of the Charter for the clearest and most pressing of reasons. In light of the essential role played by the armed forces in protecting Canada, as a free and democratic society, and the reliance placed on a summary trial system administered by officers in the chain

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[64] **Supra**, note 54.

[65] Ibid. at 268.

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of command in ensuring that the armed forces can fulfil that role, a strong argument can be made that the right to trial by an independent and impartial tribunal can be limited under s. 1 of the Charter, in relation to summary proceedings prescribed by the National Defence Act. The importance of maintaining the summary trial process in the hands of officers in the chain of command is evidenced by the similar structure of the American and British disciplinary systems. However, the question remains as to whether Parliament in this instance has "impaired the right as little as possible".

The limitation on the involvement of a commanding officer as a trying officer where the commanding officer has carried out or directly supervised an investigation or issued a search warrant in the case[66] is an attempt to increase the independence and impartiality of the service tribunal. However, there are other steps which can be taken to enhance the independence and impartiality of the summary trial which are not just limited to commanding officers. The trying officer could be required to take an oath at each summary trial similar to the judicial oath taken at a court martial.[67] In addition a provision could be enacted in the National Defence Act or regulations prohibiting interference with the summary trial process (similar to that found in U.C.M.J. art. 37). These additional provisions would not adversely impact on the summary nature of the proceedings, however, they would significantly enhance both the perceived and actual independence and impartiality of the trying officer. The failure to provide for these additional safeguards

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[66] QR&O, art. 108.25.

[67] QR&O, art. 112.15 and 112.16.

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casts into doubt the reasonableness of the limits as presently prescribed under military law.

c. Right to Counsel

There are two problems with allowing counsel to participate at summary trials. First, summary trials occur in locations and under conditions such that it is often impossible or undesirable (operational requirements) to have counsel take part in those proceedings. Secondly, the summary nature of the proceedings themselves could be in jeopardy if lawyers were allowed to participate as a right at summary trials. Particularly in terms of the availability of lawyers, assisting officers not only provide a reasonable alternative, but often they are the only alternative to legal counsel. Therefore, in cases where lawyers are not available the right to be represented by an assisting officer is a reasonable alternative to the right to counsel. That does not mean that the ability of assisting officers could not be improved. The implementation of training programmes, the development and distribution of aide-memoires and additional procedural guidance in the regulations would enhance the effectiveness of assisting officers.

The argument that assisting officers are generally a sufficiently reasonable alternative to legal counsel would be enhanced if the right to elect court martial was expanded to all summary proceedings. In Chapter 8 it was noted that a general right to elect court martial is available to all accused tried by summary proceedings under American law. The participation of counsel at summary proceedings might then be reasonably prohibited altogether on the basis that the accused could be guaranteed counsel at a court martial. However, as was indicated in Chapter 2 the option of providing a broad

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right to elect court martial was rejected by the Canadian Forces in 1983.

In fact, the right to an assisting officer is not the sole limit on the right to counsel because of the discretion which is available to the trying officer to allow the participation of counsel at a summary trial. As was indicated in Re Howard and Inmate Disciplinary Court of Stony Mountain Institution[68] the existence of any discretion to allow the participation of counsel breaches the Charter. However, the exercise of the discretion by trying officers to allow the participation of counsel is particularly unreasonable because there are presently no legislated guidelines upon which to exercise that discretion. The solution to that problem could be as simple as incorporating the guidance provided in QR&O, art. 108.03, Note D, or the factors set out in Howard[69], into the regulations and making the consideration of those factors mandatory. If it is determined that the "qualified" right to counsel set out in Howard[70] applies to service tribunals then the incorporation into QR&O of criteria upon which to base a decision could mean that there will be no Charter breach. If it is determined that there must be a general right to counsel then the legislated guidelines could provide a reasonable limit on that right. In either case the requirement for a mandatory consideration of those factors before deciding to allow counsel to participate in summary proceedings would not unduly complicate the

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[68] (1988), 19 C.C.C. (3d) 195 (F.C.A.) [hereinafter Howard].

[69] Ibid. at 211. Those criteria were the circumstances of the case, its nature, its gravity, its complexity and the capacity of the inmate to understand the case and present a defence.

[70] Ibid.

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trial process, and would provide a more reasonable limit on the right to counsel under s.7 of the Charter.

d. Pre-trial Disclosure

The considerable discretion which presently exists as to the type and quantity of pre-trial information which can be provided to the accused leaves room for the development of a number of alternate proposals dealing with disclosure. However, compliance with the principles set out in R v. Wood[71], that an accused should have sufficient disclosure to be able to make a full answer and defence, could require the release of a broad range of information contained in military police reports, summary investigations and boards of inquiry in addition to the results of any unit investigation carried out pursuant to QR&O, Art. 107.02. While such information would assist the accused in the preparation of a defence it could also complicate the trial process and cause considerable administrative problems for the unit involved. The problem with a general access to military police reports, summary investigations and boards of inquiry is two fold. First, all military police reports and many summary investigations and boards of inquiry are initiated and controlled from outside of the unit. Therefore, release of information from those reports to an accused could require considerable liaison outside of the unit where disciplinary action is taking place. Secondly, the scope of military police reports, summary investigations and boards of inquiry is often much wider than the alleged misconduct of the accused. In order to protect the confidentiality of other service personnel (and assist in maintaining discipline) it might be necessary to edit parts of the reports and investigations dealing with

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[71] (1989), 51 C.C.C. (3d) 201 (Ont. C.A.).

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activities unrelated to the accused. Again considerable liaison and administrative activity would have to be undertaken to assess what information is relevant to the accused's case and then edit the reports for release to that accused. The potential for unduly complicating the trial process is increased when the trial occurs at a location far removed from the agency which controls the additional reports and investigations.

However, the problems associated with complete disclosure does not mean that greater disclosure could not be mandated. In particular, any investigation within the control of the unit, such as the investigation carried out under QR&O, Art. 107.02 could be made subject to release. At a minimum all statements made to the investigating officer, including any statement made by the accused could be required to be released prior to trial. In addition, copies of all documentary evidence which will be relied on at the summary trial could be provided to the accused prior to trial. A legislated requirement of greater disclosure, subject to the need to protect information which might adversely affect national security, would not unduly complicate the trial process. A more regulated system of pre-trial disclosure would provide a reasonable limit on the accused's rights under the Charter.

e) Rules of Evidence

The need to have an uncomplicated and portable trial process, administered by officers who are directly responsible for the conduct of military operations means that a detailed evidentiary code such as the Military Rules of Evidence could never be applied at summary proceedings in the Canadian Forces. The lack of mandatory evidentiary rules in the legislation governing British and American summary proceedings confirms the impracticality of applying detailed and

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formal rules of evidence. However, additional steps could be taken to ensure that the accused is convicted only on the basis of relevant and cogent evidence. The regulations might be amended to provide a more precise trial procedure outlining the sequence of the trial[72], provide a detailed right to cross-examine witnesses[73], a definition of proof beyond a reasonable doubt, a requirement that all evidence be taken under oath and guidelines for the admission of documentary evidence. While some of these recommended changes to the regulations would restrict the admission of evidence presently heard at summary proceedings, such restrictions would not be unreasonable when compared to the increased protection provided to the accused.

f. Right to Record or Reasons

A requirement to produce a detailed record of summary proceedings (verbatim or otherwise), or provide detailed reasons for judgment, would be a direct and unreasonable burden on both the trying officer and the unit involved. It would also unnecessarily complicate the summary trial process. However, there are two options which could be considered to better address the accused's right to a presumption of innocence. The first option is to require that a synopsis of the evidence be prepared for all summary trials. The synopsis could be prepared by the investigating officer as part of the pre-trial investigation. The amount of detail provided in the synopsis would be directly related to the complexity of the case.

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[72] A more complete trial procedure could be patterned after the procedures used under British military law for the taking of a Summary of Evidence (see R.P. (Army) Rule 9).

[73] As has been noted this right is available to all accused tried by summary proceedings under American and British military law. QR&O should provide for a "right" to cross-examine.

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The trying officer could then certify at the end of the trial the evidence relied on to convict or acquit the accused after adding a summary of any evidence which was not contained in the original synopsis. A variation on this option would be to make the preparation of synopsis mandatory only when it is requested by the accused prior to trial. In effect, the requirement for a synopsis at summary trials, other than a trial by a superior commander, would be a modification on the use of a summary of evidence under British military law.

The second option is for the trying officer to prepare abbreviated reasons at the end of each trial, which, at a minimum, would relate the evidence to the essential elements of the offence. The regulations outlining the service offences could be amended to indicate all of the essential elements for each offence. Of the two options the second one appears to be the most "summary" in nature and therefore may provide the least administrative burden for the unit. The presumption of innocence would not be guaranteed in its entirety since neither the record (synopsis) nor the reasons would deal with any decisions on possible defences or other points of law. However, the assurance that the evidence proved all essential elements beyond a reasonable doubt would be a suitable limit on the general right to the presumption of innocence.

g. Review

The problems existing with the present system of non-judicial review (punishment warrants and redresses of grievance) center primarily on the opportunity provided to the accused to participate in the review process. At a minimum, the accused should have adequate notice of the review process and should be allowed to make representations during the review. With respect to the punishment

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warrant process the accused's representations could be appended to the actual warrant at the time it is forwarded to the approving authority. In cases where approval is sought prior to the submission of a punishment warrant[74] (eg. by telephone) the commanding officer could simply inform the approving authority of the representations made by the accused. In addition, the requirement for a punishment warrant could be extended to all privates who receive a punishment of detention, and not only those who receive detention for a period greater than 30 days.

The accused could be more adequately informed of the review of summary proceedings by way of redress of grievance by amending either the National Defence Act or the regulations to ensure that there is a direct and obvious connection between the summary trial process and the grievance system.

These amendments to the punishment warrant and the grievance procedures provide a simple method of guaranteeing the accused's rights under the Charter. These rather simple solutions meet the minimum requirements of the Charter. The knowledge of, and the ability to participate in the review process is so essential, particularily where the initial trial is conducted before a tribunal lacking the Charter mandated level of independence and impartiality, that it is difficult to conceive of any reasonable limit on that right. Therefore, it is unlikely that a court would be willing to find that the present legislation could be a reasonable limit on the accused's right to review.

While the proposed amendments to the governing legislation meet the requirements of the Charter consideration could also be given to

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[74] QR&O, art. 108.40(2).

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improving the review process. In that regard the "appeal" process from the American Article 15 hearing could be used as the basis of a more direct and responsive form of review. The approval of punishment system could be abolished and the grievance system could be amended to exclude the review of summary proceedings. Instead, the accused could be given the right to petition through the chain of command to the Commander of the Command concerning any aspect of the summary trial process. Such a system of review would be directly linked to the summary trial, allow full participation by the accused, and by stopping the review at the command level would limit the time it takes to have a final determination of the review.[75]

h. Right of Appeal

The existence of a right of appeal would provide considerable support to a claim that the overall summary trial process independent and impartial. However, a strong argument can be made that the provision for a right to appeal for all offenders convicted by a summary trial would unduly complicate the summary trial process and could create serious delays in the imposition of discipline in the armed forces. That situation in turn could impact on the "readiness" of the Canadian Forces to complete its assigned tasks.

The question of what might constitute a reasonable limit on a general right to appeal depends on a number of factors. At present the limit would be identified as the right to review which is available to an offender. However, the suitability of the review process as a limit on the right to appeal rests on the recommended

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[75] The final determination of a redress of grievance at the Governor in Council level can take a number of years. Another advantage to ending the review process at the command level is opportunity it provides to set up release pending review procedures.

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changes being made to that process. The present deficiencies in the review process weaken the argument that it constitutes an acceptable limit on the right to appeal.

A second consideration is whether there could be a more limited right of appeal available from summary proceedings. As was indicated in Engel[76] there may be a requirement that a right of appeal be provided for punishments, such as detention, which involve a serious loss of liberty. However, if detention was changed from a largely punitive to a more remedial punishment then the review process might be considered to be a sufficient limit on a right to appeal.

A modified review process could offer a reasonable limit on a right to appeal in all cases, except where detention, as it is presently constituted, is imposed on an offender. If detention remains as a largely punitive punishment then it might be necessary to provide the offender a right to appeal. Such an appeal could be in the form of an appeal de novo to a court martial.[77] The involvement of the court martial as the appellate tribunal would help limit the adverse effect on operational readiness by ensuring that the appeal

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[76] **Supra**, note 62.

[77] The de novo or "new trial" appeal was, until 1976, the way in which appeals from summary conviction by a lay magistrate could be brought before a legally trained judge in the civilian criminal justice system (see R.E. Salhany, Canadian Criminal Procedure 5th ed. (Aurora: Canada Law Book, 1989) at 445. There are also precedents for appeals to courts martial in military legal history. In both the Code of Articles of King Gustavus Adophus of Sweden (1621), and the Articles of War of James II (1688) there was provision for an appeal from the lowest court martial (Regimental Court) to the highest court martial (General Court Martial). See W. Winthrop, Military Law and Precedents 2 ed. (Washington: General Printing Office, 1920).

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was "heard" by a tribunal that is capable of being held concurrently with military operations.

i. Summary

The review of the "reasonableness" of the limits on the rights of an accused tried by summary trial reveals that service tribunal would probably not be "salvaged" by s. 1 of the Charter. Summary proceedings prescribed by the National Defence Act have the potential to fail the s. 1 test, not because there can be no reasonable limits, but rather because the legislation as it presently exits does not appear to provide an adequate and easily attainable level of procedural protection for an accused. The broad discretion left in the hands of personnel administering the summary trial process, combined with limited legislated guidance for the exercise of that discretion, fails to guarantee that an accused's rights will be impaired as little as reasonably possible. Reasonable limits can be put in place by means of enacting provisions that more closely relate to the notion of procedural fairness. However, until that is done the summary trial process is in danger of being declared unconstitutional.

iii) Proportionality Between "Effect" and "Objective"

Since the legislation governing summary trials, as it is presently constituted, does not appear to limit an accused's rights as little as is reasonably possible the analysis of the third part of the proportionality test becomes somewhat moot.

As has been noted the maintenance of a disciplined armed force is an objective which is extremely important in a free and democratic society. The weight given to that objective could have a dramatic effect on the degree to which the breach of an accused's rights under the Charter will be tolerated. However, as Chief Justice Dickson

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indicated in Edwards Books[78] a consideration in assessing the third element of proportionality is whether a serious effort has been made to accommodate the freedom without undue damage to the scope and quality of the objective.[79] The development of procedures which are based almost exclusively on the exercise of a broad, and largely unguided, discretion would not appear to be a serious effort to accommodate the accused's rights. Therefore, even if the present provisions of the National Defence Act and its subordinate legislation could pass the "impairs as little as is reasonably possible" test it would be open for a court to conclude that the importance of the objective, although weighty, does not out weigh the deleterious effect on the accused's guaranteed rights and freedoms under the Charter.

5. SUMMARY

In summary, it does not appear that the legislation governing the summary trial process presently provides reasonable limits on the seven potential breaches of an accused's Charter rights. The failure to provide those limits is a result of the requirement that they be "prescribed by law" and that the limits only impair the Charter rights as little as is reasonably necessary.

Prescribed limits can be clearly identified in relation to the right to trial by an independent and impartial tribunal and the right to review. However, the other limits are either poorly identified (right to appeal, the right to a record or reasons), non-existant (mandatory review by military officers), or potentially too vague to be considered to be prescribed by law (right to counsel, pre-trial

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78 **Supra**, note 3.

79 Ibid. at 244.

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disclosure, rules of evidence). The potential failure of the limits to pass the Oakes[80] proportionality test is largely a result of the concentration of a broad discretion over procedural matters in the hands of the trying officer.

As has been indicated in this Chapter there are other easily identifiable "reasonable" limits that could be enacted which would protect the rights of the accused while not unduly hampering military effectiveness. The legislative enactment (in the National Defence Act or QR&O) of procedural protection along the lines of those additional limits would not only provide "reasonable" limits "prescribed by law", but might also forstall an argument that there is a Charter breach.

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80 **Supra**, note 2.

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CHAPTER 10

CONSTITUTIONAL WAIVER AND THE RIGHT TO ELECT COURT MARTIAL

> I will have no Body in my Company that can write; a Fellow that can write, can draw Petitions.
>
> George Farquhar: The Recruiting Officer, 1706[1]

1. CHARTER WAIVER

Does the right of an accused to elect court martial constitute a waiver of their rights under the Charter? The identification of the right to elect court martial with the doctrine of waiver has been particularly strong since 1959 when the initial offer to exercise that right was moved from the end of the hearing of the evidence to the commencement of the summary trial.

The requirement for a valid waiver of a Charter right was first dealt with by the Supreme Court of Canada in Clarkson v. R[2]. One of the issues in that case was whether an intoxicated accused could waive the right to counsel. In writing for the court Madame Justice Wilson stated:

> Given the concern for fair treatment of an accused person which underlies such constitutional civil liberties as the right to counsel in s. 10(b) of the Charter, it is evident that any alleged waiver of this right by an accused's awareness of the consequences of what he or she is saying is crucial. Indeed, this court stated with respect to the waiver of statutory procedural guarantees in Korponay v. A.G. Can., (1982) 26 C.R.(3d) 343 ... that any 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

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis, United States Naval Institute, 1966) at 287-288.

[2] [1986] 1 S.C.R. 383 (S.C.C.).

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> enacted to protect and of the effect the waiver will have on those rights in the process."[3]

Madame Justice Wilson reviewed specific American cases, which had not only required that the accused be aware of the consequences of the decision, but also understand the legal consequences of the decision. Madame Justice Wilson did not commit herself on whether a knowledge of the legal intricacies surrounding the decision was required before there could be a valid waiver of the right to counsel, however, she indicated that the accused person must pass some form of an "awareness of consequences" test.[4]

The awareness of consequences test alone appears to require a high standard of understanding on the part of the accused. As Professor Stuart points out:

> ...when the Supreme Court has characterized the issue as one of waiver, it has repeatedly demonstrated its reluctance to find that there has been a waiver of the right to counsel.[5]

No further comment has been made by the Supreme Court of Canada on the additional requirement found in the American authorities that the accused must also be aware of the legal intricacies of the case before there is a valid waiver. It is possible that a knowledge of the legal aspects of the case, beyond the consequences of the decision to waive certain rights, may be required in circumstances such as those found at a summary trial where the accused is waiving a mode of trial which provides numerous procedural and evidentiary safeguards.

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[3] Ibid. at 394-395.

[4] Ibid. at 395.

[5] D. Stuart, Charter Rights in Canadian Criminal Law (unpublished), Chap. 2.

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A waiver of Charter rights can be express or implied.[6] The responsibility for ensuring that a waiver is made on the basis of an informed decision lies with the judge. As Mr. Justice Lamer stated in Korponay v A. G. Canada[7]:

> The judge's duties concerning any waiver are not different than those on a plea of guilty. The factors he will take into account in determining whether the accused has clearly and unequivocally made an informed decision to waive his rights will vary depending on the nature of the procedural requirement being waived and the importance of the right it was enacted to protect. However, always relevant will be the fact that the accused is or is not represented by counsel, counsel's experience, and in my view of great importance in a country so varied as ours, the particular practice that is developed in the jurisdiction where the events are taking place.[8]

In terms of a summary trial that responsibility rests with the trying officer.

2. THE RIGHT TO ELECT COURT MARTIAL

The proposition that the right to elect court martial comprises a waiver of an accused's rights under the Charter runs into three problems. First, the right to elect court martial is not extended to all accused who are threatened with an infringement of their right to life, liberty and security of the person or who are subject to a criminal or penal sanction. The right to elect court martial is only extended to those accused who are charged with specific "serious" military offences or who potentially may receive a punishment of detention, reduction in rank or a fine exceeding $200. The tying of the right to elect court martial to the more "serious" offences

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[6] See R v Manninen (1987), 58 C.R. (3d) 97 (S.C.C.).

[7] [1982] 1 S.C.R. 41 (S.C.C.) [hereinafter Korponay].

[8] Ibid. at 50.

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appears to be based on the notion that the receipt of a less serious punishment (a minor punishment) would be justified under s. 1 of the Charter. It may be, as was indicated in Engel and Others Case[9], that certain punishments can be "justified" as an integral part of military life such that they are not as serious as they might be in civilian society. However, as was noted in Chapter 5 the invoking of the rights under the Charter is not simply limited to the seriousness of the punishment. While liberty interests (penal consequences) may be different, all summary proceedings are still criminal or penal in nature. In addition, regardless of the punishment which might be considered by the trying officer at the commencement of the trial events could unfold in such a way that the accused is eventually referred to court martial even after the commencement of the summary trial.

Finally, the criteria which are used as the basis for offering the right to elect court martial do not necessarily adequately reflect the effect which a punishment can have on the "security of the person". For example a chief warrant officer who receives a severe reprimand (for which there would be no requirement to give the right to elect court martial) could be much more severely affected by that punishment than a private who receives a fine of $300 (in that case there would be a right to elect court martial). If the right to elect court martial was extended to all accused then the argument that it provides an adequate waiver of an accused's rights would be greatly enhanced.

The second problem concerns the issue of whether the accused "has clearly and unequivocally made an informed decision to waive his

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[9] 1976 Council of Europe Yearbook of the European Convention on Human Rights (The Hague: Martinus Nijoff, 1977).

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rights".[10] Presently the only requirement to explain the consequences of the right to elect court martial is found in the duties of the assisting officer set out in QR&O art. 108.03(8). At a minimum, the assisting officer must inform the accused of the matters relating to the court martial. Those matters are the greater powers of punishment at a court martial, the right to legal representation, the application of the Military Rules of Evidence and the right of appeal. The regulation is drafted in such a way as to impose additional obligations to inform the accused of the differences between the two tribunals, however, in light of the limited training for assisting officers it is difficult to see how that can be done with any consistency.

There is no requirement in the regulations to inform the accused of other important considerations such as the independence and impartiality of the court martial, the greater pre-trial disclosure, the ability to challenge the members of the court martial, the provision of a transcript of the proceedings, the more detailed review procedures and the right to release pending appeal. In addition it is unlikely that the assisting officer, due to a lack of training, will presently be in a position to explain the effect of many of the differences between the two tribunals (eg. the effect of applying Military Rules of Evidence).

One way of ensuring that an accused is fully informed of the consequences of not exercising the right to elect court martial is to ensure the accused has the opportunity, where possible, to consult legal counsel. Steps have been taken recently to ensure that there is

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[10] Korponay, **supra**, note 7 at 50.

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greater access to military lawyers by initiating a duty counsel programme.[11]

It should not be necessary that an accused consult legal counsel prior to exercising their right to elect court martial. Canadian Forces may be deployed in areas and under conditions that it is not possible to contact a lawyer. However, in order to rely on the right to elect court martial as a waiver there does appear to be a requirement that more information be made available to an accused on the effect of that decision. That information could be passed on by means of more comprehensive regulations, the use of aide-memoires and by increasing the training for assisting officers and trying officers.

The limitations on the information which is provided to an accused is compounded by the lack of an obligation on the part of the trying officer to confirm that the accused has made a fully informed decision. For example, there is no requirement on the part of the trying officer (commanding officer and superior commander) to confirm that the assisting officer has complied with the limited requirements of QR&O, art. 108.03(8). One way to ensure that the accused is fully aware of the consequences of the decision to elect court martial is for the trying officer to advise the accused of the effect of that decision. Such repetition will help ensure that the accused receives the necessary information and will confirm in the mind of the accused that the trying officer is neutral on whether the accused turns down

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[11] Legal officers posted to The Officer of the Judge Advocate General, National Defence Headquarters, Ottawa are on call 24 hours per day to answer calls from persons who find themselves in need of legal advice. Each of the duty counsel is provided with a cellular telephone. However, the mandate of these duty counsel is restricted to personnel who are detained or in custody. A duty counsel programme is also in place in Lahr, Federal Republic of Germany.

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the summary trial. The provision of that information could be recorded on the charge report. If the accused has had an opportunity to talk to counsel that information could also be recorded.

Finally, an argument could be presented that the exercise of the right to elect court martial is unfair because the accused is exposed to a greater penalty at a court martial. In effect, greater access to procedural protection should not be accompanied with the potential for a greater punishment. While prima facie that argument has some attractiveness it is evident that in criminal proceedings decisions such as pleading guilty also carry with them an assessment of potential procedural protection verses the opportunity for a lower punishment. While the question of plea bargaining is a controversial one[12] the concern of the courts has been centred on ensuring that the accused has made an informed decision.[13] In that respect the issue of entering a plea is similar to waiver. In Middendorf v. Henry[14] the United States Supreme Court specifically rejected an argument that the higher level of punishment available to general and district courts martial nullified a waiver of an accused's right to counsel when deciding to remain subject to summary court martial jurisdiction.[15]

In conclusion, it does not appear that the right to elect court martial, as it is presently constituted, provides an adequate waiver of the accused's rights under the Charter. Like the changes to the legislation which could be made to enhance the compliance with the

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[12] See R.J. Delisle & D. Stuart, Learning Canadian Criminal Procedure (Toronto: Carswell, 1986) at 423-450.

[13] Adgey v. R (1973), 13 C.C.C. (3d) 177 (S.C.C.).

[14] 425 U.S. 25 (1976).

[15] Ibid. at 40.

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requirements of s. 1 of the Charter, the alterations to the right to elect procedures are neither extensive nor difficult to undertake. An altered right to elect court martial would also not unduly complicate the trial process, or adversely affect the "readiness" of the Canadian Forces. While the changes to the election provisions of the summary trial system are easy to make they should not be done at the expense of enacting the enhanced procedural protection discussed in relation to s. 1.

The right to elect court martial provisions should be used as a "safety valve" to enhance the protection of an accused's rights , rather than as a means to avoid changing the procedures employed at summary proceedings.

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CHAPTER 11

RECOMMENDATIONS AND CONCLUSIONS

> The only thing harder than getting a new idea into the military mind is to get an old one out.
>
> B.H. Liddell Hart: Thoughts on War, v. 1944[1]

1. RECOMMENDATIONS

The proceeding chapters have identified a number of weaknesses in the summary trial system, as it is presently prescribed by the National Defence Act and its subordinate legislation. Those weaknesses indicate that challenges to the constitutionality of summary proceedings, based on the Charter, have a very good likelihood of success. The following recommendations are designed to strengthen the ability of the summary trial system to withstand such constitutional challenges:

a. The jurisdiction that commanding officers and superior commanders have over service offences should be limited to offences carrying a penalty lower in the scale of punishments than imprisonment for life. There should be a further limitation for offences charged under s. 130 of the National Defence Act. Jurisdiction over those service offences should be limited to offences that can be dealt with on summary conviction (including hybrid offences) under civilian criminal law. This limitation in jurisdiction would be similar to the restricted jurisdiction available to military commanders under American and British military law. The jurisdiction of delegated officers

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[1] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations, (Annapolis: United States Naval Institute, 1966) at 190.

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should be limited to offences carrying a specific maximum penalty such as imprisonment for less than two years;

b. The power to grant prerogative relief in relation to military disciplinary matters should be transferred from the Federal Court Trial Division to the Court Martial Appeal Court;

c. The power of the trying officer to refer the case to higher authority once a summary trial commences should be removed, except in cases where the accused is offered the right to elect court martial;

d. All trying officers should be required to take an oath prior to the performance of their judicial duties;

e. A provision should be enacted in QR&O prohibiting unauthorized interference with the summary trial process. That regulation could be drafted along the lines of U.C.M.J. art. 37;

f. The factors to be considered in determining if legal counsel will be allowed to participate at a summary trial, presently found in QR&O, art. 108.03, Note D should be incorporated into the regulations. The considerations of those factors by the trying officer should be made mandatory;

g. Pre-trial disclosure provisions could be enacted in QR&O requiring a release of all information contained in the investigation conducted pursuant to QR&O, art. 107.02. In addition copies of all documentary evidence and all statements

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made in relation to the incident (including that of the accused) to be relied on at trial should be released to the accused. Such disclosure could be subject to a need to protect national security or the administration of justice (eg. identity of informants);

h. QR&O should be amended to provide for a more complete trial procedure including:

i) the order in which witnesses are to be called;

ii) a right for the accused to cross-examine adverse witnesses;

iii) the meaning of proof beyond a reasonable doubt;

iv) all evidence to be taken under oath; and

v) rules on the admissibility of documentary evidence

i. The procedure governing the right to elect court martial should be amended as follows:

i) the right to elect court martial should be extended to all accused charged with a service offence;

ii) QR&O should be amended to require the accused be advised of the greater independence and impartiality of courts martial, increased pre-trial disclosure, the ability to challenge members of the court martial, the provision of a transcript of the proceedings and the right to apply for release pending appeal;

iii) In addition to the responsibilities of the assisting officer to advise the accused, the trying officer should be required by regulation to advise the accused of the

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differences in the two types of trial, inquire whether the accused has discussed the matter with legal counsel and confirm that the accused is making an informed decision; and

iv) A pamphlet outlining the differences between the two trial procedures should be prepared, and required under QR&O to be made available to any accused charged with a service offence.

j. In recognition that it will probably be easier to make amendments to QR&O than to the National Defence Act, it is recommended that the post-trial review process be amended in two stages as follows:

i) In the first stage QR&O, art. 108.40 (punishment warrants) should be amended to require representations by the accused to be sought and passed to the approving authority by the commanding officer. A punishment warrant should be required for all cases in which detention is awarded at trial (eg. for privates receiving detention for 30 days or less). In addition, a direct reference should be made in the regulations identifying the redress of grievance procedures as part of the review process for summary trials; and

ii) The second stage would involve a repeal of the punishment warrant process and the separation of the redress of grievance procedures from the summary trial review process. This latter step would likely involve an amendment to s. 29 of the National Defence Act. A new review process should be developed based on the "appeal"

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provisions for Article 15 hearings under the U.C.M.J. The review would be by way of a petition initiated by the offender. The petition would be passed through the chain of command with the Commander of the Command being the final level of review. The review of the petition by an legal officer should be required by regulation;

k. The punishments of detention and confinement to ship or barracks should be altered to be more remedial in nature. The training should include more drill and basic training associated with the development of collective discipline (recruit camp). Consistent with a greater emphasis on remedial training the punishments of confinement to ship or barracks should be renamed unit corrective training and general corrective training respectively. In addition persons undergoing "general corrective training" should be separated from service prisoners;

l. If the recommendations in paragraph k. are not followed, and the punishment of detention is retained at the summary trial level then every person receiving the punishment of detention should be given a right of appeal by way of trial de novo to a court martial;

m. Provision should be made for a record of the trial or reasons for conviction. The record of trial could be in the form of a synopsis that is prepared by the pre-trial investigating officer. At the close of the trial the trying officer would indicate what if any additional evidence was

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relied on in order to support a conviction. The reasons for conviction could be provided in the form of a summary by the trying officer, which at a minimum should relate the evidence to each of the essential elements of the offence. As part of the requirement for reasons QR&O Chap. 103 could be amended to outline the essential elements for each of the service offences listed therein;

n. CFAO 25-6 should be updated to reflect the existing and proposed changes to the summary trial system. However, no proposed change to summary proceedings that is intended to be relied on as a "limit" under s. 1 of the Charter should be contained solely in that CFAO; and

o. The education of military officers in military law and procedures to be followed at summary trials should be undertaken as follows:

i) Aide-memoires for assisting officers and trying officers should be developed and distributed as Canadian Forces Publications.

ii) Consistent with the importance that the maintenance of discipline has as part of the skills of the military officer, the education of officers in military law and the conduct of summary proceedings, should be standardized and increased by means of giving greater attention to that subject in the existing professional courses. For example training such as participating in mock trials should be initiated. The duties of the assisting officer could be stressed at Basic Officer Training, in the Officer

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Professional Development Programme and at Canadian Forces Staff School. The role of the trying officer could be covered at Canadian Forces Staff College and Canadian Forces Land Staff College.

iii) More concentrated training should be undertaken by establishing a School of Discipline. The school could provide training in a broad range of military law topics (summary trials, courts martial, law of armed conflict etc.), however, at a minimum 75% of the curriculum should be directed towards the conduct of summary proceedings and the post-trial review process. The instructors should be split evenly between legal officers and officers from operational classifications. The courses to be taught at the school could include a Trying Officer's Course (lieutenant-colonel and major), a Military Law Specialty Course (adjutants, unit administrative officers and senior non-commissioned members), a Senior Officers Legal Orientation Course (commanding officers) and a General Officers Legal Orientation Course.

2. CONCLUSIONS

The goal of this thesis was to assess the impact of the Charter on the summary trial system prescribed by the National Defence Act. Those summary proceedings have been identified as a unique form of trial specially designed to meet the disciplinary requirements of the Canadian Forces. However, summary proceedings are also an essential portion of a disciplinary process designed, in part, to suppress individual interests in order to develop a disciplined and effective armed force. Summary proceedings are "criminal or penal matters" and

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have the potential to affect the "life, liberty or security of the person". As a result the summary trial system is subject to the requirements of the Charter.

It was inevitable that there would be a conflict between the Charter, with its emphasis on the protection of individual rights and freedoms, and a military justice system, embodied in the summary trial process, which places a premium on group cohesion and the habit of obedience to higher authority. While the Charter provides the means by which that conflict was identified (the enumeration of legal rights) it also supplies the process by which the practical considerations of governing a free and democratic society can be weighed (s. 1 of the Charter) in determining if the summary trial process is constitutional. Therefore, the Charter should not be viewed solely as a "sword" with which to attack the military justice system. It also provides the "shield" by which limits on individual rights and freedoms can be constitutionally justified.

In assessing the constitutionality of the summary trial process it is evident that the ability of that trial process to withstand Charter scrutiny depends to a large extent on the degree to which it addresses the requirements of procedural fairness. It is in this area that the summary trial process is particularly vulnerable to attack. The structure of the summary trial system, as a disciplinary process administered by military officers in the chain of command, can be supported by reference to the unique role of the summary trial in maintaining discipline, the long history of the use of summary proceedings and the recognized need for those proceedings in other free and democratic societies. However, the balancing of individual rights against the needs of the military, particularly in terms of

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procedural fairness offered to the accused, appears to be weighted inordinately in favour of the goals of the military.

The failure to adequately protect the individual rights and freedoms of members of the Canadian Forces appears to arise primarily from a series of omissions. Rather than provide legislated guarantees of procedural fairness, Parliament has left most of the decisions affecting the conduct of summary proceedings to the unguided discretion of the trying officer. In addition, safeguards are either non-existent (in the case of a right of appeal) or arguably terribly inadequate (post-trial review process).

While the failure to adequately address the requirements of procedural fairness enhances the vulnerability of the summary trial process to a constitutional attack, it also provides the answer on how that process can be protected from a Charter challenge. The ability of the summary trial system to withstand a Charter analysis could be significantly enhanced by means of a greater sensitivity to the notion of procedural fairness. A modest increase in legislated procedures, such as is outlined in many of the recommendations, could limit the number of Charter challenges; increase the likelihood that those limits will be considered to be prescribed by law and reasonable; and, most importantly for both the individual and the maintenance of discipline in the armed forces, increase the actual and perceived fairness of the summary trial process for the individual service member. That increased level of fairness can be attained without unduly restricting the readiness of the Canadian Forces to complete its assigned roles. In the final analysis the Charter both protects individual rights and freedoms, and provides sufficient flexibility to allow Canada to maintain the disciplined armed forces necessary to maintain the country as a free and democratic society.

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APPENDIX I

RANKS OF THE CANADIAN FORCES

Officers

Title	Naval Equivalent
General	Admiral
Lieutenant-General	Vice-Admiral
Major-General	Rear-Admiral
Brigadier-General	Commodore
Colonel	Captain
Lieutenant-Colonel	Commander
Major	Lieutenant-Commander
Captain	Lieutenant
Lieutenant	Sub-Lieutenant
Second Lieutenant	Acting Sub-Lieutenant
Officer Cadet	Midshipman Naval Cadet

Non-Commissioned Members

Chief Warrant Officer	Chief Petty Officer 1st Class
Master Warrant Officer	Chief Petty Officer 2nd Class
Warrant Officer	Petty Officer 1st Class
Sergeant	Petty Officer 2nd Class
Corporal	Leading Seaman
Private	Able Seaman, Ordinary Seaman

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APPENDIX II

List of Service Offences

Section	Description of Offence
73	Misconduct of Commanders in Presence of Enemy
74	Misconduct of any Person in Presence of Enemy
75	Security Offences
76	Prisoner of War Offences
77	Miscellaneous Operational Offences
78	Spies for the Enemy
79	Mutiny With Violence
80	Mutiny Without Violence
81	Offences Related to Mutiny
82	Seditious Offences
83	Disobedience of Lawful Command
84	Violence to a Superior Officer
85	Insubordinate Behaviour
86	Quarrels and Disturbances
87	Resisting or Escaping from Arrest or Custody
88	Desertion
89	Connivance at Desertion
90	Absence Without Leave
91	False Statement in Respect of Leave
92	Scandalous Conduct by Officers
93	Cruel or Disgraceful Conduct
94	Traitorous or Disloyal Utterances
95	Abuse of Subordinates

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96	Making False Utterances
97	Drunkenness
98	Malingering or Maiming
99	Detaining Unnecessarily
100	Setting Free Without Authority
101	Escape from Custody
102	Hindering Arrest
103	Withholding Delivery Over or Assistance to the Civil Power
104	Losing, Stranding or Hazarding Vessels
105	Offences in Relation to Convoys
106	Disobedience of Ship Captain's Orders
107	Wrongful Acts in Relation to Aircraft
108	Signing Inaccurate Certificate
109	Low Flying
110	Disobedience of Aircraft Captain's Orders
111	Improper Driving of Vehicles
112	Improper Use of Vehicles
113	Causing Fires
114	Stealing
115	Receiving Property
116	Destruction, Loss or Improper Disposal
117	Miscellaneous Offences
118	Contempt of Service Tribunals
119	False Evidence
120	Offences in Relation to Billeting
121	Fraudulent Enrolment
122	False Answers on Enrolment

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123	Assisting Unlawful Enrolment
124	Negligent Performance of a Military Duty
125	Offences in Relation to Documents
126	Refusing Immunization
127	Handling of Dangerous Substances
128	Conspiracy
129	Prejudicing Good Order and Discipline
130	Service Trial of Civil Offences
132	Offences Under Law Applicable Outside of Canada

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APPENDIX III

SUMMARY TRIAL STATISTICS

1986-1988

	1986	1987	1988
Delegated Officer	3749	3077	2744
Commanding Officer	1911	1472	1443
Superior Commander	47	37	58
Total	5707	4586	4245

ELECTION TO COURT MARTIAL

1986-1988

	1986	1987	1988
Commanding Officer	780/23	671/33	649/31
Superior Commander	25/3	16/0	25/1
Total	805/26	687/33	674/32

* First figure indicates number of elections given. Second figure indicates numbers that elected court martial.

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APPENDIX IV

COURTS MARTIAL

1986-1988

	1986	1987	1988
Standing Court Martial	80	78	68
Special General Court Martial	16	12	14
Disciplinary Court Martial	26	23	10
General Court Martial	2	8	3
Total	124	121	95

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APPENDIX V

(front)

PART 1
PARTIE

CANADIAN FORCES – FORCES CANADIENNES

CHARGE REPORT – PROCÈS-VERBAL D'ACCUSATION

THE ACCUSED / L'ACCUSÉ	Number / Matricule	Rank / Grade	Surname / Nom	Given Names in Full / Prénoms en entier	Service	Station or Unit / Station ou unité	Component / Élément constitutif	Is charged with having committed the following offence(s) / Est accusé d'avoir commis l'infraction (ou les infractions) suivante(s)

CHARGE NO. / NUMÉRO DE L'ACCUSATION	SEC OF NDA / ARTICLE DE LA LDN	STATEMENT OF OFFENCE / ÉNONCÉ DE L'INFRACTION	STATEMENT OF PARTICULARS / DÉTAILS DE L'INFRACTION

WITNESSES / TÉMOINS

CF 78 (4-83) RCS V 3100
7530-21-893-6242

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PART 2 / PARTIE 2 (CHARGE REPORT) Appropriate paragraphs to be completed as the action is taken. The date to be shown is the date on which the action was taken.
(PROCÈS-VERBAL D'ACCUSATION) Remplir les paragraphes appropriés au moment où les mesures sont prises. La date à inscrire est celle où la mesure a été prise.

Charge(s) laid / Accusation(s) portée(s) _____ (Time and date / Heure et date) by / par _____ (Signature of person laying charge(s) / Signature de la personne qui porte la ou les accusation(s))

Copy served on accused / Copie remise à l'accusé _____ (Time and date / Heure et date) by / par _____ (Signature of person serving copy / Signature de la personne qui remet la copie)

DISPOSITION OF CHARGES – RÈGLEMENT DES CAS

REFERRED TO / SOUMIS À	CUSTODY / MIS AUX ARRÊTS: Open / Simples	CUSTODY / MIS AUX ARRÊTS: Close / De rigueur	Not to be held in custody / Ne sera pas détenu	SIGNATURE OF OFFICER DEALING WITH CASE / SIGNATURE DE L'OFFICER CHARGÉ DU CAS (Name and Rank – Nom et grade)	OFFICE / FONCTION	DATE

Election as to trial by court martial when applicable (QR 108.31) Demande de procès devant une cour martiale, s'il y a lieu (QR 108.31) Charges having been read, accused remanded for election at: Les chefs d'accusation ayant été lus, l'accusé est renvoyé en vue de faire un choix à _____ Time – Heure			
AT / À _____ Time – Heure accused elected: (a) trial by court martial (b) summary trial l'accusé a choisi par une cour martiale par voie sommaire d'être jugé: (delete (a) or (b) as applicable – biffer (a) ou (b) selon le cas)			
Dismissed or found not guilty of charge(s) number(s) (delete as applicable) Non-lieu ou verdict de non-culpabilité de l'infraction (des infractions) numéro(s) (biffer selon le cas) _____			
Guilty of charge(s) number(s) / Coupable de l'infraction (des infractions) numéro(s) and sentenced / et condamné DELETE Provisions not applicable ** / Biffer les mentions inutiles ** (a) without punishment warrant to / sans mandat de punition, à _____ or / ou (b) after approval of punishment warrant to* / après approbation du mandat de punition, à* _____ or / ou (c) to / à _____ punishment warrant to be forwarded / mandat de punition à faire suivre			
Charge Sheet prepared and referred to superior authority. Acte d'accusation préparé et soumis à l'autorité supérieure			

* For use when approval of higher authority required before sentence is passed (Art. 108.33).
* A utiliser lorsqu'il faut obtenir l'approbation d'une autorité supérieure avant de prononcer une sentence. (art. 108.33)

** See article 108.40 as to submissions for approval of punishments.
** Voir l'article 108.40 concernant les formalités requises pour l'approbation des peines

(back)

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APPENDIX VI

"MINOR" OFFENCES

Section	Description of Offence
83	Disobedience of Lawful Command
84	Violence to a Superior Officer (except striking or using violence to a superior officer).
85	Insubordinate Behaviour
86	Quarrels and Disturbances
87	Resisting or Excaping from Arrest or Custody
89	Connivance at Desertion
90	Absence Without Leave
91	False Statement in Respect of Leave
93	Cruel or Disgraceful Conduct
95	Abuse of Subordinates
96	Making False Utterances
97	Drunkenness
98 a) and b)	Malingering (when not on service or active service)
100	Setting Free Without Authority
101	Escape from Custody
102	Hindering Arrest
103	Withholding Delivery Over or Assistance to Civil Power
106	Disobedience of Ship Captain's Orders
107	Wrongful Acts in Relation to Aircraft (except when act or omission is wilful)
108	Signing Inaccurate Certificate
109	Low Flying
110	Disobedience of Aircraft Captain's Orders

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111(1)(c)	Permitting Vehicle to be Driven by Impaired Person
112	Improper Use of Vehicles
113	Causing Fires (except when act or omission is wilful)
116	Destruction, Loss or Improper Disposal
117	Miscellaneous Offences
118(2)	Contempt of Service Tribunals
121	Fraudulent Enrolment
122	False Answers on Enrolment
123	Assisting Unlawful Enrolment
124	Negligent Performance of a Military Duty
125	Offences in Relation to Documents
126	Refusing Immunization
127	Handling of Dangerous Substances (except when act or omission is wilful)
129	Prejudicing Good Order and Discipline

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APPENDIX VII

"MAJOR" SERVICE OFFENCES

Section	Description of Offence
73	Misconduct of Commanders in Presence of Enemy
74	Misconduct of any Person in Presence of Enemy
75	Security Offences
76	Prisoner of War Offences
77	Miscellaneous Operational Offences
78	Spies for the Enemy
79	Mutiny with Violence
80	Mutiny without Violence
81	Offences Related to Mutiny
82	Seditious Offences
84	Violence to a Superior Officer (only where striking or using violence is charged)
88	Desertion
92	Scandalous Conduct by Officers
94	Traitorous or Disloyal Utterances
98	Malingering or Maiming (only where malingering when on active service or under orders for active service)
99	Detaining Unnecessarily
104	Losing, Stranding or Hazarding Vessels
105	Offences in Relation to Convoys
107	Wrongful Acts in Relation to Convoys (only when the act or omission is wilful)
111(1)(a) and (b)	Improper Driving of Vehicles
113	Causing Fires (only where act or omission is wilful)
114	Stealing
115	Receiving Property
119	False Evidence

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128 Conspiracy

130 Service Trial of Civil Offences

132 Offences Under Law Applicable Outside of Canada

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