THE CANADIAN BAR ASSOCIATION / L'ASSOCIATION DU BARREAU CANADIEN

Sword & Scale
Salut militaire

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CBA National Military Law Section/Section nationale de droit militaire de l'ABC

The evolution of the Canadian Forces Terms of Service

PRÉCIS

L'évolution des conditions de service au sein des Forces canadiennes

Les conditions de services existantes au sein des Forces canadiennes, intitulées « Programme d'orientation des carrières — officiers (POCO) » et « Programme d'orientation des carrières — Personnel non officier (POCPNO) », constituent le cheminement de carrière fondamental des membres des Forces régulières depuis 1968.

La structure du régime de gestion de carrière est fondée sur un engagement à vie dans les Forces armées, et remonte à l'époque précédant l'unification des armes. Au moment de l'unification, elle a été simplifiée mais reflète les pratiques de l'époque. Avant l'adoption de la *Charte*, pour s'enrôler, il fallait être citoyen canadien, en bonne santé, et avoir entre 17 et 25 ans. À la fin des années 60, la grande majorité des candidats étaient mâles, chrétiens et blancs.

Le régime a survécu jusqu'à l'an 2000 avec de nombreux cataplasmes pour se conformer à la *Charte* et s'adapter aux changements dramatiques survenus dans la société civile et dans le marché du travail au cours des 30 dernières années. Enfin, en janvier 2001, le Conseil des Forces armées a donné son aval à un certain nombre de recommandations qui modifieront les conditions de service de la Force régulière. En voici un sommaire.

A. L'engagement initial de durée variable
Au moment de l'engagement, le candidat est affecté à un GPM particulier pour une période initiale pouvant varier de trois à neuf ans. Dans ce régime, les conditions de services sont ajustées selon leurs besoins, en remplacement du modèle universel actuel. Ainsi, les occupations nécessitant un entraînement et des coûts de production plus élevés correspondront à des conditions de service de plus longue durée.

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March 06, 2002 Kandahar, Afghanistan Bombardier Dale Boyd with The 1 Royal Canadian Horse Artillery (RCHA) out of Shilo, Manitoba, attaches a Canadian pin on the shirt of a local boy from the village of Molla Abdulla Kariz, Afghanistan. Photo by Cpl Lou Penney, 3 PPCLI BG

Le 6 mars 2002 Kandahar, Afghanistan Le bombardier Dale Boyd, membre du 1er Bataillon, Royal Canadian Horse Artillery (RCHA), de Shilo, au Manitoba, attache une épinglette canadienne à la chemise d'un garçon du village de Molla Abdulla Kariz, en Afghanistan. Photo by Cpl Lou Penney, GT 3 PPCLI

By Captain C.S.M. Waters
Directorate of Law/Human Resources

Introduction

The existing Canadian Forces (CF) Terms of Service, called the Officer Career Development Plan (OCDP) and Other Rank Career Development Plan (ORCDP), have been the fundamental career path of members of the Regular Force since 1968.

This career management system, now entering its fourth decade of use, envisioned a life-long career in the CF, with a structure of three distinct blocks of service. Those blocks corresponded to the growth and development patterns of members of the Regular Force, and were named, in order, the Basic Engagement, the Intermediate Engagement and the Indefinite Period of Service. Career management control remained with the CF, and members had to meet specific qualifying criteria in order to progress to the next block in the career path. The life-long career ended at the compulsory release age of 55 (CRA 55).

The OCDP/ORCDP structure arose out of the pre-unification Army, Navy and Air Force terms of service, called, not surprisingly, the "Single Service" plans. At unification, National Defence Headquarters simplified the former Single Service plans into one coherent CF system. The human resource management theory upon which the OCDP/ORCDP was based reflected the civilian practices of the time, namely

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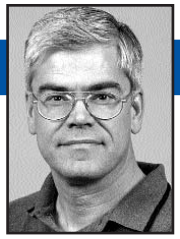

Message from the Chair

By Major Glen Rippon

While nullifying the trial judge's decision on procedural grounds, the CMAC went on to reject the trial judge's s. 7 Charter analysis, pointing out that mere risk to life or security of the person is not sufficient to invalidate orders.

By Major Glen Rippon

Early 2002 has been an interesting time for those who work in and observe the field of military law. The Court Martial Appeal Court (CMAC) handed down its decision in the case of *The Queen V. Kipling*, and the issue of prisoner-of-war status under the Law of Armed Conflict assumed front page status as Canadian soldiers took their fist captives in Afghanistan. Issues of military law that had once occupied only academics and training planners assumed immediate significance.

In the case of Sergeant Mike Kipling, a flight engineer, he refused to take an anthrax vaccine prior to his deployment to Kuwait in support of an operation against Iraq. Since his operational readiness under all warfare conditions was essential to his fellow aircrew and the fighter pilots who depended on his air-to-air refueling expertise, another (vaccinated) flight engineer had to be removed from duties in Canada and sent in his place. When tried for refusing the vaccine, the judge ruled that the order was a violation of Section 7 of the Charter, as he found there to be risks associated with the vaccine.

While nullifying the trial judge's decision on procedural grounds, the CMAC went on to reject the trial judge's s. 7 Charter analysis, pointing out that mere risk to life or security of the person is not sufficient to invalidate orders. A proper balancing must take place with the societal interests in advancing the defence of Canada, including the advancement of strategic security and maintain our collective defence obligations with our allies.

As we go to press, there has been no decision whether to re-try Sergeant Kipling.

Nevertheless, the CMAC has provided a useful template for the active discussion of how the section 7 "right to life and … security of the person" interacts with the state's fundamentally just requirement that its soldiers place themselves in harm's way in order to defend our free and democratic society. To that end, a panel discussion has been set as part of the CLE program at the AGM in London, August 11-14, to discuss this very issue. I hope you will take the opportunity to observe and provide us with your views.

We will also be holding a business meeting during the AGM in London for all our NMLS members, and we extend an open invitation to meet the section executive. Those of our members actually in the military are always distinguishable at the AGM by our uniforms, so feel free to approach them and learn more about the section and military legal issues generally. We especially welcome the civilian input and perspective, and this newsletter is a useful forum to deal with military law from all points of view, and we welcome analysis and criticism on all aspects of the national security and defence issues of the day.

PRÉCIS

Message du président

Le début de 2002 s'est avéré fort intéressant pour les observatrices et observateurs du droit militaire. La Cour d'appel de la Cour martiale (CACM) a rendu sa décision dans la cause *Reine c. Kipling*, et la question du statut de prisonnier de guerre en vertu du droit du conflit armé a défrayé les manchettes quand les troupes canadiennes ont fait leurs premiers prisonniers en Afghanistan.

Dans la cause du sergent Mike Kipling, mécanicien de bord, ce dernier avait refusé de se laisser vacciner contre la maladie du charbon avant son départ pour le Koweït où il devait participer à des opérations contre l'Iraq. Un autre mécanicien de bord au Canada avait dû être réaffecté au Koweït pour le remplacer. Accusé d'avoir désobéi à l'ordre de se faire vacciner, le juge d'instance avait décidé que l'ordre constituait une violation de l'article 7 de la *Charte des droits et libertés*, ayant jugé que certains risques étaient associés au vaccin.

Tout en annulant la décision pour des motifs de procédure, la Cour d'appel de la Cour martiale a également rejeté l'interprétation de l'article 7 de la *Charte*, se disant d'avis que les risques pour la vie ou la sécurité d'une personne ne sont pas des motifs suffisants pour invalider l'ordre d'un supérieur. Il faut aussi tenir compte, disait la Cour, des intérêts sociétaux associés à la défense du Canada, y compris sa sécurité stratégique et nos obligations envers nos alliés.

Au moment de mettre sous presse, aucune décision n'avait été prise quant à la tenue d'un nouveau procès pour le sergent Kipling. Quoiqu'il en soit, l'interprétation de l'article 7 de la *Charte* fera l'objet d'une table ronde dans le cadre du programme de FJP du Congrès annuel de l'ABC, du 11 au 14 août, à London, Ontario. Il y aura aussi une réunion d'affaires de la Section du droit militaire à London, et tous, toutes y sont bienvenus.

Sword & Scale is published by the CBA's National Military Law Section. We invite your comments.

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Vessels and aircraft: Where the LOAC differs

By Captain Alex Bolt
Deputy Judge Advocate Toronto

Introduction

At its heart the law of armed conflict (LOAC) regulates vessels and aircraft in a comparable way. In the air and on the sea the principles of humanity, necessity and proportionality are an inviolable backdrop against which hostilities may be conducted.

In a number of specific cases, however, the LOAC treats aircraft in a manner fundamentally different than vessels. Structural and capability differences between these machines account for some of the differences, which include vessel and aircraft movement and the use of false marks.

Movement of vessels and aircraft

Belligerent aircraft and vessels share freedom of movement in or over their own territory, the territory of belligerents, or the high seas, and are permitted to conduct otherwise lawful hostilities in these places. However, subject to a number of exceptions, belligerent vessels may also pass though the territorial waters of a neutral. Belligerent aircraft, on the other hand, may not enter neutral airspace, and neutrals are obliged to "intern every belligerent military aircraft which is found within its jurisdiction after landing or watering for whatever cause."

As might be expected, this disparity in the LOAC blurs in certain circumstances. Provided an aircraft remains on board a vessel, the rules applicable to vessels will apply. If a seaplane lands on the high seas and then drifts into neutral territory, the aircraft rules will apply.

Vessels carrying civilians and "civil airliners" are protected from attack and certain other aggressive acts under the LOAC, and safe conducts can be granted in relation to both vessels and aircraft. Protected under the LOAC, however, are "vessels engaged in transporting cultural property under special protection," and "vessels charged with religious, non-military scientific or philanthropic missions," while their aircraft counterparts receive no corresponding protection.

Medical vessels are protected no matter where they are, provided only that the "names and descriptions" of the vessels are given by the party seeking protection to the other parties to the conflict 10 days before the vessels are employed. However, it is only when medical aircraft are flying over non-contact land controlled by friendly forces that they receive similar blanket protection. Over contact zone land, enemy, or neutral territory, medical aircraft are protected only by prior agreement, or if they are "recognized."

There are historical customs built into the naval law rules due to their long period of development. When the law of aerial warfare was being developed in this century, the naval law system could have been applied in its entirety, *mutatis mutandis*. The differing developments of the respective laws, however, make it clear that structural and capability factors were considered.

Aircraft have military capabilities that vessels do not, and are certainly regulated differently for this reason. They move in three dimensions, while vessels move in only two. Aircraft also move with greater speed than is available to vessels, and have a correspondingly increased ability to evade capture. It is extremely difficult to prevent entry of aircraft into a space, while vessels can be corralled in some cases through blockades.

Generally, there is more risk to aircraft integrity from damage caused during combat, and a correspondingly greater risk to the crew. However, as a general rule, there are more lives on vessels. This latter fact may motivate a greater measure of protection for vessels in the LOAC.

A rationale applicable to the prohibition on belligerent aircraft passage through neutral airspace relates to the varying consequences to neutral interests inherent in aircraft and vessels sovereignty infringement. Whenever belligerents are permitted into neutral territory, there is a possibility of conflict. With naval conflict, there is normally little danger to neutral civilians and economic interests. In aerial conflict, however, which is frequently concluded by the shooting down of aircraft, there is a likelihood of material falling into neutral territory, possibly resulting in damage to property or persons.

False exterior marks

Aircraft may never use false exterior marks, and they are prohibited at all times "from

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PRÉCIS

Le droit des conflits armés, sur mer et dans les airs

Fondamentalement, le droit des conflits armés régit les navires et les avions de manière comparable. Dans les airs ou sur la mer, les principes d'humanité, de nécessité et de proportionnalité doivent être rigoureusement observés durant les hostilités.

Dans nombre de causes spécifiques, cependant, le droit des conflits armés traite les avions différemment, en partie à cause des différences de structure et de capacité des appareils.

Les navires et avions ont en commun la liberté de mouvement dans leur propre territoire, sur le territoire des belligérants et en haute mer durant un conflit armé. Les navires peuvent, moyennant certaines conditions, traverser les eaux territoriales d'un pays neutre. Les avions belligérants, par contre, n'ont pas le droit de violer l'espace aérien neutre.

Comme on pourrait s'y attendre, le droit des conflits armés s'embrouille dans certaines circonstances. À condition qu'un avion demeure à bord d'un navire, les critères maritimes s'appliquent. Si un avion de la marine amerrit et dérive en eaux territoriales neutres, les règles aériennes s'appliquent.

Les navires transportant des biens culturels sous protection spéciale ou chargés de missions religieuses, scientifiques non militaires ou philanthropiques sont protégés en vertu du droit des conflits armés, mais pas les avions. Les navires médicaux jouissent de protection partout, mais les avions médicaux ne seront protégés que s'il y a eu accord préalable, ou s'ils sont « reconnus ».

Les règles maritimes ont évolué au fil des siècles et ont été appliquées au droit aérien, plus récent, *mutatis mutandis*. Mais les avions ont des capacités que les navires n'ont pas. Ils ont une liberté et une vitesse de mouvement qui leur permet d'échapper à l'ennemi. Un blocus peut permettre d'intercepter des navires, mais il est difficile d'interdire un espace aérien à des avions.

Structurellement, l'avion est plus à risque durant un combat, mais il y a bien plus de vies humaines sur un navire. Cela peut expliquer la protection supérieure accordée aux navires par le droit des conflits armés.

L'interdiction de l'espace aérien neutre peut s'expliquer par les risques accrus pour le territoire et les citoyennes et citoyens de l'État neutre advenant que l'avion d'un belligérant y soit abattu. Ce risque est beaucoup moindre avec un navire. Enfin, alors que les navires peuvent, en certaines circonstances, hisser un faux pavillon, les avions n'ont pas ce droit.

Why is independence of the legal profession important?

By Major David McNairn
Directorate of Defence Counsel Services
Vice-Chair

As one author has put it, the independence of the legal profession is a widely invoked, yet rarely defined concept. The notion of independence is not well understood by those outside of the legal system and arguably is not well grasped by lawyers themselves. Nevertheless, the legal profession regards "independence" as one of its "foundational values."

The importance of such independence has recently been recognized by the Chief Justice of Ontario's Advisory Committee on Professionalism. In 2000 this Committee was established to devise a definition of professionalism for lawyers, based on key components or "building blocks." The Committee is a cooperative effort of the judiciary, Law Society of Upper Canada, Ontario's law schools and other legal organizations. In December 2001 the Committee produced a draft report defining "professionalism" for lawyers. One of the 10 essential elements of professionalism for lawyers identified by the Committee is independence.

With respect to the importance of independence, the Committee's draft report quotes the words of Ottawa lawyer, David Scott, Q.C.:

> The Bar is independent of the State and all its influences. It is an institutional safeguard lying between the ordinary citizen and the power of government. The right to counsel, which as mentioned, is inter-related with the law of privilege, depends for its efficacy on independence.
>
> In order to fulfil the heavy responsibilities imposed on lawyers as officers of the court, a meaningful and practical environment of independence is essential.

In 1982 the Supreme Court of Canada had occasion to comment on the importance of the independence of the legal profession. In the case of *Attorney General of Canada v. Law Society of British Columbia*, Mr. Justice Estey, speaking on behalf of himself and eight other justices of the Supreme Court of Canada, made the following observation:

> "The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally."

The view that the independence of the legal profession is essential to the existence of a free and democratic society is one that is frequently expressed. In the minds of many commentators, there is a clear linkage between the independence of the legal profession and other institutions that form the backbone of a free and democratic society.

The following passage, written by Mr. Justice Finlayson of the Ontario Court of Appeal, must rank as one of the classic statements on the importance of the independence of the legal profession:

> The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been an historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so there can be no compromise in the principle of freedom of the profession from interference, let alone control, by government.
>
> A vital role of the lawyer is to stand between the citizen and the state, and this role is more important now than ever before. The extent of government interference in the lives of citizens can only be described as massive. It is at every level - municipal, provincial, and federal - and whether it is for good or ill is irrelevant. The law is the instrument of government, and lawyers form the only profession trained in the law.
>
> Lawyers could not advise citizens as to their responsibilities with respect to particular legislation or governmental action if they can not maintain their independence as individuals…. It is imperative that the public have a perception of the legal profession as entirely separate from and independent of government, otherwise it will not have confidence that lawyers can truly represent its members in their dealings with government.

PRÉCIS

Pourquoi l'indépendance de la profession est-ele si important?

Un auteur écrivait que l'indépendance de la profession juridique était souvent invoquée, mais rarement définie. Cette notion d'indépendance est mal comprise, tant par les personnes à l'extérieur du système de justice que par les juristes eux-mêmes. Néanmoins, la profession juridique a fait de l'« indépendance » une de ses « valeurs fondamentales ».

Le juge en chef du Comité consultatif ontarien sur le professionnalisme a reconnu l'importance de cette indépendance dans son rapport préliminaire en décembre 2001. Regroupant des membres de la magistrature, du Barreau du Haut-Canada, ainsi que des représentantes et représentants des facultés de droit et d'autres organisations juridiques, le Comité a identifié l'« indépendance » comme l'une des 10 composantes essentielles du professionnalisme.

Au sujet de l'importance de cette indépendance, le rapport préliminaire du Comité cite David Scott, c.r., un avocat d'Ottawa :

> « Le Barreau est indépendant de l'État et de toutes ses influences. Il forme un bouclier entre le citoyen ordinaire et la puissance du gouvernement. L'efficacité du droit à un conseiller juridique qui, tel que mentionné, est relié au droit privilégié, est fondée sur l'indépendance.
>
> Les avocates et avocats, pour remplir les lourdes responsabilités qui leur sont conférées en tant qu'officiers de la cour, doivent oeuvrer dans un véritable climat d'indépendance. »

En 1982, la Cour suprême du Canada s'est permis un commentaire sur l'importance de l'indépendance de la profession juridique. Dans l'affaire *Procureur général du Canada c. Barreau de la Colombie-Britannique*, M. le juge Estey, parlant au nom de ses huit collègues de la Cour, affirmait que l'indépendance du Barreau constituait l'un des traits marquants d'une société libre. Conséquemment, disait-il, la réglementation de la profession juridique doit se faire, autant que cela se peut, sans ingérence politique de l'État.

M. le juge Finlayson, de la Cour d'appel de l'Ontario, affirmait pour sa part que la profession juridique occupe une place unique au sein de la société. Selon lui, un des rôles fondamentaux de l'avocat est de s'interposer entre la citoyenne ou le citoyen et l'État, et ce rôle devient encore plus important avec l'intervention massive de l'État dans la vie des citoyens. Les avocats ne seraient pas en mesure de conseiller les citoyens au sujet de leurs responsabilités face à telle loi ou telle action de l'État s'ils ne peuvent assurer leur indépendance professionnelle.

Substance over form: The Scotch Oath

By Captain Andrew E. Appolloni
Directorate of Law/Human Resources

> 30. (A) If any person desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he shall be permitted to do so.
>
> (…)
>
> A person desiring to be sworn in the Scotch form will swear standing and holding up his right hand, and the oath will be in these terms: "I swear by Almighty God, as I shall answer to God at the Great Day of Judgment, that…". If a person has expressed his desire to be so sworn, no question as to his religious belief is to be asked, nor is he required to hold or kiss a Bible while being sworn. This provision is in accordance with the general law, 51 and 52 Vict., c. 46 (*Oaths Act*, 1888).
>
> (Excerpt from *Manual of Military Law 1894*)

In today's common law courts it is generally accepted that if a witness takes an oath that binds his conscience then the common law requirements are satisfied. As long as the conscience of the witness is bound, the form in which the oath is taken becomes irrelevant. Interestingly enough however, the Scotch oath was not always so readily accepted, particularly in British courts with Christian witnesses. The "normal" practice of "kissing the Book" or the "touching of the Gospels" was deemed to be the acceptable standard.

The adjuration by invocation of the Deity with an uplifted hand had been in use in Scotland well before the traditional English method involving the "touching of the Gospels." Regardless of its longevity, the Supreme Court of Canada in *R. v. Curry* (1913), 48 S.C.R. 532, had to decide if a witness, who used the Scotch form of oath, could be convicted of perjury since he was never asked if he objected to taking an oath without kissing the Bible. At issue was whether the witness was actually sworn at law in a manner that would make him feel bound to tell the truth. The form of the oath taken as opposed to what was actually being said was considered by some to be extremely important and critical to binding one's conscience.

Interestingly, military courts martial in the 19th century were concerned with similar situations so much so that a note specifically addressed this issue in the section for *Procedures at Trial — Challenge and Swearing in the Manual of Military Law 1894*:

> In the case of a witness, it is well, in the interest of truth, to prevent subterfuges such as omitting the words "So help me God," or kissing the thumb instead of the book, as dishonest witnesses fancy that thus they escape the guilt of perjury.

In Canada, the Supreme Court put to rest this debate of form over substance in the *Curry* case by holding that a witness who voluntarily takes an oath without objecting to its form can be regarded as an admission by the witness that he feels himself bound by his conscience. The Court also acknowledged the absolute right of every person to be sworn in Scotch form without using any holy books and without any questions being asked of the witness. To understand the significance of such a ruling, one must look to the history and evolution of the Scotch oath as it was introduced into the common law courts.

The Scotch oath was not always available to just any witness. Initially the Scotch oath was permitted by the *Oaths Act* 1888 in order to facilitate Scottish witnesses being sworn in accordance with their own customs and beliefs throughout the U.K. The practice of not using a Bible soon gained wider acceptance, particularly amongst the medical profession who wanted changes made to the traditional British custom of "kissing the Book." The doctors were unanimous in their position that the traditional method was a way of spreading disease because at the time the Police Courts and the Coroner's Courts used the same copy of the Bible over and over again for years, in which it was "kissed by numbers of people of the lowest class and most uncleanly habits."

Change did not come very easily though, as the judges initially resisted such attempts to make the Scotch oath more widely applicable. The *Encyclopedia of the Laws of England* summed up the final outcome of this acrimonious debate, which today is perhaps taken by many for granted, by stating,

> … this resistance was overruled by the highest authority (see circular letter from the Home Office to justices and coroners issued 31 May 1893), and may now be considered to have been overcome; and it is to the medical profession and its organs in the press that the public owe the full recognition which now obtains of the absolute right of every person to be sworn for every purpose in Scotch form without the use of any book, and without any question being asked.

And the rest, as they say, is history!

PRÉCIS

La saga du serment écossais

30. (A) Si une personne désire prêter serment à main levée selon la forme et la manière habituellement observée en Écosse, elle pourra le faire.

....

Une personne désirant prêter serment selon la forme écossaise le fera debout en levant la main droite, et le serment sera prêté en prononçant ces paroles : « je jure, au nom de Dieu tout puissant, et j'en répondrai devant Dieu au jour du jugement dernier, que... ». Si une personne a exprimé le désir de prêter serment ainsi, aucune question ne sera posée concernant ses croyances religieuses, et on n'exigera pas qu'elle tienne ou qu'elle embrasse une Bible en prêtant serment. Cette disposition est conforme avec le droit général. (*Oaths Act*, 1888).

Les tribunaux d'aujourd'hui reconnaissent généralement aux témoins le droit de prêter serment sans avoir à invoquer Dieu. Tant que la conscience du témoin est engagée, la forme du serment a peu d'importance. À l'époque, cependant, le serment écossais a rencontré beaucoup de résistance devant les tribunaux britanniques. La pratique normale d'embrasser la Bible ou de toucher aux Évangiles était jugée la seule norme acceptable.

La Cour suprême du Canada a dû, dans *R. c. Curry*, en 1913, décider si un témoin, ayant prêté serment selon la forme écossaise, pouvait être jugé coupable de parjure étant donné qu'on ne lui avait jamais demandé s'il s'objectait à prêter serment sans embrasser la Bible. La Cour a décidé qu'un serment volontaire, sans objection quant à la forme du serment, peut être considéré comme un aveu du témoin qu'il a engagé sa conscience. La Cour a aussi reconnu le droit de tout témoin de prêter serment selon la manière écossaise sans recours à un livre saint et sans questions sur ses convictions religieuses.

L'importance de ce jugement devient évidente quand on analyse l'histoire et l'évolution du serment écossais. Au début, en Grande-Bretagne, le serment visait à accorder aux Écossais, partout en Grande-Bretagne, le droit de prêter serment en conformité avec leurs coutumes et croyances. La pratique s'est graduellement propagée, notamment à l'insistance des médecins qui voyaient dans la tradition d'embrasser la Bible un moyen de transmettre les maladies.

Éventuellement, en dépit de la résistance initiale des juges, elle s'est imposée partout.

The Evolution...

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employment with a single employer from high school or university graduation until retirement.

At the time of the introduction of OCDP and ORCDP (the pre-Charter era), to be eligible to enlist in the CF, one had to be a Canadian citizen, between 17 and 25 years of age and healthy. The CF of the late 1960's was an overwhelmingly Christian white young male organization. While women could enroll, the choice of careers open to women was limited to mainly clerical functions. For the time, the CF reflected the social and industrial standards in the wider population.

This state of affairs survived, albeit with modifications to keep ahead of the Charter and associated labour and employment law changes, until today. To use the well-known tire analogy, the original system has been patched so many times that we have lost sight of the underlying tire. There have been dramatic changes in the workplace in the last 30 years, and it has been recognized by many civilian institutions that those policies were dated and for the most part unlawful. Thus the CF, driven by the social dynamic, civilian employment conditions and the law, has re-designed the system. What follows is a description, with a diagram, of the proposed CF Terms of Service. At the time of writing, these Terms of Service have been confirmed by the Armed Forces Council (AFC), but have not yet received governmental approval.

The structure of the new Terms of Service

A. The variable initial engagement

I will define the terms by starting with enrolment and progressing (like we all hope to do) until graceful retirement at CRA 60. Upon enrolment, the applicant is placed on a Variable Initial Engagement (VIE). This new term differs from the former regime in that the environmental commands will set terms of service that best suit their needs, rather than the "one size fits all" approach previously taken. Thus CF occupations that have higher initial training and production costs will establish longer terms of service for their applicants. The opposite also applies. Those members who leave the CF after a VIE are not normally eligible for an annuity, but instead receive a return of contributions, with interest.

B. The short duty engagement

There is a new term introduced in this model, the "Short Duty Engagement" (SDE). While not new to the CF, this type of service has not been used for two decades. The previous similar regime was known as the Youth Training Employment Program (YTEP). YTEP was a year-long Reserve "Class B" engagement, with an option to convert to Regular Force terms of service on completion of the year. A temporary government program to provide employment to young Canadians, YTEP gave the CF a surge capability in recruit production. SDE is a similar engagement, but with different attributes.

SDE is targeted at high school graduates who may want a short stint in the real world before attending college or university, and at other groups, such as seasonal workers or skilled professionals. SDE is intended to meet short-notice emergencies and to attract specialists for particular projects. The former intent demands that low-skilled members be available at short notice for short-term missions.

One example is a truck driver on a UN mission. That skill is readily available in society, and the initial military training period may be very short for such applicants. Thus a truck driver could be enrolled for a period of 18 months to two years, to meet a pressing operational need. Those who display interest and potential would be offered conversion to other engagements upon completion of the term. The desired SDE applicant might be a seasonal worker, or between jobs, and would like to try something different. An SDE would provide for a short-term commitment, with reasonable compensation and an opportunity to refine and develop existing skills.

The other type of applicant would be a very highly skilled person whose talents are required for a particular task. Doctors, dentists or operational research scientists come to mind in this category. Again, they would need minimal training, and would serve only for the duration of that particular mission or project. There would be no pension benefits or long-term financial investment in this individual, as opposed to the investment made in a career member. While the chart shows the SDE only at an early stage, it could be used at any time in a person's working life, up to and including CRA 60. Similarly, one could come and go from the CF in a series of SDE engagements without ever committing to a full-blown CF career with all the attendant obligations. This type of engagement is a relatively inexpensive means of keeping force strengths up for operational surges and particular specialized tasks.

C. The intermediate engagement

The first career gate occurs between the VIE and an Intermediate Engagement (IE). Those members who demonstrate the wherewithal to continue in the CF may be offered a conversion from VIE to IE. The IE is the engagement that provides the majority of the junior and middle leadership to the CF. It is during this engagement that the member attends career courses, service colleges and completes professional development programs. A successful IE lasts from the VIE conversion gate up to the 25-year point. This is a change from the current 20-year gate. Members who have little or no potential or interest in advancement

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PRÉCIS

L'évolution...

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B. L'engagement d'affectation à court terme
Un engagement d'affectation à court terme permettrait aux FC d'embaucher des civils non formés ou des civils et des réservistes qualifiés pour une période déterminée, afin de combler un poste vacant ou de répondre à des besoins particuliers.

Par exemple, les Forces canadiennes peuvent avoir besoin de camionneurs pour des missions des Nations Unies. Cette compétence est disponible dans la société civile, et la période de formation initiale pour de tels candidats pourrait être très courte. Ainsi un camionneur pourrait s'enrôler pour une période de 18 mois à cause d'un besoin opérationnel pressant.

On pourrait aussi recruter de cette façon des professionnelles et professionnels hautement qualifiés – médecins, dentistes, scientifiques – pour une mission ou un projet particulier.

C. L'engagement de durée intermédiaire
Les membres des Forces armées engagés pour une durée variable et qui voudraient poursuivre leur engagement pourront passer au régime de durée intermédiaire, pouvant aller jusqu'à 25 ans (contrairement à la limite actuelle de 20 ans). À la fin de cette période, ils auront l'occasion de prendre leur retraite ou de poursuivre jusqu'à l'âge de 60 ans, et les Forces auront l'option de mettre fin à l'engagement.

D. L'engagement de durée indéterminée
Les personnes voulant poursuivre leur engagement au-delà de 25 ans et sélectionnées à cette fin se verront offrir un engagement de durée indéterminée jusqu'à l'âge de la retraite, qui sera par ailleurs repoussée de 55 à 60 ans.

Le prolongement de l'engagement jusqu'à 60 ans repose sur des données scientifiques qui démontrent que les gens demeurent productifs et habiles à un âge plus avancé, même dans une profession à haut risque comme les Forces armées. D'autre part, des indications provenant du Tribunal des droits de la personne suggèrent qu'une retraite obligatoire à 55 ans pourrait être jugée illégale.

The Evolution...

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will elect retirement at this career point, encouraged by their eligibility for an unreduced annuity. Otherwise, the CF retains the ability to decline to re-engage a person at this point, if further service is not in the best interests of the organization.

D. The indefinite period of service

Those deserving members selected for an engagement beyond 25 years' service will be offered either an Indefinite Period of Service (IPS) or a Continuing Engagement (CE). The former term provides for career employment from the 25-year point to CRA 60. It is in this engagement that members achieve higher appointments and promotion to the senior levels of command, either as officers or NCMs. During this engagement officers should be attending the Advanced Military Studies Course (AMSC) and, if earmarked for general or flag rank, the National Security Studies Course (NSSC).

Those who are deemed eligible for a short engagement after the IE/IPS gate, but are neither interested in, nor selected for IPS, may be offered a CE. A CE is of 5 years' duration or less, and the requirements are based on occupational needs. A person serving on a CE is promotable, but not eligible for subsequent conversion to IPS.

Compulsory release age

The former OCDP and ORCDP have a CRA of 55. As discussed in the introduction, there have been significant changes in society in the past 30 years. There is now scientific data to support the notion that people remain productive and capable to an older age, even in a high-risk hardship profession such as the CF. Indications from recent Human Rights Tribunals and courts suggest that there is a real legal risk in adherence to the CRA 55 career gate.

Accordingly, following comprehensive studies and legal analyses, the CDS issued policy direction to raise the CRA from 55 to 60. Once this policy is converted to regulation, a person serving in the CF may serve until 60 years of age, with a possibility, in special circumstances, of an extension beyond 60.

Conclusion

The CF is making significant progress in human resource management issues in order to keep up with the changing societal norms and human rights decisions. However, the CF must be able to apply force at any location and at any time to further Canadian governmental policy. To do this requires combat ready and capable forces that are deployable and employable. The challenge is to hire, train, retain and terminate CF members in pursuit of government policy while balancing the diverse rights and needs of those members of society who form the population of the CF. The proposed new Terms of Service but one step in the balancing act.

London 2002

BRANCH OUT IN NEW DIRECTIONS

EMPRUNTEZ DE NOUVEAUX SENTIERS

Annual Conference - London - August 11-14, 2002

The National Military Law Section will be holding a business meeting on Tuesday, August 13 at 12:00 (noon), at the London Convention Centre in London, Ont., following their CLE. All members welcome. Visit www.cba.org/Sections/military/ for more information.

Plan to attend the CLE:

Tuesday, August 13, 2002
9 a.m. to 12:00 (noon)

2.1 Hazardous Duty: Charter s. 7 & the Soldier's Right to Life and Security
This summer, the Court Martial Appeal Court will render its decision in *The Queen v. Kipling*. This case involves mandatory vaccination of soldiers against anthrax bioweapons. Given the present global situation, the capacity of the state to place its soldiery in the way of weapons of terror is even more germane than during the trial.

Congrès annuel de l'Association du Barreau canadien à London (Ontario) - 11 au 14 août 2002

La Section nationale du droit militaire tiendra une réunion d'affaires le mardi le 13 août, à midi au London Convention Centre, à London (Ontario), après leur FJP. Tous les membres sont les bienvenus. Pour plus de détails, rendez-vous sur le site Web de la Section : *abc.cba.org/Sections/military_F/*.

Le mardi 13 août, de 9h à midi

2.1 Un droit en péril : l'article 7 de la *Charte* et le droit du soldat à la vie et à la sécurité
Cet été, la Division d'appel de la Cour martiale rendra sa décision dans l'affaire *The Queen c. Kipling*. Cette cause porte sur la vaccination obligatoire des soldats contre le charbon. Étant donné la situation qui prévaut actuellement dans le monde, la capacité d'un État à placer ses soldats dans la ligne de mire des armes terroristes revêt depuis le procès une actualité alarmante.

Vessels...

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feigning exempt, civilian or neutral status." Military vessels, on the other hand, are permitted to fly a false flag in some circumstances, and in fact have a colourful history of so doing. While vessels may never fly a false flag while launching an attack, and may never simulate the status of hospital and other protected ships, positioning and travel is permissible through the use of this ruse of war.

Two rationales for the difference in the LOAC on this point present themselves. First, even if it was permitted, there are technical and other difficulties in having an aircraft switch its rondels mid-flight.

Second, the offensive power of aircraft differs from that of vessels fundamentally in that aircraft can engage in "peaceful war," by dropping propaganda leaflets over undefended but populated areas. If aircraft were permitted to make use of the marine tactic of disguise, this method of warfare could, conceivably, go on unchecked and in secret, a solution at odds with LOAC first principles.

Why is...

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In short, the independence of the legal profession is important because citizens turn to lawyers when they face legal troubles. In one author's view, the "hard core of truth" to pronouncements about independence is that lawyers perform the vital function of protecting the rights and freedoms of fellow citizens. These platitudes are lofty but unlikely to incite great public passion. Nevertheless, the independence of the legal profession is of great importance because citizens turn to lawyers when they face legal troubles — frequently involving the state — and they rely on lawyers to protect their rights, freedoms and interests.

2001-2002 National Military Law Section
Section nationale du droit militaire