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Directorate of History
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REPORT NO. 91

HISTORICAL SECTION

ARMY HEADQUARTERS

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Some Aspects of Disciplinary Policy in the Canadian Services, 1914-1946

CONTENTS

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ARMY HEADQUARTERS

CONFIDENTIAL

Some Aspects of Disciplinary Policy in the Canadian Services, 1914-1946

1. This report outlines certain aspects of Canadian disciplinary policy in the services during the period beginning with the outbreak of the First World War and ending with Canadian participation in the occupation of Germany at the end of the Second World War. The material on which the report is based exists mainly in the C.E.F. records of the Public Archives Records Centre and the Historical Section, Army Headquarters. Recourse has also been made to information held by the Naval and Air Historians of the Department of National Defence. Unfortunately, these sources, although co-operating to the fullest possible extent, have been unable to provide the information required for a complete study of discipline in their respective services.[1] Similarly, the Office of the Judge Advocate General, although helpful in many respects, has relatively little information on the period under study. Attention is directed to the exchanges of correspondence, on this subject, between D.H.S. and J.A.G. in 1933, 1936 and 1960.[2] The lack of complete information on legal developments in the R.C.N. and R.C.A.F. has meant that the bulk of this report is devoted mainly to purely military aspects of disciplinary policy.

2. The most significant development in

disciplinary policy during the period covered by this report was the process by which complete control of punishment in the Canadian forces passed from British to Canadian authorities.[3] This process began in the First World War and was completed as a result of constitutional changes in the period before the outbreak of the Second World War. By the Statute of Westminster (1931) the British Parliament officially recognized the virtually independent status of the Dominions, under one Crown, in the British Commonwealth of Nations. Additional legislation was required to implement the military aspects of this constitutional mile-stone. Accordingly, reciprocal statutes were passed by the Commonwealth Parliaments as, for example, "The Visiting Forces (British Commonwealth) Acts, 1933" of Canada and the United Kingdom. The provisions of the Canadian statute applicable to disciplinary policy will be considered in more detail at a later stage of this report. It is, however, important to realize from the outset that the background to changes in disciplinary policy was constitutional, rather than military, in character. Changes were necessary in order to bring military practice into line with a new pattern of Commonwealth relationships; such modifications had a direct effect upon considerations of overall strategy and command. As will be seen, the translation of essentially juridical concepts into workable formulae for wartime administration was a complicated and, at times, vexatious process.

THE FIRST WORLD WAR

(i) Policy during the Initial Period, 1914-15

3. At the beginning of the First World War problems of Canadian disciplinary policy were restricted to the naval and military forces, since the "Canadian Air Force" (in rudimentary form) was not formed until the end of the war.[4] Naval policy on these matters presented few difficulties, either initially or later in the conflict, because the Canadian service was so closely integrated with the Royal Navy. Thus, section 48 of The Naval Service Act of 1910 (9-10 Edward VII, Chap. 43) had expressly provided:

> "The Naval Discipline Act, 1866," and the Acts in amendment thereof passed by the Parliament of the United Kingdom for the time being in force, and the King's Regulations and Admiralty Instructions, in so far as the said Acts, regulations and instructions are applicable, and except in so far as they may be inconsistent with this Act or with any regulations made under this Act, shall apply to the Naval Service and shall have the same force in law as if they formed part of this Act.

At the Imperial Conference held in the following year British and Canadian representatives agreed that, although the Canadian Government retained exclusive control of its own naval service, "training and discipline were to be generally the same as, and personnel interchangeable with, those of the Royal Navy."[5]

4. With this measure of co-operation clearly established in the pre-war period, Canadian naval discipline seems to have passed smoothly and uneventfully to a wartime basis in 1914. By order in council (P.C. 1978) of 1 August the provisions of the Naval Discipline Act, 1866, the King's Regulations and Admiralty Instructions (subject to the provisos mentioned in the Canadian Act of 1910) were extended to the "Naval Volunteer Force". Throughout the First World War the emphasis in Canadian naval effort was applied towards supplementing the Royal Navy's undertakings -- rather than developing a distinctively Canadian effort.

This situation continued long after the war. Indeed, the official historian notes that right up to the Second World War Canadian ships formed an "integral part of the British fleet" in wartime.[6] The relatively small size of the Canadian naval contribution, in terms of manpower, was possibly another reason why few complicating factors appear to have disturbed the administration of naval discipline.

5. Although a somewhat similar situation developed, initially, with respect to Canadian military participation in the First World War, the trend towards greater autonomy was much more pronounced. The size of the Canadian Expeditionary Force, the nature of operations and the resulting heavy casualties all tended to focus sharper, more critical eyes on the relationship between the ground forces of Canada and those of her Allies. Moreover there were clear signs, before the end of the war, that Canadians were deeply concerned about the need for more autonomy and greater control over various aspects of their overseas military organization.

6. The status of any Canadian force serving abroad was discussed, even before war began, in a telegram from the Governor-General to the Secretary of State for the Colonies. His Royal Highness Field-Marshal the Duke of Connaught pointed out that, under section 69 of the Canadian Militia Act, the active militia could "only be placed on active service beyond Canada for the defence thereof."[7] It was also suggested that Canadian regiments might "enlist as Imperial troops" for a stated period; but the British Government postponed a decision on this suggestion, pending further developments. Then, on 5 August, the Canadian authorities dispelled doubts by

bringing volunteers directly under sections 175 and 176 of the Army Act. The situation was further clarified, on the following day, by an order in council (P.C. 2068) providing that "such corps or parts of the Militia as may from time to time, with the approval of the Governor General in Council, be named or designated in General Orders published in the Canada Gazette, be placed on Active service in Canada."[8]

7. Nevertheless, there appears to have been no attempt to establish, in advance, the precise legal position of Canadian troops serving overseas. Mr. Justice R.M. Dennistoun, who served as Deputy Judge Advocate General of the Overseas Military Forces of Canada from February 1917 to September 1919, afterwards observed: "When the first Canadian Contingent sailed from Canada in 1914, there was much uncertainty as to the status of the force and of the officers who accompanied it, and this uncertainty was not entirely removed until almost the end of the war."[9] The confusion was doubtless due, in part, to lack of information about operational requirements. In the House of Commons the Minister of Militia and Defence (Colonel the Hon. Sam Hughes) stated bluntly: "We have nothing whatever to say as to the destination of the troops once they cross the water, nor have we been informed as to what their destination may be."[10] In these circumstances, it seems safe to assume that problems of disciplinary policy did not loom large in the minds of the Canadian authorities. The general position appears to have been that the C.E.F. would serve directly under British control and that British military law would apply directly to Canadian troops.

8. This impression was strengthened by Militia Orders issued by the Adjutant General on 17 August, containing the following:

> para 3. The Canadian Expeditionary Force will be Imperial and have the status of British regular troops.
>
> ---
>
> para 9. For purposes of discipline all ranks will be subject to the Army Act, to King's Regulations, and to such other ordinances as apply, or may be made to apply to the British Regular Army.[11]

Mr. Justice Dennistoun afterwards criticized para 3 of this order as having "no valid authority".[12] He pointed out that for legal purposes, as stated in the Manual of Military Law (1914), "Colonial Forces" included forces of a Dominion and comprised two classes: "the forces raised by the government of a colony, and the forces raised in a colony by direct order of His Majesty to serve as auxiliary to, and in fact to form part for the time being of, the regular forces."[13] The importance of the distinction appears in the following quotation from the Manual of Military Law (1914): "The first class of Colonial forces -- those raised by the government of a colony -- are only subject to the Army Act when so provided by the law of the colony and when serving with part of His Majesty's regular forces, and then only so far as the colonial law has not provided for their government and discipline, and subject to the exceptions specified in the general orders of the general officer commanding the forces with which they are serving. The Army Act, however (s. 177), provides that the colonial law may extend to the forces, although beyond the limits of the colony where they are raised."

9. Dennistoun commented on the application of

these principles to Canadian mobilization in 1914:

> The mobilization which took place at Valcartier in August and September was authorized by order-in-council which made it clear that the force being assembled was not an Imperial or Regular Force, but that it consisted of specially formed units of the Canadian Militia.
>
> The Government of Canada had no power to raise, equip and send overseas a military force except under the provisions of the Militia Act; and while His Majesty might possibly have levied troops in Canada to form part of his regular forces he did not see fit to do so.
>
> Until the end of the war the Canadians were referred to in the London Gazette under the heading "Regular Forces," though it was well understood by that time that they were nothing of the kind.
>
> ---
>
> It was difficult to convince the War Office that the Militia order which has been referred to, and which was never revoked, was ultra vires of the Headquarters which published it in August, 1914, and it took several years to do it.[14]

10. Disciplinary arrangements governing troops in Canada were the subject of an order in council (P.C. 701), approved by the Governor General on 31 March 1915. This instrument gave authority, under section 89 of the Militia Act, "for the issue of a Warrant to the Acting Adjutant General, Canadian Militia, or, in his absence, to the senior combatant officer of the Adjutant General's Branch present at Militia Headquarters, and not being under the rank of Colonel in the Militia, to convene General and District Courts-Martial, and to confirm, remit or mitigate the sentences of any District Court-Martial, and to reserve for His Majesty's consideration the proceedings of any General Court-Martial."[15] It may be noted, in passing, that this order in council reflected a long-standing

requirement of British military law, since the jurisdiction of every court martial depends upon the order calling it into existence -- in other words, the convening order issued by a duly authorized person. The warrant giving authority to convene courts martial stems from the royal prerogative, exercised in the above instance by the Governor General.[16] The effect of the order in council of 31 March 1915 was clearly restricted to Canada. As we shall see (paragraphs 17-20, below), the procedure authorized by the order was not applied to Canadians serving overseas.

11. At this point brief reference may be made to the solution found by the British and French Governments to the problem of military legal jurisdiction. On 15 December 1915 the two governments agreed "to recognize during the present war the exclusive competence of the tribunals of their respective Armies with regard to persons belonging to these Armies, in whatever territory and of whatever nationality the accused may be."[17]

(ii) <u>The Trend towards Greater Autonomy, 1916-18</u>

12. During the initial period of the Canadians' service overseas, the administration of military law was carried out "solely by the Imperial Authorities acting through the Army Council and the General Officers commanding the different Imperial Commands."[18] However, during the summer of 1916 there were signs of growing Canadian dissatisfaction with this arrangement. In August, Major-General J.W. Carson, who occupied a somewhat loosely defined position as the representative, in London, of the Minister of Militia and Defence,[19] drew the latter's attention to a report in the British press of a change in Australian practice. It appeared that the Australian

courts martial held abroad would be "reviewed by a committee appointed in Australia, with power to recommend remissions."[20] Carson took the matter up with the War Office, pointing out that "we have all along felt the great importance of reviewing Court Martial Proceedings of Canadians held in France, and that in the few instances where we have suggested reconsideration, we have been met with a very decided 'No'." He added that, as far as courts martial in England were concerned, "we always make a point of being represented by our Assistant Judge Advocate General."[21]

13. The War Office took the view that the Australian report referred to Australian soldiers who had been returned to their country to undergo sentences, thereby passing out of the jurisdiction of the British military authorities. The British communication continued: "... in nearly all cases Courts Martial for the trial of Canadian soldiers are convened and confirmed by the Canadian Authorities ... [these] after careful review by the local Military Authorities, are finally reviewed and stored by the Judge Advocate General, London, who, if he considers it desirable, submits cases to the Secretary of State for reconsideration."[22] The War Office also referred to additional safeguards under Rules of Procedure 126 (A) 1 and (C) and section 57 of the Army Act. Thereupon, Carson observed that the Canadian authorities had "nothing to complain of with regard to Courts Martial in England", which were attended by the Canadian Assistant Judge Advocate General. However, he added: "With regard to Courts Martial in France, while I cannot bring any one specific case to

my memory at present, I can recall that on at least two or three occasions, I wrote to Headquarters, France, asking if the sentence of two or three Courts Martial might not be reconsidered and I was merely told that it was not possible."[23] It appears that no further action was taken by the Canadian authorities at this time.

14. At the end of 1916 a new issue arose with an important bearing on disciplinary policy -- the status of Canadian officers serving in France. The headquarters of General Sir Douglas Haig, British Commander-in-Chief in France, enquired whether Canadian officers could properly be described as "Officers of the Regular Forces" in view of section 190 (8) of the Army Act.[24] By definition, under this Act, the term "regular forces" applied only to officers and men "liable to render continuously for a term military service to His Majesty in every part of the world, or in any specified part of the world." The matter was duly referred back to Canada, and the Department of Justice expressed the opinion that the "C.E.F. [was] raised and organized under authority of Militia Act and sent overseas to serve with His Majesty's Forces for defence of Canada, subject to provisions of Militia Act and Sections 175, 176 and 177 of the Army Act [dealing with persons subject to military law]. Men attested and status of officers regulated accordingly."[25] On the basis of this information the Deputy Minister, Overseas Military Forces of Canada, concluded that the definition in section 190 (8) was not applicable to members of the C.E.F. He reported to the Adjutant General, Overseas Military Forces: "It further follows that the Army Act and the King's Regulations, Imperial, where not inconsistent with the Canadian Militia Act, the King's Regulations,

Canadian, and such modifications thereof as may be made from time to time by Order-in-Council, apply to this Force. All officers hold commissions in the Canadian Militia only and are seconded to the C.E.F."[26]

15. In 1917 the Canadian Corps won undying fame at the capture of Vimy Ridge, Hill 70 and the Passchendaele Ridge. Perhaps partly because of the distinctively Canadian nature of these achievements, new impetus was given to "adoption of the principles of control of Canadian troops in England by the Canadian Government through the Minister, Overseas Military Forces of Canada and his Military Advisers."[27] The new development was first evident in connection with "the applicability to Canadian Troops of the Royal Warrant for their pay, etc., and early in 1917 it was established that Canadian Orders in Council and Canadian Pay Regulations should govern this subject exclusively."[28] Thereafter, the principle was steadily extended "to [nearly] all disciplinary regulations."[29]

16. In an article in the Canada Law Journal (February 1920), Mr. Justice Dennistoun gave another illustration of the trend towards increased Canadian control over disciplinary matters affecting Canadian troops serving overseas:

> In 1917 a number of Canadian soldiers refused to submit to re-inoculation against typhoid fever. One of them was court-martialed for "refusing to obey a lawful command" and his conviction was quashed by direction of the [British] Judge Advocate General--Mr. Felix Cassel, K.C., a very able lawyer, who gave the Canadian legal staff every consideration and assistance at all times.
>
> On enquiry as to the reason for this decision he stated that the British authorities have always refused to compel a soldier to submit to a surgical operation (Manual, p. 397), and that inoculation, involving a puncture of the skin by a needle, was regarded as such an operation.

> It was pointed out in reply that no soldier could be sent to France without a certificate that he had been inoculated against typhoid and that such a decision would enable a considerable number of men to escape service at the front. He was obdurate. It was the law, and he had no power to change it. But we had power to change it, and in a very brief space of time obtained an order-in-council from Ottawa, passed under the provisions of the War Measures Act, aided by sec. 177 of the Army Act, making it a military offence for a Canadian soldier to refuse to submit to inoculation. The Judge Advocate General at once admitted the validity of the enactment, and undertook to quash no more convictions on the ground previously taken, but he was never called to rule upon the point a second time, for on publication of the new law in orders, the recalcitrant soldiers submitted without exception, and disciplinary action was no longer necessary.[30]

17. Nevertheless, as the war entered its final stage, the British authorities still retained a large measure of formal control over Canadian discipline. The extent of this control was apparent in reports prepared during May and June 1918 by Lt.-Col. R.M. Dennistoun, then Deputy Judge Advocate General, Overseas Military Forces of Canada. Reviewing the general principles applicable to contemporary trials of Canadian soldiers in England and France, the D.J.A.G. pointed out that there were two sources of court-martial jurisdiction. The first was derived from the King, as provided in section 122 of the Army Act, "by warrant under his sign manual to his Generals."[31] Courts martial authorized by this channel were held under the Army Act. The latter, in turn, was applicable to Canadian officers and men serving in England and France by virtue of section 74 of the Militia Act. Consequently, this jurisdiction was actually employed in the trials of Canadians serving overseas throughout the First World War. The alternative source of court-martial jurisdiction is of particular interest in view of subsequent constitutional

developments and the practice adopted in the Second World War. As described by the D.J.A.G.:

> The other source of court-martial jurisdiction is derived from the Governor-in-Council in Canada under the provisions of Section 98 [sic, see paragraph 10, above] of the Militia Act. Warrants may be issued by the Governor-in-Council authorizing General, or other, Officers, to convene courts-martial. Such courts-martial are subject to the restrictions imposed by the Militia Act. The sentence of a general court-martial held under the provisions of the Militia Act cannot be carried into execution until it has been approved by the Governor-in-Council.

The D.J.A.G. advanced significant reasons for the failure to employ the alternative source of jurisdiction in the war then in progress:

> It is open to the Canadian Forces in England and France to act under warrants sent from Canada, but in view of the restrictions imposed and the delays which are inevitable and the confusion which would arise, if disciplinary action were taken in the field under the Militia Act, it is considered advisable to administer discipline under the provisions of the Army Act and the King's warrant, rather than under the provisions of the Militia Act and the warrant of the Governor-in-Council.
>
> If the Canadian Forces were serving independently in certain parts of the world, it would be desirable and convenient to act under Canadian warrants, but so long as they form part of the British Armies in the field, it is considered better to act under Imperial warrants.

Reference to "the restrictions imposed", in the above quotation, may have been aimed at British reluctance to accept greater Canadian autonomy. However, practical, rather than theoretical difficulties of administration appear to have been the decisive factor.

(iii) Procedure in Disciplinary Cases

18. In the majority of disciplinary cases occurring overseas, Canadian soldiers were tried by their commanding officers, who were empowered to impose punishments

not exceeding 28 days' detention or field punishment.* If the commanding officer's punishment would affect the soldier's pay, the latter had a right to demand a court martial. In England, soldiers were tried by District Courts Martial, in France by Field General Courts Martial.** As described by the D.J.A.G.,

> These courts consist of three or more officers, who are selected by the Officer who convenes the court, and who is, generally, the Area Commander or Brigadier of the soldier concerned. The court is composed of officers in the area who are qualified by length of service to sit on courts-martial and who are available for that duty.

In practice, Field General Courts Martial for trials of Canadians serving in the Canadian Corps were "exclusively composed of Canadian officers", although the "Court-Martial Officer attached to the Corps" (a legal expert, but not necessarily Canadian) was detailed to attend in difficult cases.[34] In the case of a Canadian soldier serving in France away from the Corps, the court was not necessarily

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*"Rules for Field Punishment" (1907), under section 44 of the Army Act, stated that an offender might be punished as follows:

(a) He may be kept in irons, i.e., in fetters or handcuffs, or both fetters and handcuffs; and may be secured so as to prevent his escape.
(b) When in irons he may be attached for a period or periods not exceeding two hours in any one day to a fixed object, but he must not be so attached during more than three out of any four consecutive days, nor during more than twenty-one days in all.
(c) Straps or ropes may be used for the purpose of these rules in lieu of irons.
(d) He may be subjected to the like labour, employment, and restraint, and dealt with in like manner as if he were under a sentence of imprisonment with hard labour.[32]

**Briefly stated, the differences between District and General Courts Martial lay mainly in their composition and the degree of punishment which could be awarded. A District Court Martial could not try officers and could not award a sentence of greater severity than two years' imprisonment. On the other hand, a Field General Court Martial was a special tribunal, adapted to the needs of active service, having the powers of a General Court Martial. Like the G.C.M., a F.G.C.M. could try officers and could pass sentence of death.[33]

composed of Canadian officers; but the D.J.A.G. reported that, "so far as practicable", efforts were made to have at least one Canadian officer on the court. Canadian soldiers sentenced to long terms of imprisonment were committed to British civil prisons. While so incarcerated they were subject to British law, being entirely removed from Canadian control.

19. The procedure in disciplinary cases involving Canadian officers followed parallel lines. Both in England and France such officers could be tried only by General Courts Martial. These courts consisted of not less than nine, and generally eleven, officers. The courts were convened by the appropriate General Officer Commanding, who held a warrant, or delegated warrant, from the King. The D.J.A.G. observed:

> General courts-martial on Canadian officers, in most cases which have come under notice, have been composed, in large part, of Canadian officers. The president is sometimes a British officer of experience and the Judge Advocate is either a British or Canadian officer of experience.
>
> - - - - - - - - - - - - -
>
> Courts-martial proceedings on officers which involve dismissal or cashiering, are, as a rule, submitted to His Majesty the King for confirmation.[35]

20. Under the procedure in force in 1918, the officer authorized to convene a court martial had power to confirm, partially confirm, or refuse to confirm the sentence. When confirming the sentence, he also had authority, under section 57 of the Army Act, to mitigate, remit, commute, or suspend the execution of the sentence. After confirmation of sentence, the accused could apply through the Home Secretary for the royal clemency which, in the words of the D.J.A.G., "the King is pleased to

exercise in certain cases."[36]

21. The disposition of court-martial proceedings in the First World War was a further illustration of the lingering control exercised by the British authorities. The British Judge Advocate General, described as "a civilian lawyer at the War Office",[37] received the proceedings of all courts martial in England. In proper circumstances he was empowered to quash a conviction; he could also direct that a court be reconvened for the purpose of correcting irregularities and illegalities. His functions in France were performed by a representative with the rank of Brigadier-General. All proceedings, covering cases tried both in France and England, were finally retained on file in the London office of the British Judge Advocate General. In 1920 the proceedings in some 17,000 courts martial of members of the C.E.F. held in England and in the field were transferred to the Judge Advocate General at Ottawa. However, this transfer did not cover all courts martial of Canadians, since the British J.A.G. retained certain proceedings in which persons other than members of the C.E.F. were involved. As late as 1936, no chronological record or definitive statistics were available covering all courts martial of members of the C.E.F.[38]

(iv) Policy regarding Death Penalty

22. The policy governing imposition of death sentences on members of the C.E.F. was subjected to close scrutiny in the final months of the war. Apart from growing Canadian autonomy in matters of military discipline, generally, interest in military executions was stimulated by apparently divergent policies of certain Allies, notably Australia and the United States.

23. The procedure applied in cases of death sentences on members of the C.E.F. did not vary in any important respect from the normal administration of British military law. In France no death sentence was carried out without reference to the Commander-in-Chief. An official "Circular Memorandum on Courts-Martial" contained the following provision:

> 63. RESERVATION. - A death sentence must not be promulgated without the sanction of the Commander-in-Chief, to whom it will be forwarded through the usual channels. The Confirming Officer should enter the word 'Reserved' in the last column of the schedule of A.F.A. 3, and should sign certificate 'C'. Neither finding nor sentence should be confirmed.[39]

Particulars of each case, including the name of the executed soldier, were promulgated in General Routine Orders issued by the British Commander-in-Chief. A typical entry read:

> COURT-MARTIAL
>
> No._____ Private M. _____ Canadian Battalion, was tried by Field General Court-Martial on the following charge:-
>
> 'When on Active Service. Deserting His Majesty's Service.'
>
> The accused left his platoon when it was proceeding to the trenches and remained absent till apprehended by the French police behind the fighting area sixteen days later. After his arrest he escaped and remained absent till again apprehended five days later.
>
> The sentence of the Court was 'To suffer death by being shot.' The sentence was carried out at 7.11 a.m. on 7th December, 1916.[40]

24. Available information does not give the precise total of Canadians, serving in the C.E.F., who were executed. In June 1918 the D.J.A.G., Overseas Military Forces of Canada, stated: "I do not know the number of Canadian soldiers who have been executed but understand that there are very few cases in which the sentence has

been carried into effect."[41] Great care was taken to guard information of this nature from disclosure. However, it is now known that there were at least 26 entries in General Routine Orders, each giving notice of the execution of a member of the C.E.F.[42] It may be noted that the total number of executions in the military forces of the British Empire during the First World War was 346. Of these 31 were listed as members of "Overseas Contingents"; the remainder was composed of 291 from "Imperial Troops", 5 from "Colonial Forces" and 19 from "Native Labour Corps" and "Followers".[43] The vast majority of these executions (240) were punishment for desertion.

25. Canadian acceptance of British jurisdiction, in the disposition of cases carrying the death penalty, diverged widely from Australian practice. Since the Australian Defence Act permitted the death penalty only in cases of mutiny, desertion to, or treacherous dealings with the enemy, imprisonment was the only punishment which could be awarded for desertion to the rear. Moreover, the death sentence was never imposed without confirmation by the Governor-General of the Commonwealth in Council.[44] This restriction was carried further in practice; the Australian Official History comments:

> It is true that the Defence Act placed Australians, when on war service, under the operation of the British 'Army Act', except so far as the British Act was inconsistent with the Australian. Sentences of death were occasionally passed on them by military courts, but they well knew that these could not be carried out. Both in the ranks of the A.I.F. and in the people of Australia there was an invincible abhorrence of the seeming injustice of shooting a man who had volunteered to fight in a distant land in a quarrel not peculiarly Australian. The frequent reading out on parade of death sentences passed on British soldiers much intensified this feeling, and, though most officers and a small proportion of the men saw the need for a death

> penalty in the case of a small class of criminal offenders, and the Australian Government was more than once sounded concerning its adoption, the general opposition was far too strong; no Government would have dared to flout it.[45]

It is clear that, backed by strong opinion at home, the Australian Government was prepared to go much further than its Canadian counterpart in maintaining control over the discipline of forces serving overseas.

26. Nevertheless, the problem of Canadian responsibility was not entirely ignored. To some extent interest was spurred on, after the United States entered the war, by revelations of American practice. In the case of American soldiers sentenced to death by courts martial in France, the proceedings were normally approved by their senior commander, General J.J. Pershing, and sent to the War Department, Washington, for review by the Judge Advocate General's office. If no remedial action was required, the proceedings were then passed to the Secretary of War and, ultimately, to the President for decision.[46] In a number of cases it was publicly revealed that the President had commuted death sentences.

27. One Canadian organization, the National Prison Reform Association (with head office in Montreal), was particularly concerned about the comparative handling of American and Canadian death sentences. In reply to an enquiry from the honorary president of the Association (Mr. R. Bickerdike, M.P.*), Sir Edward Kemp, Minister, Overseas Military Forces of Canada, wrote reassuringly in

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*Mr. R. Bickerdike (1843-1928), an influential business man and legislator, was a Liberal representative of a Montreal constituency in the House of Commons. He was a strong advocate of the abolition of capital punishment.

the summer of 1918 that "although the death sentence is frequently imposed by courts-martial at the front, it is in rare instances carried into effect. Such a sentence is either commuted or remitted by the Convening Officer or reserved by him for the decision of the G.O.C. in Chief". He added, as already mentioned, that "the exercise of the Royal Clemency is the prerogative of His Majesty the King in all cases. Appeals for Clemency are dealt with by the Home Secretary."[47] The Association was not, however, satisfied. Mr. Bickerdike wrote again and his protest undoubtedly reflected an important segment of Canadian opinion:

> ... The vital point ... is that appeals for clemency should be transferred from the Home Secretary to the Government at Ottawa. It is the old issue of Canadian autonomy versus Whitehall government ... the ultimate court of appeal should be at the seat of Canadian Government.
>
> This Association is of opinion that the people of Canada are justified in asking that their own Government shall have full jurisdiction over its subjects while engaged in warfare on foreign soil.[48]

Fifteen years later these views found formal expression in "The Visiting Forces (British Commonwealth) Act, 1933".

(v) <u>The Problem of Imperial Commissions for Canadian Officers</u>

28. Before leaving the question of disciplinary policy in the First World War, this report must draw attention to one important problem which caused some difficulty at the end of the great conflict. In a sense, this issue -- the status of Canadian officers to whom Imperial commissions were granted -- epitomized the anomalous stage then reached in the evolution of disciplinary policy.

29. In September 1918 the Deputy Judge Advocate General, Overseas Military Forces of Canada, pointed out that "a large number" of Imperial commissions had been issued directly to Canadian officers. He noted that these commissions appointed an officer to His Majesty's "Land Forces", calling upon the officer "to observe and follow such orders and directions as from time to time you shall receive from Us, or any our superior officer, according to the rules and discipline of war, in pursuance of the trust hereby reposed in you." Speculating upon the effect of this form of commission, Colonel Dennistoun added: "If it has the effect of placing a Canadian officer under the jurisdiction of the War Office without reference to the Government of Canada, it is considered that the attention of the Government should be called to it and instructions given as to action to be taken, after consultation with the Imperial Authorities."[49]

30. In a private report to the Judge Advocate General, Department of Militia and Defence, Colonel Dennistoun gave the following interpretation of this "peculiar document":

> No doubt the object of giving this commission is to satisfy the [British] J.A.G., who has, on more than one occasion, expressed a doubt as to the right of Canadian officers to sit upon an Imperial court-martial when that court-martial is held for the trial of Imperial officers or soldiers. It is not considered that there is any force in this expression of doubt on the part of the J.A.G. as the definition of an officer given by section 190 of the Army Act includes 'officers commissioned or in pay' as an officer in His Majesty's Forces. The Canadian Militia is certainly part of His Majesty's Forces, but it would appear by a perusal of section 178 (Note 1), that it was considered advisable to make it clear that officers of the Territorial Force may sit indiscriminately on courts-martial for the trial of members of the Regular Forces and members of the Territorial Force.[50]

The D.J.A.G. pointed out that "the granting of a special commission might be considered as imposing an obligation to serve generally under the orders of Imperial officers without reference to the wishes of the Government of Canada or the Parliament thereof"; it might, therefore, be necessary for the British Government to "make clear the status of Canadian officers by a special statute which would give jurisdiction if needed to all officers holding commissions in the Canadian Militia to sit upon Imperial courts." Adoption of this procedure would dispense with the existing, cumbersome method of conferring jurisdiction upon individual officers.

31. The D.J.A.G. further argued that since, under section 38 of the Militia Act, officers' commissions could be granted by the Governor General on behalf of The King, it seemed "somewhat derogatory that an officer's commission issued through the Governor-General should not be considered sufficient to give him a status throughout the Empire as an officer of His Majesty's Forces." In a prophetic passage Colonel Dennistoun declared:

> While it is not anticipated that any conflict of interest will arise, it does seem advisable that Canadian autonomy should be definitely asserted. We are now creating precedents, which will be quoted hereafter and possibly followed if there should be future wars, and as it is always difficult to deal with subjects of this kind after the emergency which gave rise to them has passed away, it is considered better to deal with the subject now, and respectfully to point out that the Canadian Government considers His Majesty's commission now issued to officers of the Militia sufficient in itself without the necessity of supplementing it by the issue of a further commission when the Canadian Army goes upon service overseas.[51]

32. The answers to a number of subordinate problems depended upon finding a satisfactory solution to

the main issue. For example, the Adjutant General, Overseas Military Forces of Canada, questioned whether "Orders issued under certain circumstances, not defined by the Militia Act, by Imperial Officers to Canadian Officers of inferior rank could be legally considered as lawful commands within the meaning of the Army Act".[52] Likewise, the validity of courts martial, partly composed of officers of the C.E.F., to deal with Imperial soldiers was in doubt. Pending a solution to these difficulties, it was decided that no further applications for Imperial commissions would be made.[53] When the issue was revived, in the spring of 1919, Colonel Dennistoun again emphasized the importance of precedent; he wrote: "To persist in making applications for these commissions may imply a feeling of doubt on the part of the Canadian Authorities with regard to the validity of their commissions which does not exist, and it may hereafter prove embarrassing to the Canadian Government if precedents made in this war be considered binding for the future."[54]

33. In view of the foregoing considerations, the Ministry of Overseas Military Force of Canada requested the War Office to agree that no further applications for Imperial commissions be submitted. The Canadian communication stated:

> It appears that in the early stages of the war the Judge Advocate General had some doubt relative to the competency of officers holding Canadian commissions to sit upon courts martial. This doubt has long since disappeared and in innumerable cases he has confirmed findings where such circumstances existed, and it appears that the King's Commission is the same whether issued in the right of the Imperial Government or the Canadian Government. It was this point which originally led to the issuance of an Imperial commission to Canadian officers.

> The Canadian Government issues commissions to officers of its Forces and it would therefore appear that in applying for further commissions no material end is served, but a tremendous duplication of effort ensues.[55]

The Army Council accepted the Canadian proposal without further discussion.[56] Dennistoun afterwards noted that "the incident was closed with the assurance that the status of the Canadian officer was beyond question equal to that of any other officer who held His Majesty's Commission, that they were all officers of His Majesty's Forces and whether 'Regular' or 'Canadian Militia' made no difference so far as status was concerned."[57]

34. Thus, at the end of the First World War the official Canadian view remained that "an officer of the Canadian Expeditionary Force held his commission in that Force by virtue of the commission granted to him in the Canadian Militia."[58] Accordingly, arrangements were made to complete and distribute commissions in the Canadian Militia to officers originally gazetted to commissions in The London Gazette and subsequently gazetted to commissions in Canada.

35. This clarification represented a further significant stage in the process whereby control of Canadian service discipline was passing from the British to the Canadian authorities. We have seen that certain reservations lingered on -- notably with respect to confirmation and disposition of certain court-martial proceedings. It is also interesting to note that, when a Canadian Section of General Headquarters of the British Armies in France was formed in July 1918, there was a clear understanding that the Section "was not intended to interfere in any way with the responsibility of General Headquarters and the

Supreme Command, in relation to matters affecting military operations or discipline ...."[59] Yet, in the broader aspects of disciplinary policy, considerable progress had been made towards Canadian autonomy. The Report of the Ministry, Overseas Military Forces of Canada 1918 summarized these developments:

> King's Regulations (Imperial) are still, it is true, in general use, but this is for the most part a matter of convenience and it is recognized that they are only applicable where they are consistent with Canadian Regulations bearing on the same subject. Army Council Instructions and Routine Orders are only made applicable to the Canadian Forces when considered desirable by the Canadian Authorities. No Imperial Order or Army Council Instruction is applicable to the Canadian Overseas Military Forces unless made so in Headquarters Canadian Routine Orders.[60]

(vi) Naval Disciplinary Policy

36. Before leaving the First World War, we may briefly note certain parallel developments in disciplinary policy as applied to the R.C.N. As already suggested, there was much less evidence of change in this quarter, mainly because the Canadian service was so closely integrated with the Royal Navy. An Imperial statute, the Naval Discipline (Dominion Naval Forces) Act, 1911, had given Dominion governments the power to apply the Naval Discipline Act, 1866, to their respective ships "under all conditions."[61] However, the British legislation was not adopted in Canada until the end of the war. The following explanation for the long delay has been provided by the Naval Historian:

> This long delay was caused by the fact that the main effect of this adoption was to make possible the holding of courts-martial without the help of the Royal Navy. Until this date it had been necessary specially to empower a British flag officer, by commission, to order a court-martial, and to borrow British officers to form the court, as was done in the case of the stranding of HMCS NIOBE in 1911. Apparently the power to convene a court-martial had still to be delegated in the same manner for some time after 1918, but there

> were now enough senior officers holding Canadian Commissions (mostly ex-RN) to sit on a court in most cases. While the officer ordering a court-martial on an RCN officer might be serving in the Royal Navy, his authority to do so was given by a Canadian commission.[62]

The provisions of an order in council of 12 August 1913, regulating disciplinary arrangements for the R.C.N., R.N. and the naval forces of other Dominions, did not come into effect until 1 September 1920.[63]

CHANGES IN POLICY BETWEEN THE FIRST AND SECOND WORLD WARS

(i) Evolution of R.C.A.F.

37. In the period immediately following the First World War, the principal changes in Canadian disciplinary policy were connected with the evolution of the Royal Canadian Air Force. At the end of the war two squadrons and a wing headquarters had been formed overseas for a "Canadian Air Force". It appears that, although the wing headquarters came under the control of the Ministry of Overseas Military Forces of Canada, the squadrons had "dual status" as units of both the R.A.F. and the C.A.F. Evidence is lacking of any unusual disciplinary problems during this transitory period. In 1920 another Canadian Air Force was constituted, under the Air Board, and disciplinary regulations were prepared for this service. Then, when the air service was reorganized on a permanent basis, as the Royal Canadian Air Force, King's Regulations and Orders for the Royal Canadian Air Force were promulgated in 1924. The Air Historian has observed: "This original KR (Air) seems to have been based upon the similar volume for the RAF; there are frequent references to the Air Force Act, and disciplinary procedure was a copy of the RAF's."[64]

(ii) The Visiting Forces (British Commonwealth) Act, 1933

38. In spite of increasing pressure, at the end of the First World War, for revision of military disciplinary policy in the direction of greater Canadian autonomy, little formal action might have resulted. As Colonel Dennistoun had so aptly observed, in September 1918, "it is always difficult to deal with subjects of this kind after the emergency which gave rise to them has passed away". Indeed, confronted with great problems of demobilization and rehabilitation, the Governments of the post-war period might well have been pardoned for delay in attending to questions of service discipline. However, policy eventually took a more positive direction -- not because of military urgency, for there was none in the first decade following the Armistice -- but because of other events of greater significance.

39. Recognition of the Dominions' important contribution to the Allied war effort hastened the evolution of a new concept of constitutional relations. The latter led, in turn, to the Balfour Declaration of 1926 and, five years later, to the Statute of Westminster. Thus appeared the British Commonwealth of Nations, in which the former Dominions achieved virtually independent status, though still linked by a common Crown. Certain restrictions on national sovereignty remained -- most notably, in the case of Canada, inability to amend the constitution (itself a British statute) without recourse to Westminster.[65] (Nevertheless it should be remembered that, even in this respect, Canada remained the slave of her own constitution, without any wish of the Imperial Parliament to perpetuate the situation.) But in practically all other aspects of

policy, including defence and the conduct of external relations, members of the Commonwealth became masters of their own destinies, completely removed from the domain of Imperial control.

40. In so far as service discipline was concerned the most important result of the constitutional change was "An Act to make provision with respect to Forces of His Majesty from other parts of the British Commonwealth or from a colony when visiting the Dominion of Canada; and with respect to the exercise of command and discipline when Forces of His Majesty from different parts of the Commonwealth are serving together; and with respect to the attachment of members of one such force to another such force, and with respect to deserters from such forces."[66] This statute, better known by its short title, The Visiting Forces (British Commonwealth) Act, 1933, became law in Canada on 12 April of that year. In moving the first reading of the legislation in the House of Commons, the Prime Minister (The Right Honourable R.B. Bennett) said: "In consequence of the passing of the Statute of Westminster it becomes essential that questions arising out of visiting of forces from one of His Majesty's dominions to another, or questions of command, discipline and attachments of commonwealth forces when serving together, should be dealt with by separate legislation, that is legislation passed by the parliaments of each of the dominions and of the United Kingdom."[67]

41. The Act endeavoured to cover a wide range of disciplinary problems. For example, dealing with the discipline and internal administration of a "visiting

force"*, section 3 (1) provided:

> When a visiting force is present in Canada it shall be lawful for the naval, military and air force courts and authorities (in this Act referred to as the 'service courts' and 'service authorities') of that part of the Commonwealth to which the Force belongs, to exercise within Canada in relation to members of such Force in matters concerning discipline and in matters concerning the internal administration of such Force all such powers as are conferred upon them by the law of that part of the Commonwealth.

This obviously referred to cases such as where an Australian service authority might exercise disciplinary power over a member of an Australian force in Canada.

42. Section 6 dealt with the more complicated problem of reciprocal authorities when members or forces of one part of the Commonwealth were attached to, "serving together" or "in combination" with forces of another part. Dealing first with individuals attached to forces of a Commonwealth country other than their own, sub-section (3) stated:

> Whilst a member of another force is by virtue of this section attached temporarily to a home force, he shall be subject to the law relating to the Naval Service, the Militia, or the Air Force, as the case may be, in like manner as if he were a member of the home force,** and shall be treated and have the like powers of command and punishment over members of the home force to which he is attached as if he were a member of that force of relative rank:
>
> Provided that the Governor in Council may direct that in relation to members of a force of

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*Defined as "any body, contingent or detachment of the naval, military and air forces of His Majesty raised in the United Kingdom, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State, or Newfoundland, which is, with the consent of His Majesty's Government in Canada, lawfully present in Canada" (section 2 (1)(h)).

**Defined to include "any body, contingent, or detachment of any of the home forces, wherever serving" (section 2 (1)(e)).

any part of the Commonwealth specified the statutes relating to the home forces shall apply with such exceptions and subject to such adaptations as may be so specified.

Sub-sections 4 and 5 of section 6 established the principles governing the exercise of mutual powers of command and punishment when forces of different parts of the Commonwealth were "serving together" or "in combination" with each other:

(4) When a home force and another force to which this section applies are serving together, whether alone or not:-
(a) any member of the other force shall be treated and shall have over members of the home force the like powers of command as if he were a member of the home force of relative rank: and
(b) if the forces are acting in combination, any officer of the other force appointed by His Majesty, or in accordance with regulations made by or by authority of His Majesty, to command the combined force, or any part thereof, shall be treated and shall have over members of the home force the like powers of command and punishment, and may be invested with the like authority to convene, and confirm the findings and sentences of, courts martial as if he were an officer of the home force of relative rank and holding the same command.

(5) For the purposes of this section, forces shall be deemed to be serving together or acting in combination if and only if they are declared to be so serving or so acting by order of the Governor in Council, and the relative rank of members of the home forces and of other forces shall be such as may be prescribed by regulations made by His Majesty.

The distinction between "serving together" and "acting in combination" was based mainly on operational requirements: when forces of the Commonwealth were "serving together" they were, in the legal and constitutional sense, still independent of each other. However, as soon as such forces were placed "in combination", command was unified and the overall commander was invested with the supplementary "powers of command and punishment" set out in sub-section (4)(b). In passing, it may be noted that the meaning of

the term "His Majesty" in sub-sections 4(b) and (5) of section 6 was explained in the Canadian House of Commons. The Prime Minister quoted the opinion of the Government's legal advisers: "... His Majesty will not act in a matter that concerns Canada, without the advice of his Canadian ministers. This matter concerns two or more parts of the British Empire, and the section compels the co-operating governments to agree in the advice given to the crown for the purpose of appointing the commander."[68]

43. The foregoing provisions of The Visiting Forces (British Commonwealth) Act, 1933, have been considered in some detail because they contain the definitive answer to the question: when did complete control of punishment in the Canadian forces pass to the Canadian authorities? Prior to 1933, as already shown, many elements of disciplinary policy in relation to members of Canadian units and formations serving overseas remained largely in British hands. Procedure governing the convening of courts martial, confirmation of their sentences and disposition of all proceedings was subject to close scrutiny and control by British officers and officials. While in many instances British policy went a long way towards conciliating Canadian opinion, there remained the ultimate difficulty that, in strict law, Canada could not, as of right, control punishment affecting her sailors, soldiers and air men when they served under British operational command. The passing of the Visiting Forces legislation (and reciprocal statutes by the United Kingdom and other Dominions) removed this obstacle to the free exercise of national sovereignty. Nor was this entirely a matter of form, or mere procedure. As already indicated,

opinion in the Dominions diverged considerably on some subjects, such as justifiable grounds for military executions, from accepted British policy. The constitutional developments of 1931-33 brought a fundamental change in the administration of discipline. Thereafter, all disciplinary matters affecting members of the Canadian armed forces serving abroad were controlled by the Canadian Government -- either directly, through its own senior officers, or indirectly, by <u>delegated</u> authority to the appropriate officer of an ally.

DISCIPLINARY POLICY IN THE SECOND WORLD WAR

44. Although, before the beginning of the Second World War, Canada had achieved full control over the disciplinary policy of her armed services, she still lacked experience in the exercise of that policy. The full measure of new responsibilities, and the most suitable methods of fulfilling them, could only be ascertained by the exacting requirements of wartime. To some extent, therefore, Canada was feeling her way, from precedent to precedent, through novel problems of some complexity.

45. It is only necessary to contrast the vastly different arrangements for the administration of military law in the C.E.F. with those which accompanied the arrival of Canadian troops in the United Kingdom in the Second World War, to appreciate the nature and scope of the later problems. Add to this consideration the fact that Canada sent her troops to such widely separated places as Gibraltar and Hong Kong, that for long periods she maintained large formations in both the Mediterranean and North-West Europe theatres and that the operations of her naval and air

forces encircled the globe. It will then be seen that, although certain roots remained from the First World War, much new ground had to be broken in the Second.

46. In the following section of this report disciplinary policy in the period 1939-46 will be examined from three main angles: first, brief mention will be made of certain special problems of internal administration in Canada; second, consideration will be given to other problems that arose out of service commitments in territories adjacent to Canada and at Hong Kong (1941); finally, an attempt will be made to describe the relatively complicated pattern of disciplinary policy in relation to Canadian forces serving overseas, with particular reference to military developments in the United Kingdom and continental Europe.

(i) Problems of Internal Administration

47. One of the first formal steps taken at Ottawa, as war drew near, was to place the Active Militia on war establishment. Accordingly, by order in council (P.C. 2482) of 1 September 1939, the Governor General authorized the organization of the Canadian Active Service Force. At the same time (under section 20 of the Militia Act) specified "Units, Formations and Detachments" were named as "Corps of the Active Militia". Further, by virtue of section 64 of the Militia Act,* the order placed these units, formations and detachments "on active service in Canada". The definition of "on active service" given in section 2 (g) of the Act was: "as applied to a person

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*"The Governor in Council may place the Militia, or any part thereof, on active service anywhere in Canada, and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency." (Section 64)

subject to military service, means whenever he is enrolled, enlisted, drafted or warned for service or duty during an emergency, or when he is on duty, or has been warned for duty in aid of the civil power."[69]

48. The legal effect of calling the Militia out on "active service" was that officers and men immediately became subject to military law as thus defined in section 69 of the Militia Act:

> The Army Act for the time being in force in Great Britain, the King's regulations, and all other laws applicable to His Majesty's troops in Canada and not inconsistent with this Act or the regulations made hereunder, shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia.

However, members of the active militia placed "on active service in Canada" (which included territorial waters) could not be legally employed on active service beyond Canada without a further order of the Governor in Council. The opinion given by the Judge Advocate General's office was that, although the declaration made on the individual soldier's M.F.M. 2 was "not restrictive with respect to service either in or beyond Canada", the declaration "would not in itself result in his being required to serve overseas unless there is the further Order of the Governor in Council mentioned above."[70]

49. The Reserve and Permanent Naval Forces of Canada were placed on active service, under section 19 of the Naval Service Act, by orders in council (P.Cs. 2478 and 2479) of 1 September 1939. All officers and airmen of the Permanent Active Air Force and specified units, formations and detachments of the Auxiliary Active Air Force were placed on active service, under the War Measures Act, by

order in council (P.C. 2500) of 2 September. By a further order (P.C. 2511) of 3 September the Minister of National Defence was authorized "to call out for service from time to time such Officers and Airmen of the Reserve Air Force as may be required."

50. In the First World War standing General Courts Martial had been established in each Military District in Canada.[71] The procedure to be adopted in the Second World War was outlined, at the end of September 1939, in general instructions for the C.A.S.F. issued by the Adjutant General. He pointed out that a soldier on active service could be lawfully tried by a District Court Martial and that it was unlikely that the number of more serious cases would necessitate use of Field General Courts Martial instead of General Courts Martial. The Adjutant General also observed:

> While field punishment may be lawfully awarded to a soldier on active service who is found 'guilty' of an offence, it is not considered that the conditions under which troops are serving in Canada are such as would warrant such a form of punishment being awarded. A sentence of detention or imprisonment would, it is considered, meet the ends of justice, and therefore it should only be in very exceptional cases that field punishment should be awarded.[72]

51. The results of disciplinary policy in Canada were constantly reviewed. In the summer of 1940 various authorities, including the Inspectors-General, became seriously concerned about "a widespread slackening in discipline throughout the Forces". The situation with respect to absence without leave was particularly unsatisfactory. It was, however, realized that intelligent administration, no less than carefully framed codes of conduct, was essential to a solution. In a circular letter

to all District Officers Commanding, the Adjutant General (Major-General B.W. Browne) stated:

> What is wanted is effective action to inculcate discipline, not as an artificial rule but as a fundamental of soldiering and of any organized enterprise as well. Discipline will save lives and win battles. Absence without leave is a manifestation of lack of discipline. Whether the remedy is by drastic action or by administration, or both, is for decision in the particular circumstance. Results must be obtained.
>
> The scale of punishment should be checked very carefully. Where necessary severe punishment should be administered.
>
> District Officers Commanding, if this has not already been done, should call together the officers of each unit and impress on them the urgent necessity for obtaining the desired standard of efficiency required. This responsibility should be handed down from Commanding Officers to junior officers. If the junior officers take the requisite amount of interest in their men and gain their confidence, it is felt that results will be obtained quickly.[73]

52. Arrangements were also made for close co-operation between service and civilian authorities in disciplinary matters affecting members of the services. Police magistrates and Justices of the Peace were instructed that, whenever possible, the appropriate military authorities were to be notified when a soldier was charged with an offence lying within the formers' jurisdiction. Paragraph 484 of K.R. (Can.) provided that, in certain circumstances, an officer would attend the trial of a soldier before a civil court and pay any fine levied on the soldier. The provincial attorneys general were informed: "The purpose of the Regulation is, inter alia, to prevent a soldier escaping the performance of some military duty which he could do by refusing to pay the fine, and serve the term of imprisonment which may be awarded in default of payment."[74]

53. In other respects a careful line was drawn between service and civilian responsibilities. Thus, late in 1940, the Judge Advocate General rejected the suggestion that, in order to avoid overcrowding of detention barracks, courts martial should award sentences of imprisonment with hard labour, which would then be served in civil jails. He pointed out that "detention was introduced into the scale of punishments for the express purpose of avoiding having to send soldiers to civil prisons who were sentenced for purely military offences." In his view the Department of National Defence would have been "open to justifiable criticism" if instructions had been issued that resulted in "young soldiers, having no criminal propensities, being committed to civil prisons, with the stigma thereto attaching, to say nothing of the associations which they would have in such prisons."[75]

54. Another legal problem was connected with inter-service powers of arrest. In August 1940 the regulations in effect on this point were very confusing. "Military custody", as defined in section 45 (2) of the Army Act,* did not include either naval or air force custody. Therefore, neither naval nor air force police would legally arrest a soldier. On the other hand, "Air Force custody", as defined in the Air Force Act, included <u>both</u> naval and military custody -- with the result that both naval and military police could legally arrest airmen. Finally, there was no provision in the King's Regulations or the Admiralty Instructions for the arrest of naval ratings by either military or air force police. The Judge

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*"Military custody means, according to the usages of the service, the putting the offender under arrest or the putting him in confinement."

Advocate General stated that, if it was desired to remedy this situation, an order in council would be required under the War Measures Act.[76]

55. Eventually, an order in council (P.C. 609) of 26 January 1942 gave Naval, Army and Air Force Provost Marshals reciprocal powers of arrest over members of the other services. This order also contained the following provisions:

> That the powers conferred ... on any Provost Marshal are exercisable also by his assistants and by any officer or seaman, soldier or airman as the case may be, legally exercising authority under him or on his behalf except that no officer can be arrested or detained otherwise than on the order of another officer.*
>
> That the above powers may be exercised in the area comprising the Dominion of Canada and Newfoundland.

P.C. 609 was revoked by order in council (P.C. 3056) of 15 April 1943, which retained the principle of reciprocal powers of arrest, but substituted "Staff Officers for Naval Shore Patrols" for "Naval Provost Marshals". P.C. 3056 was revoked, in turn, by P.C. 3771 of 10 September 1946, which again retained the principle of reciprocal powers of arrest but made changes to conform with revised terminology in The King's Regulations for the Royal Canadian Air Force.

56. In passing, it may be noted that a member of the Provost Corps was not a "peace officer" within the meaning of the Criminal Code. Consequently, in dealing with civilians, his powers of arrest did not exceed those of a civilian who was not a peace officer. However, by order in council (P.C. 4179) of 25 May 1943, the power of

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*It will be recalled that, in certain circumstances (set out in section 45 (3) of the Army Act), a junior officer could legally order the arrest of a senior.[77]

arrest by a member of the Provost Corps was "extended to include arrest of any person acting in a suspicious manner and action akin thereto, in any area designated by the Minister of National Defence."[78]

57. Introduction of compulsory service for home defence, under the National Resources Mobilization Act (1940), brought additional problems of service discipline. The first men called out under the appropriate regulations reported for duty on 9 October 1940, severe penalties having been provided for those who failed to comply.[79] Under the Reserve Army (Special) Regulations 1941, a recruit or Home Defence member of the Canadian Army was considered to be "subject to all obligations and duties, and be governed by the same laws, orders and regulations as a man of the Active Militia, on the strength of a Corps thereof, which is placed on Active Service pursuant to S. 64 of the Militia Act." This meant that, if such soldiers were under close arrest, they could "be ordered to bear arms, attend parades and perform all such duties as may be required of them" by reason of their active service status.[80] Furthermore, the principle was clearly established that, if N.R.M.A. recruits were arrested by civil authorities for a civil offence, "they should be dealt with as if they were members of any active Unit or Formation of the Canadian Army."[81] On the other hand, N.R.M.A. recruits were originally required to perform service and duty only within the territorial limits of Canada or in such areas as were designated by Parliament of the Governor in Council. This restriction was given a narrow interpretation. In 1942 the Judge Advocate General's office expressed the opinion that "no authority exists for compelling them to proceed as part of a convoy to the

United States, and even should such personnel volunteer to proceed, it would be advisable to refuse such offers in view of restrictions surrounding their service."[82] However, a succession of orders in council gradually enlarged the permitted area of employment within the North American zone.[83] Still later, an order in council (P.C. 8891) of 23 November 1944 authorized the Minister of National Defence to send 16,000 N.R.M.A. soldiers overseas to relieve the infantry reinforcement crisis.[84]

58. Disciplinary policy was also concerned with the legal relationships of members of the British and United States armed forces to Canadian service authorities in Canada. Thus, inauguration of the British Commonwealth Air Training Plan,[85] whereby airmen from the United Kingdom and other parts of the Commonwealth came to Canada for training, necessitated action under The Visiting Forces (British Commonwealth) Act, 1933. Training schools and other units of the Royal Air Force began moving to Canada early in 1940 and, before the end of that year, the necessary legal arrangements had been concluded. Action by both British and Canadian authorities was required. The Air Council of the United Kingdom agreed to "communicate warrants to the appropriate Officers of the Royal Canadian Air Force conferring upon them the power, (with limitations which would require consideration in detail), to convene and confirm Courts-Martial, other than Field General Courts-Martial, under the Air Force Act."[86] Canadian action was based upon the provisions of The Visiting Forces (British Commonwealth) Act, 1933, and the War Measures Act (Chapter 206 of the Revised Statutes of Canada, 1927). An order in council (P.C. 6841) of 25 November 1940 stated, in part:

2. That the Royal Canadian Air Force shall serve together in Canada with all such Training Schools, Units and Formations of the Royal Air Force as aforesaid which are now, or which hereafter may be moved to Canada.

3. That all Training Schools, Units and Formations of the Royal Canadian Air Force serving or present in any Royal Canadian Air Force Air or Training Command shall act in combination with all such Training Schools, Units and Formations of the Royal Air Force as are for the time being present or serving in such Air or Training Command, and that, for the purposes of paragraph (b) of subsection (4) of Section 6 of the said The Visiting Forces (British Commonwealth) Act, 1933, the Royal Canadian Air Force Officer in command of such Air or Training Command, as the case may be, shall be the Officer in command of the Combined Force serving in such Command.

The provisions of this order in council were given retroactive effect to 10 September 1940.

59. The application of British and Canadian service law to training establishments under the British Commonwealth Air Training Plan was further clarified by decisions given in 1942 and 1943. It was established that members of the R.C.A.F. who were posted to units of the R.A.F. in Canada remained subject to R.C.A.F. law. On the other hand, members of the R.A.F. placed at the disposal of the R.C.A.F. in Canada became subject to R.C.A.F. law. The following ruling, given in 1943, serves to illustrate the difficulties which arose:

> If an R.A.F. officer or airman is posted to an R.C.A.F. station in Canada, he is subject to R.C.A.F. law. But if, while at an R.A.F. station in Canada he commits an offence against R.A.F. law and is subsequently posted to an R.C.A.F. station in Canada, he cannot be tried under R.C.A.F. law for an offence against R.A.F. law. Hence he should be posted back to the R.A.F. station and tried under R.A.F. law.[87]

60. Special arrangements were also made to regulate the legal relationships of members of the Canadian

and United States forces in Canada and the United States.* The United States Army was given the power of trying its personnel in Canada by court martial under the American Foreign Forces Order (1941), which was made applicable to United States forces stationed in Canada by order in council (P.C. 2813) of 6 April 1943. Accordingly, members of the United States forces in Canada could be legally apprehended at the request of either their Officer Commanding or the United States Government. However, this order applied only to members of the American forces stationed in Canada; in July 1943 the office of the Judge Advocate General ruled that "absentees and deserters of the United States Army who are not members of a United States Force stationed in Canada cannot be apprehended in Canada under this Order by Canadian Service Police."[88]

61. The present report cannot attempt to cover all aspects of the wartime administration of disciplinary policy within Canada. However, by way of concluding this section, brief reference may be made to certain decisions with a wide application to members of the services. For example, refusals of inoculation were dealt with by order in council (P.C. 634) of 27 January 1942, rescinding an order in council (P.C. 6375) of 19 August 1941. It had been clearly established that when a member of the forces refused to submit to vaccination, inoculation or treatment against any infectious disease and blood examination, he could not be physically forced to comply. But P.C. 634

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*The special requirements of disciplinary policy in the First Special Service Force, "a unique international organization whose personnel was drawn partly from the Canadian and partly from the United States Army" is discussed in Six Years of War, 108. See, also, paragraph 95 of this report.

provided that "an unreasonable refusal" constituted an offence under sub-section 2 of section 9 of the Army Act.* The office of the Judge Advocate General stated that "this would not be a continuing offence and each refusal would constitute a separate offence."[89]

62. Another decision, based upon an order in council (P.C. 4059) of 15 May 1942, clarified the status of nursing sisters. Since they were appointed to commissions, they were deemed to be officers within the meaning of section 190 of the Army Act and therefore subject to appropriate disciplinary action.[90] On the general subject of reducing officers in rank, the Judge Advocate General contributed this opinion:

> Since a commission is granted by His Majesty the King to discharge 'his duties as an officer in the rank of ... or in such other rank as we may from time to time hereafter be pleased to promote or appoint you,' such officer may not be demoted and neither the War Measures Act nor the Militia Act, neither of which bind the Crown, could be invoked to accomplish this end.[91]

It was also established that the procedure for removal, retirement or reversion to reserve status of an Army officer, under paragraphs 267 and 268 of K.R. (Can.), was "not in any sense a punishment but such action is taken purely from the point of view of the good of the Service. The Adjutant-General may, if in his opinion, he feels that the facts do not justify submission to the Minister, refuse to submit same; but once the matter is submitted, the Minister is not limited in any way by consideration of the legal sufficiency of the evidence."[92]

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*Dealing with disobedience to a superior officer. (See paragraph 16, above).

63. Peculiar difficulties sometimes arose in the administration of service law. Thus, under Article 144 of the Canadian Naval Regulations (1942), only applicants "of the white race" were eligible to serve in the Royal Canadian Navy. Almost inevitably, the authorities were called upon to decide whether an applicant with mixed blood -- in this case, one with one-twelfth Indian blood (his father was one-sixth Indian and his mother white) -- was eligible for enlistment. The Judge Advocate General decided that, since the applicant in question showed "all the characteristics of the white race and none of the Indian Race", he was properly eligible to serve in the Royal Canadian Navy.[93]

(ii) Disciplinary Policy in Territories Adjacent to Canada

64. In May 1940 the Canadian Government accepted a British suggestion to send Canadian troops to the West Indies. For a time the troops occupied both Bermuda and Jamaica; later the Canadian commitment was extended in the Caribbean to the Bahamas and British Guiana.[94] The legal problems created by these dispositions were solved, in Canada, by invoking The Visiting Forces (British Commonwealth) Act, 1933, and the War Measures Act. By order in council (P.C. 2218) of 28 May 1940 "all Military Forces of Canada present in the West Indies and Bermuda" were ordered to "serve together therein with the Military Forces of the United Kingdom and the Military Forces of the said Colonies, present in the West Indies and Bermuda." The Canadian forces were also directed to "act in combination with those Forces of the United Kingdom present in the West Indies and Bermuda and those Forces of the said Colonies to which the same have been so detailed." This procedure

was repeated, in 1942, when Canada despatched a small force to protect vital interests in British Guiana. By order in council (P.C. 4744) of 5 June 1942 the Canadian force was ordered to "serve together, and act in combination therein, with the Military Forces of the United Kingdom and with the Military Forces of any other part of the British Commonwealth and of the colony of British Guiana present in British Guiana."

65. In the spring of 1940 the British Government also suggested that Canadian troops be sent to Iceland. Further consultation, profoundly influenced by Allied military reverses in North-West Europe, led the Canadian Government to despatch "Z" Force to Iceland during June and July.[95] The R.C.A.F. was also involved in these defensive arrangements. Again, The Visiting Forces (British Commonwealth) Act, 1933, and the War Measures Act were employed to resolve questions of command and discipline. An order in council (P.C. 2581) of 14 June 1940 ordered "all Military and Air Forces of Canada present in Iceland" to "serve together" and "act in combination with those Forces of the United Kingdom and of other parts of the British Commonwealth present in Iceland to which the same have been so detailed."

66. The same machinery was used to adjust legal relationships between Canadian military and air forces, on the one hand, and military forces of Newfoundland, on the other, after Canada participated in the defence of the island.[96] Fortunately, The Visiting Forces (British Commonwealth) Act, 1933, was adequate to deal with any difficulties which, otherwise, might have arisen through

Newfoundland's peculiar constitutional status.* By order in council (P.C. 3822) of 13 August 1940 "all Military and Air Forces of Canada present in Newfoundland" were ordered to "serve together" and "act in combination with those Forces of Newfoundland present in Newfoundland to which the same have been so detailed." In 1941 the Canadian Judge Advocate General pointed out that, if a "member of the Newfoundland Militia was, by virtue of Section 5 (1) (b) of The Visiting Forces Act (Newfoundland), attached temporarily to the Canadian Force serving in Newfoundland, he would, by virtue of Section 6 (1) (b) and sub-section (3) of the said Section 6 of The Visiting Forces Act (Canada), be subject to Military Law and be treated as if he were a member of the Canadian Force, unless otherwise ordered by the Governor-in-Council."[97] No such order had been made. P.C. 3822 was revoked by P.C. 3464 of 29 April 1943 which, however, merely consolidated existing orders dealing with the relationship of the Military Forces of Canada to those of other parts of the Commonwealth. (See paragraph 88, below).

67. Defensive arrangements in the West Indies, Iceland and Newfoundland were directed against German aggression. Parallel dispositions countered the threat of a Japanese offensive in the North Pacific. In this area units of the R.C.N., Canadian Army and R.C.A.F. participated in large-scale American operations, culminating in the fiasco at Kiska in July 1943.[98] Beginning with an order in

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*Responsible government was suspended and Newfoundland was administered by a Commission of Government, responsible to the British authorities, from February 1934 to March 1949, when Newfoundland entered Confederation.

council (P.C. 7995) of 4 September 1942, authority was granted for the despatch to Alaska of certain Canadian units containing personnel called out under the National Resources Mobilization Act (1940). The provisions of this order were extended by P.Cs. 3238 and 5011 of 20 April and 18 June 1943, respectively.

68. Policy covering the general employment of N.R.M.A. soldiers in territories adjacent to Canada was clarified by order in council (P.C. 6296) of 11 August 1943:

> The Minister of National Defence is hereby authorized and directed to despatch personnel called out for training, service or duty pursuant to the National Resources Mobilization Act, 1940, to Newfoundland (including Labrador), Bermuda, Bahamas, B.W.I., Jamaica, B.W.I., British Guiana, Alaska and the United States of America for training, service or duty with any Active Unit of the Canadian Army as from time to time he deems necessary having regard to the military exigencies of the moment; and to issue or cause to be issued all Orders and to take all steps necessary to give effect to this authorization and direction; and all personnel so to be despatched are respectively hereby required (in addition to all other obligations for training service or duty) to perform while in Newfoundland (including Labrador), Bermuda, Bahamas, Jamaica, British Guiana, Alaska and the United States of America, such training, service or duty as may be ordered by any Superior Officer in all respects as if the aforesaid training service or duty were training service or duty performed or ordered to be performed in Canada.

All such personnel were brought completely within the scope of military law by being placed "on Active Service beyond Canada for the defence thereof" under section 64 of the Militia Act.

69. When Canada despatched an expeditionary force to Hong Kong, at the end of 1941, special arrangements covering discipline were again necessary. Under authority of The Visiting Forces (British Commonwealth) Act, 1933, and the War Measures Act, an order in council (P.C. 8020)

of 17 October 1941 stated that "Military Forces of Canada serving in Hong Kong or elsewhere in the Far East" would "serve together" and, when so ordered by "the appropriate Canadian Service Authorities", would "act in combination with those Forces of the United Kingdom and of other parts of the British Commonwealth, Colony or Territory administered by any of His Majesty's Governments present in Hong Kong or elsewhere in the Far East to which the same have been so detailed."

70. The instructions issued to Brigadier J.K. Lawson, commander of the Canadian force, made it clear that, although the force would serve under the operational control of the General Officer Commanding, Hong Kong, the latter was not "vested with authority to convene and confirm the findings and sentences of Court-Martial, in respect of Canadian personnel" under Lawson's command.[99] By another order in council (P.C. 8022), also of 17 October 1941, the commander of the Canadian force was "empowered in the case of officers and soldiers under his command to convene General Courts-Martial for the trial of any such officer or soldier, and District Courts-Martial for the trial of any such soldier, and to delegate power to any officer duly qualified by law in that behalf to convene any such District Courts-Martial." The Canadian commander was also authorized to "approve, confirm and cause to be put into execution, mitigate, commute or remit any sentence" of a court martial "other than in the case of officers a sentence of death or penal servitude or imprisonment with or without hard labour or cashiering or dismissal from His Majesty's Service, and in the case of soldiers a sentence of death or penal servitude...." Sentences in the restricted

category, passed by General Courts-Martial, were to be referred to the Judge Advocate General who, acting under section 99 of the Militia Act,* would pass the proceedings (through the Minister of National Defence) to the Governor in Council. Such sentences could be legally executed only after the Governor in Council had given approval. Under K.R. (Can.) both the officer commanding and the Officer in Charge of Administration were vested with the powers of a District Officer Commanding to deal with less serious disciplinary matters.

(iii) Disciplinary Policy Overseas

71. Unlike the anomalous situation which had persisted throughout the First World War, Canadian control of disciplinary policy with respect to Canadians serving overseas was clearly established from the beginning of the Second World War. British authorities were quick to realize the autonomous status of Canadians serving in theatres under British or Allied operational control and there was very little friction, on this issue, between Canada and other members of the Commonwealth. The only difficulties over disciplinary matters were self-imposed, arising out of attempts to implement Canadian policy in the light of constantly changing strategical considerations.

72. Certain aspects of disciplinary policy in relation to military formations serving overseas have already been mentioned in the Official History of the Canadian Army in the Second World War**. The early problems

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*"No sentence of any general court-martial shall be carried into effect until approved by the Governor in Council". (Militia Act, Chapter 132, Revised Statutes of Canada, 1927). See Appendix "F" to this report.

**Six Years of War, 425-7.

of legal relationship between Canadian and British forces have also been examined in two reports prepared by the Historical Section: Chapter Two of the "Preliminary Narrative: The History of the Canadian Military Forces Overseas 1939-40" and C.M.H.Q. Historical Section Report No. 180, "The Visiting Forces Act 1941-4". The present account will supplement this information by outlining the successive changes in procedure, mainly in the form of warrants to convene courts martial, which enabled Canadian commanders to cope with the changing requirements of disciplinary policy between 1939 and 1946. Because of the lack of available material on developments in the R.C.N. and R.C.A.F. (see paragraph 1, above) this section of the report is restricted mainly to the military aspects of disciplinary policy.

(a) Preliminary Naval, Military and Air Arrangements

73. An order in council (P.C. 3391) of 2 November 1939, purported to be made under The Visiting Forces (British Commonwealth) Act, 1933, contained provisions for the employment of Canadian military and air forces in the United Kingdom and on the continent of Europe:

1. That all Military and Air Forces of Canada present in the United Kingdom serve together with the Military and Air Forces, respectively, of the United Kingdom;

2. That all Military and Air Forces of Canada serving on the Continent of Europe shall act in combination with those Forces of the United Kingdom serving on the Continent of Europe with which they may from time to time be serving, and that they shall so act upon their embarkation in the United Kingdom for the purpose of proceeding to the Continent of Europe; and

3. That, in respect of any Military and Air Forces of Canada serving in the United Kingdom, those parts thereof as may from time to time be detailed for that purpose by the appropriate

> Canadian Service Authorities as from time to time designated by the Minister of National Defence, shall act in combination with those Forces of the United Kingdom to which the same have been so detailed.

Some doubt having been expressed about the competence of the Governor in Council to delegate certain of these powers, under The Visiting Forces (British Commonwealth) Act, 1933, a further order in council (P.C. 3802) was approved on 23 November 1939, bringing P.C. 3391 under the authority of the War Measures Act (Chapter 206 of the Revised Statutes of Canada, 1927). P.C. 3391, as amended, was afterwards revoked by P.C. 1066 of 3 April 1940 (effective 2 November 1939), which ensured "uniformity of procedure in the matter of declarations made under the respective Canadian and United Kingdom Statutes". The principal change concerned the first paragraph of the above quotation, which was revised to read:

> 1. That all Military and Air Forces of Canada which are present in the United Kingdom or on the Continent of Europe, or are proceeding from one to the other, serve together with the Military and Air Forces, respectively, of the United Kingdom.

In due course P.C. 1066 was revoked, insofar as the designation of the Minister of National Defence was concerned, by P.C. 3464 of 29 April 1943 (see, below, para 88).

74. It will be noted that the above arrangements did not include provision for the Royal Canadian Navy. Very early in the war, an order in council (P.C. 2638 of 14 September 1939) gave authority for certain ships of the R.C.N., "together with the officers and seamen serving them, to co-operate to the fullest extent with the forces of the Royal Navy." This order was rescinded by another (P.C. 3732), of 17 November 1939, which stated that "all Canadian Naval Establishments and all H.M.C. Ships now in

commission or to be commissioned, together with the officers and seamen serving therein, shall during the present war co-operate to the fullest extent with the Royal Navy, and with all other Naval Forces of His Majesty." Detailed information on the disciplinary procedure applied to Canadian naval personnel in foreign waters is not presently available. However, it appears that throughout the Second World War ships of the R.C.N. were "attached" to the R.N. and that, when required, courts martial were convened by the R.N. These courts usually contained Canadian representatives and sentences were subject to Canadian review. Disciplinary cases in Canadian waters were, of course, dealt with exclusively by Canadian authorities.[100]

75. Canadian control of military discipline was much more clearly defined. Order in council (P.C. 149) of 13 January 1940, effective from 15 December 1939, provided (italics added):

> With respect to the Military and Air Forces of Canada, serving in the United Kingdom:-
>
> (a) The Officer Commanding 1st, Canadian Division, C.A.S.F.
>
> The Senior Combatant Officer of Canadian Military Headquarters in Great Britain; and
>
> The Senior Combatant Officer of the Royal Canadian Air Force Headquarters in Great Britain,
>
> not below the rank of Brigadier or Air Officer, as the case may be, are hereby empowered in the case of officers, soldiers and airmen under their respective commands, to convene General Courts-Martial for the trial of any such officer, soldier or airman, and District Courts-Martial for the trial of any such soldier or airman and to delegate power to any officer duly qualified by law in that behalf to convene any such District Courts-Martial.
>
> (b) The Officer Commanding, 1st Canadian Division, C.A.S.F.;

> The Senior Combatant Officer of Canadian Military Headquarters in Great Britain; and
>
> The Senior Combatant Officer of The Royal Canadian Air Force Headquarters in Great Britain;
>
> not below the rank of Brigadier or Air Officer, as the case may be, are hereby empowered, with respect to any Court-Martial held for the trial of an officer, soldier or airman under their respective commands, to approve, confirm and cause to be put into execution, mitigate, commute or remit any sentence of any such Court-Martial other than, in the case of officers a sentence of death or penal servitude or imprisonment with or without hard labour, or cashiering or dismissal from His Majesty's Service and, in the case of soldiers or airmen, a sentence of death or penal servitude, provided always that the officer who, under the provisions of this sub-paragraph has power to confirm, may, if he deems fit, refer the sentence of any General Court-Martial in the manner hereunder provided for approval or otherwise by the Governor-in-Council.

Warrants for these purposes were issued to the foregoing officers. It was clear that the powers delegated to G.O.C. 1st Canadian Division, under P.C. 149, could be exercised only while the division was in the United Kingdom. It was also clear that, except in the more serious cases (italicized in the foregoing quotation), the restriction imposed by Section 99 of the Militia Act upon the carrying out of sentences by General Courts Martial was removed.[101] In an explanatory letter to A.A.G., Aldershot Command, Colonel the Hon. P.J. Montague* (then A.A. & Q.M.G. at C.M.H.Q.) emphasized the purely Canadian channel of authority: "The Militia Act which is part of the law of Canada and which has been brought with it into England by the Canadian Force, provides in Section 93 that the Governor in Council may

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*A Puisne Judge of the Court of King's Bench in Manitoba before the Second World War, Montague rose through various senior appointments to become Chief of Staff, C.M.H.Q., with the rank of lieutenant-general, while remaining J.A.G. for the Canadian Army Overseas until the end of the war.

convene courts martial and delegate the power to convene such and to approve and confirm sentence of such."[102]

76. While these arrangements were being implemented, the Adjutant General at Ottawa issued supplementary instructions, governing the discipline of the Canadian Active Service Force in the United Kingdom, similar to those issued at the beginning of the war for internal administration in Canada (see paragraph 50, above):

> In the United Kingdom, it is unlikely that the number of offenders who are required to be tried by General Courts-Martial, or who have committed offences which warrant trial by such Courts, will be sufficient to necessitate the convening of Field General Courts-Martial instead of General Courts-Martial and so, such Courts will not be convened... Unless it is considered that the offender should be tried by a General Court-Martial, recourse will be had to a District Court-Martial.
>
> While field punishment may be lawfully awarded to a soldier, on active service, who is found guilty of an offence, it is considered that the conditions under which the troops are serving in the United Kingdom are such as will not warrant such form of punishment being awarded. A sentence of detention or imprisonment will, it is considered, meet the ends of justice, and, therefore, only in very exceptional cases should field punishment be awarded.[103]

77. Early in 1940 a technical difficulty arose over the meaning of "superior military authority" in relation to suspended sentences. Colonel Montague, as D.J.A.G., advised Major-General A.G.L. McNaughton, G.O.C. 1st Canadian Division, that the latter was not a "superior military authority" within the meaning of section 57A of the Army Act and consequently could not legally suspend sentences awarded by Canadian courts martial overseas. Montague pointed out that it was necessary "to protect the Commander because if by reason of any officer's illegal act a soldier's common law rights are impaired, the officer can be held liable in damages."[104] This situation was quickly

remedied in Canada by promulgation of General Order No. 48 of 1940, which appointed the following officers as "superior military authority for the purpose of the said Section 57A of the Army Act":

> Major-General A.G.L. McNaughton, C.B., C.M.G., D.S.O., General Officer Commanding First Canadian Division, C.A.S.F.
> (Effective 28th February, 1940)
>
> Major-General H.D.G. Crerar, D.S.O., Senior Combatant Officer, Canadian Military Headquarters in Great Britain.
>
> Brigadier P.J. Montague, C.M.G., D.S.O., M.C., Assistant Adjutant and Quartermaster General, Canadian Military Headquarters in Great Britain.
> (Effective 16th March, 1940)

It will be noted that the designation was restricted to three senior officers by names, and not by their appointments. This was changed by General Order No. 275 of 1940, which altered the appointments to read:

> The Senior Combatant Officer of the Canadian Militia not below the rank of Major-General serving in the Canadian Military Forces in the United Kingdom or elsewhere in the field with respect to forces under his command.
>
> The Senior Combatant Officer at Canadian Military Headquarters in Great Britain, not below the rank of Brigadier.

(b) Disciplinary Problems on the Continent and in the United Kingdom - 1940

78. As the war entered the fateful spring and summer of 1940 other problems arose with a direct bearing upon disciplinary policy. Anticipating the departure of Canadian military and air forces for operations on the Continent, the Canadian Government considered the necessity of issuing a warrant to convene courts martial to the "Officer Commanding the combined Forces and, if so, what limitation should be made in exercise of powers relating

to confirmation findings and sentence."[105] As a guide, the Government sought information on the procedure adopted in cases where Australian or New Zealand forces were "acting in combination with forces of [the] United Kingdom under the command of an Officer appointed to command the combined Forces." The High Commissioner for Canada in the United Kingdom (Mr. Vincent Massey) recapitulated Montague's opinion, that since Australia and New Zealand had not yet adopted section 4 of the Statute of Westminster "their troops overseas apparently come at present under Army Act Section 187 C, being amendment 7 of June, 1932."[106] These Dominions were then enacting the necessary legislation to conform with their new constitutional status. The High Commissioner's communication continued:

> No limitation made by British on exercise by Gort* of full powers relating to confirmation of findings and sentences. No instructions have of course yet been issued by United Kingdom to Commander proposed combined forces in France.

When General McNaughton discussed the integration of Canadian forces in the B.E.F. with Lord Gort, the latter freely conceded Canadian autonomy in disciplinary matters:

> The C.in-C. indicated that he did not desire or think it necessary that in matters of discipline the Canadian Force should be under G.H.Q. He pointed out the difficulties which had been experienced by Sir D. Haig in 1918 when the Australians had had a different scale of punishment from the B.E.F. (i.e. abolition of the Death Sentence): he stated that if he had to he would accept responsibility for Discipline but that he thought that matters would work out most advantageously if the Canadian Force remained autonomous as far as possible in disciplinary matters.
>
> The G.O.C., Canadian Forces, agreed that the scales of Punishment in the two forces should be similar and he thought that no difficulty would be met in bringing this about by conference between the two staffs.[107]

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*General (later Field-Marshal) Lord Gort, V.C., who had been C.I.G.S., 1937-9, and who was C.-in-C., British Expeditionary Force, 1939-40.

79. On 14 June 1940 an order in council (P.C. 2579) was passed, effective 1 June 1940, providing for the convening of General and District Courts Martial and the confirmation and carrying out of sentences awarded in cases concerning members of Canadian military forces serving "in combination" with forces of the United Kingdom "on the Continent of Europe". The order stated, inter alia:

> The power and authority from time to time granted by His Majesty under the Army Act to the Officer appointed by or under the authority of His Majesty to command the combined Force with which any said Canadian Military Forces are acting in combination, to convene General and District Courts-Martial, and to confirm the findings and sentences thereof, as well as any power of delegation vested in any such Officer by His Majesty, shall apply with respect to the convening of any such Courts-Martial for the trial of any member of any such Canadian Military Forces when so acting in combination, and with respect to the confirmation of the findings and sentences of any such Courts-Martial, and with respect to the carrying into effect of such sentences....
>
> That the provisions of Section 99 of the Militia Act [see paragraph 70, above] shall not apply with respect to the carrying into effect of the sentence of any General Court-Martial held on the Continent of Europe for the trial of any officer or soldier of the Military Forces of Canada, or of any officer or airman of the Royal Canadian Air Force, or of any member of the naval, Military and Air Forces of His Majesty raised in any other part of the British Commonwealth while attached temporarily to any Military Forces of Canada serving on the Continent of Europe....

80. These arrangements were nullified by the disastrous turn of events on the Continent and no warrant was issued to the Commander-in-Chief.[108] Successive Allied reverses led to the evacuation of Dunkirk during the first days of June. By the middle of the month the 1st Canadian Infantry Brigade, which had only just arrived in France, was preparing to withdraw to England.* On 22 June the Franco-German armistice was signed. Meanwhile, on the 18th, Brigadier Montague had telegraphed to National

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*Six Years of War, 279-83.

Defence Headquarters, pointing out that the words "on the Continent of Europe" in P.C. 2579 "must be interpreted as referring only to the mainland of the Continent and therefore the matter of convening and confirming [courts martial] where forces are in combination in the United Kingdom requires to be dealt with...."[109] Under the British system the C.-in-C. Home Forces was not charged with administration, which was left to the War Office and Commands. Montague also noted that special arrangements would be needed to cope with the arrival of a second division and formation of a corps. He urged that authority should also be given for the convening of Field General Courts Martial in the United Kingdom and that restrictions on the award of field punishment should be removed.

81. Responding to the changed strategic situation overseas, the Canadian Government passed an order in council (P.C. 2932) of 4 July 1940, effective 25 June 1940. This order endeavoured to cover various contingencies in the United Kingdom, including inability of the Senior Combatant Officer to act, as follows (italics added):

> (a) The Senior Combatant Officer of the Canadian Militia, not below the rank of Major General, serving in the said Canadian Military Forces; and the Deputy Adjutant General at Canadian Military Headquarters in Great Britain, not below the rank of Brigadier, are hereby empowered, in the case of officers and soldiers under the command of said Senior Combatant Officer or of Canadian Military Headquarters in Great Britain, as the case may be, to convene General Courts-Martial for the trial of any such officer or soldier, and District Courts-Martial for the trial of any such soldier, and to delegate power to any officer duly qualified by law in that behalf to convene any District Court-Martial.
>
> (b) The Senior Combatant Officer of the Canadian Militia, not below the rank of Major General, serving in the Canadian Military Forces in the United Kingdom is hereby empowered, with respect

> to any Court-Martial held for the trial of an officer or soldier under his command, or under the command of Canadian Military Headquarters in Great Britain, to approve, confirm, and cause to be put into execution, mitigate or remit any sentence of any such Court-Martial, and the provisions of Section 99 of the Militia Act shall not apply with respect to any such sentence.

By the same order the Deputy Adjutant General at C.M.H.Q. was given "the powers, duties and functions" which, under sub-paragraph (b) of paragraph 1 of P.C. 149 (quoted in paragraph 75, above), had been previously exercised by the Senior Combatant Officer of Canadian Military Headquarters in Great Britain. It will be noted that the order changed the designation "The Senior Combatant Officer of Canadian Military Headquarters in Great Britain" (used in P.C. 149) to "The Senior Combatant Officer of the Canadian Militia" and that the latter's powers were extended by removal of the restriction imposed by section 99 of the Militia Act. On the other hand, while D.A.G., C.M.H.Q., could convene courts-martial, he could not confirm or put into execution the most severe sentences, such as death, cashiering, dismissal or penal servitude.

82. N.D.H.Q. advised C.M.H.Q. that, if Field General Courts Martial were held on British troops in the United Kingdom, and if field punishment was awarded by the British authorities, similar action could be taken with respect to Canadian troops in the United Kingdom.[110] Accordingly, Canadian Active Service Force (Overseas) Routine Order No. 232 of 7 August 1940 authorized trial by Field General Courts Martial; paragraph 10 of the same order stated:

> Field punishment may now be awarded summarily and by sentence of Court Martial. It is desirable that as far as possible sentences of detention shall continue to be awarded by Courts Martial

and that field punishment shall be reserved for summary awards.

83. As the build-up of Canadian formations in the United Kingdom continued, supplementary arrangements were necessary to cover the expanding requirements of discipline. By an order in council (P.C. 3780) of 13 August 1940, "the Officer Commanding Second Canadian Division" was given the same "powers, duties and functions" which, under P.C. 149 of 13 January 1940, had previously been given to G.O.C. 1st Division.[111] (See paragraph 75, above). The Senior Combatant Officer of the Canadian Militia (not below the rank of Major-General) serving in the United Kingdom was then authorized to confirm sentences awarded by courts martial in the 2nd Division.[112] Similar arrangements were made in 1941, by P.Cs. 8121 and 8122 of 22 and 24 October, respectively, to cover the 3rd and 5th Divisions when they arrived in the United Kingdom.

(c) Convening Courts Martial on the Continent and in the United Kingdom, 1941-2

84. Meanwhile, returning prospects of an Allied invasion of North-West Europe inevitably led to further consideration of the problems of convening courts martial on the Continent. At the beginning of 1941, in a letter to Lieut.-General McNaughton, Commander, Canadian Corps, Major-General Montague commented on the application of P.C. 2579 of 14 June 1940, pointing out that "the Commander-in-Chief of the British forces on the Continent, with which a force of the Canadian Army is acting in combination, is invested with power to convene and to confirm and to delegate such powers. In the result the Commander-in-Chief's action

will be final and it will be for him to delegate powers to you and to divisional commanders as was the practice in the last war and in the B.E.F. in the present one."[113] It is, however, important to remember the distinction, in channels of authority, between the procedures of the First and Second World Wars. As we have seen (paragraph 17, above), authority to convene and confirm courts martial in the earlier conflict emanated from The King, through exclusively British channels, with Canadian acquiescence. In the Second World War authority was derived from Canada, through the Governor in Council, acting upon the advice of the Canadian Government. The difference between the two procedures was illustrated in an order in council (P.C. 547) of 24 January 1941, which gave authority to convene and confirm courts martial "to the Officer Commanding each of those Forces of His Majesty serving on the Continent of Europe with which Canadian Military Forces there serving are acting in combination". Attached to this order was a draft warrant (see Appendix "A" to this report) designed to convey the necessary authority when the need arose.

85. The flexibility of these arrangements was shown by the application of P.Cs. 2579 and 547 to the discipline of Canadian troops stationed at Gibraltar from 1940 to 1942.* The Canadian authorities provided the Governor and Commander-in-Chief, Gibraltar, with a warrant to convene and confirm courts martial on Canadian soldiers in the fortress. After consultation with C.M.H.Q., the War Office advised His Excellency that his powers of command and punishment were equivalent to those of an "officer of

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*Six Years of War, 299-301.

[the] Dominion force of relative rank and holding same command." He was given "similar powers and authority as granted under [the] Army Act for United Kingdom troops to convene General and District courts-martial, confirm findings and sentence thereof, of delegation and carrying sentences into effect." He could also appoint Canadian or British officers to sit as members of such courts. Section 99 of the Militia Act was waived and His Excellency could, therefore, "confirm sentences by General Court-Martial under Canadian military law" to the same extent as applicable to British troops under a British warrant. The communication from the War Office concluded: "In any case where you think fit to reserve confirmation for approval of [the] Governor in Council in Canada case should be sent here for transmission through Canadian H.Q. London. Disposal of C.M. [Court Martial] proceedings duly confirmed should follow same channels."[114]

86. Nevertheless, by the autumn of 1941, the Canadian authorities recognized the need for further revision of the overseas warrants for military commanders. A memorandum prepared by the Senior Officer, C.M.H.Q. (Major-General Montague), for the Minister of National Defence (Col. the Hon. J.L. Ralston) observed: "The present situation as to the various warrants has grown piecemeal since the Canadians landed in the U.K., and has become complicated....The S.C.O. [Senior Combatant Officer] in the U.K. under the terms of his warrant may delegate the power to convene but not his power to confirm."[115] Montague's paper referred to the necessity of seeking separate orders in council and warrants for divisional commanders and advocated "a simple solution ... for the present and any

future circumstances in connection with the force or forces in the field whether in the U.K. or on the Continent." These problems were discussed at a conference held at C.M.H.Q. on 21 October 1941 and attended by the Minister of National Defence, Lieut.-General McNaughton, Major-General H.D.G. Crerar (then C.G.S.) and Major-General Montague. Agreement was reached on the form of a new draft warrant for the Senior Combatant Officer of the Canadian Militia serving with the Canadian Army Overseas; it was also agreed "that if the proposed warrant for the Senior Officer, C.M.H.Q., be identical in terms with that proposed for the Senior Combatant Officer it will serve all purposes and circumstances that exist or may arise in respect of troops under the command of C.M.H.Q."[116]

87. As a direct result of the above conference another order (P.C. 9586), effective 1 January 1942, was approved by the Governor in Council on 11 December 1941. This order cancelled previous orders (P.Cs. 149, 2579, 2932 and 3780 of 1940 and 547, 8121 and 8122 of 1941) in so far as they related "to the convening of Courts-Martial for the trial of an officer or soldier of the Military Forces of Canada, to the confirmation of the finding and to the approval, confirmation and putting into execution, mitigation, commutation or remission of sentences of any such Courts-Martial...." The new order provided (italics added):

> 2. The Senior Combatant Officer of the Canadian Militia, not below the rank of Major-General, serving with the Military Forces of Canada in the United Kingdom or on the continent of Europe is empowered to convene General Courts-Martial for the trial of any officer or soldier serving in said Military Forces of Canada under his command and to confirm the finding and to approve, confirm and cause to be put into execution, mitigate, commute or remit any sentence of any such Court-Martial.

> 3. Major-General the Honourable P.J. Montague, C.M.G., D.S.O., M.C., so long as he shall continue to be the Senior Officer at Canadian Military Headquarters in Great Britain is empowered to convene General Courts-Martial for the trial of any officer or soldier serving in said Military Forces of Canada under his command and to confirm the finding and to approve, confirm and cause to be put into execution, mitigate, commute or remit any such Court-Martial.

Under paragraph 4, both the Senior Combatant Officer and Major-General Montague were authorized to delegate authority to convene General Courts Martial to subordinate officers of their commands; but the latter were not authorized to confirm the most severe sentences, which were "reserved for confirmation or otherwise by the said Senior Combatant Officer or Major-General Montague, as the case may be." Paragraph 5 of the order stated:

> The provisions of Section 99 of the Militia Act shall not apply with respect to the sentence of any Court-Martial which any of the foregoing officers is empowered to confirm; provided always, however, that the said Senior Combatant Officer or Major-General Montague, as the case may be, may, should he so deem fit, reserve the sentence of any such Court-Martial for the approval or otherwise of the Governor in Council.

Warrants covering the above changes were issued to the Senior Combatant Officer and Major-General Montague. Appendix "B" to this report is a copy of the "Delegated Warrant for Convening General Courts-Martial" issued on 1 January 1942 by Lieut.-General McNaughton, as Senior Combatant Officer, Military Forces of Canada in the United Kingdom or on the Continent of Europe, to "the officer detailed temporarily to command the Canadian Corps, Canadian Army (Active), not below the rank of Major-General" (then Major-General Crerar). Similar delegated warrants were issued, under P.C. 9586, to the commanders of the 1st, 2nd, 3rd and 5th Divisions, the 1st Canadian Army Tank Brigade and the Governor and C.-in-C., Gibraltar.[117]

88. The expanding ramifications of the war and the steady growth of Canadian military and air commitments overseas brought many additional problems of disciplinary policy. Some of these affected other members of the Commonwealth. In view of the possibility that Canadian forces might be serving in the same areas or commands as forces of Australia and New Zealand, an order in council (P.C. 789) was approved by the Governor in Council at Ottawa on 3 February 1942. This order extended the provisions of P.C. 1066 of 3 April 1940 (see, above, paragraph 73) by applying them "with respect to the Military and Air Forces of the Commonwealth of Australia and the Dominion of New Zealand, as are or may be present in the United Kingdom or on the Continent of Europe, or proceeding from one to the other, in like manner as they now apply with respect to the Military and Air Forces of the United Kingdom." P.C. 789 was revoked by P.C. 3464, of 29 April 1943, which consolidated earlier orders dealing with "the relationship and status of the Military Forces of Canada with the Naval, Military and Air Forces of other parts of the British Commonwealth present in the same place". Using the procedure provided by The Visiting Forces (British Commonwealth) Act, 1933, and the authority of the War Measures Act (1927), P.C. 3464 set the pattern for effective co-operation in the future without limitation to any specific theatre:

> 1. (a) The Military Forces of Canada shall serve together with the Naval, Military and Air Forces of any other part of the British Commonwealth with which the said Military Forces of Canada are at any time serving in the same place.
>
> (b) Such part of the Military Forces of Canada as may be detailed for the purpose by the appropriate Canadian Service Authorities designated by the Minister of National Defence, shall act in combination with the Naval, Military and Air Forces of any part of the British Commonwealth to which the same have been so detailed until such an appropriate Canadian Service Authority otherwise directs.

2. The aforesaid appropriate Canadian Service Authorities, in respect of the Military Forces of Canada, are hereby authorized to take such action as may be necessary to effect the attachment of members of the Naval, Military and Air Forces of any part of the British Commonwealth other than Canada to the Military Forces of Canada and vice versa.

3. Any officer of the Naval, Military or Air Forces of His Majesty, raised in any part of the British Commonwealth, who is for the time being exercising command of a combined force (being a force in which a Canadian force is serving together and acting in combination with any other force or forces also declared to be so serving and so acting by the appropriate authorities for such other forces) or any part thereof, is hereby declared to be an officer appointed by His Majesty, or in accordance with the regulations made by or by authority of His Majesty, to command the combined force or any part thereof for all purposes, unless otherwise specified by appropriate authority.[118]

89. Meanwhile, in April 1942, Headquarters First Canadian Army came into existence in England with Lieut.-General McNaughton as G.O.C.-in-C. The overseas military force continued to expand, bringing further legal problems. To assist in coping with the situation, an order in council (P.C. 10,770), of 26 November 1942, authorized the Deputy Adjutant and Quartermaster General, First Canadian Army, to convene General Courts Martial for Army Troops.[119] Delegated warrants were also required for the commander of the 4th Division (21 October 1942), when his formation arrived in the United Kingdom, and for the commander of the 2nd Corps (18 January 1943), when his headquarters was formed. It was also necessary to provide adequate disciplinary authority for the Commander of Canadian Reinforcement Units (who was given powers equivalent to those of a divisional commander)[120] and to Group Commanders of Reinforcement Units (if not below the rank of Colonel, these commanders were authorized to convene and confirm Field General Courts Martial)[121] and to clarify the responsibilities of Heads of Services at higher

formation headquarters.[122]

(d) Policy in Relation to Canadian Commitment in Mediterranean - 1943

90. In the spring of 1943 the Canadian Government made strong representations to the British Government in favour of giving Canadian troops operational experience in North Africa or elsewhere in the Mediterranean. By the end of April, as a direct result of these urgings, arrangements had been made for the 1st Division and the 1st Army Tank Brigade to participate in the invasion of Sicily (Operation "Husky").* This commitment led to further revision of the system of enforcing discipline outside the United Kingdom. The authorities at Ottawa questioned whether, under P.C. 9586, the powers exercisable by Generals McNaughton and Montague would extend to Canadian troops serving in Africa, not being under their command.[123] For his part, the Army Commander "wished to free himself as much as possible from administrative work so that he would be free to attend to operational duties."[124]

> With regard to Courts-Martial it was his wish to centralize matters pertaining to the administration of the detached forces in CMHQ with authority to take action; the executive work to be done at CMHQ....He felt strongly that the severe punishments - both officers and other ranks - should not under the present circumstances be confirmed by the Commander in the Field, but should be reserved for the SO [Senior Officer] CMHQ, who would consult him where public or general policy was involved, with power to reserve to the Governor in Council.

McNaughton noted that the Australians had experienced difficulty because of "the exercise of full powers of confirmation by British commanders in cases where Australian

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*The Canadians in Italy, 20-26.

soldiers had been court-martialled." He expressed his willingness to give "full power of confirmation" to the commander of a Canadian corps serving outside the United Kingdom. In a cabled message to the C.G.S., on 16 May, McNaughton stated:

> I take the strongest view that the provisions of P.C. 9586 dated 11 Dec 41 are apt and appropriate to the present circumstances and contain ample powers for setting up the required system for the administration of military law and the institution of appropriate safeguards. In my view the Canadian forces repeat forces (I use the plural deliberately for by reason of the plan of operations there will for a time at least be two Canadian forces) to be based on the continent of Africa each constitute "a Canadian body, contingent or detachment" (Reference para 4, P.C. 9586).
>
> I feel that P.C. 9586 empowers me to issue warrants for General Courts Martial to appropriate officers whether British or of other part of Commonwealth or Canadian and to include therein the reservation of confirmation in respect to severe sentences.
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>
> As regards Field General Courts Martial I fully share view that severe sentences should be reserved similarly and I suggest that the appropriate authority be obtained by P.C.[125]

91. Nevertheless, the legal officers at N.D.H.Q. held that it was unwise to rely on P.C. 9586 as a means of authorizing the commander of a Canadian component, serving in a "combined force", to convene and confirm courts martial. Another difficulty was the apparent necessity of restoring to the Governor in Council "the power to confirm certain sentences, for instance death or penal servitude, in order to remove differentiation in this respect" between members of the R.C.A.F. and military personnel.[126] (See paragraph 114, below). On these grounds, and out of regard for "abundant caution", Canadian authorities on both sides of the Atlantic finally agreed that the situation should be

clarified by yet another order in council.

92. The new order (P.C. 4895), approved by the Governor in Council on 15 June 1943, dealt specifically with "any of the Military Forces of Canada which are controlled and administered by or through Canadian Military Headquarters in Great Britain". The order provided:

> 2. With respect to a Field General Court-Martial held for the trial of any member of such Military Forces of Canada, the powers of confirmation exercisable by a Confirming Authority under Section fifty-four of the Army Act and Rule one hundred and twenty of the Rules of Procedure made under that Act shall not, in the case of an officer, extend to a sentence of death or penal servitude or imprisonment, with or without hard labour; or cashiering or dismissal from His Majesty's Service, and, in the case of a soldier, to a sentence of death or penal servitude, which said sentences shall be reserved for confirmation or otherwise by the Senior Combatant Officer of the Canadian Militia not below the rank of Major-General, serving with the Military Forces of Canada in the United Kingdom or on the continent of Europe, or Major-General the Honourable P.J. Montague, C.B., C.M.G., D.S.O., C.M., so long as he shall continue to be the Senior Officer at Canadian Military Headquarters in Great Britain or by the Governor in Council or by such other authority as may from time to time be designated by the Governor in Council for such purpose, in which authority such power to confirm or otherwise may be exclusively vested. The powers of confirmation vested in the two said officers by Order in Council dated 11th December, 1941, P.C. 9586, and by this Order, shall, in respect of such sentence as aforesaid, apply mutatis mutandis.
>
> 3. The officers who, pursuant to paragraph four of the Order in Council dated 11th December, 1941, P.C. 9586, may be authorized to convene General Courts-Martial elsewhere than in the United Kingdom and to confirm the findings and sentences thereof, shall include any officer, not below the rank of Field Officer, commanding any part of the Military Forces of Canada which is serving alone or, pursuant to the Visiting Forces (British Commonwealth) Act, 1933, is serving together or acting in combination with a Force of any other part of the British Commonwealth.
>
> 4. The said Senior Combatant Officer and Major-General the Honourable P.J. Montague are severally hereby empowered to confirm the finding and sentence of any General Court-Martial convened by an officer authorized so to do pursuant to the said paragraph 4 of the Order in Council dated

11th December, 1941 P.C. 9586, or pursuant to this Order in like manner and to the same extent as each of the said officers is empowered to do under the provisions of the said Order in Council in the case of officers and soldiers serving under their respective commands, and the Governor in Council or such other authority as may from time to time be designated by the Governor in Council shall enjoy and exercise like powers.

93. On 19 June 1943, acting under the authority of P.Cs. 9586 and 4895, Lieut.-General McNaughton, as Senior Combatant Officer of the Canadian Militia serving with the Military Forces of Canada in the United Kingdom or on the Continent of Europe, issued delegated warrants for convening General Courts Martial to the officers commanding 15th Army Group (not below rank of lieutenant-general), Eighth Army (not below rank of major-general), 1st Canadian Division and 1st Canadian Army Tank Brigade (not below rank of brigadier) and 1st Canadian Base Reinforcement Depot (not below rank of colonel).[127] Apart from minor variations, due only to differences in rank, these warrants were identical in form. Appendix "C" to this report is a copy of the delegated warrant issued to the officer commanding 15th Army Group. At a later stage of the campaign, similar warrants were issued to the officers commanding 5th Canadian Armoured Division, 1st Army Group, Royal Canadian Artillery, and 1st Canadian Base Reinforcement Group and to the Officer in Charge, Canadian Section, G.H.Q. 1st Echelon, Headquarters 15th Army Group.[128] Major-General Montague, as Judge Advocate-General, Canadian Army Overseas,* issued supplementary instructions to the latter Section on the quashing of irregular Field General Courts Martial held on Canadian soldiers.[129]

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*His appointment (which he carried in addition to his appointments, successively, as Senior Combatant Officer, Major General in Charge of Administration and Chief of Staff, C.M.H.Q.) was confirmed by order in council (P.C. 9701) of 20 December 1943.

(e) Disciplinary Aspects of Preparations for "OVERLORD" - P.C. 3740 of 18 May 1944

94. At the end of 1943 General McNaughton relinquished the command of First Canadian Army and Lieut.-General K. Stuart, then C.G.S., took over the command in an acting capacity while, at the same time, becoming Chief of Staff, C.M.H.Q. The latter appointment replaced that of Senior Officer and a new office, Major General in Charge of Administration, C.M.H.Q., was created.* As a result of these changes it was necessary to alter the earlier arrangements covering the convening and confirmation of courts martial. Accordingly, an order in council (P.C. 493) of 25 January 1944 (effective 27 December 1943) provided that "all the powers, duties and functions" in relation to courts martial previously exercised by "the Senior Combatant Officer of the Canadian Militia, not below the rank of Major-General, serving with the Military Forces of Canada in the United Kingdom or on the continent of Europe, the General Officer Commanding-in-Chief, 1st Canadian Army, the Senior Combatant Officer, or the Senior Officer at Canadian Military Headquarters in Great Britain, or Major-General the Honourable P.J. Montague, C.B., C.M.G., D.S.O., M.C., V.D., in respect of the Military Forces of Canada" would, in future, be performed by:

> the senior combatant officer of the Canadian Militia serving with those Military Forces of Canada which are controlled and administered by or through Canadian Military Headquarters in Great Britain,
>
> or,
>
> the Chief of Staff at Canadian Military Headquarters in Great Britain,
>
> or,
>
> the Major-General in charge of Administration at Canadian Military Headquarters in Great Britain

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*Six Years of War, 222.

in each of such cases not below the rank of Major-General, notwithstanding that any of the said Military Forces are not under their respective commands, and/or

the officer (not below the rank of Major-General) of the Canadian Militia for the time being in command of the 1st Canadian Army, but only in respect of any of the said Military Forces under his command.

95. As the tempo of the war quickened, with steady Allied progress in Italy and the invasion of North-West Europe (Operation "Overlord") drawing nearer, many subordinate problems of military discipline were solved. Thus, even before the First Special Service Force* left the United States for the Italian theatre, the Canadian authorities had arranged that the proceedings in any court martial of Canadian personnel in the unit would be forwarded to C.M.H.Q. for confirmation.[130] Special instructions were also required for the 1st Canadian Parachute Battalion, which served with the 6th Airborne Division, a British formation. In a directive to the officer commanding, while the unit was training in the United Kingdom, the Senior Officer, C.M.H.Q., gave the following instructions:

General Courts Martial

If it becomes necessary to try personnel of 1 Canadian Parachute Battalion by General Court Martial, such personnel will be posted to the appropriate Canadian Reinforcement Unit for trial under that Reinforcement Unit. It is not possible under Canadian legislation to issue to British commanders in the United Kingdom General Courts Martial warrants.

Field General Courts Martial

Field General Courts Martial for the trial of soldiers under your command are convened by Commanders under the authority of AA 49, but ordinarily such Courts Martial will not be convened

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*See paragraph 60, above.

> by any but commanders in 6 Airborne Division not below the rank of Brigadier. Under the provisions of PC 4895 dated 15 Jun 43 [see paragraph 92, above] it is ordered that with respect to a Field General Court Martial held for the trial of any member of the Military Forces of Canada detailed from the Military Forces of Canada, which are controlled and administered by or through Canadian Military Headquarters in Great Britain, the powers of confirmation exercisable by the confirming authority under Section 54 of the Army Act and Rule 120 of the Rules of Procedure made under that Act and made applicable to the Military Forces of Canada by Militia Act Sec 69, shall not in the case of an officer extend to a sentence of death or penal servitude or imprisonment with or without hard labour or cashiering or dismissal from His Majesty's service and in the case of a soldier to a sentence of death or penal servitude all of which said sentences shall be reserved for confirmation or otherwise by myself.
>
> - - - - - - - - - -
>
> The powers of discipline which are vested in you as the Officer Commanding a Canadian body, contingent or detachment detailed as aforesaid, and in the General Officer Commanding 6 Airborne Division are such only as are conferred by Canadian law and the military personnel under your command so detailed are subject to Canadian Military law.[131]

The flexibility of these arrangements was shown by the fact that identical instructions were issued to the officer commanding No. 1 Railway Operating Group, Royal Canadian Engineers, covering his unit's employment in the United Kingdom.[132] In passing, it may be noted that the Canadian Forestry Corps, which had been continuously employed in the United Kingdom since the end of 1940, was also "administered exclusively under Canadian Military Law".[133] Disciplinary policy was also concerned with auxiliary services supervisors.[134]

96. As First Canadian Army continued preparations for the invasion of Normandy other legal problems arose. Thus, in the early part of 1944, the 3rd Canadian Division was undergoing rigorous training for the D Day assault and the divisional commander was unable to cope with the heavy

burden of administration, including disciplinary matters. Accordingly, an arrangement was worked out, between the J.A.G. at Ottawa and the Major-General in Charge of Administration, C.M.H.Q., whereby the latter issued a delegated warrant to convene General Courts Martial to a Deputy Commander of the 3rd Division.[135]

97. On a higher level, it was necessary to deal with reciprocal disciplinary arrangements between First Canadian Army and the 21st Army Group, the formation in which Canadian troops would serve in North-West Europe. Writing to the Director of Personal Services at the War Office, in January 1944, Major-General Montague observed:

> ...It is fully appreciated that any military forces of the United Kingdom placed under command of HQ First Cdn Army will remain subject to your military law both at home and abroad...
>
> In the event of operations abroad it is considered advisable that the Canadian commander of First Cdn Army should be given by you a General Court-Martial warrant for the trial of your troops under command. I understand that a legal officer will be assigned by your JAG to the staff of HQ First Cdn Army to advise him in respect of such courts-martial. We are, of course, prepared to agree to a reservation in the terms of your warrant or by collateral arrangement that confirmation of a sentence of death will be reserved to a United Kingdom authority.
>
> It does not appear necessary to provide the commander of 21 Army Gp while in the United Kingdom with a General Court-Martial warrant for the trial of Canadian personnel. Our Army, Corps and Div commanders hold such warrants. It will probably not be necessary to do so abroad even if some Canadian troops in L of C come under his command, because warrants can be given to appropriate Canadian commanders...
>
> ...In respect of Field General Courts-Martial held under Canadian military law it is now provided by Order in Council that a sentence of death and certain other severe sentences are to be reserved for confirmation by designated Canadian authorities.* I have recently forwarded to NDHQ for enactment a revision of this Order in Council which will further provide that the terms of Rule of Procedure No.120 in respect of carrying a sentence of death into execution will not apply and special provision will be made for this to be done by a Canadian authority...

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*See paragraphs 119 and 121, below.

> So long as 21 Army Gp is in the United Kingdom I do not think there will be any occasion for one of your commanders to convene or confirm a Field General Court-Martial for the trial of a Canadian accused, but against the possibility that such may happen I would like it understood such convening and confirming be done only after consultation with the appropriate Canadian officers of "A" Branch at HQ First Cdn Army. I will arrange that there will be a reciprocal understanding in respect of a court for the trial of a member of your forces in 21 Army Gp.
>
> I am also prepared to have it understood, as you suggest, that a General or Field General Court-Martial convened by a commander of one force for the trial of a member of the other force will have at least one member who belongs to the same force as the accused.[136]

The War Office expressed general agreement with the foregoing. It also suggested that confirmation of death sentences would not be "reserved to any British authority other than the C-in-C. in the field." As regards Field General Courts Martial, British opinion preferred "the Visiting Forces Act to operate, within the United Kingdom and without it, with as few limitations as possible".[137]

98. In anticipation of active operations on the Continent, Canadian commanders were invested with the powers of British commanders of corresponding rank for the purpose of convening and confirming courts martial on British personnel. By the same token, delegated warrants to convene and confirm General Courts Martial on British troops were issued to G.O.C.-in-C. First Canadian Army and G.O.C. 2nd Canadian Corps. These arrangements included the following stipulation:

> At least one British officer will, if possible, be appointed as a member of any Court Martial dealing with UK troops, and the proceedings of trial shall be in accordance with the Military Law affecting troops of the UK, except in the cases of UK personnel who pursuant to being posted for duty are serving with Canadian formations, units, detachments, establishments or Staff on attachment. [See paragraph 42, above.][138]

99. On the eve of the invasion of Normandy steps were taken, "in the interests of simplification of administration", to consolidate previous orders in council dealing with courts martial and to change certain provisions. The new order (P.C. 3740) of 18 May 1944 cancelled the following orders in council (discussed in previous paragraphs) and the warrants issued thereunder:

Order in Council dated 13 January 1940 - P.C. 149
Order in Council dated 14 June 1940 - P.C. 2579
Order in Council dated 4 July 1940 - P.C. 2932
Order in Council dated 13 August 1940 - P.C. 3780
Order in Council dated 24 January 1941 - P.C. 547
Order in Council dated 22 October 1941 - P.C. 8121
Order in Council dated 24 October 1941 - P.C. 8122
Order in Council dated 11 December 1941 -P.C. 9586
Order in Council dated 26 November 1942 -P.C. 10770
Order in Council dated 15 June 1943 - P.C. 4895

P.C. 3740 ran to considerable length; only the main provisions will be discussed here, a copy of the complete order is attached, as Appendix "D", to this report.

100. P.C. 3740 applied to "the military forces of Canada which are controlled and administered by or through Canadian Military Headquarters in Great Britain". Paragraph 2 provided:

> 2. The General Officer of the Canadian Militia commanding 1st Canadian Army, the Chief of Staff and the Major-General in Charge of Administration at Canadian Military Headquarters in Great Britain, in each case not below the rank of Major-General, are each hereby authorized to exercise in accordance with Canadian military law as hereby modified the following powers, namely,
>
> (a) To convene General Courts-Martial for the trial in accordance with Canadian military law of persons subject to that law, whether such persons are under or within the territorial limits of his command or not;
>
> (b) To confirm the findings and sentence of any such General Court-Martial whether convened by him or not; except where a sentence of death has been passed;
>
> (c) To delegate by his warrant to any officer, not below the rank or relative rank of field officer, of the naval, military or air forces of

Canada or of any other part of the British Commonwealth, who is commanding for the time being any body of the said forces or serving on the staff thereof, the power to convene General Courts-Martial for the trial in accordance with Canadian military law of persons subject to that law who may be under or within the territorial limits of the command of the said officer or of the headquarters in which he may be serving;

(d) To delegate by his warrant to any such officer mentioned in sub-paragraph (c) hereof the power to confirm the findings and sentence of any General Court-Martial convened under such delegated power whether by the same officer or not;

Provided, however, that if by the sentence of any General Court-Martial convened under such delegated power an officer or a person subject to Canadian military law as an officer has been sentenced to suffer death, penal servitude or imprisonment with or without hard labour, or to be cashiered or dismissed from His Majesty's service, or a soldier or a person subject to Canadian military law as a soldier has been sentenced to suffer death or penal servitude, the findings and sentence thereof shall be reserved by the said officer for confirmation, in which case the said three authorities first above mentioned are each hereby empowered to confirm in accordance with Canadian military law the findings and sentence so reserved, except where a sentence of death has been passed.

(e) To appoint, and to delegate by his said warrant the power to appoint, a fit person from time to time for executing the office of Judge Advocate of any such General Court-Martial;

(f) To appoint, and to delegate by his said warrant the power to appoint, a Provost Marshal from time to time to use and exercise that office in accordance with Canadian military law in respect of enforcing the sentence of any such General Court-Martial;

(g) To cause, and to delegate by his said warrant, except in respect of a sentence of death, the power to cause the sentence of any such General Court-Martial to be put into execution;

(h) To revoke the whole or any part of a warrant issued by him hereunder;

(i) To provide, subject to the provisions of this order, that any such delegation or revocation shall be subject to such restrictions, reservations, exceptions and conditions as he may see fit and which are consistent with Canadian military law.

101. The order stated that section 99 of the Militia Act would not apply to the findings or sentence of

any General Court Martial. Changing the earlier procedure, no warrant was required from the Governor in Council to authorize the convening and confirmation of General Courts Martial.[139] Paragraph 4 stated:

> 4. In respect of a Field General Court-Martial held under Canadian military law for the trial of a person subject to that law, the powers and duties of a confirming authority under Section 54 of the Army Act and Rule 120 of the Rules of Procedure made under that Act shall not extend, in the case of an officer or a person subject to Canadian Military law as an officer, to a sentence of death, penal servitude, imprisonment with or without hard labour, cashiering or dismissal from His Majesty's Service, and, in the case of a soldier or a person subject to Canadian military law as a soldier, to a sentence of death or penal servitude, which said sentences as well as the findings in each such instance shall be reserved for confirmation, and each of the said three authorities first above mentioned is hereby empowered to confirm in accordance with Canadian military law as hereby modified such findings and sentences so reserved, except where a sentence of death has been passed.

Other provisions dealt with powers of confirmation, generally, and the procedure when sentence of death was passed. (See paragraph 121 , below).

102. Due to cancellation of the earlier procedure, new delegated warrants were required, under P.C. 3740, for subordinate commanders. At the beginning of June 1944 the Major General in Charge of Administration, C.M.H.Q. (Major-General Montague), proposed to G.O.C.-in-C. First Canadian Army (Lieut.-General Crerar)* that all three senior officers mentioned in paragraph 2, quoted above, should <u>jointly</u> execute the warrants.[140] However, the Army Commander questioned the advisability of this procedure, adding:

> In my opinion warrants issued within 21 Army Gp should be signed, and any related instrs or revocations issued, by the GOC in C First Cdn Army. The power of the GOC in C to direct, or to relieve from duty, any offr under his comd would seem to be properly exercisable solely by himself.

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*He had assumed command of First Canadian Army on 20 March 1944.

Turning to the matter of confirmation of severe sentences, General Crerar wrote:

> The responsibility for discipline within a force must remain that of the Comd. I am inclined to the view that confirmation by myself would be bound to effect substantial savings in time. The proceedings would, in any event, require policy review of sentence at Army HQ. Pre-confirmation legal review could also be done at Army HQ with advice from the DJAG or the JAG in more difficult cases.
>
> I realize the advantage which has been gained up to date through having a single authority responsible for pre-confirmation review of proceedings and for "A" advice while the bulk of the Cdn Army was within the UK, and while that part of the force serving out of the UK was under comd of an offr, not the senior offr, serving overseas. I believe, however, that the time factor makes it inadvisable to centralize in the UK all confirmation of severe sentences, and that the advantages of quick confirmation and promulgation based upon a consideration of the disciplinary factors particularly affecting the theatre, outweigh those offered by review and confirmation at a central point.[141]

103. Accordingly, on 12 June 1944, General Crerar issued delegated warrants, identical in form, for General Courts Martial to the officers commanding 2nd Canadian Corps, 2nd, 3rd and 4th Canadian Divisions, 2nd Canadian Armoured Brigade, 2nd Army Group, Royal Canadian Artillery, Headquarters Army Troops Area and C.M. 203 Increments to Headquarters First Canadian Army and Headquarters 3rd Canadian Division as well as the Deputy Adjutant and Quartermaster Generals at Headquarters First Canadian Army and Headquarters 2nd Canadian Corps. Attached, as Appendix "E" to this report, is a copy of the delegated warrant issued to G.O.C. 2nd Canadian Corps. General Montague, as Major General in Charge of Administration, C.M.H.Q., issued similar warrants to the Officer in Charge, Canadian Section, General Headquarters 1st Echelon, 21st Army Group, to the commander of No. 2 Canadian Base Reinforcement Group and to the commander and deputy commander of Canadian Reinforcement Units. The M.G.A. also issued warrants to officers commanding Canadian formations in Allied Armies in Italy -- 1st

Canadian Corps, 1st and 5th Canadian Divisions, 1st Canadian Armoured Brigade and 1st Army Group, Royal Canadian Artillery -- as well as to the Deputy Adjutant and Quartermaster General /at Headquarters 1st Canadian Corps, the Officer in Charge, Canadian Section, General Headquarters 1st Echelon, Allied Armies in Italy, and the commander of No. 1 Canadian Base Reinforcement Group.[142] Distribution of delegated warrants in the Mediterranean meant that there was no need to issue a new warrant, under P.C. 3740, to the Commander-in-Chief.[143]

(f) Problem of Canadian Elements of Airborne, General Headquarters, Lines of Communication and Base Troops

104. The procedure outlined in the foregoing paragraphs proved generally adequate to the needs of Canadian forces, both in the Mediterranean and North-West Europe, during the remainder of the war. One difficulty did arise in the summer of 1944, however, between the British and Canadian authorities over the convening and confirming of Field General Courts Martial for Canadian elements of Airborne, General Headquarters, Lines of Communication and Base Troops. The M.G.A., C.M.H.Q., proposed to Headquarters 21st Army Group that it might be convenient for the Officer in Charge, Canadian Section, General Headquarters 1st Echelon, to be given the status of "commander" in order to convene these courts. (Following normal practice, the delegated warrant issued to this appointment, under P.C. 3740, had been restricted to an officer "not below the rank of brigadier".)[144] General Montgomery's headquarters objected to the proposal, mainly on the grounds that it would result in there being two "commanders" in the Lines of Communication Area. Major-General Miles Graham, M.G.A., 21st Army Group, wrote: "It was precisely to avoid such a position with 1st Canadian Army that it was agreed that the

U.K. tps in 1st Canadian Army should be placed under command of Commander 1st Canadian Army for all purposes. The Visiting Forces Act and the Orders in Detail made in pursuance of it have provided the necessary machinery to render such action a simple one... Is there any reason why a reciprocal arrangement cannot apply?"[145] He suggested solving the problem by having the Canadian authorities issue delegated warrants to the Commander-in-Chief and the Commander, Lines of Communication.

105. The British suggestion was not welcomed at C.M.H.Q. (The following exchange of views is set out at some length because its significance, in terms of disciplinary policy, transcends the immediate point at issue.) General Montague commented:

> I suggest that the experience of this war has indicated that it is not actually essential in all circumstances to regard the administration of discipline (including the convening and confirming of courts-martial) as inseparable from the other functions of command. A commander must not, of course, be precluded from imposing on the forces under his command the general principles of his policy in respect of discipline, but it does not appear necessary that he himself should be vested with the technical means of carrying out his policy. If it were necessary, then it would be impossible, without special reciprocal legislation, to have an officer of the United States Army, for instance, commanding a force composed of allied armies.
>
> - - - - - - - - - - -
>
> As to issuing a delegated warrant to the C-in-C, 21 Army Gp, it seemed to us to be inappropriate and an anomaly under the principle of command that the GOC-in-C, First Cdn Army, or even either one of the delegating authorities at this HQ [that is, the Chief of Staff or M.G.A., C.M.H.Q.], should delegate to him and require, as stipulated by PC 3740, that certain severe sentences be reserved by him for confirmation, where in respect of the UK troops under his command he had complete authority in regard to such sentences. ..In view of the distribution of delegated warrants throughout the Cdn forces in 21 Army Gp being similar to that in the Allied Armies in Italy, it would appear that we may anticipate like results. Furthermore, the C-in-C is in a position with respect to the Cdn forces in combination in 21 Army Gp to direct the appropriate

Cdn officer to convene a General Court-Martial for the trial of a particular accused. In any event, the C-in-C is within his legal rights if he himself convenes a Field General Court-Martial for the trial of any person in 21 Army Gp who is subject to Canadian military law.[146]

General Graham replied at the end of July 1944:

I recognize the force of the instances you quote in which the commander of a combined allied force does not control in any detailed sense the interior administration of discipline in part of his command, though my impression is that such instances usually concern homogeneous bodies, each serving under a substantially differing code, rather than isolated units serving under substantially the same code such as we are now discussing.

Granting...that there may well be occasions when command and administration of discipline have of necessity to be separated, and have been separated without grave consequences, the point I would like to make... is this: under the Visiting Forces Act no technical difficulties exist, and reciprocal arrangements under that Act are now in force in the 1st Canadian Army whereby U.K. troops under the command of the Army Commander are also fully under him for the administration of discipline, including courts-martial. I am informed, moreover, that Canadian Corps and Canadian Divisional Commanders are convening and confirming FGCsM on U.K. troops, and that no difficulties have been experienced. I hoped, therefore, that you would agree to a similar reciprocal procedure in respect of Canadian troops under command of Commander, L of C as the normal practice.

The practical advantages of this course seem to me considerable. I am particularly anxious to guard, as I have no doubt you are, against any complaint or suggestion that there is a different scale of punishment for a Canadian and a U.K. soldier convicted of the same class of offence. If a Canadian soldier and a U.K. soldier are parties to the same offence, or commit a similar offence in the same locality, it seems to me desirable on grounds of justice, equity and discipline that they should be tried promptly, by the same court if possible, or at least by a court serving under similar conditions, whether convened by a Canadian or U.K. authority, rather than that one of them should be removed and tried by a distant authority possibly not so well acquainted with local conditions.

I have, it is true, issued a directive on the general length of sentences for particular offences, but I hope you will agree that subsequent co-ordination at a high level does not achieve the same satisfactory impression of even justice as does trial by one tribunal or under the immediate control of one authority.[147]

106. General Montague continued to urge adoption of his own proposal, resisting any suggestion that it cut across "normal channels". Late in August he wrote to M.G.A., 21st Army Group: "It is my view that the OIC [Officer in Charge] is for Canadian purposes serving your GHQ and the Commander, L of C, as a staff officer in the same way as the DA & QMG of First Cdn Army serves his commander in respect of disciplinary matters." He concluded:

> Until circumstances greatly change and indicate the actual necessity for issuing a warrant to the Commander, L of C, and for the appointment of the Canadian legal and PS staff element that will then have to be added to his HQ, I am sure that you will find that the OIC Cdn Sec will keep in close touch with the Commander, L of C, in order that there will be the fullest co-ordination which you desire in respect of courts-martial dealt with by him. The place of trial and the officers to compose the court, in regard to both General and Field General Courts-Martial for the trial of Canadian troops under command of the Commander, L of C, should certainly be subject to the wishes of the Commander, L of C.... Field General Courts-Martial would no doubt in nearly all cases be dealt with without reference to the OIC Cdn Sec, except for any necessary advice on Canadian military law....
>
> I am sure that you will not feel that I am acting contrary to our mutual desire to maintain the highest degree of co-operation. In applying Canadian policy in respect of the administration of discipline and the economical employment of staff personnel I fully appreciate that we must not prejudice the complete co-ordination which is essential in a combined force....[148]

General Graham replied, in September, regretting that the Canadians were unable "to give unqualified assent to a reciprocal system of disciplinary administration". He suggested that "matters might be allowed to rest unless and until any difficulty arises which seems to require a decision on principle."[149] There the matter ended, although General Montague was careful to warn the Officer in Charge, Canadian Section, General Headquarters 1st Echelon: "I do not want any trouble to arise in this connection, and I am sure none will arise if you act according to the arrangements

now settled."[150]

107. The exchange of views on this thorny question doubtless served a useful purpose in clarifying fundamental principles and reaffirming Canadian determination to retain close control over the administration of military law in relation to Canadian troops in the field. From another point of view, settlement of the issue reflected a common determination to conduct the campaign on the Continent without prolonged wrangling over fine legal distinctions.

(g) Post-war Disciplinary Policy on the Continent

108. The end of the war with Germany necessitated consideration of the disciplinary powers of officers in the Canadian Army Occupation Force. On 9 July 1945 Lieut.-General Montague, as Chief of Staff, C.M.H.Q., issued a delegated warrant for General Courts Martial (under P.C. 3740) to G.O.C. 3rd Canadian Infantry Division (Canadian Army Occupation Force). This warrant was identical with those issued previously to commanders in the Mediterranean and North-West Europe (see paragraph 103, above). The warrant automatically conferred upon the divisional commander power, under section 47 of the Army Act, to try summarily any officer below the rank of lieutenant-colonel and any warrant officer in his formation.[151]

109. At the end of July General Crerar ceased to command First Canadian Army and Lieut.-General G.G. Simonds assumed command of Canadian Forces in the Netherlands. Accordingly, another delegated warrant for General Courts Martial was issued, under P.C. 3740, to the new commander. Differences in terminology were then adjusted by an order in

council (P.C. 5403) of 7 August 1945, effective 31 July 1945, which amended P.C. 3740 (and P.C. 1405 of 1 March 1945)* "by substituting the 'General Officer Commanding, Canadian Forces in the Netherlands (but only in respect of persons under his command)' for the 'General Officer Commanding 1st Canadian Army' wherever the latter expression appears therein."[152] General Montague advised General Simonds that, with respect to Canadian troops under the command of Headquarters 21st Army Group (but not under Simonds' command), General Courts Martial could only be convened by the Officer in Charge, Canadian Section, General Headquarters 1st Echelon. Severe sentences awarded by General and Field General Courts Martial in such cases were reserved, to be dealt with by the Chief of Staff or M.G.A., C.M.H.Q.[153] After the command and administrative sections of Headquarters Canadian Forces in the Netherlands were disbanded, at the end of May 1946, a delegated warrant for General Courts Martial was issued by the Chief of Staff, C.M.H.Q., under P.C. 3740, to the Commander, Canadian Troops, North-West Europe.[154] This warrant provided the basis for disciplinary action during the final phase of Canadian military activities on the Continent following the Second World War.

(h) Statistics for Canadian Army Overseas

110. This portion of the report may be concluded with a recapitulation of certain statistical information

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*Authorizing the Army Commander and the Chief of Staff, C.M.H.Q. (or, in latter's absence, M.G.A., C.M.H.Q.) to exercise the powers of the Army Council in "substituting valid findings of courts-martial in cases wherein on review findings of said courts-martial were found to be irregular" (Section 70 (1)(ee) of Army Act and Rule of Procedure 53A).

compiled by C.M.H.Q. for the Canadian Army Overseas, covering the period beginning in 1939 and ending in September 1945.*[155] This information was based on a review of 20,500 proceedings. It revealed that the total number of convictions registered by courts martial in which the penalty was death, imprisonment from one to three years inclusive, and imprisonment for more than three years were three, 2179 and 302, respectively. (The equivalent figures for the entire Canadian Army, as given in the House of Commons, were three, 2776 and 302.)[156] The number of instances in which verdicts of courts martial were reversed or varied, in the same period, was given as follows:

1940	4	
1941	47	
1942	56	
1943	205	
1944	182	
1945	142	(to 1 September 1945)
Total	636	

(The equivalent figure for the entire Canadian Army was 958).[157] It should be noted that the overseas statistics were based only on convictions registered at C.M.H.Q.; that "imprisonment" did not include detention and that the figures did not include proceedings held in connection with "Canloan" officers** and trials held by the British authorities under Canadian or United Kingdom law.

(i) Developments in the R.C.N. and R.C.A.F. Overseas

111. We have already seen that the administration of naval discipline evidently provided few complications during the Second World War. The R.C.N. was so closely

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*Partly in response to an enquiry by Mr. J.G. Diefenbaker, M.P.

**The Victory Campaign, 633-5.

integrated with the R.N. that, although the emergence of Canadian autonomy in these matters was freely recognized, in practice little difficulty was encountered. (See paragraph 74, above).

112. The administration of discipline in the R.C.A.F. Overseas was relatively more complicated, although the resulting problems never attained a magnitude comparable with those in military formations. The reason may well have been that units and formations of the R.C.A.F. were employed overseas in a different role; there was, in fact, no R.C.A.F. equivalent of First Canadian Army, with its homogeneity and highly developed organization, supported by C.M.H.Q., constantly maintaining an independent point of view. In examining the problems of the R.C.A.F. we are hampered by the lack of information referred to in paragraph 1 of this report. Without attempting to provide a complete outline of R.C.A.F. policy we may nevertheless draw attention to certain significant developments, affecting the R.C.A.F. Overseas, during the Second World War.

113. We have already seen (paragraph 75, above) that by P.C. 149 of 13 January 1940, effective 15 December 1939, the Senior Combatant Officer of the Royal Canadian Air Force Headquarters in Great Britain was given equivalent powers to those of G.O.C. 1st Canadian Division and the Senior Combatant Officer of C.M.H.Q. The authority of the Senior Combatant Officer of the R.C.A.F. applied only to the forces under his command in the United Kingdom.[158] Moreover, due to the dispersal of R.C.A.F. formations and personnel (including "attachment to and in combination" with the R.A.F.) in the United Kingdom, the power of the Senior Combatant Officer of the R.C.A.F. was, in practice,

limited to personnel at the Overseas Headquarters of the R.C.A.F.[159] A subsequent order (P.C. 2579 of 14 June 1940) stated that the provisions of Section 99 of the Militia Act would not apply to a sentence of a General Court Martial "held on the Continent of Europe for the trial ... of any officer or airman of the Royal Canadian Air Force." (See paragraph 79, above).

114. An important change in the administration of R.C.A.F. discipline occurred in 1942. An order in council (P.C. 6324) of 21 July limited the unrestricted powers to confirm findings and sentences of courts martial which had been granted previously to "the officer appointed to command any Command of the Royal Air Force with which any ... Air Forces of Canada may be acting in combination". Referring to the provisions of P.C. 1066 of 3 April 1940 (see paragraphs 73 and 88, above), covering forces "acting in combination", P.C. 6324 stated:

> ...The powers hereby granted with respect to the confirmation of findings and sentences, and to the carrying into effect of such sentences, shall not extend to the proceedings of any Court-Martial which, in the case of an officer, involve a sentence of death, penal servitude, imprisonment with or without hard labour, cashiering, or dismissal from His Majesty's Service, and, in the case of an airman, involve a sentence of death or penal servitude, confirmation of which findings and sentences shall be reserved for the approval, or otherwise, of the Governor in Council.

It will be recalled that adoption of this change in R.C.A.F. disciplinary policy had an important bearing on the corresponding change made in military policy by P.C. 4895 of 15 June 1943 (see paragraphs 91-2, above). P.C. 6324 also established the correct procedure for the transmission of proceedings to the appropriate Canadian authorities and provided a draft warrant for the use of Air Officers or other officers commanding Commands in which "Canadian Air

Forces" were serving "in combination".

115. During the first years of the war, Major-General Montague performed "the powers, duties and functions of the Judge Advocate-General" in relation to units and formations of the R.C.A.F. as well as military forces serving in the United Kingdom. (P.Cs. 3429 and 9334 of 2 November 1939 and 2 December 1941, respectively). However, in view of the overseas expansion of the R.C.A.F., it became desirable for an officer of that service to exercise these powers. Accordingly, by order in council (P.C. 468) of 19 January 1943, the responsibilities hitherto performed by General Montague in relation to the R.C.A.F. Overseas were vested in Wing Commander J.A.R. Mason, R.C.A.F. It may be noted that this officer's powers were not limited to the United Kingdom and the Continent. The order expressly provided that Wing Commander Mason should "exercise and perform in respect of the Royal Canadian Air Force Overseas as may from time to time be serving in the United Kingdom or on the Continents of Europe, Asia and Africa the powers, duties and functions of the Judge Advocate-General."

(j) Policy regarding Death Penalty

116. During the Second World War the Canadian authorities, both service and civilian, gave very careful consideration to the policy governing imposition of the death penalty on members of the services. In actual practice, as indicated above (paragraph 110), the death penalty was rarely imposed by courts martial. No member of either the R.C.N. or the R.C.A.F. was executed and only one soldier of the Canadian Army, as indicated below, was sentenced to death by court martial and actually executed.[160]

117. In the summer of 1943 the Senior Officer, C.M.H.Q. (Major-General Montague), investigated the policies of the British and American forces with respect to this matter. He advised the Adjutant General, N.D.H.Q., that the commanders of the First and Eighth British Armies and their Lines of Communication Area all had power to confirm sentences of death. R.A.F. policy permitted the Deputy Air C.-in-C., North-West African Air Force, to confirm such sentences. In the United States forces the G.O.C. Headquarters European Theatre of Operations confirmed sentences of death "without reference to Washington in respect of sentences imposed in the United Kingdom."[161] General Montague observed that the "power of [the] Senior Officer R.C.A.F. to confirm sentences of death applies only to R.C.A.F. personnel in U.K. and by virtue of Air Force Act ... civil offences in U.K. for which such punishment would normally be awarded may not be tried by court martial." His report continued:

> I consider it important that especially in view of practice in U.K. and U.S. Armies courts martial in the Cdn Army should be dealt with throughout in the normal way under military authority with the right which is given under P.C. 9586 and P.C. 4895 [see, above, paragraphs 87 and 92] to confirming authorities to refer to Governor in Council any special case in which, in the exercise of the responsibilities entrusted to them they consider the circumstances warrant it. It is my view that the power contained in P.C. 4895 to vest power of confirmation exclusively in another authority provides adequate safeguard.[162]

General McNaughton expressed his full agreement with Montague's observations.[163] In a subsequent memorandum, prepared for the Minister of National Defence, the Senior Officer, C.M.H.Q., stated:

> As early as 1940 when resort was first made to the use of Field General Courts-Martial, which are convened under the provisions of the Army Act for active service conditions and not through warrants, we directed in Routine Orders for the Cdn Army Overseas [Canadian Active Service Force (Overseas) Routine Order No. 232

> of 7 August 1940] that "all offences for which the maximum sentence is death will be tried [sic] by General Courts-Martial." This ensured that the court for the trial of such a case would be convened only by ourselves or a senior commander to whom we had given a delegated warrant, and would consist of not less than five officers instead of not less than three officers as obtains for a Field General Court-Martial. The trial would also be more formally conducted and the Court have the benefit of the advice of a Judge Advocate.
>
> ---
>
> Both Lt-Gen McNaughton and myself feel that military circumstances and considerations might on occasion arise when it would be very undesirable for us not to have the power to deal with a death sentence as expeditiously as possible. It is considered that we should in such instances have equal authority with our corresponding British commanders.[164]

118. As already mentioned (paragraphs 91 and 114, above), R.C.A.F. policy had limited the power of confirming death sentences to the Governor in Council. General Montague endeavoured to distinguish between the positions of the military and the R.C.A.F. with respect to this problem:

> Position with regard to Army widely different from R.C.A.F. as Army personnel in close contact with civil population as advance progresses under circumstances which will render it of the utmost importance, especially in view of record of the enemy in respect of offences against civilians, that civil population be impressed with the speed and certainty of military justice and be made fully aware of the authority vested in military officers.[165]

There were other important considerations -- for example, "swift military action" would "satisfy the outraged sentiment of people who otherwise might take private vengeance with no proof, resulting in reprisals, chaotic conditions and general unrest among those who have been led to expect a situation under Allied military forces widely different from that which existed under the enemy." Montague reiterated the importance of ensuring that Canadian practice conformed as closely as possible with that of the British and United

States forces. He advised the Adjutant General:

> Offences in the face of the enemy may have an adverse effect on morale unless soldiers are aware that they will be completely dealt with by military authority without any undue lapse of time.
>
> The principle supporting the vesting of administration and preservation of military discipline in military authorities is that they alone are in a position to form a correct judgment as to what sentences the state of discipline in the Army as a whole or in a particular force requires. It is not always possible to communicate a full appreciation of these considerations to other authority and the evil to be avoided may have resulted before the matter can be disposed of.
>
> I submit that commanders who are entrusted with the safety of an army should not be fettered in their decisions as to matters which so vitally affect the discipline of the army and the success in the field which depends on that discipline and on relations with the civil population. Military punishment must be exemplary and speedy to prevent military and civil disaffection and to ensure success.
>
> From the standpoint of humanity it is most important that a soldier should not be kept in suspense any longer than absolutely necessary if in the end a sentence of death will be carried out.
>
> The soldier by petition under KR (Can) 574 which will be known to the defending officer may bring forward all considerations which may affect his case and the GOC-in-C in the field in considering sentences will have before him recommendations from commanders from unit, brigade, division and corps and the advice of a senior legal officer.
>
> In the last war no fewer than 89 per cent of death sentences were commuted by the Commander-in-Chief of the British Army which compares very favourably with the record of civil executive clemency in this respect.
>
> Not only is it important for the maintenance of morale and discipline in the Army that justice should be exemplary and delay occasioned through reference to Governor in Council avoided but the exercise of the jurisdiction on active service by the military authority will, you will agree, avoid any suggestion of interference with military matters in which the foregoing considerations are of such importance in a theatre of war. Personally I feel this would be a source of the greatest embarrassment to the Government of Canada.[166]

119. When a draft (consolidation) order in council was under consideration, in the autumn of 1943, General

Montague proposed that death sentences should be "reserved for confirmation or otherwise" by G.O.C.-in-C. First Canadian Army or Senior Officer, C.M.H.Q., "or by the Governor in Council, or by such other authority as may from time to time be designated by the Governor in Council for such purpose in which authority such power to confirm or otherwise may be exclusively vested...."[167] This formula was not acceptable to the Government's legal officers in Ottawa, who remained of the opinion that death sentences should be confirmed only by the Governor in Council. Although prepared to give the senior officers mentioned powers of commutation, the legal authorities adopted the principle that "where a sentence of death has been passed by a Court Martial held under Cdn Military Law [,] the Governor in Council or such other authority as may from time to time be designated by the Governor in Council shall have the exclusive power to confirm both the finding and sentence of such Court Martial."[168]

120. Early in 1944 General Montague solicited the opinion of General Crerar (then commanding 1st Canadian Corps in Italy), who replied:

> The responsibility of confirming a death sentence awarded by court martial is not one which I seek and yet I quite fail to understand why it is assumed that [the] Governor in Council is in a better position to decide whether death or some lesser sentence is the proper and just answer to a question which requires to be weighed in the circumstances of some particular or general military situation. Whatever the procedure finally adopted steps must be taken to ensure speedy confirmation or commutation once death sentence has been awarded. The deterrent effect of punishment by death [,] which effect is the chief justification for such action [,] loses seriously by delay.[169]

This view may be compared with the opinion afterwards expressed by General Crerar as G.O.C.-in-C. First Canadian Army (see paragraph 102, above).

121. Policy on this important matter was finally decided, along the lines previously indicated by the authorities in Ottawa, by these provisions of the order in council (P.C. 3740)* of 18 May 1944 (italics added):

> 7. Where a sentence of death has been passed by a Court-Martial held under Canadian military law, the Governor in Council, or such other authority as may from time to time be designated by the Governor in Council, shall have the exclusive power to confirm both the finding and sentence of such Court-Martial. Nevertheless, any one of the said three authorities first above mentioned [G.O.C. First Canadian Army, Chief of Staff and Major General in Charge of Administration, C.M.H.Q.] shall, in respect of such Court-Martial, have the powers of commutation of the confirming authority under Section 57(1) of the Army Act (notwithstanding the fact that he is not the confirming authority). If such sentence of death is commuted by any one of the said three authorities first above mentioned, the finding and sentence as commuted may be confirmed as though such commuted sentence were the original sentence of the Court-Martial, and such sentence as commuted shall for all purposes be deemed to have been the original sentence of the Court-Martial.
>
> 8. Where a sentence of death has been passed by a General Court-Martial or by a Field General Court-Martial held under Canadian military law and has been confirmed under the provisions of this order without being commuted, the provisions of the said Section 54 and Rule 120 [relating to confirmation, revision and approval of sentences under the Army Act and the Rules of Procedure] shall not apply to the carrying of the said sentence into effect, and the authority who confirmed the said sentence under the provisions of this order is hereby empowered to cause it to be put into execution in accordance with Canadian military law as hereby modified.

This procedure applied throughout the remainder of the campaign on the Continent.**

122. In only one instance during the Second World War was a member of the Canadian armed services executed under sentence of a Canadian court martial. A synopsis of

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*Appendix "D" to this report.

**General Order No. 418 of 13 September 1944 gave specific instructions regarding "communication to an accused person upon whom sentence of death has been passed by court-martial".

the facts in this case and the procedure adopted is given below.

123. In Italy, between 14 and 22 February 1945, a soldier of The Hastings and Prince Edward Regiment, No. C. 5292, Private Harold Joseph Pringle, was tried at Rome by a General Court Martial upon the following charge:

> When on Active Service, Committing a Civil Offence, that is to say, Murder,
>
> in that he
>
> in the Field, in Italy, on, or about 1 November 1944, murdered Pte. McGillivary (otherwise known as "Lucky").

The composition of the court was as follows:

President

Col. R.W. Richardson, E.D., R.C.A.M.C., of No. 5 General Hospital, R.C.A.M.C.

Members

Lieut.-Col. J.H. Zeigler, E.D., R.C.A.S.C., of 1st Canadian Corps Transport Column;

Lieut.-Col. R.L. Tindall, C.I.C., of Headquarters 5th Armoured Division;

Maj. W.A. Boothe, C.A.C., of the 3rd Armoured Reconnaissance Regiment (The Governor General's Horse Guards); and

Maj. W. McLaws, Gen. List, of Canadian Section G.H.Q. 1st Echelon, Allied Force Headquarters.

The Judge Advocate at the trial was Maj. W.A.D. Gunn, Assistant Deputy Judge Advocate at Headquarters 1st Canadian Base Reinforcement Group.

124. The main facts in this case are taken from the record of service of the accused and the proceedings at the trial. The accused, who was born at Port Colborne, Ontario, on 16 January 1920, enlisted in the Canadian Active Service Force early in 1940. He proceeded overseas later in the same year. In the United Kingdom he was continually

in trouble with the military authorities, his record showing a long list of convictions for absence without leave. In February 1944 he was despatched with other infantry reinforcements to the Italian theatre. Following a short period of active operations with his unit in the Liri Valley, Pringle again went absent without leave in June 1944 and became involved with a gang of disreputable characters, including McGillivary, in Rome. There, apparently on the evening of 1 November, a fracas developed between McGillivary and another member of the gang, resulting in McGillivary being shot and severely wounded. Four men of the group, including Pringle, then took the victim to a point some distance outside Rome, where Pringle, together with another member of the gang, fired shots into the victim's body and left it in a ditch. Pringle was apprehended by the military police on 12 December and was charged with murder. An Adviser in Neuropsychiatry at Canadian Section, 1st Echelon, Allied Force Headquarters, who examined the accused in February 1945, certified that he found "no evidence of nervous or mental disorder", at that time, and that Pringle was "fit to stand trial and to serve any punishment that might be awarded."[170]

125. At Pringle's trial, the defence rested upon two main propositions: first, insufficiency of evidence to support a conviction; second, that the victim (McGillivary) was dead, as a result of his earlier wound, when the accused fired into his body and that, therefore, Pringle's act could not constitute murder. Medical testimony given at the trial was conflicting on the material point of whether or not the victim could have been alive when the accused fired at the body.

126. On 22 February 1945 the General Court Martial found Pringle guilty of the charge and sentenced him "to suffer death by being shot." On 12 March the Officer in Charge, Canadian Section, 1st Echelon, Allied Force Headquarters, reserved the finding and the sentence for confirmation. The proceedings were then forwarded to C.M.H.Q. for review. On the 26th the accused submitted a petition, under paragraph 574 of K.R. (Can.),* against the finding and sentence to the Chief of Staff, C.M.H.Q. Meanwhile, British courts martial (one naval) were trying two other principals in the case for the same offence; both were convicted and the findings and sentences were confirmed, one (Sapper C.H.F. Honess) being executed in April and the other (Fireman W.R. Croft) in May.[171]

127. At C.M.H.Q. the finding and sentence in the Pringle case were reviewed at great length. (General Montague received a confidential report, on certain aspects of the medical testimony, prepared by Sir Bernard Spilsbury, Honorary Pathologist at the Home Office.)[172] On 12 May, having concluded that there was "no justification for directing that the sentence be commuted", the Chief of Staff forwarded the proceedings to the Adjutant General, N.D.H.Q., for consideration by the Governor in Council. Montague wrote:

> It is my firm recommendation that the finding and sentence should be confirmed. I am entirely satisfied that the court having had all of the witnesses before them and having been able to evaluate their evidence,

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*"Any officer or soldier who considers himself aggrieved by the finding or sentence of a court-martial may forward a petition to the confirming or any reviewing authority through the usual channels. If such petition raises any question of law it should be referred to the Judge Advocate-General."

> has come to the correct conclusion on all of the facts. The effect of the finding of guilty is that the court was convinced that the victim, "Lucky" MacGillivary [sic], was in fact alive at the time that he was shot by our accused, Pte. Pringle. As is so frequently the case, there is conflicting expert medical testimony on this point, but the Court having given it first consideration and having made its finding, I can find no reason for refusing to accept that finding.
>
> I desire to point out further that the conviction is a conviction of murder, and the case must be considered as a civil offence. If I were a member of a Court of Appeal reviewing the findings of the Jury on the evidence in this case, I would find no reason for interfering with a finding of guilty. The fact that the accused and the victim were both members of the Canadian Army, and that the trial was by a Canadian Court Martial, is not, in my view, the controlling feature of this case. In essence, this is a case which arises out of the shooting of one Canadian citizen by another Canadian citizen. Considering the matter in this way, I have come to the opinion that the fact that the war is now over and won should not influence me to treat the matter otherwise than simply as a case of murder.[173]

128. When the proceedings were reviewed at Ottawa the J.A.G. raised the question of whether a medical officer should have presided at the court martial in view of paragraph 220 of K.R. (Can.), which read:

> An officer, other than a combatant officer, will, by virtue of his rank, or of his position, be entitled to precedence and other advantages attached to the corresponding rank among combatant officers. Such rank or position will not, however, entitle the holder of it to the presidency of courts-martial or to military command of any kind, except over such officers and men as may be especially placed under his command, or attached to his corps for duty.

General Montague answered the question by referring to earlier advice, received from N.D.H.Q., to the effect that all officers of the Canadian Army were combatant "except those granted honorary commissions". He added that Army Council Instruction No. 1135 of 1941 had established that the corresponding paragraph of K.R. did not prohibit the selection of a medical officer for appointment as president of a British court martial.[174]

129. Although the proceedings had reached Ottawa by 22 May, nearly a month elapsed before the irrevocable decision was taken. In the meantime the evacuation of Canadian troops from Italy for service in North-West Europe had reached the final stage.* In mid-June, General Montague cabled N.D.H.Q. that, while he appreciated fully "the need for most careful preconfirmation consideration", it was advisable that the remaining Canadian elements in Italy, including personnel connected with the Pringle case, should be withdrawn at the earliest opportunity.[175]

130. The official decision was eventually conveyed in an order in council (P.C. 4418) of 20 June 1945. The order referred to the petition put forward by the accused, through General Montague, and stated:

> That the Judge Advocate-General, to whom the proceedings and Petition have been referred, has reported that the Proceedings are regular, the finding properly made and the sentence according to law, and has also expressed the opinion that the petition discloses no legal grounds for withholding confirmation of the Finding or Sentence.

Consequently, the finding and sentence were confirmed and detailed instructions, following the British practice, were given for the procedure at the execution. The finding and sentence were promulgated at Avellino, Italy, at six o'clock on the morning of 5 July, at which time Pringle was informed of the disallowance of his petition by the Governor General in Council. Exactly two hours later the sentence was carried out by a firing squad.[176]

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*The Canadians in Italy, 660-5.

CONCLUSION

131. "Today as never before the Canadian soldier is 'justice conscious'. At expense to the country and with no expense to the soldier, we furnish legal aid in connection with a great variety of his problems so that he may be assured the fact that he is in the Army does not deprive him of his civil safeguards . . . In these and kindred matters knowledge of the availability of full justice to the soldier tends to the maintenance and strengthening of morale with increased confidence in the military authorities who may direct or lead him in battle."[177] These observations, in a letter written in 1943 by Major-General Montague, as Senior Officer, C.M.H.Q., to Brigadier R.J. Orde, J.A.G., N.D.H.Q., had a wide application to the administration of disciplinary policy in all three services. Whether the case in point was a minor matter for summary disposal, such as dealing with a man who had over-stayed his leave by a short period, or was of major concern, such as the Pringle case, Canadian disciplinary policy endeavoured to satisfy the most exacting demands of justice.

132. Critics of the administration of certain facets of service discipline in wartime would do well to reflect on the important distinctions between civilian and military practice, as well as the exigencies of the times. In his article on "Canadian Military Law" in The Canadian Bar Review (March 1951), Brigadier W.J. Lawson, Judge Advocate General of the Canadian Forces, drew attention to the necessity for "a special code of law prescribing that certain acts or neglects that are not offences under the ordinary law shall be offences under the special code and treating acts that may be minor offences under ordinary law

as major offences."[178] Thus, in civil law, a common assault may be a minor matter; but, in military law, may be "a serious offence involving a heavy punishment". These distinctions are widened in wartime, when there is not always the same opportunity to conduct proceedings in the relatively detached atmosphere of civilian courts. As we have seen (paragraphs 102, 117-8, 120, above), senior Canadian military officers, serving overseas, were unanimous in the opinion that disciplinary policy in the field must be handled expeditiously in order to be effective. On the other hand the requirements of ideal justice could not always be reconciled with operational necessity. Highly trained legal officers might not be available for courts martial because they were engaged in active operations; the extensive resources of a legal library were seldom available to hard-pressed legal officers at the headquarters of a formation; the vast resources of criminology, of scientific investigation and analysis, were sometimes lacking and, above all, the chaos of war frequently resulted in the destruction of important evidence and introduced confusion and uncertainty. Yet, in spite of these defects -- which no system of discipline can overcome completely in war -- the administration of Canadian policy achieved remarkably successful results in two protracted World Wars.

133. Apart from the constant aim to maintain the highest standards of justice consistent with operational requirements, the most significant development in the period under review was Canada's assumption of complete control over disciplinary policy affecting Canadian sailors, soldiers and airmen serving overseas. As described in an earlier section of this report, considerable progress in the direction

of autonomy had been made before the end of the First World War. But it was not until the passing of The Visiting Forces (British Commonwealth) Act, 1933, that complete autonomy was recognized as a legal, as well as de facto, right.

134. In the Second World War there was never any serious doubt about the true status of Canadian forces vis-à-vis those of other members of the Commonwealth. On occasion, early in the war, British authorities sometimes misunderstood the Canadian position; but as soon as the true situation was brought to their attention they were scrupulous in their recognition of Canadian autonomy in all matters affecting discipline.* As previously mentioned (paragraph 97, above), it was significant that, when arrangements were being concluded for the invasion of North-West Europe, the British authorities preferred the Visiting Forces Act to operate, both inside and outside the United Kingdom, "with as few limitations as possible". The principal Canadian difficulty resulted from the constant need for improvisation of disciplinary arrangements (mainly in the form of changing warrants for convening courts martial and confirming sentences) to cope with operational requirements. Nevertheless, considerable flexibility was attained in the policy covering troops in such widely separated places as Gibraltar and Hong Kong.

135. Finally, we may note that, although the achievement of Canadian autonomy in these matters applied equally to all three services, certain variations, or shifts of emphasis, appeared in the administration of their

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*Six Years of War, 230-1.

disciplinary codes. Unfortunately, as mentioned in the first paragraph of this report, available material is insufficient for a detailed comparison of the procedures employed in the three services. However, it is clear that, largely because of the nature of naval operations, the R.C.N. was much more closely integrated with the R.N. in disciplinary matters than was either the Canadian Army or the R.C.A.F. with its British counterpart. Again, since R.C.A.F. formations serving overseas attained neither the strength, in manpower, nor the organizational status of First Canadian Army (many R.C.A.F. units and formations being dispersed in various R.A.F. Commands), there appears to have been a tendency for disciplinary policy in the R.C.A.F. to assume somewhat less significance than was the case in Canadian military formations. It was inevitable that, dealing with relatively greater numbers of men in homogeneous formations, the Canadian Army Overseas encountered larger and more complicated problems of discipline than did either the R.C.N. or the R.C.A.F. In any event, the most important consideration in all three services was a common determination to co-operate with each other and with Canada's Allies in achieving final victory.

136. This report was prepared by Lt.-Col. T.M. Hunter, a member of the Law Society of British Columbia.

J. M. Hunter, Lt-Col
for (G.W.L. Nicholson) Colonel
Director Historical Section

Appendix "A"

DRAFT

[Annexed to P.C. 547 of 24 Jan 41]

CANADA

GEORGE THE SIXTH, by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Officer Commanding each of those Forces of His Majesty serving on the Continent of Europe with which Canadian Military Forces there serving are acting in combination.

Greetings:-

In pursuance of the provisions of the Militia Act, the Army Act and the King's Regulations and Orders for the Canadian Militia and of the provisions of Order-in-Council of the day of P.C.No.

WE DO HEREBY AUTHORIZE AND EMPOWER you from time to time as occasion may require, to convene General Courts-Martial and to appoint officers to constitute the same for the purpose of trying any member of the Canadian Military Forces subject to Military Law Serving under your command on the Continent of Europe who shall be charged with any offence against the Army Act, the Militia Act or the King's Regulations and Orders for the Canadian Militia, when the Canadian Military Forces of which he is a member shall be acting in combination with the Forces under your command on the Continent of Europe, which said Courts-Martial shall be constituted and shall proceed in the trial of such offences and in the giving of sentence and awarding of punishment according to the powers conferred by and under the said King's Regulations and Orders for the Canadian Militia, the Militia Act and the Army Act to the extent to which the latter may be applicable to the Canadian Military Forces.

AND WE HEREBY AUTHORIZE and empower you to receive the Proceedings of any such Courts-Martial, and according to the provisions of the Militia Act, the Army Act, the King's Regulations and Orders for the Canadian Militia and of Order in Council of of P.C.No. to approve, confirm and cause to be put into execution, mitigate, commute or remit any sentence of any such Court-Martial.

AND WE DO HEREBY FURTHER AUTHORIZE you to direct your Warrant to any Officer under your command, not below the degree of a Field Officer, giving him a general authority to convene General Courts-Martial, for the trial, under the said Act, of any such persons subject to Military Law, as are for the time being under or within the territorial limits of his Command on the Continent of Europe, whether the offences shall have been committed before or after such Officer shall have taken upon him his command, and also to exercise, in respect of the proceedings of such Courts-Martial, the power of confirming the findings or sentences thereof in accordance with the Militia Act, the Army Act and the King's Regulations and Orders

for the Canadian Militia and of the provisions of Order-in-Council of the day of P.C.No. , or if you should so think fit, of directing him to reserve for your confirmation the proceedings of all or any such Courts-Martial, in which case you are hereby authorized to exercise, in respect of the proceedings so reserved, all the powers of a confirming Officer in accordance with the Militia Act, the Army Act and the King's Regulations and Orders for the Canadian Militia and of the provisions of Order-in-Council of the day of P.C.No.

WE ALSO HEREBY AUTHORIZE YOU in any case in which you shall think fit so to do, to transmit the proceedings of any General Court-Martial to the Judge Advocate-General, Department of National Defence of Our Government in Canada in order that he may forward them to Our Minister of National Defence of Our said Government who will lay the same before Our Governor in Council for his decision thereon.

AND THAT there may not in any case be a failure of justice from the want of a proper person authorized to act as Judge-Advocate, We do hereby further empower you, to nominate and appoint, and to delegate to any Officer duly authorized to convene a General Court-Martial, the power of appointing a fit person from time to time for executing the office of Judge Advocate of any Court-Martial for the more orderly proceedings of the same.

AND for enforcing the sentence of any such Court-Martial, We do also give you authority to appoint, and to delegate to any Officer duly authorized to convene a General Court-Martial, the power of appointing a Provost-Marshall to use and exercise that office according to the provisions of the Militia Act, the Army Act and the King's Regulations and Orders for the Canadian Militia and of the provisions of Order-in-Council of the day of P.C.No.

AND for executing the several powers, matters and things herein expressed, these shall be to you, and all others whom it may concern, a sufficient Warrant and Authority.

IN TESTIMONY WHEREOF etc.

Appendix "B"

DELEGATED WARRANT FOR CONVENING GENERAL COURTS-MARTIAL

TO THE OFFICER DETAILED TEMPORARILY TO COMMAND THE CANADIAN CORPS, CANADIAN ARMY (ACTIVE), NOT BELOW THE RANK OF MAJOR-GENERAL.

WHEREAS I am empowered by Order-in-Council, P.C. No. 9586 dated 11 Dec 41 to come into effect 1 Jan 42, and by Warrant of His Majesty issued therunder, to direct my Warrant to any Officer under my command, not below the rank of Field Officer, giving him a general authority to convene General Courts Martial for the trial under the Army Act, of any Officer or Soldier of the Military Forces of Canada under the command of such last mentioned officer who is subject to military law, and also to execute (subject to the provisions of the said Order-in-Council and Warrant) in respect of the proceedings of such Courts-Martial, the power of confirming the findings and sentences thereof in accordance with the said Act:

By virtue of the said Order-in-Council and Warrant, I do hereby authorize and empower you (or the Officer on whom your command may devolve during your absence, not under the rank of Major-General) from time to time, as occasion may require, to convene General Courts-Martial for the trial, in accordance with the said Act and Rules made thereunder, of any Officer or Soldier of the Military Forces of Canada under your command who is subject to military law and is charged with any offence mentioned in the said Act, and is liable to be tried by a General Court-Martial.

And I do hereby empower you (or the Officer on whom your command may devolve during your absence, nor under the rank of Major-General) to receive the proceedings of such Courts-Martial and confirm the findings and sentences thereof, and to exercise, as respects these Courts and the persons tried by them, the powers created by the said Act in the Confirming Officer in such manner as may be best for the good of His Majesty's Service.

Provided always that if by the sentence of any General Court-Martial an Officer has been sentenced to suffer death, or penal servitude, or imprisonment with or without hard labour, or cashiering, or dismissal from His Majesty's Service, or a Soldier has been sentenced to suffer death or penal servitude, you shall in such cases, as also in the case of any other General Court-Martial in which you shall think fit so to do, withhold confirmation of the findings and sentence and transmit the proceedings to me or whoever shall at the time be entitled under the terms of the said Order-in-Council and Warrant to confirm such proceedings.

And that there may not in any case be a failure of justice from the want of a proper person to act as Judge-Advocate, I hereby empower you to nominate and appoint a fit person from time to time for executing the office of Judge-Advocate of any Court-Martial for the more orderly proceedings of the same.

And for so doing, this shall be, as well to you as to all others whom it may concern, a sufficient warrant.

Given under my hand and seal in the Field in the United Kingdom this first day of January, 1942.

(Sgd) A.G.L. McNaughton (L.S.)

(A.G.L.McNaughton) Lieutenant-General
G.O.C. Canadian Corps
Senior Combatant Officer,
Military Forces of Canada in the
United Kingdom or on the Continent
of Europe.

By Command

(Sgd) J.E. Rodger Lt.-Col
(Staff Officer)

Appendix "Q"

DELEGATED WARRANT FOR CONVENING GENERAL COURTS-MARTIAL

To The Officer Commanding 15 Army Group not below the rank of Lieutenant-General.

WHEREAS by Order-in-Council of the eleventh day of December 1941 PC 9586 and by Warrant thereunder I, as Senior Combatant Officer of the Canadian Militia not below the rank of Major-General, serving with the Military Forces of Canada in the United Kingdom or on the Continent of Europe am empowered to convene General Courts-Martial for the trial of any officer or soldier serving in the said Military Forces of Canada under my command and to confirm the findings and to approve, confirm, and cause to be put into execution, mitigate, commute or remit any sentence of any such Court-Martial;

AND WHEREAS I, as the said Senior Combatant Officer of the Canadian Militia am empowered by the said Order-in-Council of the eleventh day of December 1941 PC 9586 and by the said Warrant to authorize any officer under my command (but not below the rank of Field Officer) and any officer not below the rank of Field Officer of the force of any part of the British Commonwealth under whose command any Canadian body, contingent or detachment elsewhere than in the United Kingdom may be serving alone or together or acting in combination, to convene General Courts-Martial for the trial of any officer or soldier of the Military Forces of Canada under the command of the officer so authorized and to confirm (subject to the provisions of the said Order-in-Council and Warrant) the finding and sentence thereof;

AND WHEREAS by Order-in-Council of the fifteenth day of June 1943 PC 4895 which applies to any of the Military Forces of Canada which are controlled and administered by or through Canadian Military Headquarters in Great Britain, it was provided that the officers who pursuant to para 4 of the said Order-in-Council PC 9586 may be authorized to convene General Courts-Martial elsewhere than in the United Kingdom and to confirm the findings and sentences thereof, shall include any officer not below the rank of Field Officer commanding any part of the Military Forces of Canada which is serving alone or pursuant to the Visiting Forces (British Commonwealth) Act, 1933, is serving together or acting in combination with a force of any other part of the British Commonwealth;

AND WHEREAS by the said Order-in-Council of the fifteenth day of June 1943 PC 4895, I am empowered to confirm the findings and sentence of any General Court-Martial convened by an officer authorized so to do pursuant to the said para 4 of the Order-in-Council of the eleventh day of December 1941 PC 9586, or pursuant to the said Order-in-Council of the fifteenth day of June 1943 PC 4895 in like manner and to the same extent as I am empowered to do under the provisions of the said Order-in-Council PC 9586 in the case of officers and soldiers serving under my command.

NOW THEREFORE by virtue of the said Orders-in-Council and the said Warrant I do hereby authorize and empower you (or the officer on whom your command may devolve during your absence not below the rank of Lieutenant-General) from time to time as occasion may require to convene General Courts-Martial for the trial, in accordance with the provisions of the Militia Act, the Army Act, the King's Regulations and Orders for the Canadian Militia and the said Orders-in-Council, of any officer or soldier of the Military Forces of Canada under your command who is subject to military law and is charged with any offence mentioned in the Army Act and is liable to be tried by a General Court-Martial;

AND I DO hereby empower you (or the officer on whom your command may devolve during your absence not below the rank of Lieutenant-General) to receive the proceedings of such Courts-Martial and confirm the findings and sentences thereof and to exercise as respects those Courts and the persons tried by them the powers created by the said Acts, Regulations and Orders and Orders-in-Council in the Confirming Officer in such manner as may be best for the good of His Majesty's Service;

PROVIDED always that if by the sentence of any General Court-Martial an officer has been sentenced to suffer death or penal servitude or imprisonment with or without hard labour, or cashiering or dismissal from His Majesty's service, or a soldier has been sentenced to suffer death or penal servitude, you shall in such case as also in the case of any other General Court-Martial in which you shall think fit so to do, withhold confirmation of the findings and sentence and transmit the proceedings to Canadian Military Headquarters at London England for confirmation by me or by whomsoever shall at the time be entitled under the terms of the said Orders-in-Council and Warrant to confirm such proceedings;

AND that there may not in any case be a failure of justice from the want of a proper person to act as Judge Advocate, I hereby empower you to nominate and appoint a fit person from time to time for executing the office of Judge Advocate of any Court-Martial for the more orderly proceedings of the same;

AND for so doing, this shall be, as well to you as to any others whom it may concern, a sufficient Warrant.

Given under my hand and seal in the Field in the United Kingdom this nineteenth day of June 1943.

(SGD) A.McNaughton
(A.G.L. McNaughton) Lieutenant-General
Senior Combatant Officer of the Canadian Militia serving with the Military Forces of Canada in the United Kingdom or on the Continent of Europe.

Appendix "D"

P.C. 3740

PRIVY COUNCIL

CANADA

AT THE GOVERNMENT HOUSE AT OTTAWA

THURSDAY, the 18th day of MAY, 1944.

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS by Orders-in-Council dated 13th January 1940, P.C. 149; 14th June 1940, P.C. 2579; 4th July 1940, P.C. 2932; 13th August 1940, P.C. 3780; 24th January 1941, P.C. 547; 22nd October 1941, P.C. 8121; 24th October 1941, P.C. 8122; 11th December 1941, P.C. 9586; 26th November 1942, P.C. 10770; and 15th June 1943, P.C. 4895, provision was made inter alia for the convening of Courts Martial required to be held for the trial of members of the military forces of Canada serving in the United Kingdom or on the Continent of Europe and for the confirmation of the findings and sentences thereof;

AND WHEREAS the Minister of National Defence reports that due to the expansion of the military forces of Canada serving overseas and certain changes in their organization which have been made since the aforesaid orders were passed, as well as the fact that units and formations thereof, while under the administrative direction and control of Canadian Military Headquarters in Great Britain, are serving elsewhere than in the United Kingdom or on the Continent of Europe, the procedure prescribed by the aforesaid Orders-in-Council is no longer appropriate;

That in the interests of simplification of administration, it is considered that the provisions respecting the convening of Courts Martial and the confirmation of the findings and sentences thereof should be set forth in one Order-in-Council; and

That in respect to members of the military forces of Canada serving anywhere under the administrative direction and control of Canadian Military Headquarters in Great Britain, it is desirable in the public interests that no sentence of death awarded by a Court Martial should be put into execution unless the same has been confirmed by Your Excellency-in-Council.

AND WHEREAS the Minister recommends that in consequence of the exigencies arising out of the state of war now existing, and in view of the foregoing considerations, a new procedure in respect to the convening

of Courts-Martial required to be held for the trial of members of the military forces of Canada which are controlled and administered by or through Canadian Military Headquarters in Great Britain and for the confirmation of the findings and sentences thereof be prescribed.

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of National Defence and under and by virtue of the Militia Act, Revised Statutes of Canada 1927, Chapter 132, and the War Measures Act, Revised Statutes of Canada 1927, Chapter 206, and notwithstanding the provisions of any other statute, order or regulation, is pleased to make and doth hereby make the following Order:

- O R D E R -

"1. This order shall apply to the military forces of Canada which are controlled and administered by or through Canadian Military Headquarters in Great Britain.

2. The General Officer of the Canadian Militia commanding 1st Canadian Army, the Chief of Staff and the Major-General in Charge of Administration at Canadian Military Headquarters in Great Britain, in each case not below the rank of Major-General, are each hereby authorized to exercise in accordance with Canadian military law as hereby modified the following powers, namely,

(a) To convene General Courts-Martial for the trial in accordance with Canadian military law of persons subject to that law, whether such persons are under or within the territorial limits of his command or not;

(b) To confirm the findings and sentence of any such General Court-Martial whether convened by him or not; except where a sentence of death has been passed;

(c) To delegate by his warrant to any officer, not below the rank or relative rank of field officer, of the naval, military or air forces of Canada or of any other part of the British Commonwealth, who is commanding for the time being any body of the said forces or serving on the staff thereof, the power to convene General Courts-Martial for the trial in accordance with Canadian military law of persons subject to that law who may be under or within the territorial limits of the command of the said officer or of the headquarters in which he may be serving;

(d) To delegate by his warrant to any such officer mentioned in sub-paragraph (c) hereof the power to confirm the findings and sentence of any General Court-Martial convened under such delegated power whether by the same officer or not;

provided, however, that if by the sentence of any General Court-Martial convened under such delegated power an officer or a person subject to Canadian military law as an officer has been sentenced to suffer death,

penal servitude or imprisonment with or without hard labour, or to be cashiered or dismissed from His Majesty's service, or a soldier or a person subject to Canadian military law as a soldier has been sentenced to suffer death or penal servitude, the findings and sentence thereof shall be reserved by the said officer for confirmation, in which case the said three authorities first above mentioned are each hereby empowered to confirm in accordance with Canadian military law the findings and sentence so reserved, except where a sentence of death has been passed.

(e) To appoint, and to delegate by his said warrant the power to appoint, a fit person from time to time for executing the office of Judge Advocate of any such General Court-Martial;

(f) To appoint, and to delegate by his said warrant the power to appoint, a Provost Marshal from time to time to use and exercise that office in accordance with Canadian military law in respect of enforcing the sentence of any such General Court-Martial;

(g) To cause, and to delegate by his said warrant, except in respect of a sentence of death, the power to cause the sentence of any such General Court-Martial to be put into execution;

(h) To revoke the whole or any part of a warrant issued by him hereunder;

(i) To provide, subject to the provisions of this order, that any such delegation or revocation shall be subject to such restrictions, reservations, exceptions and conditions as he may see fit and which are consistent with Canadian military law.

3. The provisions of Section 99 of the Militia Act shall not apply to the findings or sentence of any such General Court-Martial.

4. In respect of a Field General Court-Martial held under Canadian military law for the trial of a person subject to that law, the powers and duties of a confirming authority under Section 54 of the Army Act and Rule 120 of the Rules of Procedure made under that Act shall not extend, in the case of an officer or a person subject to Canadian Military law as an officer, to a sentence of death, penal servitude, imprisonment with or without hard labour, cashiering or dismissal from His Majesty's Service, and, in the case of a soldier or a person subject to Canadian military law as a soldier, to a sentence of death or penal servitude, which said sentences as well as the findings in each such instance shall be reserved for confirmation, and each of the said three authorities first above mentioned is hereby empowered to confirm in accordance with Canadian military law as hereby modified such findings and sentences so reserved, except where a sentence of death has been passed.

5. In respect of the findings or sentence of a General Court-Martial or a Field General Court-Martial held under Canadian military law which have been reserved for confirmation by superior authority under Rule 51 and the said Rule 120, respectively, of the said Rules of Procedure, the said three authorities first above mentioned are each, except where a sentence of death has been passed and without prejudice to the power of confirmation in any such superior authority, hereby empowered to confirm such findings or sentences so reserved and to cause the sentence as confirmed to be put into execution in accordance with Canadian military law as hereby modified in all cases where he is not so qualified under that law.

6. In respect of a General Court-Martial or a Field General Court-Martial held under Canadian military law, any one of the said three authorities first above mentioned may reserve or direct that there be reserved the findings and sentence or the sentence only of such Court-Martial for confirmation by the Governor in Council or such other authority as may from time to time be designated by the Governor in Council, and the Governor in Council and the said other designated authority are each hereby empowered to confirm such findings or sentence so reserved and to cause the sentence as confirmed to be put into execution in accordance with Canadian military law as hereby modified.

7. Where a sentence of death has been passed by a Court-Martial held under Canadian military law, the Governor in Council, or such other authority as may from time to time be designated by the Governor in Council, shall have the exclusive power to confirm both the finding and sentence of such Court-Martial. Nevertheless, any one of the said three authorities first above mentioned shall, in respect of such Court-Martial, have the powers of commutation of the confirming authority under Section 57(1) of the Army Act (notwithstanding the fact that he is not the confirming authority). If such sentence of death is commuted by any one of the said three authorities first above mentioned, the finding and sentence as commuted may be confirmed as though such commuted sentence were the original sentence of the Court-Martial, and such sentence as commuted shall for all purposes be deemed to have been the original sentence of the Court-Martial.

8. Where a sentence of death has been passed by a General Court-Martial or by a Field General Court-Martial held under Canadian military law and has been confirmed under the provisions of this order without being commuted, the provisions of the said Section 54 and Rule 120 shall not apply to the carrying of the said sentence into effect, and the authority who confirmed the said sentence under the provisions of this order is hereby empowered to cause it to be put into execution in accordance with Canadian military law as hereby modified.

9. In any case in which the proceedings of a court-martial and any documents attached thereto or required to be forwarded therewith are lost or destroyed, a copy thereof certified by an officer to be a true copy shall stand and be accepted for all purposes in lieu of the said original proceedings and documents.

10. The following Orders-in-Council and the warrants issued thereunder are hereby cancelled insofar as they apply to persons subject to Canadian military law:-

Order-in-Council dated 13 January 1940 - P.C. 149
Order-in-Council dated 14 June 1940 - P.C.2579
Order-in-Council dated 4 July 1940 - P.C.2932
Order-in-Council dated 13 August 1940 - P.C.3780
Order-in-Council dated 24 January 1941 - P.C. 547
Order-in-Council dated 22 October 1941 - P.C.8121
Order-in-Council dated 24 October 1941 - P.C.8122
Order-in-Council dated 11 December1941 - P.C.9586
Order-in-Council dated 26 November1942 - P.C.10770
Order-in-Council dated 15 June 1943 - P.C.4895.

11. Order-in-Council dated 25 January 1944, P.C. 493, is hereby cancelled insofar as it vests in the officers specified therein any of the powers mentioned in the Orders-in-Council referred to in paragraph 10 hereof; provided, however, that any action taken under the aforesaid Order-in-Council P.C. 493 or under any of the Orders-in-Council or warrants referred to in paragraph 10 hereof prior to notification of this Order in Canadian Army Overseas Routine Orders shall be as valid and effectual as if this Order had not been made.

(SGD) A.M. Hill

Asst Clerk of the Privy Council

Appendix "E"

DELEGATED WARRANT FOR GENERAL COURTS-MARTIAL

TO:

THE GENERAL OFFICER COMMANDING
2ND CANADIAN CORPS, OR THE OFFICER,
NOT BELOW THE RANK OF MAJOR-GENERAL,
ON WHOM YOUR COMMAND MAY DEVOLVE IN
YOUR ABSENCE.

PURSUANT and subject to the provisions of Order-in-Council (PC 3740) of 18 May 44.

I HEREBY authorise and empower you, from time to time as occasion may require, to convene a General Court-Martial for the trial, in accordance with Canadian military law, of any person subject to that law who is under or within the territorial limits of your command and liable to be tried by a General Court-Martial, whether the offence so to be tried shall have been committed before or after you shall have taken upon yourself your command.

AND I HEREBY authorise and empower you to receive the proceedings of such General Courts-Martial and also the proceedings of any General Courts-Martial referred to you which have been convened by an officer so authorised and empowered under the provisions of the said Order-in-Council, and to confirm the findings and sentences thereof, and to exercise, as respects these courts and the persons tried by them, the powers created by Canadian military law in the confirming officer, in such manner as may be best for the good of His Majesty's service.

PROVIDED ALWAYS that if by the sentence of any such General Court-Martial an officer or a person subject to Canadian military law as an officer has been sentenced to suffer death, penal servitude or imprisonment with or without hard labour, or to be cashiered or dismissed from His Majesty's service, or a soldier or a person subject to Canadian military law as a soldier has been sentenced to suffer death or penal servitude, you shall in such case, as also in the case of any other General Court-Martial in which you shall think fit so to do, reserve confirmation of the findings and sentence and transmit the proceedings to me or as you may be otherwise directed by me from time to time.

AND that there may not in any case be a failure of justice from the want of a proper person to act as Judge-Advocate, I hereby empower you, in default of a person deputed by the Judge-Advocate-General, Canadian Army Overseas, to nominate and appoint a fit person from time to time for executing the office of Judge-Advocate of any such General Court-Martial for the more orderly proceedings of the same.

AND for so doing, this shall be, as well to you as to any others whom it may concern, a sufficient warrant and authority.

GIVEN under my hand in the Field this 12 day of June, 1944.

(Initialed) H.D.G.C.

(H.D.G. Crerar) Lieutenant-General
General Officer Commanding-in-Chief
FIRST CANADIAN ARMY

Appendix "F"

NOTE ON ORIGINS OF SECTION 99 OF THE MILITIA ACT,

CHAP. 132, R.S.C., 1927

1. In the period immediately preceding Confederation, the ultimate authority for discipline (including confirmation of courts martial) within the Canadian Militia rested with Her Majesty Queen Victoria.

2. After Confederation, section 74 of "An Act respecting the Militia and Defence of the Dominion of Canada" (Chapter 40 of the Statutes of Canada, 1868) provided, inter alia, that "no sentence of any General Court Martial shall be carried into effect until approved by Her Majesty".

3. The stipulation in section 74 was carried forward in all subsequent Militia Acts until, by section 101 of 4 Edw. VII, Chap. 23 of the Statutes of Canada, 1904, the source of approval was changed from His Majesty the King to the Governor in Council.

4. Section 99 of the Militia Act, Chap. 132, R.S.C., 1927, thus recapitulated the earlier provision as amended in 1904.

(Information supplied by Office of the Judge Advocate General, Department of National Defence, 4 May 60, on file H.Q.S. 2-121-6.)

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