Civilians Under Military Justice: A Canadian Study

Michele A. Pineau*

I. Introduction

Military law in Canada applies not only to service personnel but also to large numbers of civilians accompanying the Canadian Armed Forces outside Canada. Traditionally, "camp followers" included servants, pedlars, and other suppliers of wares. Since the Second World War, this description has applied to a more limited class of civilians, particularly families who accompanied military units engaged in peacekeeping operations abroad. Consequently, when the *National Defence Act*[1] was promulgated in 1950, it was considered proper to place persons "serving with" and "accompanying" the armed forces under the jurisdiction of the military tribunals when outside Canada. The status of civilians under military law has changed very little over the years in spite of amendments in 1954[2] designed to limit and define the ambit of military jurisdiction. This paper proposes to study the implications of military justice for civilians accompanying and serving with the armed forces outside Canada.

II. Contemporary sources of Canadian military law

A. *The National Defence Act*

Prior to 1950, military law in Canada was based primarily on the following British and Canadian statutes: the *Army Act, 1881*,[3] the *Air Force (Constitution) Act, 1917*,[4] *An Act respecting the Militia and Defence of the Dominion of Canada*,[5] *The National Defence Act, 1922*,[6] *The Royal Canadian Air Force Act*,[7] and *The Naval*

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* B.C.L., McGill University.

1 S.C. 1950, c. 43, now R.S.C. 1970, c. N-4. To avoid confusion, it should be noted that the section numbers differ from the 1950 statute to the 1970 revision. All subsequent references will be to R.S.C. 1970, c. N-4.

2 S.C. 1953-54, c. 13.

3 44-45 Vict., c. 58 (U.K.).

4 7-8 Geo. V, c. 51 (U.K.) as am.

5 S.C. 1868, c. 40.

6 S.C. 1922, c. 34.

7 S.C. 1940, c. 15.

Service Act, 1944.[8] After World War II, the federal Parliament terminated the application of British legislation by enacting the *National Defence Act* which amalgamated into one statute all legislation relating to the Canadian Forces. It featured, among other things, a single code of discipline for all individuals subject to the Act[9] and provided civilian courts of appeal with the right to review the findings of military tribunals.[10]

Part IV of the Act, concerning the disciplinary jurisdiction of the services, is of particular interest. At the time of its enactment, it applied in a general fashion to immediate dependents and to civilian employees who signed an agreement consenting to subject themselves to the *Code of Service Discipline*. It should be noted that these provisions applied only outside Canadian territory; while in Canada, all civilians came under the jurisdiction of ordinary civil courts.

In 1954, substantial amendments to the Act[11] defined more precisely the jurisdiction of service tribunals. A review of the House of Commons Debates for that period provides interesting insights into these amendments.[12] According to statements made in the House by the then Minister of National Defence, these changes were designed to establish the conditions under which persons accompanying the forces would be subject to the *Code of Service Discipline* — that is, to limit rather than extend the jurisdiction of the *National Defence Act*. In discussion pursuant to questions from Honourable Members of the House, it became clear that:

(1) the application of the *National Defence Act* would not be obligatory;[13]
(2) the dependents would be tried by a civilian judge or barrister;[14]
(3) the *National Defence Act* was not to apply to petty offences "such as traffic offences and so on";[15] and
(4) civilian employees would always be tried under Canadian civil law.[16]

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[8] S.C. 1944-45, c. 23.
[9] R.S.C. 1970, c. N-4, Pts IV-X.
[10] *Ibid.*, Pt IX.
[11] S.C. 1953-54, c. 13.
[12] [1954] 2 H.C. Deb. 2008-12.
[13] *Ibid.*, 2011.
[14] *Ibid.*, 2012.
[15] *Ibid.*, 2010.
[16] *Ibid.*, 2011.

The Minister emphasized that these procedures were not being instituted for the purpose of acquiring jurisdiction generally, but rather to acquire it in countries where the interests and protection of civilians were at stake. As will be illustrated throughout this study, the original intention of the legislators to limit the scope of application of the *National Defence Act* with respect to the above points no longer appears to be valid.

B. *The Queen's Regulations and Orders to the Canadian Forces*

Pursuant to section 12(1) of the *National Defence Act* and under the authority of the Governor General in Council, a complete and detailed set of regulations have been consolidated into what is familiarly known as the Queen's Regulations and Orders.[17] These are divided into administrative, disciplinary, and financial parts. The second part, consisting of chapters 101 to 117 of the QR&O, incorporates the disciplinary, regulatory, procedural, and explanatory material relating to the *Code of Service Discipline*. Also included are ministerial orders and instructions from the Governor General in Council, the Minister of National Defence, and the Chief of Defence Staff as well as a number of appendices including the *National Defence Act*, the *Military Rules of Evidence*,[18] and other agreements affecting the application of the Code. Annotations at the end of each section, although they do not have force of law, cannot be lightly disregarded.

In practice, the *Code of Service Discipline* and the QR&O are often used interchangeably and both are meant to refer to the whole body of military law. The *Code of Service Discipline* technically refers to Parts IV to X of the *National Defence Act*, whereas the QR&O regulate the application of the *National Defence Act* and the *Regulations* enacted thereunder. The *National Defence Act* and the QR&O create service offences and incorporate selected Canadian legislation and foreign law. For the civilian accompanying the Canadian Armed Forces abroad, the QR&O replace Canadian civil and criminal law to become the only Canadian law applicable to camp followers abroad.

C. *International agreements*

There are a number of treaties to which Canada is a signatory that affect members of the Canadian Forces serving abroad, their

[17] Hereinafter referred to as QR&O.
[18] P.C. 1959-1027 of Sept. 9, 1959, SOR/59-310, 93 Can. Gaz. Pt II 769.

dependents, and other civilians attached to the service. The 1951 Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces[19] defines *inter alia* the jurisdiction of civil courts and of service tribunals in countries which host visiting military forces. Along with the *National Defence Act*, this agreement governs Canadians stationed in the following signatory countries: Belgium, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Great Britain and Northern Ireland, and the United States.

In 1959, the NATO-SOFA was supplemented by an Agreement with respect to Foreign Forces stationed in the Federal Republic of Germany.[20] This agreement is of vital importance in determining the status of camp followers in the Federal Republic of Germany since they are the largest group of civilians attached to Canadian Forces units overseas.

III. Content of Canadian military law

A. *Who is covered*

As stated earlier, in addition to military members of the Canadian Forces, the *Code of Service Discipline* is made applicable to certain classes of civilians outside Canada as enumerated in section 55 of the *National Defence Act*:

> (1) The following persons, and no others, are subject to the Code of Service Discipline: ...
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> (f) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place; ...
>
> (j) a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby he agreed to be subject to that Code.
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> (2) Every person subject to the Code of Service Diseipline under subsection (1) at the time of the alleged commission by him of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that he may have, since the commission of that offence, ceased to be a person mentioned in subsection (1).

These civilians fall into three major categories: civilian employees, dependents, and individuals under continuing liability for previous offences. The effect of this section is to give jurisdiction over non-

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[19] 199 U.N.T.S. 67 [hereinafter referred to as the NATO-SOFA].

[20] 481 U.N.T.S. 262 [hereinafter referred to as the Supplementary Agreement].

military persons to military courts under the authority of the Judge Advocate General.

1. The three categories

Under section 55(1)(j), persons "serving with the Canadian Forces under an engagement" voluntarily agree to be governed by military law while in the employ of the Department of National Defence, as a condition of employment. This group includes elementary and secondary school teachers who instruct the children of members of the Canadian service, language teachers, and meteorologists among others. A notable exception are the employees from other federal government departments who may be temporarily attached to the Department of National Defence. Subjection to the *Code of Service Discipline* is not within the terms of their employment and, as a consequence, they come within the jurisdiction of the law of the country where they serve.

The largest group falls under section 55(1)(f) and includes persons who accompany any unit or element of the forces. Under section 55(4):

> 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...
>
> (c) is a dependant outside Canada of an officer or man serving beyond Canada with that unit or other element....

When the *National Defence Act* was first passed, this class of individuals was not included. Dependents were subject to local tribunals in the countries in which they were posted. The establishment of Canadian Armed Forces bases outside Canada as part of NATO peacekeeping operations brought about legislation to regulate the status of the visiting forces and their families. The following statement made by the Minister of National Defence in the House of Commons at the time of the amendment concerning dependents best explains the situation:

> It is not intended that the services will in fact exercise jurisdiction over civilians unless it is absolutely essential or in the best interests of the civilians themselves that they do so. Within Canada the civil courts, by virtue of the National Defence Act, will continue to be supreme and have the power to supplant the jurisdiction of service courts and themselves to try persons accused of any offence against the criminal law of Canada.
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> The legislation is being introduced at the present time as it is important for the protection of dependents and other civilians accompanying the forces abroad that the extent to which they are subject to Canadian jurisdiction be clearly defined. In other words, we are trying to create

> the necessary machinery to exercise maximum jurisdiction under all existing agreements and laws that we can acquire to ourselves in regard to our people abroad.
>
> The arrangements made by Canada with a number of the countries in which our forces are or may be stationed enable Canadian criminal law and procedures to be applied in respect of persons accompanying our forces as an alternative to having the criminal law and procedures of the country in which an alleged offence has been committed applied. In order to secure the benefits of these arrangements we must not only be in a position — I think this is the important fact about this clause — to exercise effective jurisdiction over such persons but it must also be clear to the authorities of the foreign country that we have and can exercise such jurisdiction.[21]

It is notable that dependents are the only group to which the Code applies (excluding an alleged spy for the enemy) where there is no element of real consent to the jurisdiction of military law. This is contrary to the situation of service personnel who accept this extra liability as part of their employment and that of other civilians who normally sign specific agreements and contracts.

The third and final group to which the *National Defence Act* applies are those who, no longer having any relationship with the Department of National Defence, remain subject to the *Code of Service Discipline* because of an alleged offence committed before leaving the forces.[22] This applies to both civilians and discharged military personnel. Thus the Code may remain applicable to an offender even though, between the time of the offence and the trial, he has ceased to be subject to it. However for most offences, there is a limitation period of three years from the date of the offence to the commencement of trial. Nevertheless, for an offence which would carry with it the death penalty under the Code,[23] there is a continuing liability. In the United Kingdom, the classification of camp followers is similar. However, in the United States, the Supreme Court has held that the jurisdiction of military courts ends when a serviceman is released from the forces.[24]

2. Jurisdiction

The NATO-SOFA defines a "dependent" as "the spouse of a member of a force or of a civilian component, or a child of such

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[21] *Supra,* note 12, 2009-10.

[22] R.S.C. 1970, c. N-4, s. 55(2).

[23] *Ibid.,* s. 59; but see *R.* v. *Mallard* S.C.M., Feb. 11, 1975. [Note: all S.C.M. and S.G.C.M. cases are unreported and are available in transcript form from military authorities.] It is interesting that the death penalty still exists under the *National Defence Act* [R.S.C. 1970, c. N-4, s. 125(1)] and applies to civilians by virtue of the QR&O, art. 113.03.

[24] *Toth* v. *Quarles* 350 U.S. 11 (1955).

member depending on him or her for support".[25] The Supplementary Agreement widens the above definition to include:

> A close relative of a member of a force or of a civilian component not falling within the definition contained in subparagraph (c) of paragraph 1 of Article I of the NATO Status of Forces Agreement who is financially or for reasons of health dependent on, and is supported by, such member, who shares the quarters occupied by such member and who is present in the Federal territory with the consent of the authorities of the force shall be considered to be, and treated as, a dependent within the meaning of that provision.[26]

The QR&O has its own definition:

> (a) his spouse; and
> (b) any other person wholly or mainly maintained by him or in his custody, charge or care.[27]

The definition of the QR&O may be considered narrower in its terms, in view of the Department of National Defence's policy to consider a "spouse" as being the legal spouse, and children as the only legal dependents of service personnel.

When a legal spouse, a "dependent", or a civilian employee who has signed a service agreement is charged with an offence on West German soil he may be arrested by West German authorities. To decide under which jurisdiction the offence is punishable, the authorities dealing with the case will notify Canadian military authorities who must advise within twenty-one days whether the act is punishable under Canadian law, and if so, the legal basis on which the act is punishable as well as the penalty prescribed.[28] Jurisdiction to try the offence is then decided in accordance with Article VII of the NATO-SOFA.[29] Generally the host state has jurisdiction over acts committed within its borders and punishable by its own laws, while the sending state has jurisdiction over acts committed within its territory and punishable under its laws.

The laws of the state of posting are incorporated into Canadian military law by virtue of section 121 of the *National Defence Act.* Therefore, in the case of civilians who accompany the Canadian Forces, there would be a concurrent jurisdiction. In such a case the NATO-SOFA provides the following rules:

> (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

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[25] 199 U.N.T.S. 67, Art. I(1)(c).
[26] 481 U.N.T.S. 262, Art. 2(2)(a).
[27] QR&O, art. 105.05.
[28] 481 U.N.T.S. 262, Art. 17.
[29] 199 U.N.T.S. 67.

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.[30]

Hence one of two situations may arise. Where Canada has primary jurisdiction, the case will be disposed of by a Canadian service tribunal and the results communicated to the appropriate foreign authorities.[31] When an accused has been so tried and acquitted, or has been convicted and has served his sentence, or has been pardoned, he may not be tried again for the same offence by the authorities of the host state.[32] Where Canada has concurrent jurisdiction, Canadian authorities may request West German authorities to waive their primary right to prosecute.[33] Provisions exist under both agreements to expedite the disposal of offences; and in practice, West German jurisdiction over Canadian civilians has always been waived.[34]

A second group of civilians includes those working for an armed forces unit who have not agreed to be governed by the *Code of Service Discipline,* common law spouses or other persons cohabitating with (but not legally related to) military personnel, and relatives visiting service personnel abroad. Although this hybrid group may be covered by the provisions of the NATO-SOFA and the Supplementary Agreement, they do not fall under the *Code of Service Discipline* according to the QR&O.

When such persons are accused before the laws of the host country, Canadian military authorities will be notified. However, unlike the situation of other civilians attached to a military component, Canadian authorities must decline jurisdiction since they are not in a position to apply the *Code of Service Discipline* to these individuals. With no alternative but to appear before the host tribunals, these persons' only recourse lies in the following provisions of the NATO-SOFA:

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[30] *Ibid.*, Art. VII (3).

[31] *Ibid.*, Art. VII (6)(b).

[32] *Ibid.*, Art. VII (8).

[33] Supplementary Agreement, 481 U.N.T.S. 262, Art. 19(1).

[34] *Ibid.*, Art. 19(3) provides that a waiver once granted may be recalled where "major interests of German administration of justice make imperative the exercise of German jurisdiction".

> Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled
> (a) to a prompt and speedy trial;
> (b) to be informed, in advance of trial, of the specific charge or charges made against him;
> (c) to be confronted with the witnesses against him;
> (d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
> (e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
> (f) if he considers it necessary, to have the services of a competent interpreter; and
> (g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.[35]

Upon careful reading of these provisions it becomes obvious that these protections are of a tenuous nature. There is no definition of "prompt and speedy" and nothing that ensures the opportunity to cross-examine witnesses. Furthermore the accused must bear the expense of an interpreter which in practice is prohibitive. Finally, freedom to communicate with one's own government does not guarantee a fair trial.

B. *Offences*

While the preceding section has established the legal basis for jurisdiction over the person, this section analyses the foundations for jurisdiction over the offence. In the *National Defence Act*, three main sections incorporate or create offences which apply to civilians:

(1) the general provision — section 119;
(2) offences against Canadian laws — section 120; and
(3) offences against foreign law — section 121.

A "service offence" is defined in section 2 of the *National Defence Act* as an "offence under this Act, the *Criminal Code*, or any other Act of the Parliament of Canada committed by a person while subject to the Code of Service Discipline".[36]

1. Scope of the service offence

Section 119 provides:

> Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence... .

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[35] 199 U.N.T.S. 67, Art. VII (9).
[36] R.S.C. 1970, c. N-4, s. 2.

Subsection 119(3) further provides that the contravention by any person of:

> (a) any of the provisions of this Act;
> (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof; or
> (c) any general, garrison, unit, station, standing, local or other orders,
> is an act, conduct, disorder, or neglect to the prejudice of good order and discipline.

Although worded to be particularly applicable to service personnel, this is the first major category of liability for civilians under the *National Defence Act* and is comparable to provisions in many of the world's military codes. Here the word "neglect" refers to a failure to perform a duty imposed by law, practice, or custom, of which the accused knew or ought to have known. The words "good order" are sufficiently wide to include almost any disturbance or act prejudicial to good order and discipline. There is a restriction, however, in that the act must be prejudicial to both good order and discipline. The justification for such a blanket provision would appear to be based on the principle that dependents overseas are part of the military community and as such, they accept military control.[37]

The QR&O state that:

> Where a contravention mentioned in subsection (3) is the basis of a charge, all that the prosecutor needs to prove is:
> (i) that the alleged contravention actually occurred, and
> (ii) in the case of a breach of regulations, orders or instructions under (3)(b) or (c), that the regulation, order or instruction was issued and was published in the manner prescribed. ...
> Upon proof by the prosecutor that the regulation, order or instruction was issued and promulgated in the manner so prescribed, the accused is deemed to have knowledge of its contents, and it is no defence for him to say that he was unaware of its existence or was ignorant of its contents.[38]

Typical matters which might commonly be charged and alleged under this section are improperly possessing property without evidence of actual theft, giving a false name to a military policeman, or driving a motor vehicle while not in possession of a driver's licence.[39] As a result, when a civilian is charged under section 119,

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[37] Fay, *Canadian Military Criminal Law* (1974) (unpublished thesis, Dalhousie University), 39.

[38] QR&O, art. 103.60, n. (D).

[39] *R.* v. *Johnson* S.G.C.M., Oct. 1, 1974; *R.* v. *Winterton* S.G.C.M., Mar. 25, 1975.

the service tribunal applies its general *military knowledge* of what "good order and discipline" are required in given circumstances and decides whether the conduct, disorder, or neglect complained of was prejudicial to *both* good order *and* discipline.

2. Offences against other Canadian law

Section 120 of the *National Defence Act* provides:

> (1) An act or omission
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> (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 and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

The effect of this section is to designate all civil and criminal offences described in federal statutes as service offences. Under the *National Defence Act,* acts proscribed by provincial statutes (for example, a highway act) are not service offences and cannot be tried by service tribunals. Section 119, however, would allow a comparable offence to be created in relation to the territory of a Canadian Forces base. It may be noted that in section 120(1)(b) of the *National Defence Act,* the *Criminal Code*[40] and federal acts of Parliament are complementary. Thus an act which would not be an offence under the *Criminal Code* may be an offence under the *National Defence Act.* The wide scope of this provision is illustrated by the following example. Under section 158 of the *Criminal Code,* homosexual acts between consenting adults no longer constitute offences. However, under section 83 of the *National Defence Act,* any civilian behaving in a "disgraceful manner" could be so charged:

> Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding 5 years or to less punishment.

3. Offences against foreign law

Foreign offences are of special interest in view of their unique Canadian application to civilian dependents and service workers posted abroad. The *National Defence Act* incorporates foreign offences under section 121 — a provision that is peculiar to Canadian military law:

> An act or omission that takes place out of Canada and would, under the law applicable in the place where the act or omission occurred, be an offence if committed by a person subject to that law, is an offence

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[40] R.S.C. 1970, c. C-34 as am.

> under this Part, and every person who is found guilty thereof is liable to suffer punishment as provided in subsection (2).

Thus an act or omission which would be an offence under the law of the country where the civilian is stationed is an offence under the *Code of Service Discipline* even though it would not be an offence under any law of Canada. The effect of this provision is to include in military law all the offences of any country where troops happen to be stationed.

In terms of contemporary military codes this section is unusual. Neither Britain nor the United States has made foreign law a part of its military law. Thus the military tribunals of these countries only have jurisdiction if the act or omission complained of is also an offence under the laws of their country. The original *National Defence Act* did not provide for the incorporation of foreign offences into Canadian military law. Indeed, no such provision existed in any of the acts on which Canadian military law is based.

This provision was imposed in two stages. The section creating these offences was enacted in 1952[41] when Canadian troops were first dispatched outside Canada for lengthy peacetime service. The reason for this enactment was to ensure that offences against foreign law could be adequately dealt with by Canadian service courts, and that service personnel would not be tried by foreign courts — memories of World War II were still vivid in Canadian minds. Dependents and other civilians were later included under this provision by the 1954 amendments to the *National Defence Act*.[42]

It is important to note the difference between section 121 of the *National Defence Act* and section 6(2) of the *Criminal Code* with regard to employees of the Public Service who commit offences while serving outside Canada:

> Every one who, while employed as an employee within the meaning of the *Public Service Employment Act* in a place outside Canada, commits an act or omission in that place and that, if committed in Canada, would be an offence punishable by indictment, shall be deemed to have committed that act or omission in Canada.[43]

Therefore, under the *Criminal Code*, to be prosecuted under Canadian law, public servants not under military jurisdiction (for example, those working for the Department of External Affairs) would have to commit an indictable offence under Canadian law.

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[41] S.C. 1952-53, c. 24, s. 5(1).
[42] S.C. 1953-54, c. 13, s. 16.
[43] *Criminal Code*, R.S.C. 1970, c. C-34, s. 6(2).

It is interesting that civilian employees of the Department of National Defence are covered by the terms of the *Public Service Employment Act*[44] and would, if the *National Defence Act* were not applicable, normally come under the provisions of section 6(2). Nevertheless they have been excluded from the narrower head of liability by the much broader provisions of the *National Defence Act.*

For comparison's sake, it is equally relevant to look at section 5(2) of the *Criminal Code* which states:

> Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada.

Thus the *National Defence Act* considerably extends the liability of persons under the *Code of Service Discipline,* compared to that of the ordinary citizen abroad, by giving military courts the jurisdiction to try persons subject to the Code even when such persons would not normally be tried in Canada.

Notwithstanding these very wide provisions, section 231 of the *National Defence Act* does provide a reserve authority whereby Canadian criminal courts may step in when military service tribunals have proved inadequate in a given situation:

> Where a person subject to the Code of Service Discipline does any act or omits to do anything while outside Canada which, if done or omitted in Canada by that person would be an offence punishable by a civil court that offence is within the competence of, and may be tried and punished by, a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.

It is debatable whether any of the provisions of the *National Defence Act* should be applicable to any civilian employee or dependent in light of pertinent provisions of the *Criminal Code.* Section 4 provides in relation to the Canadian Forces:

> Nothing in this Act affects any law relating to all or any of the Canadian Forces.

Section 2 defines "military" as follows:

> "military" shall be construed as relating to all or any of the Canadian Forces;
>
> "military law" includes all laws, regulations or orders relating to the Canadian Forces;

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[44] R.S.C. 1970, c. P-32 as am. See the definitions of "employee" and "Public Service" in s. 2 which should be read with the provisions of the *Public Service Staff Relations Act,* R.S.C. 1970, c. P-35 as am.

> "Canadian Forces" means the armed forces of Her Majesty raised by Canada [.]

The question here is: Are civilians part of the "Canadian Forces" or "armed forces"? Since criminal law must be interpreted restrictively, it is a moot point whether the terms "military" and "armed forces" can be extended to include civil employees and dependents. This is reinforced by the fact that the definitions in the *National Defence Act* clearly separate civilians from enlisted personnel by stating that they "serve with" or "accompany" the armed forces as opposed to forming "part of" the armed forces. Another view is that Canadians abroad should be subject to the laws of the foreign land insofar as they are almost like citizens due to the length of their postings; in addition, a country's apparent desire to "protect" its citizens from allies would be difficult to justify in diplomatic circles.

A further difficulty in applying the *National Defence Act* to civilians lies in the fact that the provision incorporating foreign law offences only takes into Canadian law the foreign offence itself and none of the procedural laws that may surround such an offence in the foreign state. As a result, Canadian military courts are put in a position where they must enforce a foreign law without its accompanying detail.

In summary, it has become clear that civilians fall under a triple disability; not only are they subject to the laws of Canada, they are also liable under the laws of the host country and under those offences created by the *National Defence Act*. The global effect of these provisions is that it is incredibly easy to come under one or another of the provisions in some way; for an act which is not an offence in Canada might be one in the host country, and if not, it might still fall under the blanket provisions of section 119.

No attempt will be made at this point to pass judgment on the desirability of these conditions. Suffice it to say that the limitation of jurisdiction contemplated by Parliament in amending the *National Defence Act* in 1954 seems to have had quite an opposite effect. The situation might be said to have a limiting effect if a civilian came under the laws only of Canada, or only those of the host state, or only those created under the *National Defence Act*. But rather, as it stands in 1979, civilian dependents and employees come under all three.

C. *Penalties*

"Only those punishments prescribed in paragraphs 125(1)(a), (b), (d), and (k) of the *National Defence Act* shall be imposed by a Special General Court Martial"[45]:

125(1) (a) death;
(b) imprisonment for two years or more;
(d) imprisonment for less than two years;
(k) fine [.]

The particularities of sentence and punishment are contained in sections 125 to 127. In practice, the authority of a Special General Court Martial to prescribe punishment has been limited to terms of imprisonment of less than two years and fines up to $500. However, "[a] civilian may only be committed to undergo imprisonment in a service prison or detention barrack on the authority of the Chief of the Defence Staff".[46]

IV. Application of Canadian military law

A. *Rights and disabilities of civilians under the Code of Service Discipline*

At the present time, a civilian charged with an offence under the *Code of Service Discipline* while abroad does not enjoy certain of the rights he would have in Canada. For example, there are no provisions for bail, no rights regarding the type or form of trial, no realistic access to a choice of civilian counsel, no right to a jury trial, and no access to legal aid assistance. In addition, the range of sentences that may be pronounced is severely limited in comparison to that available in ordinary criminal courts. The accused, however, does benefit from certain advantages which he would not have before regular courts in that, as far as possible, the defence and prosecution are on an equal footing; with regard to the evidence produced, there are no surprises at the trial.

1. Counsel

After the convening order for a court martial has been signed, the accused has two options with respect to the selection of defence counsel. The accused may choose a legally trained officer of the Office of the Judge Advocate General[47] or he may retain civilian counsel at his own expense. In the case of a court martial where

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[45] QR&O, art. 113.04.
[46] *Ibid.*, n. (A).
[47] *Ibid.*, art. 108.26.

the accused has chosen civilian counsel, a military officer may be assigned to assist civilian counsel with administrative matters. Where the charge is one of murder, rape, or manslaughter, military defence counsel is made available immediately upon arrest. However, this does not affect the accused's right to choose a civilian attorney.

The major advantage of choosing a legally trained military officer is that such counsel will normally have far greater knowledge of the military and its administration than will civilian counsel. As Fay has noted:

> This knowledge of his, together with his close association with the military society, often results in the presentation of a defence case that is likely to be far more effective; for it will be presented within the military system instead of appearing to challenge it. Criticism of military defence counsel is sometimes based on the argument that he may not, because of his military connection, have sufficient independence to adequately represent the interests of his service accused, as would a civilian who is bound by no military considerations. This is not valid. Any military defence counsel who appears to have placed military considerations ahead of the interests of the accused will be severely criticized, and a conviction of his accused in such a case may well be quashed on the ground of miscarriage of justice. Furthermore, the reputation of counsel within the military legal fraternity is, as in civilian life, often made as defence counsel. This factor alone assures a high standard of representation.[48]

2. Access to evidence and witnesses

Prior to the commencement of trial, the accused may review all the evidence against him. He is given access to all reports which are relevant to the investigation. The accused and his counsel will discover from the synopsis[49] the identity of the witnesses as well as the evidence to be introduced. Unless suitable notice has been given before trial, all witnesses in the synopsis are required to be called by the prosecution so that defence counsel may cross-examine. At the time of trial, if such a request is reasonable, the accused may ask for an adjournment to review information presented of which he had no prior knowledge.

3. Availability of resources

Perhaps one of the greatest advantages of trial within the military system is the equalizing of resources of both the defence and prosecution. Because of this, the Canadian Forces approach has been advocated for use in the civil system to ensure equality of justice

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[48] *Supra*, note 37, 161.

[49] See text, *infra*, p. 24.

by removing the financial constraints which normally impede an investigation. The resources of the investigatory and police branches of the military become openly available to the defence. The defence may have access to experienced service investigators to locate and interview witnesses, and expenses are borne by the system. Financial and technical experts may also be appointed at the defence's request.

B. *The situation of young offenders*

Unfortunately, a major deficiency of the court martial system relates to young offenders. To date, presiding judges have chosen not to apply the provisions of the *Juvenile Delinquents Act*[50] to juvenile offenders and there are no decisions in the higher courts on this issue. It is this writer's opinion that the rationale for applying the *Juvenile Delinquents Act* is based on section 2(e) of the *Canadian Bill of Rights*.[51] In the court martial decision of *R.* v. *Mallard*,[52] the effect of the *Canadian Bill of Rights* on the *National Defence Act* was successfully raised. The principle of this decision, although it involved a serviceman, remains valid for civilians and should be made to operate to protect the rights given to juvenile offenders under the *Juvenile Delinquents Act*. In allowing a plea under section 2(e) in *Mallard*, the presiding judge held:

> I find there is nothing in the *National Defence Act* which specifically contains an express statutory declaration that its provisions shall operate notwithstanding the *Canadian Bill of Rights*. ... In my view, while I am bound to note the limitation period set out in section 59 of the *National Defence Act*, I must note it and apply it in such a way so as to ensure that the accused is not denied a right enshrined in the *Canadian Bill of Rights;* that is the right of equality before the law. In so doing I find s. 59 of the *National Defence Act* to be inapplicable to the degree it purports to set a greater limitation period for an offence contrary to the *Criminal Code* that is punishable under the *National Defence Act* than would in all events, apply to such an offence if tried under the *Criminal Code*.[53]

The discussion that follows centers on how military courts have limited the principle of section 2(e) of the *Canadian Bill of Rights* and refused to apply the *Juvenile Delinquents Act* to juveniles charged under the *National Defence Act*. The case of *R.* v. *Fey*[54] predates *Mallard* by one week and it is interesting to speculate on

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[50] R.S.C. 1970, c. J-3, as am. by S.C. 1972, c. 17, s. 2(2).
[51] R.S.C. 1970, App. III.
[52] *Supra*, note 23.
[53] *Ibid.*, 74:
[54] S.G.C.M., Feb. 4, 1975.

what might have happened had *Mallard* been decided first. It was held in *Fey* that the sixteen year old accused did not come within the ambit of the *Juvenile Delinquents Act* because that act was superseded by the provisions of the *National Defence Act*, notwithstanding the *Canadian Bill of Rights*. In the later cases of *R.* v. *Olson*[55] and *R.* v. *Arsenault*,[56] the judges chose to follow the reasoning in the *Fey* case, rather than the *Mallard* decision.[57]

In both the *Olson* and *Arsenault* decisions the accused were fifteen years of age and charged with indictable offences. In both instances defence counsel made pleas in bar of trial with reference to the rights of the accused pursuant to the *Canadian Bill of Rights* and the *Juvenile Delinquents Act*, but the motions were dismissed and the youths were subsequently found guilty at the trial. In summary, the reasons cited were that:

(1) sections 4 and 9 of the *Juvenile Delinquents Act* are matters of procedure and do not of themselves bar the trial of juveniles in a Special General Court Martial, nor do they dictate the procedures of the court;
(2) the *Juvenile Delinquents Act* does not bar the trial of *all* juveniles by courts of criminal jurisdiction;
(3) section 55 of the *National Defence Act* covers all persons accompanying the forces and is not restricted to adults only;
(4) there is no denial of equality before the law since the youths have been treated like any other juvenile dependents falling within the provisions of section 55 of the *National Defence Act*.[58]

While it is possible to accept some of the disadvantages of military trials, the decisions in *Olson* and *Arsenault* are difficult to justify. It is both surprising and unfortunate that these rulings were never appealed.

In Canada, the *Juvenile Delinquents Act* provides for an exceptional procedure with respect to all juveniles up to the ages of sixteen,

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[55] S.G.C.M., July 17, 1975.

[56] S.G.C.M., Nov. 6, 1975.

[57] The effect of *R.* v. *Mallard* would appear to have been reversed by the recently reported case of *Re Mackay & The Queen* (1977) 78 D.L.R. (3d) 655 (F.C.T.D.), where it was held that members of the armed services are subject to the provisions of the *National Defence Act* regarding trial by court martial notwithstanding the guarantee of equality before the law provided for in the *Canadian Bill of Rights*.

[58] These reasons were gleaned from the transcripts of the *Olson* and *Arsenault* decisions, *supra*, notes 55 and 56.

in most provinces, and eighteen in New Brunswick and Quebec. Thus, before a juvenile can be indicted before an ordinary court, there must be a hearing in a juvenile court:

> Where the act complained of is, under the provisions of the *Criminal Code* or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the *Criminal Code* in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it.
>
> The court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts, rescind an order so made.[59]

For the juvenile, the advantages of juvenile court are that his convictions are not recorded, punishment is more lenient, and the trial proceedings are less formal. Since the Act does not threaten to undermine the effectiveness of the *National Defence Act* (and, indeed, would only mitigate its harsh consequences on juveniles), there appears to be no valid reason to deny these advantages to Canadian juveniles abroad. Further, the *Juvenile Delinquents Act* is a federal statute and as such is incorporated under section 120 of the *National Defence Act*. In addition, it may be argued that section 4 of the *Military Rules of Evidence*[60] provides that where there is no rule of evidence on a matter before a court martial, the question is to be decided in the same manner as it would be before a civil court.

The arguments against applying the *Juvenile Delinquents Act* are based on the provisions of sections 55 and 155 of the *National Defence Act*, giving jurisdiction to Special General Courts Martial over all dependents. However, taking into account the principle enunciated in *Mallard*, there is nothing in the *National Defence Act* which contains an express statutory declaration that its provisions operate notwithstanding the *Canadian Bill of Rights*. Consequently, the *National Defence Act* cannot be interpreted to abrogate special rights conferred on juveniles under another federal statute without a specific provision to that effect.

The other argument made is that a juvenile court is a provincial court established under a provincial statute and therefore has no extra-territorial jurisdiction. This is easily defeated on the ground

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[59] R.S.C. 1970, c. J-3, s. 9.

[60] P.C. 1959-1027 of Sept. 9,1959, SOR/59-310, 93 Can. Gaz. Pt II 769.

that the *Juvenile Delinquents Act* is a federal statute which supersedes any provincial statute. Furthermore, section 38 provides:

> This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

But the overriding argument would appear to be in section 4 of the Act, which speaks of the exclusive jurisdiction of the juvenile court:

> Except as provided in section 9, the juvenile court has exclusive jurisdiction in cases of delinquency including cases where, after the committing of the delinquency, the child has passed the age limit mentioned in the definition "child" in subsection 2(1).

Section 9 deals with the situation where a juvenile court authorizes a regular or adult court (such as a Special General Court Martial) to handle the case. It follows that the *Juvenile Delinquents Act* bars all trials of juveniles by criminal courts without the prior authorization of a juvenile court. Thus it would appear that in both *Olson* and *Arsenault* the presiding judge erred in law by holding that the provisions of the *Juvenile Delinquents Act* were procedural in nature and of solely provincial application.

V. Procedure

The purpose of this section is to describe the manner in which a service court disposes of offences by way of court martial. The Judge Advocate General is appointed by the Governor in Council. He is in a unique position as a member of the armed forces who is responsible directly to the Minister of National Defence for the administration of justice and not to the Chief of Defence Staff. The Judge Advocate General and his staff, consisting of qualified legal officers, deal with all legal matters affecting the forces. Each major headquarters has a representative to serve as legal adviser to the commander. However, the supervision of military law is the most important responsibility of the Judge Advocate General and his authority extends to both service personnel and civilians. Proceedings against accused service personnel and civilians differ in several areas although the legal principles are the same. This section will focus only on those rules applicable to civilians.

The arrest of persons without warrant under the *National Defence Act* is effected under three separate provisions. Generally persons are subject to arrest as provided in section 132(1):

> Every person, who has committed, is found committing, is suspected of being about to commit, or is suspected of or charged under this Act with having committed a service offence, may be placed under arrest.

For those persons who have ceased to be subject to the *Code of Service Discipline,* section 133(3) provides in part:

> Every person who is not an officer or man, but who was subject to the Code of Service Discipline at the time of the alleged commission by him of a service offence may without warrant be arrested or ordered to be arrested by such a person as a commanding officer may designate for that purpose.

The arrest and transfer of dependents in foreign countries is covered by the special provisions of section 230:

> The dependents, as defined by regulation, of members of the Canadian Forces on service or active service in any place out of Canada who are alleged to have committed an offence under the laws applicable in such place may be arrested by such officers and men as are appointed under section 134 and may be handed over to the appropriate authorities of such place.

The QR&O provide that civilians[61] who are subject to the *Code of Service Discipline* are not liable to summary trial by a commanding officer.[62] A civilian can only be tried by a General Court Martial if the offence is a military one. Where the offence is primarily of a civilian nature, the accused must be tried by a Special General Court Martial,[63] which is held only outside Canada and consists of a presiding judge who is designated by the Minister.[64] Pursuant to section 163 of the *National Defence Act,* the accused civilian may object to the presiding judge for any reasonable cause and it is the presiding judge himself who hears and disposes of the objection. If the objection is allowed, he will adjourn and inform the officer directing the proceedings, who, in turn, will then inform the Minister. The prosecutor has no right to object to the presiding judge. The judge's decision is recorded in the minutes of the proceedings. If there is no objection, the judge swears himself in before the proceedings commence according to the oath prescribed in the QR&O.[65]

In addition to the presiding judge, the proceedings must include an individual to direct the trial of civilians by the Special General

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[61] The term "civilian" is defined in the QR&O, art. 113.01.

[62] *Ibid.,* art. 102.19.

[63] *Ibid.,* art. 113.03.

[64] The presiding judge must be or have been a judge of a Superior Court in Canada or a barrister or advocate of at least ten years' standing. See the *National Defence Act,* R.S.C. 1970, c. N-4, s. 155.

[65] QR&O, arts. 113.11 and 113.12.

Court Martial. This may be the Minister, the Chief of Defence Staff, a commanding officer or any other authority who may be appointed by the Minister.[66]

The Special General Court Martial was originally intended to give the accused the opportunity of having a "trial judge" whose background and experience would be comparable to a criminal court judge. However, a review of Special General Court Martial transcripts shows that generally a representative of the Judge Advocate General's office sits, although on at least one occasion a justice of the Supreme Court of Manitoba was appointed to try a dependent.[67]

The prosecutor for each Special General Court Martial may be a military officer above the rank of corporal, and is appointed by or under the authority of the officer who has directed the trial by court martial.[68] Nevertheless, with the concurrence of the Judge Advocate General, counsel may be appointed to act as prosecutor. The accused has no right to object to the prosecutor.[69]

A case coming before a court martial will first be evaluated within the unit the civilian is accompanying. The alleged offence will be investigated and the results communicated to the commanding officer who has the power to direct a trial by Special General Court Martial. When the application is received, the commanding officer must decide whether the charges should be proceeded with. If there does not appear to be sufficient evidence to justify a trial, he may dismiss the charge and so inform the accused.[70] However, when the officer decides that the charge should be proceeded with, a charge sheet is prepared and the available evidence is gathered together in a document known as a "synopsis". The synopsis is not admissible as evidence. It serves only to establish whether there exists a *prima facie* case against the accused and to allow the accused and his counsel to know the nature of the evidence to be introduced. The accused may make a written statement to accompany the synopsis to the higher authority in order to disclose an absolute defence to the charge or a plea in bar of trial.[71]

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[66] *Ibid.*, art. 113.06.

[67] Deniset J. in the case of *R.* v. *MacDonald* S.G.C.M., Apr. 1974.

[68] QR&O, art. 113.107.

[69] *Ibid.*, art. 113.11.

[70] *Ibid.*, art. 113.09. The commanding officer has the discretion to dismiss the charge for any other reason.

[71] R.S.C. 1970, c. N-4, s. 56.

Contrary to his position in "civil" criminal courts, the accused civilian does not have a right to elect the form of trial. There is no distinction made between summary, indictable, elective, or civil offences in this respect. There is no preliminary hearing and all offences are tried by judge alone. This is explained by the fact that the *National Defence Act* incorporates the offences of the *Criminal Code* and of the host country without any of their procedural aspects. The absence of a preliminary inquiry is not as prejudicial as it might initially appear to be, in view of the provisions for complete disclosure which prevail under the military system. It is noteworthy, however, that service personnel have a limited right of election under the *Code of Service Discipline.*

At the present time, the *National Defence Act* does not have any provision for interim judicial release pending trial by court martial. However, in practice, where the offence is not of a particularly serious nature, the accused may be released on his own recognizance.

The unfolding of a court martial closely resembles that of any Canadian criminal court. The prosecutor presents evidence through the examination of witnesses, followed by cross-examination by the accused or his counsel. The judge is under the same constraints as any judge in a civilian criminal court in that he may question the witnesses only to clarify matters that have remained obscure. Once all the evidence has been presented, the accused may make a motion that there is no *prima facie* case. If this is not done, the court may, on its own motion, request the accused to do so. Should the motion be successful, the accused is found not guilty.

The presentation of the case for the defence and the rebuttal again follow the same rules as in ordinary criminal courts. Although rarely exercised, the court has the power to call witnesses to clarify or amplify existing evidence. Following the completion of the hearing of evidence, the prosecutor and defence counsel sum up their cases. An element unique to the system is that the accused is entitled to have the last word in court whether or not he has brought any evidence. The presiding judge then retires to decide alone any matter or question to be determined. After deliberating, he returns and announces the verdict. If there is a finding of guilt, the accused may present evidence and address the court to mitigate the penalty, which is then determined by the court. Trials are normally open to the public and all proceedings are recorded by a court reporter, including the judge's decision. There is no separate written opinion handed down at a later date.

Prior to the enactment of the *National Defence Act*, there was no right of appeal to civilian courts or any other judicial body. The *National Defence Act* has remedied the situation by providing a right of appeal to the Federal Court with respect to the legality of any or all of the findings, and the legality of the whole or part of the sentence.[72] Section 198 further provides that such right of appeal is deemed to be in addition to, and not in derogation of, any rights that the accused has under the laws of Canada; that is, recourse may also be had to the Supreme Court under the same conditions as any civil or criminal offence. The severity of the sentence may be appealed but only to the administrative bodies of the Canadian Forces. The period in which an appeal may be lodged is fourteen days.[73]

The Court Martial Appeal Board (a division of the Federal Court) has the general powers of any civilian court of appeal and is constituted by both Federal Court judges and judges appointed from superior courts of criminal jurisdiction from the provinces. It should be noted that the Crown has no right of appeal against an acquittal.

The appellant may appear in person before the Court Martial Appeal Board if he obtains the consent of the chairman or the presiding member, although this is requested only rarely. If he desires to be represented, it is his responsibility to retain civilian counsel. At this level, counsel will not be provided at the expense of the Crown except where, because of the serious nature of the offence and the financial circumstances of the appellant, it is considered necessary in the interests of justice, or where an important question of law which needs to be settled is raised. A serving officer with legal qualifications may appear on behalf of the Crown, although it is possible to have civilian counsel appointed by the Minister of Justice.

The Appeal Board has the following options: it may dismiss the appeal or quash the conviction, substitute a conviction on a lesser included offence, or direct a new trial. Should the Board rule in favour of a new trial, the Minister may dispense with such trial where, for example, in the cases of offences overseas, the witnesses have dispersed. This power is discretionary; a result of its use is the release of the appellant from any further proceedings by the services. When an appellant has been successful in whole or in part

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[72] *Ibid.*, s. 197.
[73] *Ibid.*, s. 199(1) and (3).

on his appeal or where his counsel was appointed by the Minister of Justice, the Minister may order that appellant's costs be paid by the Crown.

The question has been raised as to whether or not the trial judge need give reasons for his decision. A case in point is that of *R.* v. *MacDonald.*[74] This case involved the sixteen year old dependent son of an armed forces officer, accused *inter alia* of robbery and joy riding under sections 55 and 120 of the *National Defence Act.* The issue to be decided was whether or not the trial judge, sitting at a Special General Court Martial in Lahr, West Germany, was required to give his reasons for finding the accused guilty.

The majority of the Supreme Court of Canada upheld the Court Martial Appeal Board's decision.[75] Laskin C.J. stated that the reasons for judgment given were "highly desirable":

> These considerations and others that could be mustered go to show what is the preferable practice, but the volume of criminal work makes an indiscriminate requirement of reasons impractical, especially in provincial criminal courts, and the risk of ending up with a ritual formula makes it undesirable to fetter the discretion of trial Judges...
> It does not follow, however, that failure of a trial Judge to give reasons, not challengeable *per se* as an error of law, will be equally unchallengeable if, having regard to the record, there is a rational basis for concluding that the trial Judge erred in appreciation of a relevant issue or appreciation of evidence that would affect the propriety of his verdict.[76]

However, Spence J. (dissenting) noted:

> I am in agreement with the statement of the Chief Justice that the mere failure of a trial judge to give reasons in the absence of any statutory or common law obligation to give them does not raise a question of law and that such a statutory obligation would be most fettering especially when one considers the enormous number of trials which must be handled by provincial court judges in the ordinary carriage of their official duties.
> I think it is relevant, however, to point out that in this particular case Deniset J. was not acting as a provincial court judge nor even as a judge sitting in assize but was a Special General Court Martial appointed by the Minister of National Defence for the purpose of carrying out the trial of this accused youth. The trial lasted five days and it is more than regrettable that Deniset J., presiding as such Special General Court Martial did not devote the few minutes necessary to dictate reasons for judgment.[77]

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[74] (1976) 9 N.R. 271 (S.C.C.).

[75] The Board had decided that the failure of the trial judge to give reasons was not in itself a sufficient reason to quash the conviction.

[76] *Supra,* note 74, 277.

[77] *Ibid.,* 280.

It is indeed to be hoped that judges, for the reasons given by Spence J., heed such advice and substantiate their judgments in the future.

VI. Conclusion and recommendations

In assessing the impact of the application of military law to civilians, the question remains as to what policy Canada should adopt vis-à-vis its citizens accompanying the armed forces outside its boundaries. In the 1950's the immediate problem was dealt with by enacting amending legislation to "include" such civilians under a military code of justice rather than develop a civilian-oriented policy. Today a comprehensive civilian policy should take into account the following factors:

(1) diplomatic relations between Canada and foreign governments;
(2) the number of civilians concerned;
(3) the length and number of postings which may occur within a given military or civilian career;
(4) the quasi-permanent nature of Canadian presence abroad;
(5) the fact that civilians are not part of the military establishment.

With these considerations in mind, alternative solutions which might be available to define the legal status of civilians serving with and accompanying the forces will be examined.

At present the one main advantage of having Canadian military courts try camp followers is that trial under Canadian military law does not place the accused in an unfamiliar foreign court situation with different laws, language, sympathies, and customs. It is undeniable that the families of service personnel and civilian support staff are essential to the success of the Canadian Forces operations abroad. However, this is not necessarily a justification for the wholesale application of military law to a group of civilians who are there by necessity rather than by choice.

There would appear to be no international prohibition in applying ordinary Canadian criminal law, as opposed to military criminal law, to citizens accompanying the Canadian Forces abroad. According to the NATO-SOFA and the Supplementary Agreement, Canadian authorities have jurisdiction in those areas specified under the treaties. In practice, the host country's jurisdiction is usually waived in favour of the sending or home country and the case is left for Canadian authorities to dispose of — unless the accused is not covered by the *Code of Service Discipline*. There is no requirement in either agreement that prosecution be by military tribunal.

The proposal of the United States for the extra-territorial application of criminal laws which would affect civilians accompanying the armed forces overseas is of particular interest to Canada because it offers a viable alternative to military jurisdiction over Canadian civilians abroad. Consequently, it is proposed that for camp followers abroad, Canadian military jurisdiction be replaced by complete Canadian civil jurisdiction, notwithstanding that certain military facilities might continue to be used to prevent expensive duplication of services. The enactment of such a proposal providing for the application of the *Criminal Code* in its entirety and the common (and civil) law would ensure equality before the law for all Canadian civilians.

A second argument in favour of a non-military system would be the constitutional protections and safeguards afforded under the *Canadian Bill of Rights,* certain of which are absent in military courts. In addition, this proposal would eliminate inconsistencies in the application of criminal laws abroad. The effect of this proposal would be to require an updating of the present system: the *National Defence Act* could still be retained with respect to camp followers, but section 119 (the blanket provision) and section 121 (incorporating foreign offences) should be inapplicable to civilians.

In 1954, the Minister of Defence asserted that the purpose of acquiring jurisdiction over civilians was to permit the exercise of some form of control over Canadian nationals within a military unit with regard to foreign authorities, especially when the best interests of Canadians were at stake. This principle is sound and the proposed revisions would support it. Thus the major reforms of the revision would comprise:

(1) the incorporation of the whole of the *Criminal Code* with certain adaptations as specified in (2), (4) and (5) below;
(2) the enacting of legislation reinforcing the application of the *Juvenile Delinquents Act;*
(3) the operation of the common (or civil) law with respect to civil offences, rather than local foreign law;
(4) the appointment of non-military judges;
(5) the adoption of a limited jury system.

The reason for incorporating the *Criminal Code* in its entirety, as opposed to only the offences, is self-evident in view of earlier comments and would ensure that the accused is given the same rights and treatment as he would enjoy in Canada. With the continued operation of the *National Defence Act,* there would be no reason to discontinue present benefits under the military system.

The *Juvenile Delinquents Act* should be made applicable to young offenders overseas and it is proposed that the age limit be raised to eighteen years for all (as in Quebec and New Brunswick). Since young dependents may be from any one of the ten provinces, all should be given optimum rights, even if this may be slightly more favourable to some.

The application of the common (or civil) law with respect to civil offences would be a viable alternative to incorporating the foreign law and probably acceptable to the host country since the law, although not identical, would at least be parallel. If need be, the statutes of one of the Canadian provinces might be suitably applied to fill any gaps.

Of paramount importance is the need to appoint non-military judges to try civilian cases. This would be in keeping with the original intention of Parliament that the accused be given the opportunity to be heard before a judge with a non-military background and experience, and would also convey the impression that justice be not only done but seen to be done.

The adoption of a limited jury system (where allowable in the civil system) would permit the accused the right to elect (or be compelled to elect, as the case may be) a jury trial. Reducing the number of jurors to six, as in the Northwest Territories, would take into account the reduced size of the Canadian population at a given post. There could be biannual sessions when all jury cases would be heard. Provisions for interim judicial release could be suitably enlarged or modified to accommodate such a situation. It is further suggested that section 457 offences in the *Criminal Code* be appropriately tried in Canada, again in keeping with the spirit of the 1954 amendments. It is not possible to study all the modifications that might be needed in this regard, but on balance these would be relatively minor.

Therefore, in view of the above observations, it is recommended that serious consideration be given to modifying the applicability of the *National Defence Act* with respect to civilians — not to remove them from the control of Canadian law, but rather to make the law as appropriate as possible to their civilian status. The American proposals to make national laws apply extra-territorially are especially compatible with the present system and should not be overlooked by our Canadian legislators.

A number of issues have been raised, criticisms expressed, and changes advocated, but nevertheless the military system as it presently operates may be said to favour the civilian insofar as he or

she is not thereby subjected to an indigenous system of law while abroad. In retrospect, the main observation is that the possibilities of "getting caught" are broad indeed; however, once within the system, the accused enjoys advantages which, in many instances, outweigh the harshness of the charging provisions. Notable in this respect is the equality of defence and prosecution before the court.

It may be said that Canadian military law is in need of a maturing process. On the whole it is good law, and the military are well served by it, but the civilians themselves could be better served. This paper takes the position that sections in the *National Defence Act* in relation to civilian employees and dependents are unnecessarily wide and are neither justified nor required today. These sections may have appeared appropriate in the past, but the cases of *Fey*,[78] *Olson*,[79] and *Arsenault*[80] raise serious questions as to their continuing validity. Departmental and legislative re-evaluation should take into consideration the fact that a decision to change the law must involve not only military interests but also the private interests of the civilians concerned. The above proposals for change are consistent with these factors and would enhance the administration of justice for a significant group of Canadians.

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[78] *Supra,* note 54.
[79] *Supra,* note 55.
[80] *Supra,* note 56.