CANADIAN MILITARY LAW: THE CITIZEN AS SOLDIER

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Introduction

Law as a process reflects the pressures of a changing society. Implicit in the process is the continuing appraisal of different interests, an appraisal which makes possible both the formulation of appropriate standards and their practical application. The great test of the legal process is its ability to accommodate competing interests for the good of society. Democracies, like tyrannies, maintain armies; and military efficiency depends on the maintenance of discipline. Unlike tyrannies, however, democracies are also interested in seeing that soldiers retain the fundamental rights of citizens.[1] These competing interests underlie the issues examined in this article.

Realistic legal responses involve a continuing and careful weighing of the competing interests in the light of changing circumstances. Though circumstances may at times require one interest to be emphasized at the expense of the other, altered conditions demand that old questions be asked anew. Necessity often dictates the abrogation of certain of the soldier's fundamental rights as citizen: only a continuing appraisal of changing circumstances can ensure the restoration of these rights when the conditions responsible for their abrogation no longer exist. The observations in this article are offered as prolegomena to any future appraisals.

I. *History of Canadian Defence Legislation.*

The first military force organized under an Act of the Parliament of Canada was the Militia, which was established under the

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[1] *Burdett* v. *Abbot* (1812), 4 Taunt. 401, 128 E.R. 384 (Ex. Ch.), at p. 403, per Mansfield C.J.: "It is therefore highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman."

Militia Act of 1868.[2] The Act made English military legislation applicable to the Canadian Militia, providing that:[3]

> . . . from the time of being called out for actual service, and also during the period of annual drill or training under the provisions of this Act, and also during any drill or parade of his corps at which he may be present in the ranks or as a spectator, and also while wearing the uniform of his corps . . . ,

officers and men of the Militia were subject,

> . . . to the Rules and Articles of War and to the Act for punishing mutiny and desertion, and all other laws then applicable to Her Majesty's Troops in Canada, and not inconsistent with this Act . . . .[4]

Similarly, the Militia Act of 1927[5] made the Army Act[6] for the time being in force in Great Britain applicable to the Canadian Militia. The first Naval Service Act,[7] passed when the Royal Canadian Navy was organized in 1910, incorporated by reference the provisions of The Naval Discipline Act[8] of the United Kingdom; and the Royal Canadian Air Force Act of 1940[9] incorporated the provisions of the Air Force Act[10] for the time being in force in the United Kingdom.

By 1944, however, it was becoming increasingly difficult to determine the extent to which the Air Force Act and the rules of procedure in force in the United Kingdom applied to the Royal Canadian Air Force. A Canadian consolidation of the *Manual of Air Force Law* was undertaken in order to indicate the various modifications, adaptations and exceptions which had been made to the Air Force Act and to the rules of procedure in their application to the Royal Canadian Air Force. Instead of detailing proposed changes in the application of The Naval Discipline Act of the United Kingdom to the Royal Canadian Navy, the Parliament of Canada in 1944 passed a new Naval Service Act[11] containing a Canadian disciplinary code for the Navy. This code was used as the basis for drafting many sections of the National Defence Act.[12]

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[2] An Act respecting the Militia and Defence of the Dominion of Canada, S.C., 1868, c. 40.

[3] *Ibid.*, s. 64.

[4] *Ibid.*

[5] R.S.C., 1927, c. 132, s. 69. Ss. 140 and 141 were repealed in 1951 and the remaining sections in 1952 by Proclamation of the Governor in Council pursuant to s. 250 of The National Defence Act, S.C., 1950, c. 43, now R.S.C., 1952, c. 184 hereinafter cited as the National Defence Act.

[6] 1881, 44 & 45 Vict., c. 58. as am.

[7] S.C., 1910, c. 43, s. 48.

[8] 1866, 29 & 30 Vict., c. 109, as am., for the time being in force.

[9] S.C., 1940, c. 15, s. 11.

[10] 1917, 7 & 8 Geo. 5, c. 51, as am.

[11] S.C., 1944-45, c. 23.

[12] *Supra*, footnote 5.

The Army and Air Force remained subject to modified United Kingdom military legislation until after the end of the Second World War, when a careful examination of existing legislation was undertaken, culminating in the enactment of the National Defence Act.[13] The wartime experience of legal officers using the various Canadian and United Kingdom statutes and regulations indicated the desirability of making the rights and duties of the members of the Canadian armed forces readily ascertainable by reference to a single Canadian statute.

The examination of legislation which led to the passing of the National Defence Act was undertaken, in part, in response to a workaday need. But in its final form the Act, with its substantially uniform Code of Service Discipline[14] for the three services, reflected the pressures of a democratic society as well as military requirements.

II. *Disciplinary Jurisdiction of the Services: Prejudice by Inference.*

The Code of Service Discipline[15] applies to the officers and men of the regular forces,[16] and to the officers and men of the active service forces.[17] Members of the reserve forces[18] are subject to the Code only in certain circumstances.[19] The Code also applies to certain classes of civilians (including those persons serving with

[13] *Ibid.*

[14] National Defence Act, *ibid.*, s. 2 (6) provides: "'Code of Service Discipline' means the provisions of Parts IV, V, VI, VII, VIII and IX."

[15] *Ibid.*

[16] Queen's Regulations, art. 2.02: "The Regular Force consists of officers and men who are enrolled for continuing full-time service."

[17] National Defence Act, s. 56(1)(a) and (b). S. 16(5) provides: "In an emergency or if considered desirable in consequence of any action undertaken by Canada under the United Nations Charter, the North Atlantic Treaty or any other similar instrument for collective defence that may be entered into by Canada, the Governor in Council may establish and authorize the maintenance of components of the Services of the Canadian Forces, referred to in this Act as the active service forces, consisting of:

(a) officers and men of the regular forces and the reserve forces who are placed in the active forces under conditions prescribed in regulations, and

(b) officers and men, not of the regular forces or the reserve forces, who are enrolled in the active service forces for continuing, full-time military service."

[18] Queen's Regulations, art. 2.03 (1): "The Reserves consist of officers and men enrolled for other than continuing full-time service when not on active service."

[19] National Defence Act, s. 56 (c). Hollies, Canadian Military Law, [1961] Mil. L. Rev. 69, at pp. 70-71: ". . . the most important of these circumstances . . . are when the officer or man is undergoing drill or training, on duty, in uniform, called out on service, or present at any unit or on any defence establishment."

the Canadian forces under agreements by which they have consented to subject themselves to the Code),[20] alleged spies for the enemy,[21] and persons accompanying an element of the Canadian forces that is on service or active service.[22]

While efficient administering of the Code of Service Discipline requires that all persons subject to the Code be under the jurisdiction of a commanding officer at all times, the increased responsibilities of the Canadian armed forces necessitate frequent transferring of officers and men. Hence, the situation where "the old man" is acquainted with his men and therefore likely to take off-the-record circumstances favourable to an accused into consideration in disposing of a charge is of less frequent occurrence: an accused is now more likely than before to be brought before a new[23] commanding officer for disposition.

In the case of *Rex* v. *Thompson (No. 1)*[24] a non-commissioned officer in the Canadian Army was arrested on a charge alleging theft of public property and two alternative charges of improper possession of public property. A district court martial was convened and heard evidence from the accused on the question of its jurisdiction. The court ruled that it had jurisdiction to hear the case, and at that point the proceedings were interrupted by the accused's application to the Ontario High Court for his discharge from custody. LeBel J. examined the relevant provisions of the Army Act[25] and the rules of procedure and found that the juris-

[20] National Defence Act, s. 56(1)(j). Harrison, Court-Martial Jurisdiction of Civilians — A Glimpse at Some Constitutional Issues, [1960] Mil. L. Rev. 61, at p. 68: "Civilian employees performing one chore or another have long accompanied our [American] armies — and equally long been subject to court-martial jurisdiction."

[21] National Defence Act, s. 56 (1) (h).

[22] National Defence Act, s. 56 (1) (f). S. 56 (7a) provides: "For the purposes of this section, but subject to any limitations prescribed by the Governor in Council, a person accompanies a unit or other element of the Canadian Forces that is on service or active service if such person:

(a) participates with that unit or other element in the carrying out of any of its movements, manoeuvres, duties in aid of the civil power, duties in a disaster, or warlike operations,
(b) is accommodated or provided with rations at his own expense or otherwise by that unit or other element in any country or at any place designated by the Governor in Council,
(c) is a dependant out of Canada of an officer or man serving beyond Canada with that unit or other element, or
(d) is embarked on a vessel or aircraft of that unit or other element."

S. 56(1)(f) is discussed by members of the Committee in Special Committee on Bill No. 133 — An Act Respecting National Defence: Minutes of Proceedings and Evidence (1950), pp. 110-112.

[23] "New" because either (a) the commanding officer was given command of the man's unit shortly before the man was charged or (b) the man was transferred to the officer's command shortly before he was charged.

[24] [1946] 4 D.L.R. 579 (Ont. H.C.).

[25] *Supra*, footnote 6.

diction of a court martial is conditioned upon a prior hearing of the charge by the commanding officer in the presence of the accused, followed by the commanding officer's exercise of discretion by (a) dismissing the charge, (b) disposing of the case summarily, (c) referring the case to the proper military authority or (d) remanding the case for trial by court martial.[26] He held that since the required hearing had not been held the court martial was without jurisdiction, and that the applicant was entitled to be discharged from custody.[27] The accused was subsequently transferred

[26] *Supra*, footnote 24, at p. 587, per LeBel J.: "Indeed, unless there is a hearing of the charge by the officer commanding in the presence of the offender, and the offender is afforded full opportunity to be heard, upon what basis in fact could the officer commanding possibly exercise his discretion? Clearly the offender must be heard, and in the present case, who can say that if the application had been heard his officer commanding would not have dismissed the charge?"

[27] LeBel J. noted that the rules of procedure enjoined a commanding officer to take care that a person charged with an offence is not detained in custody for more than forty-eight hours without the charge being investigated unless investigation within that period seems to him to be impracticable with due regard to the public service. He found that no valid reason had been advanced for the delay in holding the hearing, and held that the failure to hold the required hearing for a period of two and one-half months while the applicant was held in close arrest afforded a further ground for ordering his release. Counsel for the applicant had contended that the long delay had ousted the jurisdiction of a military tribunal to deal with the alleged offences. After the accused was discharged he was transferred to another regiment and was rearrested on the same charges. On an application for prohibition to prevent the new commanding officer of the accused from taking further proceedings on the same charges, it was argued that ". . . there having been sufficient grounds outside of the question of jurisdiction to justify the discharge in *Rex* v. *Thompson* (*No. 1*), this part of the judgment was unnecessary and therefore amounted only to *obiter* and was therefore not binding. . . ." (*Rex* v. *Thompson* (*No. 2*), [1946] 4 D.L.R. 591 (Ont. C.A.), at pp. 596-597, per Urquhart J.). Urquhart J. replied that he had spoken to LeBel J. about the matter, and that he had been definite on the point. ". . . he considers that finding to be an essential part of his decision and intended to decide that jurisdiction was lost by the military authorities by reason of the circumstances outlined in his judgment. So I must treat him as having definitely decided that jurisdiction has been ousted and therefore lost. (*Ibid.*, at p. 597.) Counsel's objection would seem to have been well founded. "In his [LeBel J.'s] judgment, after outlining what had happened and discussing the many defects in procedure, he said (at p. 589): 'It follows that the applicant is entitled to be discharged.'

In my opinion, he could justifiably have stopped at that point and his decision would have been sufficient and the discharge of the accused amply justified.

However, LeBel J. went on to deal with another argument [*supra*] submitted by counsel for the accused . . . ." (*Ibid.*, at p. 595.)

While failure to hold a hearing may have prevented the court martial from having jurisdiction, it is submitted that delay in holding the hearing could not in itself oust the jurisdiction of a military tribunal to deal with the alleged offences. Clearly, after being discharged the accused could be rearrested and, following a hearing by his commanding officer, tried by another court martial. There was no need to transfer him to another regiment. "What the significance of the transfer is is not apparent." (*Supra*, at p. 592, per Urquhart J.). Use (and misuse) by the civil courts of the con-

to another regiment and re-arrested on the same charges, whereupon he applied to the the Ontario High Court for an order of prohibition preventing his new commanding officer from taking further proceedings on the same charges.[28] In making the order, Urquhart J. said.[29]

> The exercise of his [the commanding officer's] discretion depends in part upon the good character of the accused. The accused comes under the protection of a new commanding officer as a stranger, with little known about him except the fact that he is accused of stealing and of having supposedly stolen property and that he has struggled hard to avoid the investigation of the commanding officer.
>
> It is difficult to see how the discretion . . . could be exercised by other than the man's former commanding officer (*i.e.* one who had had him for a long time under his command rather than one to whom he has been recently transferred).
>
> The accused has for this reason, good cause in my opinion for apprehension about (a) his hearing if conducted before a strange commanding officer; (b) his trial by court-martial, and I think the public who have, I know, watched this case with interest would also feel the same.

This general attitude is not realistic. Transfers of officers and men are necessarily frequent in the modern armed forces; and few commanding officers are acquainted with all of their men. The *reductio ad absurdum* of this attitude would be that a commanding officer could not be transferred unless his men accompanied him, and *vice versa*. On the other hand, the apprehension of the accused in this case is understandable in the light of the events preceding his transfer. The reasonable apprehension of bias on the part of an accused being tried by a new commanding officer was given permanent form in 1959 by a Ministerial regulation which extended the meaning of "commanding officer" to include, in relation to an accused person, the commanding officer of the station or unit in which the accused is present when any proceedings are taken against him under the Code of Service Discipline.[30] The regulation enables a commanding officer of relatively low rank to have offenders dealt with by summary trial by having the man brought before a new commanding officer of senior rank who automatically has greater powers of punishment. In such an event,[31]

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cept of jurisdiction as an instrument of policy is discussed below under VII. The Supervisory Power of the Civil Courts Over Military Tribunals And Officers: The Fountain of Ambiguity.

[28] *Rex* v. *Thompson* (*No. 2*), *ibid.* [29] *Ibid.*, at pp. 598-599.

[30] Queen's Regulations, art. 101.01(1)(b)(i).

[31] Hollies, *op. cit.*, footnote 19, at p. 75: "In practice it is rarely necessary to resort to this expedient, but the occasion does arise from time to time."

clearly the senior officer will draw the inference that the man merits at the very least punishment greater than that which the commanding officer of lower rank has the power to award. The claim of expediency is not sufficiently weighty to justify the regulatory creation of a prejudicial situation where adequate disciplinary procedures already exist.

III. *The Continuing Jurisdiction of the Services.*

Section 56 (2) of the National Defence Act[32] extends the application of the Code of Service Discipline by providing that a person who has been released from the armed forces shall continue to be liable to a service trial if at the time of the alleged commission of an offence he was subject to the Code. Section 56(2) provides part of the basis for section 60, which places a three year limitation on the trial of all service offences with the exception of certain major offences[33] which may be tried at any time under the Code of Service Discipline. Before the enactment of the National Defence Act persons who had been released from the armed forces remained liable to the Code for periods of from three to six months, though those who remained with the forces continued to be liable to a service trial for three years after the offence was alleged to have been committed. In the United Kingdom, with certain exceptions, three months after a person has been released from the forces he is free from trial under military law.[34]

Service authorities considered the pre-National Defence Act position unfair in allowing some offenders to escape the longer period of liability to trial by securing their release from the forces, while those who remained in the services continued to be liable to trial for three years.[35] Section 60(1) was intended to subject both classes of offenders to the same period of liability to trial by a service tribunal;[36] and the period chosen was the longest provided for under the antecedent legislation.

The drafters of section 56(2) were concerned with (a) the disciplinary requirements of the services and (b) remedying an "unjust" situation. For the maintenance of discipline it is necessary

[32] *Supra*, footnote 5.

[33] Mutiny, desertion or absence without leave or a service offence for which the highest punishment that may be imposed is death.

[34] Army Act, 1955, 3 & 4 Eliz. 2, c. 18, ss. 131(1) and 132(3). The exceptions are desertion, mutiny and civil offences committed outside the United Kingdom. S. 132(1) provides that in the last case the consent of the Attorney General of England must be obtained to hold the trial.

[35] Special Committee on Bill No. 133, *op. cit.*, footnote 22, p. 121.

[36] National Defence Act, s. 2(36), "'service tribunal' means a court martial or a person presiding at a summary trial."

that service authorities have a period of time after the commission of an offence sufficient to enable them to detect and take appropriate action against an offender. News of the man who "got away with it" spreads quickly. In addition, it seemed desirable to provide the same period for those remaining in the services and those successful in obtaining their release, in order that the latter should not obtain the advantage of a shorter period of liability to military trial. These two objects could have been accomplished by placing a limitation of three months on the trial of all service offences except those major offences mentioned in section 60(2). The three year limitation period adversely affects the position of the released man. Upon release, a man ceases practically to be a member of the military community and assumes new responsibilities. He is in the main no longer subject to the additional rights and duties which are superimposed on the soldier's rights and duties as a citizen. Yet he remains subject to the Code of Service Discipline for a period of three years in respect of an offence committed while serving with the forces. Clearly the object should be to place the released man as soon as possible in a position commensurate with his new responsibilities.

If the offence committed is an offence under the Criminal Code, the man remains subject to prosecution by the civil authorities, and the limitation period is that prescribed by the Code. The rationale behind the pre-National Defence Act position and that at present obtaining in the United Kingdom is that while it is imperative for service disciplinary purposes that offenders be discovered and prosecuted, it is even more important that a released soldier should be restored as soon as possible to his full status as a member of the civilian community, and that in keeping with that status he should be amenable only to its laws. A period of three months after release during which the man is still liable to military trial is a sufficient period of transition from entirely military to entirely civilian status. After that, the concern of the military authorities ceases. The community interest in maintaining disciplined forces is served by continuing service jurisdiction in the case of the major service offences mentioned in section 60(2). These for the most part do not constitute offences under the Criminal Code and would otherwise go unpunished. But the more serious among the remaining service offences usually constitute offences under the Criminal Code and can be prosecuted by the civil authorities. The minor offences that are peculiar to the forces and thus do not constitute offences under the Criminal Code do

not justify penalizing a man so long a period after his release from the forces.[37] In the case of such minor offences, the interest of the community in the successful adjustment of the man to his new responsibilities in society overrides the disciplinary interest of the military authorities.

IV. *Jurisdiction of the Civil Courts: Double Jeopardy.*

It has been pointed out above that a man who joins the Canadian armed forces does not cease to be a citizen, and that in general the law which applies to all citizens applies to members of the forces. Yet in many cases a soldier who has been tried on the merits and convicted or acquitted by a competent service tribunal can be tried for the same offence by a civil court.[38] The Code of Service Discipline provides for two classes of offences. The first class[39] comprises those acts and omissions which are peculiar to the forces.[40] These offences have no exact counterparts in the civil law and therefore do not give rise to the risk of double jeopardy. The second class of offences comprises those offences punishable under the Criminal Code or any other Act of the Parliament of Canada.[41] Clearly persons convicted or acquitted of offences in this class are liable to subsequent prosecution for the same offence in the civil courts.[42] This class also includes acts and omissions that are minor offences under the civil law but serious offences under military law. For instance, for one man to strike another a blow causing no bodily harm is in civil law a common assault; but for a soldier to strike his superior or for an officer to strike a soldier is, under military law, a serious offence involving a heavy punishment. Since these minor offences are recognized by the civil law, albeit with lesser punishments, the risk of double jeopardy is present.

The attitude of service authorities toward this unfair situation is inconsistent. While defending it as necessary, they have attempted to meliorate the harsh consequences flowing from it. For

[37] See Special Committee On Bill No. 133, *op. cit.*, footnote 22, pp. 121-122.

[38] National Defence Act, s. 62(1): "Nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court." To date, there have been no cases where the civil courts have tried servicemen with whom service authorities have purported to deal.

[39] Ss. 64-118.

[40] For instance desertion the first class includes offences charged under s. 118(1), the omnibus provision prohibiting "conduct to the prejudice of good order and discipline".

[41] *Ibid.*, s. 119.

[42] See Special Committee on Bill No. 133, *op. cit.*, footnote 22, p. 125.

instance, the National Defence Act requests the civil court to take the military conviction into consideration in mitigation of sentence.[43] But the possibility of double punishment for the same offence remains.[44] The concern of service authorities for soldiers placed in this unfair legal position is also reflected in section 62(3) of the National Defence Act, which provides that on a civil conviction or acquittal the unexpired portion, if any, of the service punishment shall be remitted and the offender affected only by the civil sentence. Unfortunately, this provision would be of little help to a man who had undergone a considerable portion of the punishment awarded by a service tribunal at the time when he was prosecuted and convicted of the same offence by a civil court.

It is a very long established principle of the common law that a person charged with a criminal offence may plead *autrefois acquit* or *autrefois convict* if he has previously been acquitted or convicted of the same offence by a court of competent jurisdiction.[45] The National Defence Act provides for these special pleas before a service tribunal where a person has previously been convicted or acquitted of the same offence by a service tribunal or a civil court.[46] Yet they are not available to members of the Canadian forces who have been tried and convicted or acquitted by a service tribunal when they are tried in a civil court for the same offence.

Section 133(2) of the 1955 Army Act[47] makes it clear that a civil court need do no more than take into account a previous conviction by a service tribunal in mitigation of the punishment which it awards on conviction of the same offence. This position has been supported on the ground that it is vital to maintain the control of the civil authorities over the armed forces, and that should the civil authorities be prevented from trying a person who has been tried by a service tribunal on the same offence members of the armed forces could be withdrawn entirely from the jurisdiction of the civil courts by having any criminal offences committed by them dealt with quickly by service tribunals.[48] To-day,

[43] S. 62(2).

[44] See Special Committee on Bill No. 133, *op. cit.*, footnote 22, pp. 127-128.

[45] S. 516(1) of the Criminal Code provides: "An accused may plead the special pleas of (a) *autrefois acquit*, (b) *autrefois convict*." However, s. 4 provides: "Nothing in this Act affects any law relating to the government of the Canadian Forces."

[46] S. 57(1).

[47] *Supra*, footnote 34.

[48] Report From The Select Committee On The Naval Discipline Act [United Kingdom], Together With The Proceedings of The Committee, Minutes of Evidence, and Appendices (1956). Appendix 14 — *Autrefois Acquit* and *Convict*, p. 409, "As Lawrence J. said in *R.* v. *Aughet*, 'the provisions of our Army Act with regard to courts martial are based upon

however, the civil courts have exclusive jurisdiction over persons charged with murder, rape or manslaughter when the offence is committed in Canada;[49] there is no possibility of removing a soldier who commits one of these offences from the jurisdiction of the civil authorities by means of a hasty court martial and acquittal. Since the National Defence Act leaves with the civil authorities control over the main means of possible intimidation of civilians by the armed forces, the argument for continuing the liability of service offenders to a second trial fails.

The indefensibility of the present position was recognized by the Select Committee appointed in 1956 to consider The Naval Discipline Act (United Kingdom).[50] The Departmental Committee reported that the Select Committee on the Army Act (United Kingdom) in considering the draft of section 133(2) of the 1955 Army Act[51] had discussed the possibility of providing for the plea of *autrefois convict* or *acquit* in the civil courts in situations where a service tribunal had already tried the offence. The Select Committee On The Army Act had decided, however, to keep the subsection because:[52]

> (i) Very much the same provision had been contained in the old Army Act, and it was considered undesirable to alter any provision of the existing Act unless there was good reason for doing so; and
> (ii) whereas the old Army Act required a civil court to take into account the sentence of a court-martial only, the new draft required the civil court to take into account a punishment awarded summarily, and given the necessity of such a clause at all the trend was in favour of the soldier.

It has been shown above that "there was good reason for doing so", and that the "trend . . . in favour of the soldier" provides no guarantee of the fundamental right of the citizen not to be prosecuted twice for the same offence. The Select Committee On The Naval Discipline Act[53] agreed that it had been arguable under

principles of high policy'. It is probable that these principles originated in the seventeenth century fear that the army might be used as an instrument of political repression. If, for example, a soldier who had shot a civilian could be court-martialled and aquitted by a court composed of his fellow officers, and that acquittal could be pleaded as a bar to the soldier's subsequent trial before a civil court for murder, there would be a danger of the civil authorities losing control over intimidation of civilians by the army."

[49] National Defence Act, s. 61.

[50] *Supra*, footnote 48.

[51] *Supra*, footnote 34.

[52] Report From The Select Committee On The Naval Discipline Act, *op. cit.*, footnote 48, p. 407. It should be noted that s. 62(2) of the National Defence Act, *supra*, footnote 5, enjoins civil courts awarding punishment to take into account any punishment for the same offence imposed by a *service tribunal, i.e.*, a court martial or a summary court.

[53] Report From The Select Committee On The Naval Discipline Act, *op. cit.*, *ibid.*, pp. 407-409.

the Army Act, 1881,[54] and was clear under the Army Act, 1955[55] that an army court martial was empowered to try only as military offences acts or omissions that would constitute civil offences. so that trial under the Army Act for any offence could not form the basis of a plea of *autrefois acquit* or *autrefois convict* before a civil court in the absence of any express statutory provision to that effect. Nevertheless, it was in their opinion doubtful whether the different form of the corresponding provisions of The Naval Discipline Act[56] and the clauses suggested by the Select Committee[57] (and subsequently adopted in the Naval Discipline Act, 1957)[58] permitted that argument. While the Army Act[59] gave a service tribunal power to try only as military offences acts or omissions which constituted civil offences, the relevant provision of The Naval Discipline Act[60] and the provision suggested by the Select Committee for incorporation in the new Naval Discipline Act[61] gave naval tribunals power to try as criminal offences acts or omissions committed abroad which if committed in England would be punishable by the law of England. Since naval courts trying such offences were sitting as English courts of criminal jurisdiction, it was the opinion of the Select Committee that sailors tried under the Naval Discipline Act probably could not be tried again by the civil courts for the same offence.[62]

[54] *Supra*, footnote 6, s. 41: "Every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law."

[55] *Supra*, footnote 34, s. 70(1): "Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section."

[56] *Supra*, footnote 8, s. 45: "Every person subject to this Act who shall be guilty . . . of any other criminal offence which if committed in England would be punishable by the law of England . . . shall be subject to the same punishment as might for the time being be awarded by any ordinary criminal tribunal competent to try the offender if the offence had been committed in England."

[57] Report From The Select Committee On The Naval Discipline Act, *op. cit.*, footnote 48, Appendix; Draft of a Naval Discipline Bill, p. lix, clause 42(1): "Every person subject to this Act who is guilty of any civil offence . . . shall be liable on conviction under this Act.

(a) in the case of any offence, to any punishment which could be imposed on him on conviction of the offence before a court in England other than a court-martial . . . ."

[58] 5 & 6 Eliz. 2, c. 53, s. 42(1)(c)(i). [59] *Supra*, footnote 34.

[60] *Supra*, footnote 8. [61] *Supra*, footnote 58.

[62] Report From The Select Committee On The Naval Discipline Act, *op. cit.*, footnote 48, pp. 409-410: ". . . in practice the question is likely to arise very seldom, and . . . there is no evidence that the obscurity of the answer has caused substantial difficulty in the past. The police, at any rate in the United Kingdom, would never in fact prosecute some one who had already been dealt with by a court martial, and private prosecutions are not common. The Admiralty cannot recall a case in which a sailor convicted under the Naval Discipline Act has subsequently been tried by a civil court, apart from one case which arose in Malta and was due to a

At the time the Select Committee sat, naval courts had no jurisdiction to try civil offences committed on shore in the United Kingdom. As a result, it was only in the rare case (for instance murder) where United Kingdom civil courts (in addition to naval courts abroad) had power to try crimes committed abroad, that the question of *autrefois convict* or *acquit* could arise. However, the Select Committee suggested that the disciplinary jurisdiction of the services be standardized by allowing naval courts to try civil offences committed within the United Kingdom.[63] This suggestion was incorporated in the Naval Discipline Act of 1957,[64] with the anomalous result that if a soldier or airman is tried by court martial or summarily under the Army or Air Force Acts for an act or omission which constitutes a civil offence, he can be tried again by a civil court for the same offence, while a sailor who is tried under the Naval Discipline Act is not liable to a second trial.[65] The Select Committee was dissatisfied with this situation, and recommended that appropriate amendments be made to the Act governing the conduct of the other two services in order to make their provisions consistent with the naval position.[66]

While the arguments based on the form of the relevant provisions of the Naval Discipline Act are not available to Canadian service authorities,[67] it has been shown above that the argument for allowing the civil authorities to try a soldier who has been tried by a service tribunal for the same offence can no longer be supported. It would seem, then, that the only remaining interest

dispute about jurisdiction." To the same effect, see Hollies, *op. cit.*, footnote 19, at p. 72: "In actual practice, conflict between service and civilian tribunals never occurs. When the matter is one in which the civil courts may be interested, it has been the custom for the service to ascertain from the local Crown prosecutor, or if need be from the attorney general of the province, whether it is desired to have the case tried in the civil courts. Amicable arrangements as to whether it should be a military or civil trial invariably follow." It should be pointed out, however, that the National Defence Act, like the Army Act of the United Kingdom, only gives service tribunals power to try as military offences acts or omissions which also constitute civil offences; it does not give them power to sit as courts of criminal jurisdiction.

[63] Report From The Select Committee On The Naval Discipline Act, *op. cit.*, footnote 48, Appendix: Draft of a Naval Discipline Bill, p. lxiii, clause 48(1).

[64] *Supra*, footnote 58, s. 48(1). [65] *Ibid.*, s. 129(1).

[66] Report From The Select Committee On The Naval Discipline Act, *op. cit.*, footnote 48, p. 410.

[67] S. 121, the "saving provision" of The Naval Service Act, 1944, *supra*, footnote 11 provided: "Nothing in this Act shall supersede or affect the authority or power of any court or tribunal of ordinary civil or criminal jurisdiction in respect of any offence mentioned in this Part which may be punishable by the common or statute law, or prevent any person being proceeded against and punished in respect of such offence otherwise than under this Part."

worthy of consideration is the right of the soldier as citizen not to be prosecuted twice for the same offence. Accordingly, it is suggested that the following provision be substituted for section 62(1) of the National Defence Act:

> Where a person subject to this Act is tried and acquitted or convicted of an offence by a service tribunal with jurisdiction under Part IV of this Act, a civil court shall be debarred from trying him subsequently for the same offence; but save as aforesaid nothing in this Act shall be construed as restricting the jurisdiction of any civil court to try a person subject to this Act for any offence.

V. *Service Tribunals: The Power of Disciplinary Adjudication.*

The National Defence Act provides for the determination of charges under the Code of Service Discipline by summary trial and court martial. Provision is made for four types of the latter: general courts martial, special general courts martial (which may try only civilians), disciplinary courts martial and standing courts martial.[68] Standing courts martial consist of one officer, called the president, who is a barrister or advocate of more than three years' standing.[69] Although standing courts martial (which cannot impose punishment greater than imprisonment for less than two years)[70] proved extremely useful in Canada during the Second World War,[71] they have not been used since the end of the War. The National Defence Act provides for their establishment only in an emergency.[72] The question of setting up such courts in peacetime arose when the Special Committee on the National Defence Act were considering section 149 of the Act:[73]

> Mr. Harkness: I was wondering whether you would not rather cut out that part about the emergency so that if you did think it necessary you could set them up in peacetime?
> Brigadier Lawson (Judge Advocate General): There is not much point in having the words in. It is conceivable that a great expansion of the service in peacetime would make it desirable to institute this procedure. We have no objection to the words coming out. They certainly do not add anything to the bill.

The suggestion was rejected.

> Mr. Hunter: Why put in extra powers which are not needed? Why give such powers as that? You can always amend the Act if it becomes necessary.

While not "necessary" such an amendment seems desirable.

[68] National Defence Act, ss. 139, 56(7b), 143 and 149(1).
[69] *Ibid.*, s. 149(1).
[70] *Ibid.*, s. 149(2).
[71] Special Committee on Bill No. 133, *op. cit.*, footnote 22, p. 231.
[72] S. 149(1).
[73] Special Committee On Bill No. 133, *op. cit.*, footnote 22, pp. 231-232.

Officers with no legal training are at present obliged to spend time hearing minor charges when they can ill afford to spare that time from their other duties. If standing courts martial were established persons charged with minor offences could be brought from their units to selected centers where a court on circuit could try them at appointed times. The use of standing courts martial would not only save time[74] but would also tend to bring about greater uniformity in sentencing.

Although courts martial have been analogized to criminal trials with a jury, and summary trials to proceedings before a magistrate, there are important differences between military proceedings and the comparable civil ones. At courts martial, as in criminal trials with a jury, witnesses testify under oath;[75] and the proceedings are governed by rules of evidence.[76] The president and members of courts martial are usually regimental officers with no legal training.[77] While not legally necessary,[78] it is now the practice to appoint a legally-trained judge advocate to advise on the law at disciplinary courts martial. A judge advocate must be appointed to officiate at general courts martial,[79] which may impose major punishments. Though any commissioned officer may be appointed prosecutor at a court martial,[80] an officer with legal training is usually appointed to perform this function. An accused person is entitled to have either a commissioned officer or a civilian lawyer retained at his own expense to defend him at a court martial; in addition, he is entitled to have any person he may choose present as an adviser. It is, however, the responsibility of the ac-

[74] Special Committee On Bill No. 133, *op. cit., ibid.*, p. 199, per Major McClemont: "The arrangement during the Second World War was simple and direct. We could move from one area to another in the command or within districts, and all persons charged with court-martial offences would be brought to that place from their various units, ready to be tried on a particular morning, and we could dispose of eight or ten cases in a day very much like a police magistrate does in police court."

[75] The National Defence Act, s. 158(1)(e).

[76] The Military Rules of Evidence are established by regulations made by the Governor in Council under the authority of s. 152(1) of the National Defence Act.

[77] However, the National Defence Act, s. 56(7b)(b) provides that a special general court martial shall consist of "a person, designated by the Minister, who is or has been a judge of a superior court in Canada, or is a barrister or advocate of at least ten years' standing at the bar of any province of Canada".

[78] *Ibid.*, s. 147: "Such authority as may be prescribed for that purpose in regulations *may* appoint a person to officiate as judge advocate at a Disciplinary Court Martial."

[79] *Ibid.*, s. 141: "Such authority as is prescribed for that purpose in regulations *shall* appoint a person to officiate as judge advocate at a General Court Martial."

[80] Queen's Regulations, arts. 111.42(1) and 111.23(1).

cused to retain civilian counsel and to obtain an adviser.[81] During the Second World War commissioned officers with no legal training were of necessity chosen as defending officers in the great majority of cases.[82] Current service practice is to provide an accused person, on his own request, with a list of available service legal officers from which he may choose his defending officer. Where, however, a court martial is held in a remote corner of the globe, and the prosecutor appointed is without legal training, a service legal officer is not made available to act as defending officer.

It is the duty of a judge sitting with a jury in a court of criminal jurisdiction to rule on questions of law; but a judge advocate officiating at a court martial can determine issues of law only if he is so directed by the president of the court.[83] Once the judge advocate has ruled on an issue, his ruling is deemed to be the ruling of the court.[84] The members of a court martial, then, would appear to act as both judge and jury; yet they are unlike a jury sitting in a court of criminal jurisdiction in that in a majority of cases a finding of guilty is possible without unanimity.[85] However, where the punishment of death is mandatory, a finding of guilty cannot be made except with the concurrence of all the members of the court martial.[86]

Summary trials before commanding officers are not rigidly governed by rules of evidence; however, the commanding officer may direct or the accused request that the evidence be taken on oath.[87] Usually an officer is assigned to assist the accused in the preparation of his defence and to advise him regarding witnesses and evidence.[88] But the assisting officer may take part in the summary trial only to the extent of stating any fact that should be

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[81] *Ibid.*, arts. 111.60(1), 111.60(2), and 111.60(a) and (b).

[82] See Birney, Turvey — A Military Picaresque (1949), ch. 6: Turvey Attends A Court Martial, p. 70: "There were so many courts martial this week, the RAP Sergeant had told him, that there was no use Turvey standing on his rights and choosing his own defending officer. The paymaster was the only one available and even he was still busy in a Court of Enquiry regarding six rifles that a guard post had unitedly dumped in the canal last week."

[83] Queen's Regulations, art. 112.06(3).

[84] *Ibid.*, art. 112.06(5).

[85] *Ibid.*, art. 162(1): "Subject to this section, the finding and the sentence of a court martial and the decision in respect of any other matter or question arising after the commencement of the trial shall be determined by the vote of the majority of the members."

[86] *Ibid.*, art. 162(5). Art. 162(6) provides that: "Where the imposition of a punishment of death is not mandatory, the punishment of death shall not be imposed except with the concurrence of all the members of the court martial."

[87] *Ibid.*, art. 108.29(1)(c).

[88] *Ibid.*, art. 108.26(1)(a) and(b), and note (A) to art. 108.26.

brought out in the interest of the accused.[89] It is clear, however, that no provision is made in the National Defence Act for an accused person being tried by his commanding officer to retain counsel to act for him at a summary trial, and in practice the presence of counsel is not permitted. Depriving an accused of this right appears to contravene section 2(c)(ii) of the Canadian Bill of Rights,[90] which provides:

> 2. No law of Canada shall be construed or applied so as to . . .
> (c) deprive a person who has been arrested or detained . . .
> (ii) of the right to retain and instruct counsel without delay.

In 1959 service legal authorities examined service disciplinary provisions in the light of the proposed Bill of Rights. At that time it was considered that the right to counsel would be limited by the courts to the right to consult counsel regarding the legality of the detention or arrest and to instruct counsel to make an application for a writ of habeas corpus, but would not extend to permitting the accused to have counsel present at a summary trial.[91] However, the authorities were concerned with the possible effect on service disciplinary provisions of section 2(f) of the Bill of Rights. Section 2(f) provides:

> 2. No law of Canada shall be construed or applied so as to . . .
> (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal . . . .

It was considered that this provision made it necessary for the services to give any serviceman charged under the Code of Service Discipline with an offence that is also a criminal offence the right to elect trial by court martial rather than compelling trial by the man's commanding officer.

Before the enactment of The National Defence Act, the right to elect court martial with its accompanying right to counsel was not expressly conditioned on the service offence being also a criminal offence. For instance, the right to elect was given in every case where the award or finding of the commanding officer involved a forfeiture of ordinary pay.[92] However, the limited minor punishments which could be awarded at a summary trial usually meant that the opportunity to elect trial by court martial was given where the service offence was also a criminal offence. The National Defence Act does not provide for the right of election

[89] *Ibid.*, art. 108.29(1)(h), and note (A) to art. 108.26.
[90] S.C., 1960, c. 44.
[91] *Cf. Re Walsh and Jordan*, [1962] O.R. 88, 132 C.C.C. 1.
[92] Army Act, *supra*, footnote 6, s. 46(8).

where the award or finding of a commanding officer involves a forfeiture of pay. Nor did it, as originally enacted, contain provisions which would have had the effect of giving the opportunity to elect trial by court martial where the service offences alleged were also criminal offences. Although low-ranking commanding officers (commanding officers below the rank of major) were reluctant to try persons charged with service offences that were also criminal offences by summary trial because of the limitations on their powers of punishment, commanding officers of higher rank (commanding officers of or above the rank of major), faced with pressing disciplinary problems, could "make an example" of a man by exercising their considerable summary powers of punishment.[93]

Service legal authorities were troubled by the fact that persons tried by their commanding officers for service offences that were also criminal offences had neither a right to counsel nor the protection of the military rules of evidence, and in 1956 they considered the question of whether the Code of Service Discipline is a disciplinary code only, or whether it could be regarded as being, in part, in the nature of a criminal code. The results of this study are embodied in the amendments made in 1959 to articles 108.31 and 110.055 of Queen's Regulations. The amendments provide, in effect, for the right of election to be tried by court martial in a great majority of the cases involving service offences that are also indictable offences under the Criminal Code, and in certain other cases where the act or omission is considered a serious service offence involving a heavy punishment.

On its face, the Code of Service Discipline purports to be a disciplinary code, not a criminal one. The National Defence Act provides:[94]

> An act or omission
> (a) that takes place in Canada and is punishable under Part XII of this Act, the Criminal Code or any other Act of the Parliament of Canada; or
> (b) that takes place out of Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the Criminal Code or any other Act of the Parliament of Canada, is an offence *under this Part* . . . .

To point out the obvious, the National Defence Act provides that acts or omissions punishable under the Criminal Code are

[93] According to Table "A" to art. 108.27 of Queen's Regulations under certain circumstances the authorized punishment was (and still is) detention for a maximum of ninety days.

[94] S. 119(1). Italics mine.

included among the acts or omissions treated as offences *under the Code of Service Discipline.* Yet the 1959 amendments indicate that in the opinion of service authorities the Code of Service Discipline is, in part, in the nature of a criminal code. How was this characterization arrived at?

In the case of *Rex* v. *Thompson (No. 2)*[95] the Attorney General of Canada appealed from the order of Urquhart J. prohibiting the new commanding officer from taking any further proceedings on the charges against the accused. Counsel objected that the order of Urquhart J. had been made in a criminal matter, that the criminal law, including the procedure in criminal matters, is assigned to the exclusive legislative authority of the Parliament of Canada by section 91(27) of the B.N.A. Act,[96] and that Parliament had not granted any right of appeal to the Court of Appeal from the order in question. Robertson C.J.O. agreed, and dismissed the appeal as not being within the jurisdiction of the court to entertain. He found that prohibition is a matter of procedure, and has the character of a civil or criminal proceeding, according to the nature of the matter sought to be prohibited:

> To begin with, the provisions of the *Army Act*, upon which the proceedings taken against the respondent are based, are criminal law. Certain defined conduct is made an offence, and is punishable with imprisonment. "The proper definition of the word 'crime' is an offence for which the law awards punishment": *Mann* v. *Owen* (1829), 9 B. & C. 595, at p. 602, 109 E.R. 222; *Proprietary Articles Trade Ass'n* v. *A.-G. Can.*, [1931] 2 D.L.R. 1, at pp. 9-10, A.C. 310, at p. 324, 55 Can. C.C. 241, at pp. 249-250. Lord Wright, in the course of his judgment in *Amand* v. *Home Secretary*, [1943] A.C. 147, at p. 162, said: "The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter". See also *R. v. Justices of the Appeals Committee*, [1946] 1 K.B. 176.
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> . . . it is plain that the Provinces have no jurisdiction over such matters as are dealt with by the *Army Act*. They come within s. 91(7), "Militia, Military and Naval Service, and Defence". The *Army Act*, 1881 (Imp.), c. 58 is made part of the law of Canada by the *Militia Act*, R.S.C., 1927, c. 132, s. 69.
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> . . . The order of prohibition made by Urquhart J. is, therefore, made in a criminal matter, the procedure in respect of which is within the exclusive jurisdiction of the Dominion Parliament. The provincial Legislature has no power to grant a right of appeal in such case: *R.* v. *Storgoff*, [1945] 3 D.L.R. 673, S.C.R. 526, 84 Can. C.C.1.[97]

[95] *Supra*, footnote 27. [96] 1867, 30 & 31 Vict., c. 3.
[97] *Rex.* v. *Thompson (No. 2)*, *supra*, footnote 27, at pp. 603-605.

Surely the Court of Appeal may entertain an appeal from an order of prohibition made in a civil matter even though the legislation involved has been enacted under a head of power assigned by the B.N.A. Act to the Parliament of Canada. In this case the legislation involved was enacted under the Dominion's defence power. Then was Robertson C.J.O. correct in holding that because conduct defined by the Army Act was made an offence and was punishable by imprisonment, the provisions of the Army Act were criminal law under section 91(27) of the B.N.A. Act? Such a test would find a great deal of provincial legislation unconstitutional.[98]

Clearly the provisions of the Army Act were, and the provisions of the present Code of Service Discipline are disciplinary provisions, and proceedings involving these provisions are properly characterized as civil proceedings. In the United Kingdom and in Canada a serviceman convicted or acquitted by an army court martial may not plead *autrefois convict* or *autrefois acquit* before a civil court at a subsequent trial for the same offence. These pleas are available in both countries where a criminal offence is involved. The argument of the Select Committee On The Naval Discipline Act that sailors convicted or acquitted by a naval tribunal should be allowed to plead *autrefois acquit* or *convict* before a civil court at a subsequent trial for the same offence is based on the special fact that English naval tribunals sit as English courts of criminal jurisdiction. It should also be pointed out that if the provisions of the Code of Service Discipline were criminal law, offences under the code could be tried only by federally appointed judges;[99] and traditionally service tribunals are composed of regimental officers who try service offences in the course of their military duties.

In the case of *The Queen and Archer* v. *White*, a former member of the Royal Canadian Mounted Police applied to the British Columbia Supreme Court[100] for review by way of certiorari of convictions on disciplinary charges under the Royal Canadian Mounted Police Act.[101] The trial judge, Wood J., dismissed the application, finding that the Royal Canadian Mounted Police are

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[98] For instance, the Highway Traffic Act, R.S.O., 1960, c. 172, s. 60 which provides: "Every person is guilty of the offence of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway and is liable to a fine . . . or to imprisonment for a term of not more than three months . . . ."

[99] See s. 96 of the B.N.A. Act, *supra*, footnote 96.

[100] [1953] 4 D.L.R. 220.

[101] R.S.C., 1927, c. 160, as am.

constituted on a military basis, and that the authorities decided that the civil courts had no jurisdiction to review disciplinary proceedings of military tribunals. The Court of Appeal[102] reversed this decision on the ground that the military cases were not applicable. The Supreme Court of Canada allowed the appeal[103] and ordered the judgment of the trial judge restored. However, the court (with the exception of Abbot J.) did not agree with the reasons which led the trial judge to dismiss the application. Locke J. said:[104]

> It is unnecessary, in my opinion, to say more than this, that, where it is shown upon an application for a writ . . . there has been either a want of jurisdiction or an excess of jurisdiction in proceedings taken under . . . the Act, the right of the court to intervene by way of writ of certiorari is undoubted. That this is equally so in the case of the proceedings of courts martial in the Army appears to me equally undoubted.
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> . . . I do not find in the material filed on the application before Wood J. any evidence to warrant the issue of the writ. There is nothing to sustain the charges of fraud, bias or excess or want of jurisdiction, . . .
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> . . . While, with respect, I am unable to agree with the reasons which led the learned Judge to dismiss the application, I think it should have been dismissed for the reasons I have stated.

In the Court of Appeal counsel for the respondent raised the objection that the disciplinary jurisdiction of the case was within the scope of the Dominion's criminal law power and that no appeal would lie. Sloan C.J. said:[105]

> I regard ss. 29, 30 and 31 of the *Royal Canadian Mounted Police Act* as legislation not in relation to criminal matters as such, but as providing the definitions of, and punishments for, breaches of discipline. These so-called offences are not tried in a criminal court but in an internal domestic tribunal exercising a special statutory jurisdiction. It follows in my opinion that the certiorari proceedings herein do not arise from a criminal cause or matter. In consequence the preliminary objection to our jurisdiction must, in my opinion, be overruled.

A similar objection was made before the Supreme Court of Canada. Though the court found it unnecessary to discuss the point, the judgment of Rand J. adopts the reasoning of Sloan C.J. and indicates that the provisions of the Royal Canadian Mounted Police Act and, by analogy, the provisions of the Code of Service Discipline, are disciplinary provisions and not criminal law.

> Parliament has specified the punishable breaches of discipline and has equipped the Force with its own courts for dealing with them . . . . What is being carried out is not a trial in the ordinary sense but an

[102] *Regina* v. *White*, [1954] 4 D.L.R. 714.
[103] *Regina and Archer* v. *White* (1956), 1 D.L.R. (2d) 305 (S.C.C.).
[104] *Ibid.*, at pp. 315, 317.
[105] *Supra*, footnote 102, at p. 716.

inquiry for the purposes of administration and the mere fact that Parliament has authorized fines and imprisonment does not affect that fact: the contemplated standards of conduct and behavior of members of the Force are being maintained.

. . . Parliament has placed reliance . . . in the responsibility and integrity of these officers. The very existence of the Force as it is conceived depends upon this administration by men of high character, and the Act contemplates the proceedings of discipline to be what may be called as of domestic government. If, within the scope of authority granted, wrongs are done individuals, and that is not beyond possibility, the appeal must be to others than to civil tribunals, or, as in the case of the Army, they must be looked upon as a necessary price paid for the vital purposes of the Force.

Most of the offences enumerated . . . call for judgment based on long experience in the service. The daily round of duty of the superintendent and other officers and the knowledge and information of the experience and vicissitudes of the Force inevitably reaching them were known to Parliament which gave to them the power of disciplinary adjudication. . . . The Commissioner and his staff preserve and create the standards and they are best able to appreciate departures from them.

. . . What the expression "disciplinary powers" means includes at least sanctions wielded within a group executing a function of a public or quasi-public nature where obedience to orders and dependability in carrying them out are, for the safety and security of the public, essential and their maintenance of standards the immediate duty of every member.[106]

While characterizing the Code of Service Discipline as a disciplinary code rather than a criminal one weakens the formal justification for the 1959 amendments, it points out the real purpose of the amendments, and explains why the right of election is not provided in every case where the service offence involved resembles an indictable offence under the Criminal Code. Clearly service authorities were concerned both to provide the traditional safeguards where acts or omissions resembling "mother's knee" offences are involved and to allow the services to deal with dispatch with what they regard as minor disciplinary offences, even though the latter may resemble indictable offences.

VI. *The Right of Appeal: Declaring the Law.*

Before the National Defence Act there was no right of appeal to a higher court from the decision of a court martial, though the jurisdiction of the civil courts could be invoked against service tribunals in applications for prerogative writs (by way of mandamus, prohibition, certiorari and habeas corpus). At the time

[106] *Supra*, footnote 102, at pp. 309-311.

the National Defence Act was being drafted service authorities considered that the comprehensive system of review of the findings and sentences of courts martial was adequate for the protection of the fundamental rights of servicemen. Nevertheless, the Minister directed that the Act should provide for a right of appeal to a civilian court,[107] and for a further appeal, in certain circumstances, to the Supreme Court of Canada.[108]

Appeals to the Court Martial Appeal Court may be on any question relating to the legality[109] of the findings of a court martial or to the legality of the sentence imposed.[110] In addition, an accused person has the right to appeal against the severity of the sentence;[111] but this appeal is dealt with by the appropriate service authorities,[112] since it is considered that only they can appreciate the service considerations affecting the sentence.

When the time allowed for appeal has expired, the Judge Advocate General must review the legality both of the findings and sentence of the court martial.[113] Provision is also made for a right to petition for a new trial where new evidence is discovered subsequent to trial.[114]

When the new appeal procedure was being considered, service authorities insisted on the necessity of retaining the discretion of the Minister and appropriate service authorities to quash findings and to alter findings and sentences of courts martial. Section 185 of the National Defence Act preserves this discretion, which is entirely apart from the processes of appeal and review. However, the complicated Army and Air force confirmation procedure was done away with. The reason given by service legal authorities for

[107] The Court Martial Appeal Board, changed by S.C., 1959, c. 5, s. 6(1) to the Court Martial Appeal Court, was established under section 190(1) of the National Defence Act. The members of the Board were a number of prominent barristers and a County Court Judge for the County of Carleton. The chairman was a judge of the Exchequer Court. By the above amendment, section 190(2) of the Act now provides: "The judges of the Court Martial Appeal Court are not less than four judges of the Exchequer Court of Canada to be designated by the Governor in Council and such additional judges of a superior court of criminal jurisdiction as are appointed by the Governor in Council." One of the judges of the Court presides as president.

[108] National Defence Act, s. 196(1)(a) and (b).

[109] *Ibid.*, s. 184: "For the purposes of this Part, the expressions 'legality' and 'illegal' shall be deemed to relate either to questions of law alone or questions of mixed law and fact."

[110] *Ibid.*, s. 186(b) and (c).

[111] *Ibid.*, s. 186(a).

[112] *Ibid.*, s. 189(1).

[113] *Ibid.*, s. 197. It was the practice even before the National Defence Act for the Judge Advocate General to make a final review of the proceedings of all army and air force courts martial, and the same review was made of naval courts martial by the Judge Advocate of the Fleet.

[114] *Ibid.*, s. 199(1).

eliminating the system of confirmation by higher authority was that continuing the system in conjunction with an appeal procedure would result in a most complicated series of steps to be taken before final determination of charges tried by court martial. One might also observe that the system of confirmation was rendered superfluous by the introduction of an appeal procedure.

The supervisory procedures described above provide comprehensive protection of the fundamental rights of servicemen who have been convicted by courts martial. The findings of a court martial may be quashed, or the findings or sentence altered by service authorities before the statement of appeal and the proceedings of the court martial are sent to the Judge Advocate General. Where an appeal relates only to severity of sentence, it will be sent by the Judge Advocate General to the appropriate service authority having power to mitigate, commute or remit punishment. Appeals relating to legality of findings or to legality of sentence are sent by the Judge Advocate General to the Court Martial Appeal Court. However, in the former case, the Judge Advocate General may certify that all of the findings appealed from are illegal, and the service authority will normally, acting on his advice, quash the findings.[115] In the latter case, the Judge Advocate General may certify that there is no finding to sustain the legality of the sentence, and the sentence will be null and void.[116] Even when the time allowed for appeal has lapsed, the Judge Advocate General must review the legality of the findings made by the court martial, and the legality of the sentence imposed. And provision is made for a right to petition for a new trial on discovery of new evidence.

The decisions of the Court Martial Appeal Board and the Court Martial Appeal Court[117] have clarified certain rights of a serviceman being tried by court martial. Knowledge of law is required for the protection of rights, and since the president and members of a court martial are without legal training, the appeal decisions have emphasized and tended to increase the responsibility of the judge advocate to see that an accused receives the protection to which he is entitled under the law. In the case of *Doutre* v. *The Queen*[118] an appeal was taken from a conviction on a charge of attempted murder by a general court martial held in

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[115] *Ibid.*, s. 189(2). [116] *Ibid.*, s. 189(2).

[117] The Canada Court Martial Appeal Reports now comprise a substantial number of cases. To date, only volume 1 of the Reports has been published.

[118] [1957] 1 Canada Court Martial Appeal Reports 155.

Korea. The appellant had gone with two soldiers to a Korean brothel. The following morning he quarrelled with one of the women, and she was shot in the breast by a rifle held by him. The defence of the appellant was that the firing of the rifle had been an accident. The president of the court martial did not exercise his right to request the judge advocate to sum up the evidence.[119] It was contended on appeal that the judge advocate, even if not requested by the president to sum up the evidence, was under a duty to point out those parts of the evidence essential to putting the theory of the defence before the court, and that he had erred in failing to discharge this duty.

The Board found that the omission to put the theory of the defence before the court martial was a defect serious enough to justify a new trial. In the decisions of the Board the judgment of Lord Alverstone C.J. in the case of *Rex* v. *Dinnick*[120] was cited as authority for the proposition that an accused has the right to have his defence placed clearly before the court. Mr. Audette said:[121]

> . . . it is clear that it is a paramount, fundamental and inalienable right of an accused to have each and every defence available to him fairly and specifically put to the jury; . . . so paramount is this right that it includes any defence however weak, foolish or unfounded the defence may be, providing that it is within the law. If perchance any defence of the accused has not been fairly and specifically put to the jury, the law so recognizes the inherent and basic quality of this right that it is then incumbent upon the Crown to satisfy an appellate court that the verdict would have been the same had such defence been so put . . . .
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> . . . this is so fundamental a right, so important a safeguard and so essential a part of our law that nothing short of a specific abrogation of the accused's rights on this score could deprive him thereof.

Mr. Audette agreed that the discretion to request a summing up of the evidence belongs solely to the president.

> . . . the Queen's Regulations, Article 112.05, par. 18, sub-par. (e), sub-par. (ii), provide that the judge advocate shall "if requested to do so, by the president, sum up the evidence"; the discretion to do so or not to do so rests consequently not with the judge advocate, but with the president of the court martial. The terms of the Queen's Regulations are such that this discretion vested in the president, if exercised in a negative sense by him, precludes the judge advocate from summing up the evidence; this is abundantly clear from the text of the

[119] Queen's Regulations, art. 112.05(18): "When the case for the defence has been closed and any further witnesses called by the court have been heard:
(d) . . . the judge advocate, if any, shall . . .
(ii) if requested to do so by the president, sum up the evidence."
[120] (1909), 26 T.L.R. 74, 3 Cr. App. Rep. 77, at p. 79.
[121] *Doutre* v. *The Queen*, *supra*, footnote 118, at pp. 162-163.

regulation which states that he shall sum up the evidence "if requested to do so by the president".

Yet, in his opinion:[122]

> . . . though the judge advocate may not always, as in the case of a judge charging a jury, be obliged to sum up the evidence, he always has the specific duty of seeing that the theory or basis of every defence is put before the court martial to ensure that the court gives full consideration to this vital issue. In this respect his duty is indistinguishable from that of a judge charging a jury. This is essential to a fair trial for the accused; omission by the judge advocate to carry out this duty is fraught with danger: the court itself may overlook the theory of such defence in its deliberations or, by inference from the judge advocate's silence on this score, it may conclude that he considers it worthless as a plea. If this is not done, either as a result of an omission by the judge advocate or as a result of a direction by the president of the court, it would constitute so deeply inherent a defect as to justify a new trial. If to do this it is necessary for the judge advocate to advert to the evidence, in whole or in part, then he must do so; if he has not been requested to sum up the evidence, or if he has been directed not to sum up the evidence, he should then point out to the court the law on this subject; if perchance the president should persevere in his direction not to refer to the evidence, the final discretion and responsibility is of course his and the judge advocate must comply, but it would indeed be a rash and heedless president who would do so. There is a clear duty from which the judge advocate's important office allows no escape.

Clearly the possibility of conflict arises from the curious situation that while a note to Queen's Regulations provides that a court must consider the grave consequences that may result from its disregard of the advice of the judge advocate on any legal matter, the regulations also provide that the discretion to request a summing up of the evidence is vested in the president alone; and the president is an officer without legal training.

Mr. Alexandor agreed that the principle enunciated in *Dinnick* should be applied. He considered, however, that the duty of the judge advocate to put the theory of the defence before the court proceeds not from any possible similarity between the relationships of judge and jury, and judge advocate and court, but rather from the National Defence Act itself.

> This is no matter of mere procedure governed by a regulation which leaves to the president of the court martial a discretion as to whether the judge advocate is to sum up evidence; it is a paramount principle of law and the judge advocate must follow it—"the judge advocate . . . shall advise the court upon the law relating to the case" (Q.R. 112.05 para. 18 (e)(i)). The obligation flows from the duty imposed

[122] *Ibid.*, at pp. 165-166.

on him by the specific language of the regulation and not from any similarity which may exist between the respective functions of judge and judge advocate or jury and court martial.[123]

Mr. Audette found the duty of the judge advocate to see that the theory of the defence is put before the court to be indistinguishable from that of a judge charging a jury, and advised the judge advocate who has not been requested to sum up the evidence, or who has been directed not to sum up the evidence, to point out the law on the subject. Mr. Alexandor went a step further and decided that Queen's Regulations require the judge advocate to advise the court on the law, and that the law demands that the judge advocate put the theory of the defence clearly before the court. Presumably, then, the court here is not making law, but is merely declaring a requirement implicit in the regulations, a requirement of which the judge advocate should have been aware. This is a familiar and unrealistic common law attitude.

> It would seem . . . that the legal practitioners must be aware of the unsettled condition of the law. Yet observe the arguments of counsel in addressing the courts, or the very opinions of the courts themselves: they are worded as if correct decisions were arrived at by logical deduction from a precise and pre-existing body of legal rules. Seldom do judges disclose any contingent elements in their reasoning, any doubts or lack of whole-hearted conviction. The judicial vocabulary contains few phrases expressive of uncertainty. As Sir Henry Maine put it—
>
> When a group of facts comes before a court for adjudication, "the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge or acumen, is not forthcoming to detect it. The uninformed listener would conclude that court and counsel unhesitatingly accept a doctrine that somewhere, *in nubibus*, or *in gremio magistratum*, there existed a complete, coherent, symmetrical body of . . . law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."[124]

Before the *Doutre* case judge advocates had not been instructed to sum up the evidence in every case. Nevertheless, the judge advocate in *Doutre* considered a summing up of the evidence to be desirable. Then why did he fail to point out those parts of the

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[123] *Ibid.*, at p. 171.
[124] Frank, Law And The Modern Mind (1935), pp. 8-9.

evidence essential to putting the theory of the defence before the court? In the course of summing up the judge advocate said:[125]

> My second duty to this court is to summarize the evidence, but only if requested to do so by the president. The president has consented to this requirement being complied with by the alternative of having a complete transcript of all the evidence in the case placed before the court in draft form for perusal by the members. A copy of the evidence has accordingly been prepared and will be available for reference purposes.

Toward the end of his judgment, Mr. Audette noted these remarks and said that they caused him very serious concern:[126]

> It is not clear to me what this transcript of evidence "in draft form" may have been. If these words signify an unrevised, uncorrected or unverified transcript made in haste by the shorthand writers in circumstances where their oath of office precludes them from certifying such transcript, I consider it highly improper for the court to have guided itself by such a draft; this is a practice which could lead to the most unfortunate results and I have no hesitation in saying that it should never be followed. As there is to be a new trial in any event, it is unnecessary to speculate upon what, in fact, occurred on this score in the court martial or to decide upon the effect it may have had upon appellant's trial.

It would seem that what occurred "on this score" was that the president did not ask the judge advocate to sum up the evidence; and that the judge advocate, interpreting the failure of the president to ask for a summing up of the evidence as an indication that the court considered this to be unnecessary and merely time consuming, suggested to the president that with his consent the summing up could be done by placing a draft transcript of the evidence before the court. The members of the Court Martial Appeal Board did not treat the president's consent to the use of this draft transcript as a request to sum up the evidence; and Mr. Audette stated that at any rate the use of the draft was not a permissible way of complying with such a request.

Queen's Regulations provide that the discretion to request a summing up of the evidence rests solely with the president of the court martial. It is essential, however, that the judge advocate put the theory of the defence fairly to the court. The judge advocate in the present case assumed that his success in obtaining the president's consent to use the draft transcript dispensed with the need for an oral summary of the evidence. As a result, he failed to point out the theory of the defence; and the Court Martial Appeal Board

[125] *Doutre* v. *The Queen, supra,* footnote 118, at p. 172.
[126] *Ibid.,* at p. 170.

found that the omission entitled the appellant to a new trial. The appeal resulted in the clarification of a fundamental right of a serviceman being tried by court martial—the "paramount principle of law" enunciated in *Dinnick*.[127]

The present responsibilities of the judge advocate indicate that the judicial rôle of the president at a court martial is largely formal. It is submitted that this office should be given substance by providing that the judge advocate shall sit as president of the court in all cases where a judge advocate is appointed to officiate.

VII. *The Supervisory Power of the Civil Courts over Military Tribunals and Officers: The Fountain of Ambiguity.*

In addition to providing an offender with the right of appeal, the National Defence Act preserves the right of the serviceman as citizen to seek the aid of the civil courts to redress grievances arising out of exercises of military discipline.[128] The aid of the civil courts may be sought against service tribunals in applications for prerogative writs and against individual officers in actions for damages. While the civil courts are agreed on the importance of service discipline as the basis of military efficiency, examination of the case law discloses differing answers to the question of how far a civil court can interfere with exercises of military discipline without causing that discipline to suffer. In giving these answers, the courts have used (and at times misused) the concept of jurisdiction as an instrument of policy. The differing attitudes of the courts are most clearly revealed in their treatment of two fundamental questions which are often confused.

(1) Will the civil courts inquire at all into the exercise of military discipline? If they will, then

(2) will an action lie in the civil courts for the malicious exercise of authority without probable cause within admitted military jurisdiction?[129]

For a long time it was assumed that a civil court would not inquire at all into the exercise of military discipline over members of the armed forces. This assumption was based on a dictum of the Court of Exchequer Chamber in the case of *Sutton* v. *Johnstone*,[130] decided in 1786. Sutton was the captain of His Majesty's ship *Isis*, and Johnstone was the commander of the squadron. In April of 1781 the *Isis* was damaged during an engagement between

[127] *Supra*, footnote 120. [128] National Defence Act, s. 187.
[129] See Holdsworth, The Case of *Sutton* v. *Johnstone* (1903), 19 L.Q. Rev. 222.
[130] (1786), 1 T.R. 493, 784 (H.L.), 99 E.R. 1215, 1377 (H.L.).

the French and English fleets. The French sailed away, and Johnstone ordered the English ships to pursue. Owing to the condition of the *Isis*, Sutton did not obey this order. Johnstone put Sutton under arrest for disobedience to orders, and sent him to England to be tried by court martial. On being honourably acquitted by the court martial, Sutton brought an action against Johnstone for having maliciously and without probable cause charged him with disobedience of orders and delay of the public service. The case was tried twice, and the plaintiff recovered damages on both occasions. A motion was then made in the Court of Exchequer in arrest of judgment, on the ground that "no action lies for a subordinate officer against his superior officer, for an act done in the course of discipline, and under powers incident to his situation".[131] Baron Eyre delivered the unanimous opinion of the court in holding that the action would lie. ". . . be the risk more or less, all men hold their situations in this country upon the terms of submitting to have their conduct examined and measured by that standard which the law has established." He stated that the court:[132]

> . . . never had a difficulty upon this part of the case . . . . The commander-in-chief of a squadron of ships of war is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation.
>
> The propositions which attempt to establish a distinction for him are dangerously loose and indefinite . . . .
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> . . . if it be meant that a commander-in-chief has a privilege to bring a subordinate officer to a court martial for an offence which he knows him to be innocent of, under colour of his power, or of the duty of his situation to bring forward inquiries into the conduct of his officers, the proposition is too monstrous to be debated.

In addition, the court found absence of probable cause, and ordered the rule discharged. This decision was reversed in the Exchequer Chamber (the reversal was unanimously affirmed, without comment, in the House of Lords) on the ground that the defendant had probable cause for the prosecution. This was enough to dispose of the case, but Lords Mansfield and Loughborough went on to express themselves very strongly in favour of the broad proposition contended for by the defendant,[133] that:[134]

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[131] *Ibid.*, at p. 1220, per Eyre B. [132] *Ibid.*, at pp. 1221-1222.

[133] The reasons on which the opinion of Lords Mansfield and Loughborough rested were reported to the Lord Chancellor. *Ibid.*, at p. 1243: "By the course of proceeding no use could be made of them in the Exchequer Chamber; but the Chief Justices were desirous that their reasons for differing with the Court of Exchequer should be authentically known, and took this method of doing it."

[134] Argument for the plaintiff in error, *ibid.*, at p. 1226.

> An action cannot be maintained against the commander-in-chief of a squadron of ships of war for accusing, arresting, and bringing to trial a subordinate officer, he having by law an authority to do so, notwithstanding that the perversion of his authority is made the ground of the action . . .; or, in other words, an action . . . for a malicious prosecution will not lie at the suit of a subordinate, against his commanding officer, for an act done in the course of discipline, and under the powers legally incident to his situation.

They pointed out that:[135]

> . . . the person unjustly accused is not without his remedy. He has the properest among military men.

But in deciding against introducing the action they were careful to add:[136]

> . . . there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases . . . . And therefore it must be owned that the question is doubtful; and when a judgment shall depend upon a decision of this question, it is fit to be settled by the highest authority.

The judgment in this case did not depend upon a decision of the question.[137] But the caveat was largely ignored and the dictum followed in the great majority of subsequent cases where the question arose whether an action would lie for the malicious abuse of military authority without probable cause; and surprisingly the dictum was used indirectly as authority for the broad contention that the civil courts will not inquire at all into the exercise of military discipline. In the case of *Dawkins* v. *Lord Rokeby*[138] the plaintiff sued for damages for false imprisonment and malicious prosecution. Willes J. ruled that there was no cause of action even assuming the presence of malice and the absence of probable cause.[139] In a subsequent action between the same parties, Chief Baron Kelly, delivering the views of ten judges in the Exchequer Chamber said: "With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other judges in *Sutton* v. *Johnstone* . . . are . . . authorities to show that a case involving questions of military discipline and military duty alone are cognizable only by a mili-

[135] *Ibid.*, at p. 1246.

[136] *Ibid.*, at p. 1246.

[137] In *Warden* v. *Bailey* (1811), 4 Taunt. 67, 128 E.R. 253, Lawrence J. in the course of the argument, said, at p. 256: "I have heard from good private information that the reasons assigned by Lord Mansfield for reversing the judgment of the Court of Exchequer [sic], were not adopted by the House of Lords, though the judgment of the Chief Justices was affirmed."

[138] (1866), 4 F. & F. 806, 176 E.R. 800.

[139] *Ibid.*, at p. 812: ". . . it was so decided in the House of Lords in the case of *Johnstone* v. *Sutton*."

tary tribunal, and not by a court of law."[140] The words of Chief Baron Kelly were relied upon by the defendant in *Heddon* v. *Evans*,[141] a case in which a former private in the Army Service Corps claimed damages for alleged slander, false imprisonment and malicious prosecution from his former commanding officer, in support of his contention that the civil courts could not inquire at all into the exercise of military discipline. McCardie J. examined the implications of the contention[142] and found the position untenable.

> It could not be that, no matter how grave and unwarranted was the infringement of a man's person or liberty, no matter how obvious the illegality might be, no matter how contrary to the provisions of the Army Act, no matter how serious or prolonged the physical consequences of the illegality might be, a soldier was wholly devoid of remedy in the civil courts. The compact or burden of a man who entered the Army, whether voluntarily or not, was that he would submit to military law, not that he would submit to military illegality.[143]

He pointed out that a man who becomes a soldier does not cease to be a citizen, but has rights and obligations under both military and civil law.[144] It is, however, for the civil courts to determine the extent of the military jurisdiction given to military tribunals and officers.[145] Noting that the first decision cited in the dictum of Chief Baron Kelly was *Sutton* v. *Johnstone*,[146] McCardie

[140] *Dawkins* v. *Lord Rokeby* (1873), L.R. 8 Q.B. 255, at p. 271.

[141] (1919), 35 T.L.R. 642.

[142] *Ibid.*, at p. 643: "It was a settled principle of English law that a man who without lawful authority caused another to be arrested, imprisoned or otherwise injured in his person or property was liable to an action for damages. Did that apply to the acts of military tribunals? On principle, he could see no good reason for exempting military officials from the operation of that law. . . . If the acts of military tribunals or officers with respect to military discipline were insusceptible of supervision by the civil courts, then the gravest consequences might ensue. It could scarcely be that military men were alone the interpreters of military law. If so, they became above the civil law, and so to hold would be to exclude the courts from one of their most important and beneficent functions."

[143] *Ibid.*, at p. 643.

[144] *Ibid.*, at pp. 643-644: "He [the soldier] must accept the Army Act and Rules and Regulations and Orders and all that they involved. These expressed his obligations; they announced his military rights. To the extent permitted by them his person and liberty might be affected and his property touched. But save to that extent, neither his liberty nor his person or property might be lawfully infringed. Where, indeed, the actual rights he sought to assert were given not by the common law, but only by military law, then it might well be that in military law alone could he seek his remedy. For if a code at once provided the right and also the remedy, it might rightly be said that he must look to the code alike for the remedy and its method of enforcement. . . . If, however, the rights which he sought to assert were fundamental common law rights, such as immunity of person or liberty, save in so far as taken away by military law, then the common law right might be asserted in the ordinary courts."

[145] *Ibid.*, at p. 643.

[146] *Supra*, footnote 130.

J. pointed out that the failure in *Sutton* to recognize the distinction between acts done in excess of jurisdiction and acts done within jurisdiction had been the source of doubts as to whether civil courts would inquire at all into the exercise of military discipline.[147] He found, in effect, that the defendant's interpretation of the words of Chief Baron Kelly perpetuated an erroneous belief that had been prevalent since *Sutton*,[148] and rejected the defendant's contention. "He [his Lordship] could not think that those words were intended to bear the meaning which had so often been placed upon them." [149]

McCardie J. went on to consider whether an action would lie for injuries resulting from acts of military discipline done maliciously without probable cause within the limits of admitted jurisdiction.[150] Surely in light of the distinction made between acts done in excess of jurisdiction and acts done within jurisdiction the question as formulated reaches a legal conclusion.[151] If an action will lie in the civil courts against a military tribunal or officer only where the disciplinary measures giving rise to injury are taken without jurisdiction, then clearly the acts of military discipline done within jurisdiction will not be actionable, even if done maliciously. However, McCardie J. preferred to allow "a vast weight of judicial authority" [152] to decide whether the action would lie. He examined the treatment of the question in the cases of *Fraser* v. *Hamilton* [153] and *Fraser* v. *Balfour*.[154] In the former case a commander in the navy who had been compulsorily retired brought an action against the Second Sea Lord of the Admiralty alleging (a) false imprisonment and (b) malice in causing him to be retired. The latter part of the statement of claim was struck out by the judge at chambers as disclosing no reasonable cause of action. The Court of Appeal (Lord Cozens-Hardy M.R.

[147] *Ibid.*, at p. 644: "*Sutton* v. *Johnstone* had been the fountain of unceasing ambiguity."

[148] This erroneous belief should have been dispelled by the case of *Grant* v. *Gould* (1792), 2 Bl. H. 69, 126 E.R. 434, decided six years after *Sutton*. In *Grant*, Lord Loughborough, who, together with Lord Mansfield, had been responsible for the dictum in *Sutton*, affirmed (at p. 450) the general principle that courts martial are subject to the control of the civil courts, and can be prohibited if they exceed their jurisdiction.

[149] *Supra*, footnote 141, at p. 644.

[150] *Ibid.*, at p. 644: "The great question which had been at issue for more than 130 years . . . ."

[151] See Wright, Cases On The Law of Torts (2nd. ed., 1958), p. 17: "Frequently we loosely say that A has a 'right' to B's performance of an agreement. If we do this, however, we have left the bare facts, brought in the law, and reached a certain legal conclusion."

[152] *Supra*, footnote 141, at p. 645.

[153] (1917), 33 T.L.R. 431 (C.A.)

[154] (1918), 34 T.L.R. 134 (C.A.), 502 (H.L.), 87 L.J.K.B. 1116 (H.L.).

and Lord Justice Scrutton) approved of this decision and dismissed the appeal, observing that acts of military discipline, if done within jurisdiction, were not actionable on the ground that they had been performed maliciously and without reasonable and probable cause. Shortly after *Fraser* v. *Hamilton* was decided, Admiral Hamilton died and the action abated. Commander Fraser then brought an action against Mr. Balfour and the First Lord of the Admiralty. The claim of malicious exercise of authority was struck out by the judge at chambers on the ground that the point was covered by the earlier decision of the Court of Appeal in *Fraser* v. *Hamilton*; and this holding was affirmed by the Court of Appeal, which included Lord Justice Scrutton. The House of Lords ruled that the claim for the malicious exercise of authority raised a question which was still open in the House of Lords. "It involves constitutional questions of the utmost gravity, and a decision upon it should be given only when the facts are before the House in a complete and satisfactory form." [155] The action did not proceed further. Presumably, in light of the refusal of the House of Lords to decide the point, what was said in the Court of Appeal in both cases upon the question can be regarded only as strong dicta. Nevertheless, McCardie J. said that in his opinion the question was not open to the Court of Appeal nor, *a fortiori*, was it open to him as a judge of first instance.[156]

Why did McCardie J. prefer to rely on "the vast preponderance of authority" [157] instead of using the vital distinction between acts done within and acts done without jurisdiction which he pointed out when considering whether the civil courts would inquire at all into the exercise of military discipline? He was faced in *Heddon* with two conflicting lines of thought on a question which is ultimately one of policy. Lords Mansfield and Loughborough based their opinion that there is no cause of action for the malicious exercise of military discipline on the paramount importance of the preservation of discipline, and the necessity of freedom from the fear of vexatious actions at law. Only military tribunals, they contended, were capable of appreciating the exercise of discipline within the military community.[158] The influence of the other line of thought is seen in the judgment of McCardie J. in *Heddon*. In considering whether civil courts will inquire at all into the exercise of military discipline, he stated that ". . . he

[155] *Ibid.*, at p. 1118, per Lord Finlay L.C.
[156] *Supra*, footnote 141, at p. 645.
[157] *Ibid.*, at p. 645.
[158] *Sutton* v. *Johnstone*, *supra*, footnote 130, at p. 1246.

could not think that discipline would be the less readily exerted or the less loyally accepted if it were subject all times to the limitations created by the military law itself. He yielded respectful assent to the cogent and eloquent words spoken on this point by Chief Justice Cockburn in his dissenting judgment in *Dawkins* v. *Paulet*".[159] *Dawkins* v. *Paulet*[160] was an action for an alleged libel written by the plaintiff's commanding officer in a letter which he sent to the adjutant-general of the army. In that case Cockburn C.J. said:[161]

> I cannot bring myself to believe that officers in command would hesitate to give orders which a sense of duty required . . . from any idle apprehension of being harassed by vexatious actions. Men worthy to command would do their duty . . . and would trust to the firmness of judges and the honesty and good sense of juries to protect them in respect of acts honestly, though possibly erroneously, done under a sense of duty.

The dissenting judgment of Cockburn C.J. dealt, however, not with the question of whether the civil courts would inquire into the exercise of military discipline, but with the question of whether an action would lie for malice shown in the ordinary course of military duty. In his judgment, he drew a distinction between legitimate exercises of the powers given by military law and acts which are an abuse of these powers, and considered that the civil courts would inquire into the latter.[162] One of the cases he relied upon was *Wall* v. *McNamara*.[163] In that case an action for false imprisonment was brought by a captain in the Africa Corps, against the Lieutenant-Governor of Senegambia. There was a verdict for the plaintiff, with £1000 damages. The direction of Lord Mansfield to the jury was in striking contrast to his judgment

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[159] *Supra*, footnote 141, at p. 644.

[160] (1869), L.R. 5 Q.B. 94.

[161] *Ibid.*, at p. 108.

[162] *Ibid.*, at pp. 108-109. Cockburn C.J., at p. 103 approved the judgment of Eyre B. in *Sutton*, and quoted the following at p. 104: ". . . it may not be fit, in point of discipline, that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the mast-head: but if the superior were to order him thither, knowing that, from some bodily infirmity, it was impossible he should execute the order, and that he must infallibly break his neck in the attempt, and it were so to happen, the discipline of the Navy would not protect that superior from being guilty of the crime of murder. And one may observe in general, in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the extent of power, and touching the abuse of it. Cases may be put of situations so critical that the power ought to be unbounded: but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of Government, that it is equally impossible to state a case where it can be abused with impunity."

[163] (1779), cited in *Sutton* v. *Johnstone*, *supra*, footnote 130, at pp. 536 (T.R.), 1239 (E.R.).

in *Sutton*.[164] He told the jury that:[165] "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is how the heart stood. And if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But on the other hand, if the heart is wrong, if cruelty, malice and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape . . . from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trusts." It was admitted that the plaintiff was to blame for leaving his post. "But supposing it to have been the defendant's duty to call him to a military account for his misconduct, what apology is there for denying him the use of the common air in a sultry climate, and shutting him up in a gloomy prison, where there was no possibility of bringing him to a trial for several months . . . . These circumstances . . . are sufficient for you to presume a bad malignant motive in the defendant, which would destroy his justification had it even been within the powers delegated to the defendant by his commission."

The substance of the reasoning of Lord Mansfield in *Wall*,[166] of Baron Eyre in *Sutton*,[167] and of Chief Justice Cockburn in his dissenting judgment in *Dawkins* v. *Paulet*[168] is that once malice is proved, acts of military discipline done in the course of duty are considered to have been done in excess of jurisdiction. Clearly this is a misuse of the concept of jurisdiction. Once it has been shown that the military relationship exists, malicious use of authority conferred by military law will not justify granting an action in the civil courts.[169] In *Dawkins* v. *Paulet* Mellor J. pointed

[164] Holdsworth, *op. cit.*, footnote 129, at p. 225.
[165] *Ibid.*
[166] *Supra*, footnote 163.
[167] *Supra*, footnote 130.
[168] *Supra*, footnote 160.
[169] *Dawkins* v. *Paulet*, *ibid.*, at p. 114, per Mellor J: "I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty, and not the motives from or under which it is done. In short, it appears to me, that the proposition resulting from the admitted statements on

out that:[170]

> . . . special amode of redress for all officers in the army who consider themselves wronged by their superior officers in relation to the discipline and government of the army is expressly provided by the articles of war, and in that view how inconsistent it would be that the judgment of a military tribunal, familiar with the question, should be liable to be reversed, and a different result obtained by the verdict of a jury in an action at law upon the very same facts?
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> . . . [The Attorney General] argued that the plaintiff . . . , if he had ground of complaint . . . , was bound to make it to the tribunal specially provided by the mutiny act and articles of war relating thereto; and that it was the only tribunal to which a military officer could appeal in respect of such matters. There is no doubt that the 12th section of the articles of war does provide: "That if any officer shall think himself wronged by his commanding officer, and shall upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding-in-chief of our forces in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our secretary of state of war, to make his report to us thereupon in order to receive our further directions." . . . It would seem to follow from the provisions thus made by the articles of war for a special mode of redress for every officer who may think himself wronged by his commanding officer, that it was intended that every officer aggrieved by any order or report made in the course of the administration of the army must follow the special mode of redress pointed out in the articles of war, and that in respect of any grievances or complaint arising out of such administration, he can have no redress in any other way.

Lush J. was of the same opinion:[171]

> It is to be observed that the letters complained of reflect on the plaintiff in his capacity of military officer, and in that capacity only. They affect his character, not as a citizen, but as a soldier, and they were written, not for circulation amongst the public, nor to a private individual, but to the proper military authority, and for the purpose of originating an inquiry into the competence of the plaintiff.
> . . . If . . . the jurisdiction claimed for this Court by the plaintiff exists, it must be derived from the act by which the army is created and governed. No such jurisdiction is given in terms, and so far from its being conferred by implication, I think it clear that the intention of the legislature was to exclude the interference of the courts of law, and to confine all matters of complaint of a purely military character to the military authorities. For the mutiny act, supplemented by the articles of war, constitutes what purports to be a complete military code. It professes to deal with the whole military conduct of every soldier, and in every department of the service. It provides rules for

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this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not . . . ."

[170] *Ibid.* [171] *Ibid.*, at pp. 120-122.

> the protection of the subordinate against his superior officer, as well as for due subordination; for the redress of grievance, as well as the punishment of offences; and appropriate tribunals are constituted for administering and enforcing these provisions. [His Lordship referred to the 12th section of the articles of war.] Can it be reasonably inferred that any other mode or measure of redress was intended by the act than that which is specified in this article? It is no argument to say that the remedy is imperfect, because no pecuniary compensation is given to the injured party. That defect, if it be one, is a defect in the code itself, which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military, to which he engaged to submit when he entered the service, entitles him to have. The same code creates both the right and the remedy, and this Court cannot add to the one or to the other.

It is submitted that the reasoning of the majority in *Dawkins* v. *Paulet* would be followed in Canada, where Queen's Regulations provide a comprehensive redress of grievance procedure for officers and men.[172]

The attractiveness of the argument that once malice is proved acts of military discipline done in the course of duty are considered to have been done in excess of jurisdiction was felt by McCardie J. in *Heddon*.[173] In that case he was of the opinion that the power of the civil courts to inquire into the exercise of military discipline in order to protect fundamental common law rights would not cause military discipline to suffer. He could not fail to have been sympathetic to the contention that a right of action existing only where malicious intent could be proved would not be detrimental to discipline and would be in harmony with the principles of the common law. And, if accepted, the argument that malice justifies granting an action in the civil courts seemed to allow a decision based on the vital distinction between acts done within and acts done without jurisdiction. Faced with this ingenious argument, McCardie J. preferred to rely on a "vast preponderance of authority".[174] Presumably, then, in the unlikely event that an action is

[172] Arts 19.26 and 19.27.

[173] *Supra*, footnote 141.

[174] *Heddon* v. *Evans*, *ibid.*, at p. 645: "The first conclusion [that a military tribunal or officer will be liable to an action for damages if when acting in excess of, or without, jurisdiction, it or he does, or directs to be done, to a military man, whether officer or private, an act which amounts to assault, false imprisonment, or other common law wrong, even though the injury purports to be done in the course of actual military discipline] seems, I think, to be reasonably clear from the authorities *as well as upon principle*.

The second conclusion [that if the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline no action will lie upon the ground only that such act has been done maliciously and without reasonable and probable cause] seems to be fully established by . . . a vast weight of judicial authority." (Italics mine)

And again:

ever given in the civil courts for the malicious exercise of authority within military jurisdiction, it will be based on "a vast weight of judicial authority", rather than a misuse of the concept of jurisdiction.

"It is my duty to follow the vast preponderance of authority on this point, whatever my own opinion may be or can be in the matter." Presumably his decision on the basis of authority does not necessarily represent his opinion on principle.