Military Law, Courts Martial and the Canadian Expeditionary Force, 1914-1918

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A Thesis submitted to the Faculty of Graduate Studies of
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Abstract

Research into the history of Canadian military law during the Great War has received scant attention by historians. British studies into the subject have, until recently, been political in nature, with a focus on discrediting the legality and conclusions of courts martial during the war. However, the research done on the subject has been plagued by methodological problems, resulting in political conclusions which are not supported by historical evidence. In an effort to redefine the subject of military law during the Great War, this study critically engages the previous work done on the subject, establishes the legal status of the Canadian forces during the war, re-constructs the theory of military law and the procedures and legislation of courts martial during the war, and provides concrete examples of specific court martial cases. The significance of the conclusions derived from this study demonstrates that there is reason to doubt the predominant assumption that courts martial during the war were arbitrary, and questions the arguments in favour of pardons for those executed during the war. Finally, this study illustrates the need for analyses of court martial trials specifically, rather than crimes, in an effort to provide a more accurate historical understanding of Canadian military law during the Great War.

Introduction

What was Canadian military law during the Great War? Narratives of the crimes for which Canadian soldiers were executed dominate the literature on this subject. Oftentimes, these studies[1] reference British works on the subject of military law, because both Canadian and British soldiers were subject to the British *Army Act*. The vast majority of the historiography, both Canadian and British, present the military legal system as brutal, arbitrary and unjust. This assertion is problematic for two reasons: the construction of both military theory and military law are never clearly addressed; and the legislated procedures are never described or analysed to establish if they were based on such negative standards, or if they were carried out inappropriately.

The case of Lieutenant Henry N. Aldous[2] illustrated that court martial trials were documented and followed a particular format. Lt. Aldous was tried at Mont St. Eloi on 25 June 1917, by General Court Martial with the charge of "When on Active service drunkenness, in that he on 4th June 1917 was drunk," to which Aldous pleaded not guilty. The summary of evidence contained the statements of six witnesses. The first, Corporal Lloyd, stated that he was in charge of No. 1 Section under Aldous, and was told to ride ahead to No. 2 and 3 Sections to tell them to return with their remounts. They refused, claiming that Aldous was not fit to take charge of them. When Lloyd returned, he asked Aldous if he could "go on with my animals, but was refused." Aldous was attempting to match up the animals and was staggering all over the field. Lloyd claimed Aldous was

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[1] Desmond Morton, "The Supreme Penalty: Canadian Deaths by Firing Squad in the First World War," *Queens Quarterly* 79, no. 3 (1972): 345-352; and Andrew B. Godefroy, *For Freedom and Honour? The Story of the 25 Canadian Volunteers Executed in the First World War*" (Nepean, Ontario: CEF Books, 1998).

[2] H.M. Aldous, *Courts Martial Records* (Library and Archives Canada: RG150 – Ministry of the Overseas Military Forces of Canada, Series 8, File 649-A-1361, Microfilm Reel Number T-8651).

drunk. Major Cowley was the second witness and stated that, when the party which Aldous was a part of had returned from bringing back remounts from Aubigny, he had given orders to have Aldous report to him. When Aldous did not report to him, the Major went looking for him and, being told he was sick, went to his tent. In his tent, the Major found Aldous asleep; when he woke him, he found that Aldous was "in a stupid confused condition due in my opinion to drink. The tent in which Lt. Aldous was sleeping smelled of liquor." The third witness, Captain Dunlop corroborated the Major's statement of events, also describing Aldous' condition as the result of drink. Corporal Buse, the fourth witness, in charge of No. 2 Section did not remember being given any orders to return to Aldous with his remounts. He did remember seeing Aldous on two occasions on the return trip. "He was mounted and I considered him to be in a fit condition." The fifth witness, Lieutenant Davin, stated that Aldous had been complaining about a bad headache due to the sun and that, in Aldous' tent with the Major, he found that Aldous was in fit condition and not drunk. The final, sixth witness, Sergeant Hawthorne, stated he saw nothing unusual about Aldous and that he had seen him frequently on the afternoon in question.

These type-written statements did not correspond with the handwritten ones; however, the handwritten ones were unclear and illegible. The pages of the transcript of the actual court were all handwritten in small, condensed writing. That was complicated by poor transcription of the documents which make them difficult to decipher. However, what is clear is that: Aldous had a friend help him throughout the trial, often cross-examining witnesses; the court would often cross-examine witnesses as would the

prosecutor or defence; the prosecution had five witnesses and the defence had four. The accused was found not guilty of the charge.

This case demonstrates part of a trial, and illustrates the systematic procedures of court martial trials; however, without analysis and explanation of the procedures there is no way of fully understanding what had taken place or of making any claim as to whether Aldous received a fair trial.[3] Any groundwork for the historical study of Great War Canadian military law requires: (1) a historiographic analysis of the subject; (2) a construction of the history of military psychiatry during this time period, particularly of 'shell shock' and its relationship to military law; (3) a construction of what Canadian military law was, why it was understood as such, and what developments were made throughout the war; (4) an analysis of the fundamental and conceptual differences between military and civil laws, with specific focus on the theoretical foundations of military law; (5) an analysis of the legislative framework of the military legal system during the period in question; (6) and the demonstration, using specific case files, of standards applied in court martial trials.

A note on terminology: terms, common to this subject matter, require clarification, particularly the terms 'Military Law' and 'Martial Law.' Military law is a legal system which governs the administrative as well as disciplinary aspects of life in the armed forces. Thus, military law governs enlistment, terms of service, and courts martial, among other things.[4] During the Great War, the military law which applied to Canada was the British *Army Act*, originally approved by the British parliament in 1881 and

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[3] 'Fair' can only be measured if the procedures established within the legislation governing military law and courts martial were followed.

[4] Burrell M. Singer and Lieut.-Colonel R.J.S. Langford, *Handbook of Canadian Military Law* (Toronto: The Copp Clark Company LTD, 1941), 1.

renewed every year thereafter, with amendments made periodically, including in 1914. Martial Law, on the other hand "designates, in reality, no system of law at all, and it is not recognized, as such, by English or Canadian jurisprudence. … In its proper sense, the term means the suspension of ordinary law, and the temporary government of a country or parts thereof by military authorities."[5]

The subject of military law during the Great War is controversial by nature; in this war, necessitating the mass mobilization of state resources and populations, the executions of volunteer citizen-soldiers serving their countries in a wave of patriotism was and remains unsettling. The Canadian historiography on this specific aspect of our military history is extremely slim, consisting of two works: Desmond Morton's "The Supreme Penalty,"[6] an article published in *Queen's Quarterly* in 1972; and the more recent *For Freedom and Honour?*[7], Andrew Godefroy's 1998 analysis of Canadian capital court martial trials. Godefroy's work is strongly based in the British historiography on the subject, particularly Julian Putkowski and Julian Sykes work, *Shot at Dawn*,[8] but also on Anthony Babington's *For the Sake of Example*.[9] The connection between Canadian and British research on this subject found in Godefroy's book is in the relationship between Canada and Britain during the war; Canada entered as a British dominion, and subsequently was subject to British command and legislation. Godefroy, Putkowski and Sykes, and Babington are strongly political in denouncing the application of military law and the construction of courts martial during the war, calling for a

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[5] *Ibid.*, 2.
[6] Morton.
[7] Godefroy.
[8] Julian Putkowski and Julian Sykes, *Shot at Dawn: Executions in World War One by Authority of the British Army Act* (London: Leo Cooper Pen and Sword Books, 1989).
[9] Anthony Babington, *For the Sake of Example: Capital Courts Martial, 1914-1920* (New York: St. Martins Press, 1983).

reassessment of the trials and findings, as well as for blanket or specific pardons for those executed for desertion and cowardice.

This thesis opposes that historiography and is critical of the claims and research methods of Godefroy, Putkowski and Sykes, and Babington. It strongly supports the thesis presented by Cathryn Corns and John Hughes-Wilson in *Blindfold and Alone*.[10] However, rather than simply reassess and reinforce their thesis, which they have strongly and concisely presented, my work complements and further develops the concepts of military legal theory and the application of legislation in this time period. The findings will argue that the military legal system which the Canadian Expeditionary Force was subject to was in fact systematic, with clearly established procedures, and that there is no historical evidence to support a claim that those procedures were ignored or in any way distorted by military officers and courts. Furthermore, military law differed from civil law in that the military legal code was, and remains, premised on the concept of discipline and control, whereas the civil justice code is premised on an abstract construction of justice. Conversely, both the military and civil laws were, and remain, equally premised on the concept of deterrence. Therefore, when faced with total war, where soldiers risked death daily, the lack of capital punishment would have arguably resulted in a significant problem for military commanders. The purpose of law, both civil and military, is to ensure order by constructing the consequences for a crime as more severe than the consequences if the crime was not committed. In the case of war, if a soldier is faced with death on the front line, the punishment for avoidance such as

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[10] Cathryn Corns and John Hughes-Wilson, *Blindfold and Alone: British Military Executions in the Great War,* (London: Cassell, 2005).

desertion must be severe; otherwise the result of committing such a crime proves to be more beneficial than to obey the established law.

The study of Canadian courts martial during the Great War is complicated by the condition of the primary source records. As mentioned, the courts martial records are held at Library and Archives Canada, which has composed an index available online. Included in the "Descriptive Records" of the courts martial records is a statement confirming that the records were microfilmed by the National Defence Microfilm Unit between 1 December 1950 and 2 September 1954; the original records were subsequently destroyed.[11] The microfilms of the courts martial, forty-five in total, lack organization, with the files identifiable only by the name of the accused, are filed in reverse order on the reel (the first page following the title page of the file is the last page of the actual file) and in some cases repeat offences and trials are all filed together with no clear distinction as to which page refers to which trial. This organization demeans the usefulness of the index available, as most files lack file numbers, which the index uses to identify the individual files. There are no other identifying marks on the reels, save for breaks spread throughout, which are potentially useful in attempting to use as a marker to locate files. Finally, the qualities of the reproductions are particularly poor, which further hampers research into the subject. All of this contributes to significant methodological problems in regards to sampling: representative samples are not possible without analysis of the entire collection because the files are not organized by crime, date, location, finding, sentence or name. Therefore, the only possible sampling method is a random sample of the

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[11] Library and Archives Canada, "Descriptive Record: Courts martial records" http://data4.collectionscanada.ca/netacgi/nph-brs?s1=150-5&s2=&s6=&s10=&s11=&l=20&Sect4=AND&Sect1=IMAGE&Sect2=THESOFF&Sect5=MKDOPEN&Sect6=HITOFF&d=MIKA&p=1&u=http://www.collectionscanada.gc.ca/archivianet/02012302_e.html&r=1&f=G (accessed 3 June, 2008).

records. Therefore, due to the poor quality of the records, my only parameter for the sample was legibility. In an effort to illustrate the procedures evident in the files, seven cases were randomly selected from the records.

The result of this detailed study of military law, and the Canadian forces during the war, objectively questions arguments in favour of issuing posthumous pardons to soldiers executed during the war. Given all of the evidence, it becomes evident that the conclusions of many historians on this subject are not historically supported. A pardon for a particular crime needs to be based on evidence that the accused was wrongfully convicted. In a historical context, this necessitates an appreciation for the laws of the time and for the actual trials. In the cases of Canadian capital courts martial, this becomes problematic. The case files for those executed during the war are claimed to have been lost. The names of these twenty-five cases are not listed in the index for the courts martial records held at Library and Archives Canada, which means that either the index is incomplete or those files are forever lost. If lost, then an analysis of those trials is impossible. As for the laws of the time, these men were charged with a crime and punished according to a legally constructed code. To allow a blanket pardon would, in many ways, be an injustice. If the implication was that some men were unjustly convicted, then there would be equal evidence to claim that some were justly convicted. Where is the justice in pardoning the guilty along with the innocent? Furthermore, as in the case of Private Butler, executed for murder following a head injury which resulted in strange behaviour, should he not receive a pardon also, given the circumstances of his crime?

Historiography

Studies of executions during the Great War have been plagued by the limits of sources; it has been only recently, within the past ten years that the actual trial transcripts have been made available. The result is that only two works on this subject has been done recently enough to cite specific cases.[12] Therefore, studies conducted on military executions during the Great War necessarily had to be limited in scope to the available sources. This is significant because conclusions presented within the historiography often are not supported by the sources available at the time. Of all of the studies on British and Canadian military law during the Great War, Gerard Oram's *Military Executions During World War 1*[13] is the most analytical work currently available, focusing on the development of military law in Britain and the relationship between discipline and morale. The value of the work done on the subject is unquestionable; the current historiography presents a previously unknown aspect of Great War history which continues to receive scant attention.[14] However, the general conclusion presented within the historiography is that the trials were 'unjust;' if those who were executed during the war would have received trials which were 'fair,' they would have been acquitted. In order to support such a claim, the actual trials must be examined against the legal code

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[12] Cathryn Corns and John Hughes-Wilson, *Blindfold and Alone: British Military Executions in the Great War,* (London: Cassell, 2005); and Gerard Oram, *Military Executions During World War 1* (New York: Palgrave Macmillan, 2003); however, Babington did consult the actual trial transcripts but was not permitted to release particulars such as names and units.

[13] Oram.

[14] General surveys of Canadian military history such as Desmond Morton, *A Military History of Canada: From Champlain to Kosovo* (Toronto: M&S, 1985); Jack Granatstein, *Canada's Army: Waging War and Keeping the Peace* (Toronto: University of Toronto Press, 2002); and Tim Cook, *At the Sharp End: Canadians Fighting the Great War 1914-1916*, vl. 1 (Toronto: Viking Canada, 2007) simply make claims of an arbitrary and unjust legal system, if military law is even mentioned. Chris Madsen's *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press., 1999) is a survey of the evolution of the JAG, providing little insight into capital trials.

which applied to the soldiers then and there, in order to ascertain whether they did or did not receive what was then considered a lawful and just trial.

The first Canadian study of military courts martial and executions during the war was by Desmond Morton.[15] The focus was on crime and punishment as Morton recreated the crimes of eight Canadian soldiers executed during the war, using a 1922 parliamentary report.[16] This trend, of analysing the crimes rather than the trials of both Canadian and British soldiers, has been endemic throughout the historiography. The process of court martial trials has neither been re-constructed nor referenced in the analysis. Regardless, Morton asserted that: "The Canadians, without apparent protest, had accepted the cruelty of execution by firing squad as a reasonable price to pay for a disciplined participation in the war."[17] This statement illustrates two significant aspects of the general historiography: a clear opposition to the execution of Canadian soldiers, based on a general opposition to capital punishment and the perception that court martial trials were unjust; and a lack of construction of *why* the Canadian Expeditionary Force was subject to British legislation or what developments were made during the war regarding that lawful authority.

Morton did briefly address the theory of military law:

> The avowed purpose of military law is not to do absolute justice to the individual but to maintain discipline. Consequently, like any civil magistrate, the Commander-in-Chief and his subordinates tended to give greater weight to the prevalence of the crime or the possible interpretations

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[15] Desmond Morton, "The Supreme Penalty: Canadian Deaths by Firing Squad in the First World War," *Queen's Quarterly* 79, no. 3 (1972): 345-352.

[16] Although the report was not cited in the article, personal correspondence with Morton confirms the use of this source for the cases.

[17] Morton, 351.

> of leniency than to the personal merits of the unfortunate offender.[18]

Morton complemented this statement with a memorandum from the Canadian Department of National Defence released following the war in an effort to address the use of capital punishment and the execution of Canadian soldiers:

> As a general rule a death penalty was not confirmed unless the offender had previously been guilty of the same grave offence, or had been convicted of offences of a similar character though of a lesser degree such as absence of a serious nature but not amounting to desertion. There were exceptions to this rule but where a death sentence for desertion or cowardice was inflicted when a man's past record had been good it is safe to say that the offence was of a particularly flagrant character or that the particular crime was so prevalent that further leniency would have had a possible grave effect.[19]

Both statements addressed significant aspects of military law: the concept of discipline and control, and the importance of deterrence. However, these important concepts, which clarify and contextualize military law in general as well as the use of capital punishment specifically, were not given further attention.

Morton proceeded to describe the crimes of eight specific Canadians executed, though no names were provided nor any details given regarding the trials. The first Canadian mentioned was the first Canadian to be executed. He was a French-Canadian from the 14th Battalion who had "admitted to evading two tours of duty in the trenches and [was] guilty of three absences in the previous year, for the last of which he was still serving a suspended sentence." He was essentially shot as an example due to the volume

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[18] *Ibid.*, 346.

[19] "Some Notes Regarding the Award and Confirmation of Sentences of Death on Canadian Soldiers in the Great War, 1916-1918," Public Archives of Canada, R.G. 24, vol. 2538, HQS 1822-2. In *Arms, Men and Governments* (Ottawa: Information Canada, 1971), p. 248. Quoted in Morton, 346.

of similar offences in the accused soldier's unit.[20] The second was a trooper in the Royal Canadian Dragoons who shot a fellow soldier five times. However, he had behaved strangely since a bad fall from a horse and, due to this, the court martial recommended leniency. He was nevertheless executed.[21] The third was an American citizen serving in the CEF who was found near Boulogne in civilian clothing without references or representation.[22] The fourth was a Private in the 1st Canadian Reserve Park who shot his sergeant major in the back five times.[23] The fifth was a soldier in the 3rd Canadian Battalion who refused to return to the trenches even at the point of a bayonet. Due to the prevalent nature of this refusal amongst the troops, the testimonies from his platoon commander, sergeant and captain were inconsequential to his ultimate execution.[24] The sixth case was used to complement the fifth and only described as "a private of the French-speaking 22nd Battalion [who] suffered the same fate on the argument that several other members of his unit had escaped the firing squad after their attempts at desertion had failed."[25] The seventh was the single Canadian to be executed for cowardice. He was a private in the 52nd Battalion of the 4th division who had refused to accompany his unit to the line, declaring that he would rather be shot. When the authorities attempted to march him to the line under escort, he sat in a communication trench and refused to go any further.[26] The final mention was the most senior member of the CEF to be executed. He was recognized as having a history of fighting "exceptionally well" and was a veteran of the peacetime British Army. He was an acting platoon commander in the 10th Battalion

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[20] Morton, 347.
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*, 348.
[26] *Ibid.*

at the Hill 70 operation in September 1917. There he claimed to be wounded and handed command over to a corporal. After the platoon was "annihilated," the accused was found to be uninjured and was executed for desertion.[27]

These descriptions of the crimes for which soldiers were executed are problematic. The failure to construct the concept of military law results in the lack of a framework for an understanding of these cases. Furthermore, if the argument is presented that the execution of these men was 'unfair,' as implied throughout the article, then the construct of the procedures for courts martial as well as the re-construction of specific trials is necessary. Finally, if the purpose of such a discussion is to ascertain the justification, or lack thereof, of the use of capital punishment, then a discussion is required regarding civil law; capital punishment was acceptable within the Canadian and British justice systems throughout this historical period. The lack of these pertinent explorations results in a narrative which is perfunctory and, in its own way, unfair.

This patterned narrative of executions has been endemic within the British historiography. One study often cited is Anthony Babington's *For the Sake of Example: Capital Courts Martial, 1914-1920.*[28] Babington clearly established his position on the issue of capital courts martial during the war:

> It can now be revealed that the general disquiet about these events has been more than justified. Viewed by the standards of today few of the executed men received the most elemental form of justice. They were tried and sentenced by courts which often regarded themselves as mere components of the penal process and which, until the final year of the war, were asked to perform a complex judicial function without any sort of legal guidance. The

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[27] *Ibid.*

[28] Anthony Babington, *For the Sake of Example: Capital Courts Martial, 1914-1920* (New York: St. Martins Press, 1983).

> cases for the accused were seldom presented adequately
> and sometimes never presented at all.[29]

There are several aspects of this statement which are disquieting and recur throughout the study. First, Babington presented the concept of justice without clarification. Twelve years before Babington published his work, John Rawls released *A Theory of Justice*.[30] Rawls contended that justice is not a simple 'fact' or reality; rather he presents justice as a complex relationship between individuals and organizations. Thus, if the term justice has been demonstrated as a complex theory, Babington's argument for a lack of justice was unclear. To further complicate Babington's concept of justice, he focused on applying his contemporary values to historical events. In order to understand historical events, they must be analysed within their historical contexts; this is the basic premise of historicism. The period in question differed greatly from the period in which Babington was writing, particularly in that capital punishment was then an acceptable practice within the British justice system. However, he did recognize this further in the study: "It must be remembered, too, that these wartime executions took place in an age when capital punishment was accepted in Britain as a necessary component of the penal structure."[31] In an effort to support his claim that the courts were basically unable, or unwilling, to perform their duties appropriately, Babington relied on a novel, *The Secret Battle*, by A. P. Herbert, an officer who had practiced law in peace time prior to the war, who allegedly recounted his experiences within the military legal system: "A great many members of the court considered him [the defence advocate] superfluous to the proceedings and, if he made any attempts at any genuine advocacy, 'they could not

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[29] *Ibid.*, xi.
[30] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).
[31] Babington, 192.

stomach the sight of him'."[32] An assertion as strong as claiming that the legal system was corrupt requires more substantive historical evidence than one novel.

Babington's monograph was largely a narrative of the British Expeditionary Force in Europe during the war, with a focus on crimes committed by British soldiers resulting in executions of the accused. This presentation implicitly argued that the military legal code was particularly bloody, with a significant execution rate. However, later in the work, Babington stated that the execution rate was only 11.23% of all those condemned to death; because the military legal system allowed an accused to be found guilty of a lesser crime for which he was not charged (*i.e.*, be found guilty of absence without leave when charged with desertion), the execution rate for all men charged with desertion was a great deal less. Thus, the narrative itself is misleading.

Another problem was in regards to the issue of shell shock. Babington argued: "Six of the deserters who were shot in June and July might well have been suffering from some form of traumatic neurosis, but only one of them was medically examined before he was executed."[33] However, Babington failed to explore the history of military psychiatry or shell shock, thus omitting the fact that shell shock (what we understand today as post-traumatic stress disorder) was not universally accepted as a psychological injury within any medical community at the time. Using medical history to criticise legal history without engaging that medical history makes any conclusions derived questionable. This approach to the critical analysis of military law and courts martial during the Great War has become common and problematic throughout the historiography.

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[32] *Ibid.*, 14.
[33] *Ibid.*, 28.

Babington's methodology in analyzing the courts martial is also challengeable. In every case discussed throughout his study, Babington gave little if any detail about the actual trial itself, focusing instead on a narrative reconstruction of the crimes. As an example, Babington discussed the case of Private W:

> Private W, the condemned soldier, was a member of another Home Counties regiment; neither his age nor his length of service was revealed at his court martial. On 16 September his company had been in position in the ill-defined front line, entrenched behind a farm-house. A shell had landed near him, wounding two other men. Immediately afterwards W had left his trench and walked back towards the rear. His company sergeant-major had asked him where he was going and he replied that he too had been hit. W was not seen again for six days when he reported back to his battalion, unwounded and still in possession of his rifle and equipment. No defence was put forward at his trial, not even the obvious one that he had been shaken or dazed by the force of the explosion and had temporarily lost control of himself.[34]

This excerpt illustrates some significant methodological issues. As Babington claimed in his introduction, the British soldiers who were executed did not receive an adequate trial. However, as represented in this case, Babington focused more on the crime, and only mentioned that the age and length of service of the defendant were not given during the trial, and that no defence was presented. Babington failed to give any analysis of the trial process. Particularly disturbing is the implication that the responsibility for a lack of defence fell on the court. Babington failed to mention if the defendant sought or had representation at his trial, and that the defendant himself may have chosen not to present any defence. Refusal to present any kind of defence was not uncommon throughout the Field General Courts Martial (FGCM), as illustrated by a memo from an FGCM president quoted in Babington: "He was given every opportunity of giving evidence on his own

[34] *Ibid.*, 7.

behalf or making a statement. I asked him several times if he had some explanation to give for going absent and he simply replied 'No'."[35] Babington failed to point out in the cases under discussion that the defendants may have refused to defend themselves, possibly under the impression that submission to the courts would warrant leniency. Instead, Babington implied that the courts were at fault. This misleading implication distorts the historical understanding of the events under study without any justification.

Babington's presentation of the cases, with a focus on the crimes instead of the trials in an effort to demonstrate the injustice of the courts martial system, further distorted historical understanding by declaring the apparent barbarity of executing someone before clearly reconstructing the law, legislation, trial or context of the issue. Babington's work reflected a political agenda which became prominent in the 1980s in Britain: the pardoning of soldiers executed for desertion and cowardice in the First World War.

Another British work which closely resembled that of Babington is Julian Putkowski and Julian Sykes, *Shot at Dawn: Executions in World War One by Authority of the British Army Act.*[36] Putkowski and Sykes clearly state their goals in the 'Author's Statement:' "we repeat our call for the Ministry of Defence to have the courage to admit these injustices, and to initiate the procedures for exonerating all 351 men who were executed by the British Army during the First World War."[37] However, Putkowski and Sykes are similar to Babington in style and tone, differing largely in two respects: Putkowski and Sykes attempt to reconstruct the crimes and some cases using sources

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[35] *Ibid.*, 12-13.

[36] Julian Putkowski and Julian Sykes, *Shot at Dawn: Executions in World War One by Authority of the British Army Act* (London: Leo Cooper Pen and Sword Books, 1989).

[37] *Ibid.*, 5.

other than the actual trial transcripts (which were unavailable) and they release the names and units of those executed.

Andrew Godefroy's study is the most recent and in-depth study of Canadian courts martial and executions in the First World War.[38] Many concerns found in the previous studies prove to be constant throughout this study as well. Godefroy summarises his argument in the preface:

> This book examines each soldier's story and evaluates it in the historical context of the First World War. From this, it is clear that the handling of executions in the CEF/British military was neither fair nor unfair, but essentially inconsistent in its conduct. Therefore, at least for those shot for cowardice or desertion, a case by case review should be allowed, and if possible, some soldiers should have their honour restored.[39]

This thesis is problematic for two reasons. First, the use of the terms 'fair' and 'unfair' is vague and convoluted: a trial must either be considered 'fair' or 'unfair.' Godefroy's argument throughout the study implicitly supported the same argument as Babington and Putkowski and Sykes, but only in so far as the desertion and cowardice cases are concerned. The argument that the handling of the cases was 'inconsistent' was also vague, problematic, and not clarified throughout the study. If the argument was that the courts were inconsistent in general, leading to the execution of only a select few, and disregarding any type of precedent set by previous courts martial, then an examination of cases which did not lead to an execution would be required. Otherwise, consistency or the lack thereof could not be demonstrated or proven. Regardless, in order to determine the 'fairness' or 'consistency' of a trial or a series of trials, actual trials would have to be

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[38] Andrew B. Godefroy, *For Freedom and Honour? The Story of the 25 Canadian Volunteers Executed in the First World War* (Nepean, Ontario: CEF Books, 1998).

[39] *Ibid.*, x.

examined. Godefroy failed to accomplish this, relying on the same 1922 parliamentary report as Morton, a report which failed to give a description of the trials themselves.

Throughout the study, Godefroy habitually made inaccurate statements and came to false conclusions, failing to cite how he developed those understandings. In regards to the construction of Canadian military law at the time and the use of the British system, Godefroy claimed that: "The fact of the matter is that Canada did not necessarily deliberately allow its soldiers to be tried and shot under British FGCM. It simply did not have an alternative to the existing system in place at the time, and by the time it got itself organized in matters of discipline and military law the war was drawing to a close."[40] Although this statement was not entirely incorrect, it failed to reconstruct the issue of Canadian military law at the time. However, Godfroy continued "Oddly, attention was brought to the matter of Canadian control over discipline from a domestic organization back home. The National Prison Reform Association in Canada had written a letter to the Minister of Overseas Military Force of Canada in 1918, urging for full Canadian jurisdiction over matter involving Canadians and military law."[41] This statement was inaccurate as the matter of jurisdiction had been addressed by the Canadian government and by the Canadian military prior to 1918, as will be discussed below.

Godefroy's inaccurate statements continued with his discussions of courts martial.

> The poor administration of British Field General Courts-Martial has been pinpointed as a major factor that "lunacy" surrounded executions in the BEF. By their very nature (being conducted in the field), "they allowed for a considerable amount of simplification of procedural matters and requirements, all supposedly in the interests of military expediency." ... In addition to these conditions however, there was also a general lack of any standardized procedure

[40] *Ibid.*, 15.
[41] *Ibid.*, 16.

> or of supervision. There was the allowance of unauthorized decision making on the part of officers of the court, all of which contributed to the shooting of many commonwealth servicemen who might otherwise have been spared.[42]

These statements were wholly inaccurate. The procedures for courts martial were legislated by the British parliament and clearly established within the *Army Act* and the *Manual of Military Law*. Godefroy's source for this statement, like Babington's, was wholly circumstantial and failed to be derived from any historical evidence. Godefroy elaborated on the issue of officers in the court: "There have been many references to cases where the court officers were divided on the decision. In such a case, more often then not, the court president simply coerced those officers junior in rank to support his own decision."[43] These statements were unreferenced with no evidence to support such claims. In fact, the procedures established within the legislation addressed these issues, requiring junior officers to submit verdicts first, to prevent the domination of superior officers in the court.[44] Such procedures could be ignored and Godefroy claimed that this did occur but there is no historical evidence to support Godefroy's claim regarding the officers of the courts or the "inconsistent precedence and procedures, that often presided over Canadian FGCMs."[45]

The least convincing conclusion Godefroy presented was in regards to who deserved to be granted pardons and who did not. As his thesis claimed, those executed for desertion and cowardice should have their cases reviewed and be pardoned if applicable. However, in regards to those convicted for murder "there is little debate on the order of execution for those who commit murder which, if convicted, always carried the penalty

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[42] *Ibid.*, 9.
[43] *Ibid.*, 12.
[44] Britain, *Rules of Procedure* (War Office, 1907), s. 69, ss. c.
[45] Godefroy, 15.

of death."[46] Godefroy further claimed that: "The cases of murder, it is generally agreed, must stand. Both the military and civilian justice system of the period in question sentenced its convicted murderers to death. In the two CEF cases, there is not the slightest question of guilt. The issue of cowardice in the CEF is open to debate, and Sinizki received nothing resembling a fair trial."[47] Who Godefroy was referring to in regards to the 'debate on the order of execution' and the 'general agreement' as to murder remains unclear.

This perception and conclusion is disconcerting when reviewing the case of Alexander Butler. He had joined the Royal Canadian Dragoons in 1914, following Canada's declaration of war, with six and a half years of experience in a British Cavalry unit. He served without incident until May 1915, when he fell from his horse and suffered a severe head injury. There had been reports that he had behaved strangely thereafter, and in May 1916, he suffered another head injury due to another fall from his horse. His strange behaviour became aggravated and on 8 June 1916, Butler fired five rounds into another Canadian soldier for no apparent reason.[48] Godefroy recognised all of these circumstances, yet remained adamant that this case should not be reviewed, whereas cases of cowardice and desertion should. Of all the Canadian court martial cases which resulted in an execution, this is the *only* case in which, even without the trial transcripts, it is evident that the accused was wrongfully convicted given the military law. The *Army Act*, which Butler was subject to stated: "Where on trial by court martial of a person charged with an offence it appears that such person committed the offence, but that he was insane at the time of the commission thereof, the court shall find specially the fact of

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[46] *Ibid.*, 21.
[47] *Ibid.*, 73.
[48] *Ibid.*, 21-22.

his insanity, and such person shall be kept in custody in the prescribed manner until the directions of His Majesty thereon are known."[49] The *Manual of Military Law* further defined the concept of insanity: "A person cannot be convicted on a criminal charge in respect of an act done by him while labouring under such unsoundness of mind as made him incapable of appreciating the nature and quality of the act he was doing, or that such an act was wrong."[50] Thus, in this particular case, it was evident, given the crime and the laws which the accused was subject to, that Butler was wrongly convicted due to his state of mind at the time of the offence.

However, Godefroy failed to recognise this legal matter throughout his work. He compared this case to that of Sinizki who refused to go to the front line, even at the point of a bayonet, stating that he would rather be shot.[51] In this case, without having the trial transcripts available for review, Godefroy concluded that Sinizki did not receive a fair trial. The legislation for the time stated that any soldier who "Misbehaves or induces others to misbehave before the enemy in such a manner as to show cowardice shall on conviction by court martial be liable to suffer death, or such other less punishment as is in this Act mentioned."[52] In this case, if one were to judge the trial based on the crime, a prominent practice within the historiography, Sinizki was punished according to the legal standard to which he was subject. Godefroy's conclusions and analyses of these cases in particular, and of courts martial in general, were not founded upon the historical evidence available.

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[49] United Kingdom, *Army Act*, 1914, 44 & 45 Vict., s. 130, ss. 2.
[50] United Kingdom, War Office, *Manual of Military Law* (London: HMSO, 1914), 88.
[51] Godefroy, 24.
[52] *Army Act*, s. 4, ss.7.

In all of the works previously discussed (Morton, Babington, Putkowski and Sykes, and Godefroy) sources have been problematic; Morton, and Putkowski and Sykes did not have access to the actual trials, as they were closed to the public for research. This was likely the case for Godefroy as well. The problem with these works is not the materials under analysis, but the conclusions derived. Morton and Godefroy rely on a 1922 parliamentary report which may be the only official documentation addressing this issue. Although this report has significant historical value, it does not discuss the actual trials; therefore, a critique of the trials would be impossible unless supported by supplemental evidence. Putkowski and Sykes fall into the same difficulties. Reconstructions of the crimes do not clarify the procedures of the trials. Essentially, the evidence and the sources used do not support the conclusions.

The most recent British study on the subject of military law, courts martial and executions during the First World War is Cathryn Corns and John Hughes-Wilson's work *Blindfold and Alone*.[53] This is the most concise, objective and academic study available on the subject. The authors address the development of military law through history from the ancient Egyptians, Romans and the British,[54] the development and context of shell shock during the war, the *Manual of Military Law* and the *Army Act*,[55] the capital cases of courts martial, and the issue of pardons and criticism of military law during the war.[56] This revisionist work has successfully addressed many of the problems evident within the historiography.

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[53] Cathryn Corns and John Hughes-Wilson, *Blindfold and Alone: British Military Executions in the Great War,* (London: Cassell, 2005).

[54] *Ibid.*, 39-43.

[55] *Ibid.*, 44-51.

[56] *Ibid.*, 92-95.

The authors asserted: "the courts-martial were nothing more or less than the result of the legitimate application of military law as voted into statute by Parliament like any other law."[57] Furthermore "what is quite clear, however, is that the FGCM was a formally and legally constituted judicial instrument.... Any especially grave sentencing (such as death) had to be unanimous (with the junior officer giving his opinion first to avoid senior officers 'directing' the proceedings)."[58] This, a reference to criticisms like Godefroy's, was supported by the *Rules of Procedure* found in the *Manual of Military Law* which stated that "The opinions of the members of the court should be taken in succession, beginning with the junior in rank."[59] Any claim to the contrary would need to be supported by historical evidence.

Blindfold and Alone was not all-encompassing in scope. It lacked a clear construction of the theory of military law. Although there was a history of the application of military law, this differed substantially from a construction of what the military law was. Furthermore, although there is an overview of the *Manual of Military Law* and the *Army Act*, this overview was focused on crimes and punishment rather than procedures. If a particular trial is to be analysed to ascertain its legality, the procedures established through legislation would need to be reconstructed in order to develop any conclusions.

Thus, there are obvious gaps within the historiography on this subject matter. The first problem in the British historiography, reiterated within the Canadian historiography, is the issue of shell shock. The argument presented is that the men convicted for cowardice and desertion were likely sufferers of shell shock and thus unjustly executed. Although this argument is indisputable in hindsight more than eighty years after the fact,

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[57] *Ibid.*, 22.
[58] *Ibid.*, 92.
[59] Britain, *Rules of Procedure* (War Office, 1907), s.69, ss. c.

with psychological and psychiatric studies to support the concept of shell shock, the medical understanding of this injury during the war was not so clear or unanimous within the medical and military spheres. As such, due to the significance of shell shock as a basis of criticism, its construction remains essential in clarifying this little understood facet of military legal history in the Great War.

One further facet which remains obscure within the Canadian historiography is the legal status of the Canadian soldiers, how that status was understood and how it developed throughout the war. As implied, the current construction and understanding of that status is incorrect and incomplete; therefore, a clarification of that status is necessary in order to understand why Canadian soldiers were subject to British legislation during the war.

The two final areas which require clarification are broader in scope and relate to military law in general and the theories upon which it is premised. Although a brief history of how military law was applied to various societies is illuminating, it fails to explain what military law is. Therefore, a discussion of the premise and theory of military law, as well as a comparison illuminating the similarities and differences between military and civil law, will enhance the contextualization of this peculiar aspect of legal history. Finally, in an effort to disprove arguments presented that the courts martial system was arbitrary and lacked any procedures, actual procedures for courts martial used during the Great War will be reconstructed and analysed. In terms of historical method, this thesis follows the historicist rather than the presentist perspective for time and evidence.

Shell Shock and the Great War

One core pillar in the argument presented by historians like Babington, Putkowski and Sykes, and Godefroy was that the soldiers executed during the First World War for desertion and cowardice did not warrant a death sentence based on the historical assumption that many were suffering from shell shock. However, these particular historians failed to address the history of shell shock or military psychiatry during the war. This area of history, like the history of military law, has received little attention. Research does present one significant conclusion to the history of shell shock as a legal defence: its recognition during the Great War was so limited and disputed that it could not have successfully been used as a legal defence for those executed during the war.

The symptoms varied and ranged from a generalized anxiety syndrome to "hysterical neuroses with gross physical symptoms of paralysis, spasms, mutism, blindness and the like."[60] There was a distinct division within the psychiatric profession as to the cause of these symptoms. In 1844, German psychiatrist Wilhelm Griesinger developed the somatic theory of mental illness, claiming and demonstrating through autopsies that the symptoms of mental illnesses common throughout asylums at the time, particularly 'paralysis of the insane,' was the result of physical damage to the brain and central nervous system; thus, mental illness was the result of a physical injury or disease.[61] In contrast to this theory, a small group of young neurologists in the 1880s and 1890s argued that mental and nervous illnesses were disorders of the mind, not

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[60] Eric J. Leed, *No Man's Land: Combat and Identity in World War I* (Cambridge: Cambridge University Press., 1979), 163-164.

[61] Tom Brown, "Shell Shock in the Canadian Expeditionary Force, 1914-1918: Canadian Psychiatry in the Great War," *Health, Disease and Medicine: Essays in Canadian History,* ed. Charles G. Roland (Hannah Conference on the History of Medicine, 1982), 309. The post-mortem evidence used to support this theory was the result of syphilis.

originating in physical injuries, and as such needed to be treated through mental means and the use of psychotherapy.[62] This group, including Sigmund Freud, divided mental illnesses into two groups: those suffering from hysteria displayed a "bewildering array of thoroughly bizarre physical symptoms;" while those suffering from neurasthenia displayed "a more general and less dramatic nerve weakness or 'brain exhaustion'."[63]

The reaction of the majority within the psychological field as well as the military authorities was to perceive those suffering from hysteria or neurasthenia as malingerers. Due to the disciplinary effect on soldiers, "the acceptance of neurosis (by military officers inside and outside the medical corps) as a condition appropriate to soldiers in combat was a political issue"[64] based on the suspicion that many soldiers would take the opportunity to feign illness in order to avoid combat or dangerous actions. Often, when soldiers learned of the symptoms of shell shock, as well as the sympathy that such a casualty could receive, they eagerly embraced it as a "functional disorder."[65] Such 'functional disorders' could be used by soldiers to avoid service and return home.

Although there was a division within the medical community over the understanding of shell shock, the prominent perception was that it was a disciplinary issue: "Common sense urged the view that shell shock was not some new and mysterious disease nor was it a legitimate wound."[66] Furthermore, Captain T. H. Ames of the Canadian Army Medical Corps pointed out that shell shock did not occur "in soldiers who have severe wounds or severe organic disease, nor in the prisoner of war."[67] The

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[62] *Ibid.*, 310.
[63] *Ibid.*
[64] Leed, 166.
[65] *Ibid.*, 166-167.
[66] Brown, 315.
[67] *Ibid.*, 315.

Official History of the Canadian Forces in the Great War, 1914-19: The Medical Services, written by a medical officer during the war and professor at McGill University, depicted the perception of shell shock by the military medical community during the war: "Hysteria is the most epidemical of all diseases and too obvious special facilities for treatment encouraged its development. 'Shell-shock' is a manifestation of childishness and femininity. Against such there is no remedy."[68] Macphail implicitly argued that the cause of shell shock was a lack of discipline, resulting in a lack of courage and manliness, encouraged by leniency through medical treatment.

Even if the condition was recognized as legitimate, the treatment remained disciplinary, with a perception that punishment would force the sufferer to regain control over his weakened 'constitution.'[69] Shell shock was understood as a disciplinary matter, not a medical one. Courts martial were premised on the maintenance of discipline and obedience, and thus "dramatized the clash between the minority of compassionate temporary RAMC (Royal Army Medical Corps) doctors who saw shell-shocked soldiers as psychiatric casualties, and the Army authorities, which patrolled the morale of the fighting men and maintained strict discipline."[70] The Army had clearly established designations for soldiers regarding health: sick, well, wounded or mad.[71] "Anyone neither sick, wounded, nor mad but nonetheless unwilling to or incapable of fighting was necessarily a coward, to be shot if necessary."[72]

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[68] Sir Andrew Macphail, *Official History of the Canadian Forces in the Great War, 1914-19: The Medical Services* (Ottawa: F.A. Acland, 1925), 278.

[69] Leed, 173.

[70] Peter Leese, *Shell Shock: Traumatic Neurosis and the British Soldiers of the First World War* (New York: Palgrave MacMillan, 2002), 41.

[71] Ben Shepard, *A War of Nerves: Soldiers and Psychiatrists in the Twentieth Century* (Cambridge: Harvard University Press, 2001), 25.

[72] *Ibid.*, 25.

This overlap between the medical and legal systems, and the "varied responses, from medical therapy to military punishment," [73] complicated the understanding and acceptance of shell shock as a legitimate psychological injury. From a legal perspective, shell shock could not be used as a valid defence if there was no official medical recognition of it as an illness. Of those executed for cowardice and desertion, none were cases of 'hysteria' nor did they display more acute physical symptoms such as paralysis, blindness or deafness; these would have been handled by the medical authorities. Those that were handled by the legal authorities were the ones who, arguably, would have exhibited more subtle symptoms such as anxiety and fear. As a result of the legal and medical understandings of the time, they were not medically unfit nor were they suffering from any type of physical or psychological wound. Arguments presented by historians that these men should have been examined by doctors are moot because of the medical perception of shell shock as a disciplinary issue: "shell shock was simply a euphemism for cowardice."[74]

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[73] Chris Feudtner, "Minds the Dead Have Ravished: Shell Shock, History, and the Ecology of Disease-Systems," *History of Science* 31 (1993): 377.

[74] Brown, 317.

Legal Status of CEF

In 1914, over 32,000 Canadian men enlisted in the military and left for Europe as the first contingent of the Canadian Expeditionary Force (CEF). The CEF fell under the jurisdiction of British legislation, applied by British authorities. Although there was a legislative precedence for British authority, the actions of the Militia and Defence Minister, Sam Hughes, attracted the attention of the Canadian government and led to an effort to remove him from his position and establish greater administrative control over the CEF. The reality of British authority changed in 1916 when Prime Minister Robert Borden created the Ministry of Overseas Military Forces of Canada in order to establish administrative and ministerial control over the CEF, as well as to remove Sam Hughes from his position. The creation of the new ministry also resulted in clarification of the independent legal status of the CEF as a Canadian rather than an Imperial force.

The British legislative authority over the Canadian military dates back to the *British North America Act, 1867* and the *Militia Act, 1904.*[75] The *British North America Act* stated that command of the Canadian militia rested in the Queen.[76] The aspect of command was complemented by the aspect of legal jurisdiction, which the *Militia Act* addressed by specifying that the British *Army Act*,[77] the British legislation governing the British military, applied to any Canadian force with the same effect, as if it had been passed by the Canadian Parliament.[78] Finally, the *Militia Act* also addressed the issue of

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[75] Patrick Bouvier, *Déserteurs et Insoumis: Les Canadiens Français et la Justice Militaire (1914-1918)* (Quebec: Athéna Editions, 2003), 37.

[76] "The Commander-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen." United Kingdom, *British North American Act*, 1867, 30-31 Vict., c. 3, sec. 15.

[77] United Kingdom, *Army Act*, 1914, 44 & 45 Vict., c. 58.

[78] "The Army Act for the time being in force in the United Kingdom, the King's Regulations, and all other laws applicable to His Majesty's troops in Canada and not inconsistent with this Act or the

command by stipulating that, when any Canadian force served conjointly with the British Regular forces in times of war, the Canadian force may be placed under the command of a senior British officer.[79] These three sections created a legislative precedence for British authority over the CEF during the Great War in every aspect, including command and administration. British authority was not questioned by the Canadian government in 1914, when it was understood that the CEF would be "imperial and form part of H.M. regular forces."[80]

The Canadian government had discussed the issue of British authority over the military prior to 1914. During a conference at the War Office in 1908, Frederick Borden, the Minister of Militia and Defence, presented a memorandum questioning whether the command and discipline of the Canadian military could be the responsibility of the Canadian government; the British government postponed any amendment, which resulted in no further discussion of the issue due to Borden's electoral loss in 1911.[81] However, his attempt to increase Canadian control of its military would not end in 1911. In 1911, due to Borden's efforts while in office, Colonel Henry Smith, a friend and associate who possessed some legal knowledge, was appointed as Canada's first Judge Advocate General (JAG).[82] The JAG was appointed by the Department of Militia and Defence and was responsible for overseeing the administration of military law, as well as providing advice regarding legal matters affecting the CEF; regardless of this Canadian

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regulations made thereunder, shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia [...]" Canada, *Militia Act*, 1904, 4 Edw. VII, c. 23, sec. 74.

[79] "In time of war, when the Militia is called out for active service to serve conjointly with His Majesty's Regular Forces, His Majesty may place in command thereof a senior General Officer of His Regular Army." *Ibid.*, sec. 72.

[80] Robert Dennistoun, "Canadian Military Law Overseas," *Canada Law Journal* 56 (1920): 42.

[81] Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press., 1999), 40.

[82] *Ibid.*, 41.

appointment, the British example remained predominant.[83] Also, with the arrival of Sam Hughes as the new Minister of Militia, education in military law greatly increased in the Canadian military due to his efforts to improve the militia; however, he was not concerned with the legal administration of the CEF once the war began.[84] Because the CEF was considered as having the status of British regular troops, the authority for legal administration would reside with the British military authorities. The implication of the CEF being considered as anything but Canadian made many Canadian officials uneasy, desiring more authority over Canadian governance. Regardless of that unease, neither Prime Minister Robert Borden nor the British authorities could devise an effective, alternative system to replace the one which was being applied.[85] The confusion created by Sam Hughes did not ameliorate the situation. Amidst the chaos of mobilization, recruitment, equipment and management, the legal status of the CEF, its administration and discipline received little attention.[86]

Regardless of the confusion and problems created by Sam Hughes, Prime Minister Borden was reluctant to dismiss the Minister of Militia.[87] Borden's reluctance was largely attributed to a sense of loyalty to Hughes, due to his support of Borden during his opposition years;[88] however, Borden himself made no such admission.[89] He did admit that Hughes was difficult to control and mentioned several incidences which

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[83] *Ibid.*, 30.

[84] *Ibid.*, 43.

[85] Desmond Morton, *A Military History of Canada: From Champlain to Kosovo* (Toronto: M&S, 1999), 145-146.

[86] Ronald Haycock, *Sam Hughes: The Public Career of a Controversial Canadian, 1885-1916* (Ottawa: Canada War Museum, 1986), and Robert Stewart, "The Obsession of Sam Hughes," *Beaver* 83, no.5 (October 2003): 14. *MasterFILE Elite,* EBSCO*host* (accessed July 27, 2007).

[87] Robert Borden, *Robert Laird Borden: His Memoirs*, ed. Henry Borden (Toronto: The Macmillan Company of Canada ltd., 1938), 556-571.

[88] Donald M. A. R. Vince, "Development in the Legal Status of the Canadian Military Forces, 1914-19, as Related to Dominion Status" *The Canadian Journal of Economics and Political Science* 20, no. 5 (1954): 358.

[89] See Borden.

required him to reprimand Hughes.[90] He also expressed a sense of hesitation in appointing Hughes as his Militia Minister due to his "erratic temperament, and his immense vanity [...] his past vagaries, his lack of tact and his foolish actions and words on many occasions."[91] Borden decided to appoint Hughes as his minister after discussing the matter with him, after which Hughes admitted to his problems and asserted he would be more discreet; as Borden recalled, "discretion did not there-after prove to be a prominent characteristic."[92] Borden described Hughes as being very emotional, breaking down when confronted regarding his behaviour,[93] as well as being prone to using 'violent' language.[94] Hughes' 1916 announcement of the creation of an "Acting Overseas Sub-Militia Council," which had not been approved by the Prime Minister or Parliament, surpassed Borden's level of tolerance and patience.[95] Borden asserted that "it had become essential to curtail the activities of Hughes"[96] and notified him of the creation of a new Ministry. Hughes responded with what Borden described as an "impertinent letter" which could not be overlooked, resulting in Borden's demand for Hughes' resignation.[97] On 9 November 1916, Borden dismissed Hughes and created the Ministry of Overseas Military Forces of Canada, with George Perley, the acting Canadian High Commissioner in London, as minister.[98]

The task of organizing and asserting Canadian administrative control over the CEF proved to be difficult; Perley later admitted he would not have accepted the position

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[90] *Ibid.*
[91] *Ibid.*, 330.
[92] *Ibid.*
[93] *Ibid.*, 463.
[94] *Ibid.*, 462.
[95] Robert Craig Brown, *Robert Laird Borden: A Biography*, vol. 2 (Toronto: Macmillan of Canada, 1980), 57.
[96] Borden, 567.
[97] *Ibid.*, 569.
[98] *Ibid.*, 57.

had he realised its daunting nature.[99] Every department needed to be reorganized, beginning with the medical service. Due to a divisive report commissioned by Hughes condemning the permanent force officers who created the Canadian medical system in England and overseas, as well as implications of gross incompetence, Perley was faced with an outraged medical corps.[100] His solution was to disavow the report and place a conscientious officer as administrator, which proved to be an effective policy, one Perley would use successfully.[101] Next he reorganized the array of camps to improve efficiency and coerced the surplus officers in the camps to serve at a lower rank.[102] Finally, on 9 June 1917, Arthur Currie, a Canadian officer, became the first Canadian Commander of the Canadian Expeditionary Force.[103]

In 1918, following the armistice, the Ministry of Overseas Military Forces of Canada submitted its report to the Canadian Parliament regarding its activities in 1918 specifically, but with mention of the changes in administration since creation of the ministry in 1916. By 1918, the ministry had been organized into a system allowing for careful administration of the CEF: the Minister had a military staff which consisted of the heads of the various branches and departments of the Canadian military forces.[104] The ministry also created an Overseas Military Council, authorised by an Order-in-Council in April 1918, which allowed for closer co-operation of the different departments within the ministry; it consisted of the Minister as Chairman, the Deputy Minister as Vice-Chairman, and leading officers in the Canadian overseas forces as members and associate

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[99] Morton, *A Military History of Canada,* 147.

[100] Desmond Morton, *A Peculiar Kind of Politics: Canada's Overseas Ministry in the First World War* (Toronto: University of Toronto Press., 1982), 104.

[101] *Ibid.*, 105.

[102] Morton, *A Military History of Canada,* 148.

[103] Radley, 159.

[104] Canada, Ministry of Overseas Military Forces of Canada, *Report of the Ministry of Overseas Military Forces of Canada, 1918* (London: Ministry, Overseas Military Forces of Canada, 1918), xi.

members.[105] Another important change which allowed for improved management of the CEF was the establishment of the Canadian section within the British Headquarters in France.[106] This section, consisting of a General Officer in charge and his staff, was tasked with responsibility to represent the minister and the General Headquarters, as well as ensuring proper communication between the Canadian departments in the field and the Ministry. Also, the report confirmed that the fifty-seven Infantry Reserve Battalions they had inherited from the previous military administration under Hughes had been reduced to fifteen, while the Headquarters staff had been reduced by half, with both changes allowing for improved organization.[107] However, the report conceded that active operations within the field remained under the administration of the British.[108]

With regards to discipline and military law, the CEF and the Ministry retained the British *Army Act* and its regulations as a matter of convenience.[109] No other mention was made in the report regarding legal administration of the CEF or the courts martial system. However, on 19 July 1917, a prominent Winnipeg lawyer, Lieutenant Colonel Robert Dennistoun, became the deputy judge advocate (DJAG) in London.[110] In 1920, Dennistoun published an article in the *Canada Law Journal* which described the developmental history of Canadian military law during the Great War.[111] While Dennistoun was the DJAG, the matter of the independent legal status of the CEF was addressed and confirmed.

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[105] *Ibid.*, xii.
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*, xi.
[109] *Ibid.*, 37.
[110] Madsen, 45.
[111] Dennistoun.

The conception of the CEF as an imperial force arose from the *Manual of Military Law,* the British legal reference. However, Dennistoun argued that the 1914 interpretation was incorrect, as was the assumption that the CEF was an imperial force. On page 194 of the manual, attention was specifically paid to colonial forces which included dominion forces, of which there were two classes: forces raised by the Government of the colony and forces raised in a colony by direct order of the crown.[112] The CEF was understood as falling under the first category, which meant that it would then fall under the jurisdiction of the *Army Act* only so far as the colonial law did not provide for administration or discipline of the forces. Due to the mobilization of the CEF through an Order-in-Council, the assembled force was not Imperial or a British regular force as described in the manual; it was a specially formed force of the Canadian militia.[113] The CEF also did not meet the criteria by which "regular forces" or "His Majesty's regular forces" were described. Due to section 74 of the *Militia Act*, which provided for the legal administration of the CEF, combined with section 177 of the *Army Act*, which enabled Canada to apply their own law to overseas Canadian forces, the Canadian authorities had the power to administer and manage the discipline of the CEF.[114] However, they chose to allow the British authorities to control that aspect of the CEF as a matter of convenience.[115] The legal status of the CEF was clarified and established as Canadian rather than Imperial, even though the British disciplinary system was retained.

The administration of the CEF was greatly hampered by Sam Hughes during the early stages of the First World War. Hughes proved to be incapable of effectively

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[112] United Kingdom, War Office, *Manual of Military Law* (London: HMSO, 1914), 194.
[113] Dennistoun, 43.
[114] *Ibid.*, 44.
[115] Ministry of Overseas Military Forces of Canada, 37.

organising or administering the Canadian contribution to the war, and his rude and overbearing demeanour resulted in his dismissal by Robert Borden in 1916. To replace Hughes, Borden created a new ministry, responsible solely for the administration of the CEF. With Hughes no longer creating confusion, the administration of the CEF became more organized and efficient. Also following the dismissal of Hughes, the legal status of the CEF was recognized as being separate from the British forces. The Great War resulted in greater Canadian organizational and legal administration over its own military forces.

Theory of Military Law

Military law during the Great War has been described as barbaric and arbitrary, based on the use of capital punishment and what has been perceived as an unregulated courts martial system. However, this perception fails to consider several factors, including the fact that capital punishment was an accepted form of punishment in civil as well as military law. Perhaps more significant, due to lack of attention, was the factor of theory in shaping military law. Military law was not an abstract, arbitrarily constructed legal code focused on brutality and executions; rather, it was a legal system established in order to ensure obedience and discipline within a large group of highly armed and trained men. The function of military law, like that of civil law, was to ensure order. Thus, there were certain aspects of military law during the Great War which remained obscure from historical knowledge. The historical understanding of law, particularly criminal law and the concept of deterrence, demonstrates the significant similarities between military and civil law. The early writings of Vegetius, Jomini and Machiavelli, among others, demonstrated that the primary focus of military law, in order to maintain order, was punishment and deterrence. The primary difference between military and civil law clarified why, both historically as well as in the present, a distinction was evident and necessary between civil and military law.

One fundamental concept of criminal law was that a crime affected society as a whole.[116] Therefore, as Max Weber argued, "the primary purpose of law is to regulate the flow of human interaction."[117] The oldest of the justice philosophies used in the twentieth

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[116] Frank Schmalleger, David MaCalister, Paul F. Mckenna, *Canadian Criminal Justice Today,* 2nd ed. (Toronto: Preston Hall, 2004), 70.

[117] *Ibid.*, 66.

and twenty-first centuries is deterrence. Deterrence has been fundamental to the Canadian justice system throughout history, with strong convictions that punishments served as "the wages of a sin and as a deterrent."[118] Although this attitude began to shift following Confederation (1867) with a desire to reform the penal system and allow greater focus on reform of the criminal, "that philosophy was honoured more in the breach than in the observance. While paying lip service to the concept of reform, many, both inside and outside the system, looked upon incarceration as serving primarily the dual purposes of punishment and deterrence."[119] Deterrence as a philosophy had its roots in eighteenth century Europe, particularly in the works of Italian reformer Cesare Beccaria.[120]

Beccaria illustrated the concept of the social contract in his work *On Crimes and Punishment.*[121]

> Laws are the conditions under which independent and isolated men unite to form a society. Weary of living in a continual state of war and of enjoying a liberty rendered useless by the uncertainty of preserving it, they sacrificed a part so that they might enjoy the rest of it in peace and safety. ... The sum of all these portions of liberty sacrificed by each for his own good constitutes the sovereignty of a nation, and their legitimate depository and administrator is the sovereign. But merely to have established this deposit was not enough; it had to be defended against private usurpations by individuals each of whom always tries not only to withdraw his own share but also to usurp for himself that of others. Some tangible motives had to be introduced, therefore, to prevent the despotic spirit, which is in every man, from plunging the laws of society into its original chaos. These tangible motives are the punishments established against infractors of the law.[122]

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[118] D. Owen Carrigan, *Crime and Punishment in Canada, A History* (Toronto: M&S, 1994), 324.
[119] *Ibid.*, 398.
[120] Colin Goff, *Criminal Justice in Canada,* third edition (Scarborough, Ontario: Nelson, 2004), 63.
[121] Cesare Beccaria, *On Crimes and Punishment*, translated by Henry Paolucci (Indianapolis: Educational Publishing, 1963).
[122] *Ibid.*, 11-12.

As Beccaria implied, law existed in order to ensure order, through the use of punishments which deter people from committing crimes. There were two types of deterrence applied in the use of punishments: specific deterrence and general deterrence.[123] Specific deterrence is the effect of a punishment on a person who has committed a crime; general deterrence is the effect that the punishment of crime has on society in general. This was implicit in Beccaria's construction of the social contract and the use of punishments. However, as Beccaria noted, the punishment must not be excessive and only severe enough to protect the "deposit of public security."[124]

Although Beccaria was opposed to the use of capital punishment, he did recognize specific instances in which it was necessary:

> There are only two possible motives for believing that the death of a citizen is necessary. The first: when it is evident that even if deprived of liberty he still has connections and power such as endanger the security of the nation – when, that is, his existence can produce a dangerous revolution in the established form of government. The death of a citizen thus becomes necessary when a nation is recovering or losing its liberty or, in time of anarchy, when disorders themselves take the place of laws. ... I see no necessity for destroying a citizen, except if his death were the only real way of restraining others from committing crimes; this is the second motive for believing that the death penalty may be just and necessary.[125]

Beccaria illustrated and justified the significance of capital punishment in deterrence. That concept, and Beccaria's justification of capital punishments as deterrence, was reflected in the construction of military law. Beccaria pointed out two instances in which capital punishment was necessary: when the life of a citizen endangered the security of the nation and when the execution of a citizen was the only real deterrence for a crime.

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[123] Goff, 63.
[124] Beccaria. 13.
[125] *Ibid.*, 46.

Desertion and cowardice were crimes perceived as necessitating the death penalty in order to ensure order within the military. If soldiers thought that fleeing combat would secure their safety from death, then there would be less inducement among soldiers to continue fighting. As a result, the death penalty was seen as a necessary punishment. However, it was not consistently applied to all those charged and convicted of crimes, or of those sentenced to death. The significance for this arguably arbitrary use of capital punishment by courts martial was in its perceived effect as a deterrent; not all those convicted of desertion needed to be executed in order to demonstrate that the risk of execution was real. If the risk of execution was perceived by soldiers to be non-existent, then there would be no deterrent effect for the punishment.

The concepts of deterrence and discipline are fundamental to the functioning of any military force: "The principle object of military law is to enforce discipline, and military law in its punitive and exemplary aspects is only called into play when discipline has broken down."[126] This concept can be traced back to the Roman military philosopher Publius Flavius Vegetius Renatus. His work, *Epitome of Military Science,* was the most popular Latin technical work from antiquity throughout the Middle Ages, continuing to receive praise during the Renaissance, and has remained a highly respected work in military theory, comparable with Sun Tsu's *The Art of War.*[127] Vegetius, recognizing the significance of discipline in an army, argued that idleness was a significant factor causing disciplinary problems.[128] In order to prevent this, troops should be constantly training and held to the strictest discipline: "Soldiers who have been so trained and exercised at their

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[126] Brooke Claxton, *Notes on Military Law and Discipline for Canadian Soldiers* (Montreal: COTC, 1940), 42.

[127] Vegetius, *Epitome of Military Science*, translated by N. P. Milner (Liverpool: Liverpool University Press, 1993), xiii.

[128] *Ibid.*, 67.

base [...] when they come together for a campaign from the various units inevitably prefer warfare to leisure in the rivalry of valour. No one thinks of mutiny when he carries confidence in his skill and strength."[129] Vegetius argued that strong discipline and good training was more praiseworthy than severe punishment.[130] If significant disciplinary problems did occur, exemplary punishments were required "so that fear extends to all, but punishment to few."[131] Henri Jomini, "the native of Switzerland who soldiered in the Grande Armee and later became a full general in the Imperial Army of the Russian Czar, is rightfully entitled to a place on the level with the foremost makers of military thought" concurred with Vegetius on the significance of discipline.[132] He equated good discipline and training with military spirit:

> By inuring armies to labour and fatigue, by keeping them from stagnating in garrison in times of peace, by inculcating their superiority over their enemies (without depreciating the latter too much), by inspiring a love for great exploits – in a word, by exciting their enthusiasm by every means in harmony with their tone of mind, by honouring courage, punishing weakness, and disgracing cowardice – we may expect to maintain a high military spirit.[133]

This focus on the maintenance of discipline as the primary purpose for military law was recognized and further reinforced by Machiavelli.[134] He argued that the reputation of the General was a significant contributor to the maintenance of discipline:

> But what most commonly keeps an army united, is the reputation of the general, that is, of his courage and good conduct; without these, neither high birth nor any sort of

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[129] *Ibid.*, 68.
[130] *Ibid.*, 69.
[131] *Ibid.*, 69.
[132] Henri Jomini, *Jomini and his Summary of the Art of War*, edited by General J. D. Hittle (Harrisburg, PA: Telegraph Press, 1958), 1.
[133] *Ibid.*, 65.
[134] Niccolo Machiavelli, *The Art of War*, introduction by Neal Wood, translated by Ellis Farneworth (New York: Bobbs-Merrill Company Inc., 1965).

> authority is sufficient. Now the chief thing incumbent upon a general in order to maintain his reputation is to pay well and punish soundly.[135]

Machiavelli elaborated further, stating that "few men are brave by nature, but good discipline and experience make them so. … Good order and discipline in an army are more to be depended upon than ferocity. … While your men are in quarters, you must keep them in good order by fear and punishment."[136] This concept of the significance of submission and exemplary punishment was, according to military philosopher Marshal Marmont, paramount to an army, for without severe and exemplary punishment "all bands would be broken, and the military edifice, which is based upon respect and submission alone, would crumble to pieces without the sustaining pillar."[137]

There were many British military philosophers who also recognised the significance of deterrence in ensuring discipline. Alexander Bruce, writing in 1717, argued that "It is an irrefrugable [*sic*] truth, and attested by the experience of the ages, that exact and implicit obedience to the military laws and instruction is the surest means to keep an army in any tolerable order, and render it finally victorious."[138] Furthermore, in order for the punishment of a crime to be effective, it had to occur at the location of the crime in order to instil fear into others.[139] In 1805, the Deputy Judge Advocate to His Majesty's troops serving in North America, S. Payne Adye, wrote *A Treatise on Courts*

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[135] *Ibid.*, 174.
[136] *Ibid*, 174.
[137] Marshal Marmont, Duke of Ragusa, *The Spirit of Military Institutions*, translated by Frank Schollerr (Westport: Greenwood Press, 1974), 125.
[138] Alexander Bruce, *The Institutions of Military Law, Ancient and Modern: Wherein the most Material Questions and Cases Relating to Martial Discipline and Fully Examined and Cleared from the Principles of Civil Law, and Present Uniform Practice of This and Neighbouring Nations* (Edinburgh: Heirs and Successors of Andrew Anderson, 1717), 226.
[139] *Ibid.*, 228.

Martial; Also an Essay on Military Punishments and Rewards.[140] Stating that "military discipline is so essential to an army, and punishments so necessary to discipline,"[141] Adye specifically addressed the general concept of deterrence:

> Criminals, says Plato, are not punished because they have offended, for what is done cannot be undone, but that for the future criminals themselves, and such as see their punishment, may take warning and learn to shun the allurements of vice. ... It is the end then of penal laws, to deter, not to punish.[142]

In apparent foresight to criticism of military law, Adye claimed "And lastly, with respect to the use of example, nothing in general can be more prevalent; yet we find that this is often insufficient: however, it is the best apology that can be made for legislatures who inflict what otherwise might be deemed cruel and inhumane punishments."[143]

The focus on training, submission and deterrence as fundamental to discipline became more complex when considered within the context of Canada, as well as Britain, during the Great War. Canada, founded on British tradition, did not look highly upon the regular forces and its regular army was very small. As such, the Canadian Expeditionary Force was composed largely of the militia and fresh volunteers. Military theory implies that soldiers are not made overnight; therefore the application of these theories in assessing military law during the war becomes more complicated. The First World War was the first major industrialized war which required mobilization of entire states, both their populations and industries, as well as being global in scope. As far as the application of military law is concerned, this type of warfare was problematic. Because the armies,

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[140] S. Payne Adye, *A Treatise on Courts Martial; Also an Essay o Military Punishments and Rewards* (London; T. Maiden, 1805).

[141] *Ibid.*, 247.

[142] *Ibid.*, 238-239.

[143] *Ibid.*, 249.

particularly those of Canada and Britain, were composed largely of citizen-soldiers who had been hastily trained and thrown into combat, the discipline and submission to authority which theory dictates as necessary would not have been properly inculcated within the troops. Therefore, as Vegetius realised centuries before, this would require a greater reliance on deterrence in order to establish control. The technology of the war proved to be another significant issue which complicates military theory. The military philosophers who constructed military theory never anticipated a war as grand and devastating as the Great War; and the theories constructed do not reflect the industrialisation of death throughout the war. However, disciplinary problems could have been foreseen.

As theory implies, discipline and submission are induced into a soldier over time. However, with the First World War, armies faced new variables which affected discipline and the application of military law. The brief training of troops was a significant factor, but fails to explain why professional soldiers would break down during or after combat. The most significant factor affecting this breakdown was time; the duration of the stress under which soldiers were placed far exceeded the relatively short campaigns which were traditional prior to the twentieth century. Thus, many soldiers proved unable to withstand the pressure of combat, causing general disciplinary problems. The psychological aspect of both of these factors was not recognised by the military and medical authorities of the time, which resulted in a reliance on the only factor which was recognised: deterrence.

Although both civil criminal law and military law were strongly premised on deterrence, it was the primacy of discipline in military law that set it apart: "In order to maintain proper discipline in the army, it has been found necessary to confer special

powers on the military authorities, to enable them to deal with offences which it would be either dangerous or impossible to leave to the civil power."[144] There were vastly different social relationships within military society which were alien to civilian society. Although there was a level of submission on the part of the labourer on the factory floor, that labourer was not expected to risk his or her life at the command of the employer. The labourer's failure to complete their job would not have repercussions on their comrades. In the end, the labourer's decision to stay or leave work was an economic decision which usually favoured continued income.

The soldier was, and remains, an entirely different creature. One soldier could be the cause of victory or defeat in a battle; one soldier could instil fear and panic among his comrades, which could be disastrous; one soldier could spread insubordination, mutiny or the will to run away among comrades. The intricate and dependant relationships in an army were such that in combat, everyone depends on everyone to do their best. "Discipline facilitates teamwork and co-operation, and it promotes self-control and individual initiative just as much as it instils a prompt obedience to orders. Discipline is the keystone of military organization."[145] Military theory and military law developed over the centuries with a focus on establishing order, discipline and obedience within armies in an effort to ensure victory in combat. Analyses of military law must take this into account in order to give justice to the subject matter, as well as to allow for objective assessment.

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[144] Lieut.-Colonel Sisson C. Pratt, *Military Law: Its Procedure and Practice* (London: Kegan Paul, Trench, Trubner & Co., LTD., 1910), 1.

[145] Claxton, 42.

Legislation and Procedures for Courts Martial

Prior to the 1950 *National Defence Act*, Canada had no legislation governing the legal administration of its military. The Canadian military was governed by the British *Army Act,*[146] originally enacted in 1881. In 1914, the British War Office published its *Manual of Military Law,* providing a concise guide describing and explaining military law to those governed by it, as well as for those responsible for administering it. It contained three sections: the first consisted of commentary on various aspects of the *Army Act* as well as other legislation concerning the armed forces, both British and colonial; the second provided full text for the *Army Act,* including explanatory notes; and the final section contained various regulations which concerned or were of interest to the armed forces. Originally published in 1884, it underwent four revisions prior to the 1914 edition, as well as further revisions following the First World War.

The *Army Act* had six parts, of which the first addressed discipline and the fourth offered general provisions, including supplemental sections for courts martial, jurisdiction and rules of evidence. These described the framework and application of military criminal law for any court martial case, as the basis for critically analysing actual cases. However, such a project quickly becomes problematic because there were four different types of courts martial available under the British *Army Act* to try someone accused of a crime: regimental courts martial, district courts martial, general courts martial, and field general courts martial. Furthermore, for minor offences, an officer could summarily discipline a soldier without the use of a formal court martial. Due to this *ad hoc* aspect of military law, the task of developing a theoretical framework becomes

[146] United Kingdom, *Army Act*, 1914, 44 & 45 Vict., c. 58.

two-fold: one must first establish the framework for each of the four types of courts available, including that of summary proceedings, and then establish similarities and differences between their applications. Furthermore, issues surrounding evidence and the rights of the accused must be examined against the theoretical framework presented, to allow depth to any critical analysis of a specific case. Finally, due to the significance of field general courts martial in the First World War, this will be given special attention.

Analyses of crimes and punishments, the procedures for arrest and investigation, and the rules of evidence specified in the legislation, are essential to understanding the differences among each court martial. Types of crimes were arranged according to the severity of each regarding military service, from the most severe crimes listed first to the least listed last. There were a total of fourteen categories of crimes listed in the *Army Act*:[147] (1) offences in respect of military service; (2) mutiny and insubordination; (3) desertion, fraudulent enlistment, and absence without leave; (4) disgraceful conduct; (5) drunkenness; (6) offences in relation to persons in custody; (7) offences in relation to property; (8) offences in relation to false documents and statements; (9) offences in relations to courts martial; (10) offences in relation to billeting; (11) offences in relation to impressment of carriages; (12)offences in relation to enlistment; (13) miscellaneous military offences; and (14) offences punishable by ordinary civil law. Each category was subdivided into a total of thirty-eight sections, each listing numerous different crimes. The organization of the categories was based on types of offences, whereas the organization of subsequent sections was based on severity of the punishment available upon conviction.

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[147] *Ibid.*, s. 4-43.

A guilty conviction through a court martial resulted in one of numerous possible punishments listed in the legislation, of which there were two categories: one for officers and one for soldiers. An officer could be sentenced to: death; penal servitude for a term not less than three years; imprisonment, with or without hard labour, for a term not exceeding two years; cashiering; dismissal from the armed forces; forfeiture of seniority of rank; severe reprimand, or reprimand.[148] A soldier could be sentenced to: death; penal servitude for a term not less than three years; imprisonment, with or without hard labour, for a term not exceeding two years; detention for a term not exceeding two years; discharge with ignominy from the armed forces; forfeiture of seniority of rank; forfeitures, fines or stoppages.[149] In addition to these punishments, a soldier could also be sentenced to field punishments,[150] which ranked next below detention: field punishment no. 1 and field punishment no. 2. In cases of field punishments, either a court martial or a commanding officer could sentence a soldier found guilty of a crime, the difference being that a sentence imposed by a court martial could not exceed three months and a sentence imposed by a commanding officer could not exceed twenty-eight days. Field punishment no. 1 kept the convicted in irons, attached to an object for two hours per day, for no more than three out of four consecutive days and no more than twenty-one days total. Field punishment no. 2 was identical, save for an exemption from being attached to an object.

Specified within the legislation was a maximum punishment allowable for each crime. Certain crimes were punished more severely if committed on active service than otherwise. However, the court presiding over a trial was free to sentence a person found

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[148] *Ibid.*, s. 44.
[149] *Ibid.*
[150] United Kingdom, War Office (UKWO), *Manual of Military Law* (London; HMSO, 1914), 721-722.

guilty of a specific crime to any punishment considered less severe than that specified in the *Army Act*.

The *Army Act* provided legislated procedures to be followed in respect to the arrest of a soldier.[151] All procedures specified within the *Army Act* were framed clearly and concisely, with any possible circumstances accounted for and elaborated. With regards to arrest of an officer or soldier who was not on active service, custody for more than eight days without trial required the commanding officer to file a special report detailing the necessity for further delay. This ensured that a person charged with a crime would receive a speedy trial and not be kept in custody for an extended period of time without a specified reason. However, this subsection made no mention of such procedures for officers or soldiers on active service.

Military custody was specifically defined as arrest or confinement. Only certain people, holding certain ranks could place others into custody, and the power to do so depended on the rank of the person being placed into custody. An officer had the power to place someone of inferior rank into custody, as well as an officer of higher rank engaged in some sort of disorder. A non-commissioned officer had the power to place any soldier into custody. But, a non-commissioned officer did not have the power to place any superior officer into custody, even if that officer was involved in some sort of disorder. The person placing another into custody was required to submit a signed, written account of the offence to the person responsible for holding those charged with a crime within twenty-four hours. With regards to the holding of those charged with a crime, the officer or non-commissioned officer responsible for holding people could not

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[151] *Army Act*, s. 45.

refuse to accept into custody any person charged. Finally, there could be no delay in the investigation of any offence.

The commentary in the *Manual of Military Law* elaborated on legislation governing procedures for arrest using the *King's Regulations*, a supplement to the *Army Act;*[152] it distinguished officers from non-commissioned officers and soldiers. The arrest of an officer was usually preceded by an investigation, after which the officer would be placed under open or close arrest. The distinction between the two forms of arrest was based on the level of restrictions. Under close arrest, an officer could not leave his quarters except for supervised exercise. Conversely, while under open arrest an officer could exercise at stated periods within a certain boundary; however, he could not appear out of uniform, at the mess or other places of amusement, or wear a sash, sword, belt or spurs. Finally, an officer had the right to be notified of the nature of his arrest in writing. Procedures for the arrest of non-commissioned officers were the same; but one section stated that an officer under arrest had no right to demand a court martial.

There were different procedures for soldiers placed under arrest;[153] they were confined under guard unless the charge was minor, in which case the soldier would be placed under open arrest. However, if that minor charge was pending, then the soldier would not be placed in custody and would perform his duties as normal, save for being detailed for duty. A soldier placed in custody where accommodations for confinement were unavailable could be held in a civilian prison or local lock up for no more than seven days. Furthermore, a soldier under close arrest could not bear arms or perform military duties unless ordered by the commanding officer in cases of emergency or while

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[152] UKWO, 25-28.
[153] *Ibid.*

on march. The soldier charged with a crime could be released from confinement while awaiting trial, but only at the discretion of the commanding officer. An aspect specified for soldiers but not for officers pertained to the charge: for a soldier it was to be a concise summary of the offence and evidence, containing the material points alleged. Finally, one significant difference between officers and soldiers was that soldiers did have the right to elect to be tried by court martial.

The British *Army Act* did not provide for investigation into a crime. However, the commentary in the *Manual of Military Law* did address the procedures involved in the investigation of a charge by a commanding officer.[154] Similar to procedures for arrest, the procedures for investigation differed if the accused was an officer or a soldier. Officers charged with offences did not require formal investigation but could be presented to a court of inquiry. That was the extent of information given by the commentary regarding investigation pertaining to charges laid against officers.

In the case of a soldier, his commanding officer was responsible for conducting an investigation. The investigation usually took place in the morning and was required to be conducted in the presence of the accused. During the investigation, which consisted of the interrogation of witnesses, the accused had the right to cross-examine any witnesses and demand that they be sworn. Following the hearing of accusations, the commanding officer could dismiss the charge if he found that no military offence had been committed. However, if he found otherwise, the accused then had the right to make a statement and call witnesses in his defence, as well as present other applicable evidence. Following this, the commanding officer could decide to dismiss the charge, deal with the charge summarily, or present the charge and findings to a court martial. If choosing to deal with

[154] *Ibid.*, 28-33.

the case summarily, the accused had the right to have a formal court martial hearing. If a court martial was to proceed, then all of the evidence had to be transcribed onto paper. The commentary stated that, if this was the case, the exact statements made by witnesses and the accused, as well as any cross-examination, would be transcribed in the presence of the accused, witnesses and the commanding officer. Thus, the transcription must occur during every investigation prior to any decision being made about the status of the charge. This summary of evidence would then be reviewed again by the commanding officer to determine if the charge warranted any further proceedings. Furthermore, the commentary specified that caution needed to be taken on the part of the investigating officer not to make judgment regarding the guilt or innocence of the accused. However, there was no expression regarding any rights of the accused if this did not occur.

Final preliminary procedural aspects of military law were rules of evidence as elaborated in commentaries in the *Manual of Military Law.*[155] There were four rules regarding admissibility of evidence: rule of relevancy, rule of best evidence, rule of hearsay, and rule of opinion. The rule of relevancy specified that "Nothing shall be admitted as evidence which does not tend immediately to prove or disprove the charge."[156] This was vague and begged a question: what was relevant and what was not? Although there was no direct answer for that question, there were subordinate rules presented to illustrate what was relevant. To prevent prejudicial injustices, the character of the accused could not be used as evidence by the prosecution; however, it could be used by the defence only in so far as general character was considered. Evidence of particular cases of praiseworthiness was not admissible. Although the character of the

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[155] *Ibid.*, 59-84.
[156] *Ibid.*, 59.

accused could not redeem him from a charge, it could strengthen the presumption of his innocence. If the accused did present evidence regarding his character, the prosecution could then present evidence to rebut that which was presented. However, evidence could not be presented to demonstrate a history of similar offences or a disposition to commit such an offence unless it demonstrated intention, belief, knowledge, malice or any other state of mind pertinent to the charge. Thus, a person charged for murder could not have a similar prior charge used to question his character, but a prior charge of attempted murder against the same person was admissible to prove capacity for intent. This aspect of the rules of evidence complicated the procedures of courts martial; if a person was charged with desertion, was a previous charge of desertion admissible as evidence of intent? Although the simplest answer would be positive, the language used to describe the admissibility of character references and prior convictions lacked clarity. In the case of desertion, the soldier's intent determined whether his crime was actually desertion or absence without leave (AWOL): regardless of how long the absence, if the accused intended to return, he was guilty of AWOL. Thus, previous convictions for desertion could not demonstrate intent due to the possibility of different motives of the accused at different times.

The rule of best evidence specified that "The evidence produced must be the best obtainable under the circumstances."[157] This was more strictly enforced with regards to written evidence as opposed to oral evidence and was usually applied in the form of two subordinate rules: a verbal account of the contents of a document could not be received in court if the document itself was obtainable; and a copy of a document was not admissible if the original document could be produced. These were differences between primary and

[157] *Ibid.*

secondary evidence. Another aspect of this rule was the distinction between direct and indirect or circumstantial evidence. Direct evidence referred to the statements of people who observed the fact in question, whereas circumstantial evidence referred to the evidence of facts from which the fact in question could be presumed. Regarding both direct and circumstantial evidence, neither was considered better than the other, resulting in the inapplicability of the rule of best evidence.

The rule of hearsay specified that it was not evidence. Specifically "no statement with reference to a person charged with an offence, relative to the charge, made in his absence, can be received as evidence against him."[158] The final rule, of opinion, specified that opinions were not evidence unless given as evidence by an expert in the field relevant to the defence or prosecution of the accused.

The crimes and punishments, the procedures for arrest and investigation, and the rules of evidence provide the background necessary to understanding the processes of the various trials. The analyses of the different types of trials allows for the distinction between the four types of courts martial, as well as to develop a framework which could be used to analyse specific court martial cases. The *Army Act* addressed the powers of commanding officers to deal summarily with charges.[159] If the commanding officer decided, following an investigation, that the charge warranted further proceedings, he was free to decide to deal with the case summarily, but only if the accused agreed. The accused was free to choose a formal court martial. However, if the offence was drunkenness while not on active service, or the offender had not been warned of active service, then the commanding officer was required to deal with the case summarily, again

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[158] *Ibid.*, 68. Dying declarations were the exception.
[159] *Army Act*, s. 46.

unless the offender decided otherwise. In the case of summary proceedings, the commanding officer could not sentence an offender to more than twenty-eight days detention. Furthermore, a commanding officer could sentence an offender to a maximum of twenty-eight days of field punishment, as well as twenty-eight days forfeiture of pay. A forfeiture of pay could be combined with one of the two other punishments. If the sentence awarded was detention for absence without leave, the term of detention, if above seven days, could not exceed the number of days the accused was absent. Finally, the accused had the right to demand that the evidence presented against him be taken under oath.

The offender could not be tried by court martial for an offence which had already been dealt with summarily; nor could he be tried summarily for an offence which had been tried by a court martial. The legislation for summary trials made one provision for appeals: the accused had no right to appeal the decision of the commanding officer. However, he did have the right to elect for a court martial instead of accepting the commanding officer's verdict if the sentence included forfeiture of pay or any other punishment which was not considered minor.[160] A minor punishment, as mentioned, was one that a commanding officer had the power to impose. However, this particular section remained unclear: if the commanding officer only had the authority to impose minor punishments, as Section 46 specified, there should be no need for this provision because of the express understanding that no other punishment could be imposed. Although this section remained unclear, a soldier given a sentence which was not considered minor could elect to be tried by court martial.

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[160] UKWO, 29.

For all of these procedures, there remained no officially documented evidence save for crimes and punishments as well as the statements of witnesses and summaries of evidence, all documented in the trial transcripts. Thus, analyses of trial transcripts cannot support or refute any argument that these procedures were followed or not. However, these procedures were clearly established through legislation passed by the British parliament. There is no evidence to support that these procedures were consistently ignored by military authorities responsible for conducting courts martial trials; nor is there any specific evidence within the 1922 parliamentary report on the twenty five Canadian executions that these procedures were not followed.

With these preliminary procedural aspects of military criminal law covered, including summary trials, the four types of courts martial can be addressed. The *Manual of Military Law* included *Rules of Procedure, 1907*[161] which discussed and described regimental courts martial in detail. The *Army Act* addressed specifics regarding the different courts martial. Although the *Rules of Procedure* did not address the other types of courts martial, save for field general courts martial, the procedures were similar save for specific differences found in the *Army Act*.

The *Rules of Procedure* addressed arrest and the powers of commanding officers, as already discussed.[162] Charges to be addressed by courts martial were filed on charge sheets containing the name and description of the person charged (including rank, corps, and number), as well as the charge or charges to be tried. Although several charges could be included on a single charge sheet for each person tried in a court martial, each charge was required to be listed separately. Each offence was to be stated in the terms of the

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[161] *Ibid.*, 566-645.
[162] *Rules of Procedure*, s. 1-8.

Army Act if it was a military offence, followed by the circumstances of the offence, referred to as particulars. Such particulars could be used to frame the particulars of another charge. Another aspect of the charge sheet was in respect to deductions from pay, where facts supported by evidence that warranted such deductions were required to be included. Finally, a charge sheet could not be invalidated due to an error in the name or description of the person. [163]

Once a person had been charged, and the investigation by the commanding officer had been completed, the accused was permitted to form his own defence. In order for the accused to prepare, he had the right to a minimum of eighteen hours from the time he was informed of a charge, as well as to contact any witnesses, friends or legal advisors. Furthermore the accused was to be provided with a copy of the charge sheet as well as a list of those officers who were to form the court (which would be explained and read to him if he was illiterate). There were provisions made to protect these rights, in that the court, if it deemed that the accused was prejudiced due to any non-compliance with these procedures, could adjourn itself. If a crime was alleged to have been committed by several people, those accused could be tried together, in which case each accused had to be informed as such. In such cases, an accused could apply to be tried separately if the court agreed that the evidence presented by one or more of the others was material to his defence.[164]

Following this, the commanding officer responsible for the investigation, if not addressing the charge summarily, was required to apply for a court martial to an officer with authority to convene one. The convening officer was required to convene a court

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[163]*Ibid.*, s. 9-12.
[164]*Ibid.*, s. 13-15.

martial as soon as practicable, without prejudicing the right of the accused to properly prepare his defence. The convening of the court martial was also subject to the convening officer's confidence that the charge and the evidence warranted a court martial. The convening officer was responsible for appointing the officers to form the court, as well as the president of the court martial, and for sending the president the original charge sheet along with the summary of evidence. If the convening officer had not convened a court martial within fifteen days of the application for a court martial within the United Kingdom, or thirty days elsewhere, he was required to submit a report and the reasons for this delay to the Army Council, or to the Commander-in-Chief of the forces in India if in India. If the full number of the court could not be organized before arraignment of the accused, the court was required to adjourn until a full court could be assembled, unless the legal minimum of members were available and there was recorded reason to proceed without a full assembly. For an officer to qualify to serve as a member of the court, he was required to be subject to military law. Furthermore, an officer could be disqualified if he: had convened the court; was the prosecutor or a witness for the prosecution; had investigated the charges or made the preliminary inquiries into the case; was a member of the court of inquiry; had transcribed the summary of evidence; was the commanding officer of the accused; or had any personal interest in the case. Finally, in order to be eligible to be a member of a court martial, the officer was required to have held a commission for a minimum of one full year.[165]

Once the court had assembled, its first responsibility was to read the order convening the court, as well as the names, ranks and corps of each member officer. It was also their responsibility to ensure that the court was legally constituted with regard to

[165] *Ibid.*, s. 16-21.

procedures established by the *Army Act* and the *Rules of Procedure*: that it consisted of the legal minimum of officers, all eligible for service on the court, as well as the appropriate appointment of its president. If the court was not satisfied that any of these requirements for a court martial were met, or that lawful procedures had not been followed, they were responsible to report their findings to the convening authority, in which case the court might be adjourned. However, if the court was satisfied, it was responsible to ensure that the charges were being laid upon someone who was under the jurisdiction of that court and that the charges were framed according to the *Army Act* and understandable to the accused. Again, if the court was not satisfied, it was required to report this to the authority and could adjourn.[166]

If the court was satisfied, the prosecutor would take his place and the accused would be brought before the court. Generally, the prosecutor was an officer whose selection was approved by the convening officer. The convening officer could not appoint himself as prosecutor and the prosecutor was subject to military law. In complicated or serious trials, the prosecutor was selected based on his experience and knowledge of military law. Once the accused was brought before the court, he had the right to object to the participation of any member of the court save the prosecutor. The accused could also call upon witnesses to give evidence to substantiate his objections. If more than one officer were being objected to, then each objection would be handled separately beginning with the officer of lowest rank, unless the president was also objected to, in which case the president would be handled first. Following an objection the other members of the court were required to give their opinions regarding that objection, save the officer in question. If the objection was allowed, that officer was

[166] *Ibid.*, s.22-23.

required to retire from the proceedings. That officer's position could then be filled by another officer selected for the purpose of filling vacancies due to objections. Once the court was assembled with the proper number of officers accepted, the president was required to administer an oath or solemn declaration to every member of the court.[167]

After all members of the court had been sworn, the accused was read the charge(s) and pleaded separately to each charge. The accused had the right to object to a charge on the ground that it was not an offence under the *Army Act* or that it was not in accordance with the *Rules of Procedure*. The accused could also object to the jurisdiction of the court prior to pleading to any charge. If this was the case, the court would hear the evidence provided by the accused in support of such a plea, followed by the evidence of the prosecutor in either disproof or qualification of that plea, followed by any replication from the accused and reply by the prosecutor. If the court over-ruled the plea, the trial continued. If the court allowed the plea, it was recorded along with reasons for their decision and reported to the convening authority and the court was adjourned. The convening authority would then convene another court if it disallowed the plea or release the accused. Following any objection on the part of the accused, the trial would commence. If there were any amendments required to the name or description of the accused, they could be made by the court at any time during the trial. However, if there was an amendment necessary to the charge, the court had the option of adjourning, but was required to report this to the convening authority which would either order a new trial or amend the charge and have the trial proceed following notification of the accused.[168]

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[167] *Ibid.*, s.24-30.
[168] *Ibid.*, s. 31-34.

The accused would have the opportunity to make a plea of guilty or not guilty to each charge. If the accused refused to plea, or if the plea was unintelligible, then a plea of not guilty was entered. If the accused pleaded guilty to a charge, the president would ascertain that the accused understood the nature of the charge as well as the possible punishment. The president would also have to inform the accused of the meaning of the charge to which he was pleading guilty and the differences in procedure that such a plea entailed. Then the president was required to recommend that the guilty plea be withdrawn if it appeared, according to the summary of evidence, that the accused should plead not guilty. Following that, the accused would have the opportunity to change his plea. If a plea of guilty was kept, that plea would be recorded as the court's finding. After a plea of guilty had been recorded, the accused had the opportunity to make a statement regarding the offence. Following that statement, the court would review the summary of evidence, after which the accused could make another statement and call character witnesses in order to mitigate the severity of the punishment. If, however, the court began to question the understanding of the accused regarding the charge or the effects of a plea of guilty, the court could then change the plea to one of not guilty and proceed as such.[169]

If the plea was not guilty, the trial proceeded with an opening address by the prosecutor, if he desired to do so, as well as presentation of his evidence against the accused. The accused had a right to cross-examine the prosecution, after which the prosecution could make a further statement. After the prosecution presented evidence, if there were no other witnesses to be examined by the court, the accused then had a right to present his evidence, after which he could be cross-examined. Then the prosecutor would address the court a second time in order to sum up the evidence presented by the

[169] *Ibid.*, s. 37.

prosecution, as well as comment on what had been presented by the accused. The accused had a right to address the court in his defence, as well as to call character witnesses. The prosecution could then present proof of previous convictions or evidence regarding the conduct of the accused but only in reply to the use of character witnesses by the accused. However, if the accused called witnesses to present statements for his case, then the accused had the right to address the court in his defence, present evidence as a witness as well as call his witnesses and then address the court a second time. This would be followed by the prosecution's address to the court. The accused had the right at any time during the trial to change his plea of not guilty to guilty.[170]

There was a third plea which could be made by a person before a court martial. This was a plea in bar of trial. This plea could be made on the grounds: that the accused had already been convicted or acquitted of the offence by a competent civil court, court martial or summary trial; the offence had been pardoned or condoned by competent military authority; or the offence had occurred more than three years prior to the commencement of the trial, unless the offence was mutiny, desertion or fraudulent enlistment. The court was then required to hear any evidence to support the plea, as well as to record it. If the court was convinced of the merit of the plea after hearing statements from both the accused and the prosecutor, the court would then adjourn, unless addressing other charges for which a plea in bar was not made, and notify the confirming authority. If the plea in bar was not proved or confirmed, then the court would reassemble and the trial would continue. However, if the plea was proved and confirmed, then the

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[170] *Ibid.*, s. 38-42.

accused would have to be released under legislation which protected the accused from being tried for the same offence more than once.[171]

Following presentation of the evidence, the court would then deliberate in a closed court, with the opinion of each member taken for each charge. The findings for every charge would then be listed on the charge sheet as either guilty or not guilty. If the finding was not guilty, the court could honourably acquit the accused. The court also had the power to record a special finding if the evidence differed materially from the particulars of the charge but nevertheless demonstrated the guilt of the accused. If the evidence did not demonstrate that an offence had occurred under the *Army Act,* then they were required to acquit the accused. If the court found that the accused was not guilty, the president would sign the proceedings, the findings would be read in open court and the accused released. Record of the proceeding would then be transmitted for confirmation.[172]

If the finding of the court was a guilty verdict, the court was responsible to assess and record the character, age, service, rank and any recognized acts of gallantry or distinguished conduct, as well as the length of time held in custody on any previous sentence, any deferred pay, military decoration or reward which the accused was in possession of or entitled to, which the court could sentence to be forfeit. Evidence would then be given by a witness as to the accuracy of the assessment according to the regimental books; however, evidence on the part of the prosecutor could not be given by any member of the court. The accused had the right to cross-examine any witness as well as to call witnesses of his own and demand that the regimental books be presented. Once

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[171] *Ibid.*, s. 36.
[172] *Ibid.*, s. 43-45.

the evidence had been presented, the accused then had the right to address the court. The court was also obligated to enquire into any additional punishment awarded, if that were the case. The court then awarded one sentence for all guilty charges presented on the charge sheet. The court also had the power to recommend mercy on behalf of the accused, which would be documented, along with the amount of support within the court and the reasons for the recommendation. Once the sentence was awarded, the president would sign and date the sentence and it would be transmitted for confirmation. A confirming authority could confirm or refuse to confirm the proceedings. If he had reason, which would be documented, he could re-assemble the court for the purpose of revising the sentence or finding. During revisions by this court, it would sit in a closed court and could not receive any new evidence.[173]

The *Rules of Procedure* addressed one final issue which would become significant during the Great War. The specific attention to issues of insanity would be strongly reflected in the war with recognition of the condition of 'shell shock.' If the person charged was found by the court to be unfit, by reason of insanity, to stand trial or that the crime for which the accused was charged was committed when the accused was insane, the president of the court could send the findings for confirmation. If the findings were rejected, the accused could stand trial before a court martial. If the findings were confirmed, the accused was to be confined in a manner "calculated to keep him securely without unnecessary harshness, as he [was] not to be considered a criminal but as a person labouring under a disease."[174] However, this was the only explicit mention of the

[173] *Ibid.*, s. 46, 48-53.
[174] *Ibid.*, 57.

use of insanity as a defence; there was no mention within the legislation of any other procedures pertaining to the interaction between the medical and legal military fields.

The *Army Act* further stipulated distinctions between the different courts. The regimental court martial was convened by any officer authorised to convene a district or general court martial, or any commanding officer with the rank of captain or higher; it consisted of no less than three officers who had held commission for a minimum of one full year; it had a president, appointed by the convening officer, who would have held a rank of captain or higher, unless on march or a captain was unavailable; but it could not try an officer, or award a punishment of death, penal servitude, imprisonment, discharge with ignominy or detention for more than forty-two days.[175] A district court martial was convened by any officer authorised to convene a general court martial, or some officer deriving authority from an officer authorised to convene a general court martial; it consisted of no less than three officers who had held a commission for a minimum of two full years; and it could not award a punishment of death or penal servitude.[176] A general court martial could only be convened by the King, or an officer given authority to do so by the King; it consisted of a minimum of nine officers who had held a commission for a minimum of three full years, if the court was taking place in the United Kingdom, India, Malta or Gibraltar, and otherwise no less than five officers. The *Army Act* also stipulated that, in both district and general courts martial, an officer below the rank of captain could not be a member of a court trying a field officer; a sentence of death could only be passed with concurrence of a minimum of two-thirds of the court; and the president could be

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[175] *Army Act*, s. 47.
[176] *Ibid.*, s. 48.

appointed by the convening officer but could not be under the rank of a field officer or captain for district courts martial.[177]

The *Army Act* also addressed the confirmation of sentences. In regimental courts martial, the convening officer or another officer with authority to convene could confirm a proceeding. With regard to district courts martial, an officer with the authority to convene a general court martial, or an officer given authority by such an officer, could confirm a proceeding. The King or an officer given authority by the King could confirm a proceeding of a general court martial. In field-general court martial cases, an officer with the authority to confirm general courts martial could confirm the proceedings. Prior to confirmation, the confirming officer could send the finding or sentence back to the court for revision, but only once. During revision, the sentence could not be increased, nor could new evidence be presented. A member of the court could not be the confirming officer. Also, a confirming authority could mitigate or remit a punishment which had been awarded or commute the punishment to a lesser punishment.[178]

The subject of counsel was addressed in the *Rules of Procedure.* During a trial, the accused had the right to have a person assist him. That person could be a legal advisor or any other person chosen by the accused and could assist the accused in all matters regarding his trial. If the trial was a general or district court martial held in the United Kingdom, the accused had a right to have counsel represent him at trial. If the trial was held elsewhere, representation by counsel had to be approved by the court. Counsel could also represent or aid the prosecution. Finally, the qualifications to be counsel were: a

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[177] *Ibid.*
[178] *Ibid.*, s. 54.

barrister-at-law in England or Ireland; an advocate or law agent in Scotland; a legal practitioner in India; or someone deemed comparable to a barrister-at-law.[179]

Another aspect of military law is the judge-advocate. The officer convening a general court martial was required to appoint a judge-advocate. This was optional in the case of a district court martial. The judge-advocate's responsibilities and powers were: to provide his opinion to the prosecution and the accused when it was asked for; to represent the Judge-Advocate-General; to inform the court of any informality or irregularity in proceedings; to give his opinion on the legal bearing of the case and summarize the evidence; and to ensure that the accused did not suffer any disadvantage and generally remain impartial.[180]

Finally, the *Army Act* addressed the final court available to try a soldier, and the most significant for any military conflict: field-general courts martial. This was convened in order to try soldiers and officers in cases where normal courts martial were unavailable. This was the case during the First World War, as trials occurring on the battlefield would have been field-general courts martial. Such courts consisted of no less than three officers, unless three officers were unavailable in which case the court could consist of only two officers. The convening officer could have presided over the court if necessary, but the court should have had a president with a rank of captain or higher appointed by the convening officer. If the court consisted of less than three officers, the punishment awarded could not exceed imprisonment or field punishment. If a sentence of death was passed, it had to be passed by all members of the court and could not be carried until it was confirmed.

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[179] *Rules of Procedure*, s. 87-94.
[180] *Ibid.*, s.101-103

However, with regards to the historical study of courts martial on the battlefield during the First World War, there was one other crucial difference. Due to the demands of being on the battlefield, often near the front line, courts martial could be convened and the trial carried on without proper written records ordinarily required for courts martial. The only written records required were the particulars of the case: the name of the accused, the charge, the finding, the sentence and any recommendation for mercy. This has created a severe limitation for any analysis of cases during the Great War based on the acceptability of a lack of written trial records.

Again due to military circumstances, some rules of procedure could be suspended in the interests of disciplinary necessity. Specifically, when evidence was documented during an investigation, the accused would normally have the right to be present, to cross-examine the witness and sign the transcripts. These rights could be suspended. Also, when the person charged with an offence was an officer, he would have the right to be present at the documentation of evidence and, if not present, be given an abstract of the evidence. These rights could also be suspended. There were also two sections within the *Rules of Procedure* which specifically addressed the right for a proper defence which could be suspended. Specifically, the right to have free communication with witnesses, legal advisors and friends, as well as the right to be given a copy of the charge sheet, along with the names of witnesses and the summary of evidence. Suspensions of these rights of the accused could severely hamper his defence at a court martial. However, the "accused shall have full opportunity of making his defence, and shall be afforded every facility for preparing it which is practicable."[181]

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[181] *Ibid.*, s. 104.

This reconstruction of trial procedure has clearly demonstrated that courts martial were not arbitrary or haphazard; they were systematically constructed, based on procedural legislation approved by the British government. Furthermore, the legislation recognized and confirmed certain rights for any person accused of a crime. However, the reconstruction of trial cases available within the historiography does not reflect or illustrate what occurred in the trials in order to ascertain if the prescribed procedures were indeed followed. This reconstruction of actual trials is paramount in any effort to criticise them for their legality and to judge whether those executed for crimes received 'fair' or 'just' trials. The analysis of a trial focusing on the procedure of that trial itself, rather than on the alleged crime, allows for a clearer understanding of how the procedures were applied, as well as what can be confirmed through the documentation.

Select Cases

Pte F. Ferll[182] of the 14/C.E.F was tried by a field-general court martial on 13 October, 1917, for "When on active service: 1) Neglecting to obey a lawful command given by his superior officer; 2) Using insubordinate language to his superior officer;" he pleaded not guilty to the first charge and guilty to the second. The trial was presided over by a Major of the 15th Canadian Division, with a Captain and two Lieutenants sitting as members of the court. The transcript did not specify any prosecutor or friend of the accused. During the trial, Ferll's conduct sheet was presented, documenting that he had been disciplined repeatedly for several infractions. The first witness for the prosecution was Sergeant Byce of the 14th Canadian Battalion who was the superior officer whom Ferll was charged with disobeying and using insubordinate language. The date of the crime, as specified in the Sgt.'s statement was 29 August, 1917, thus the timeframe between date of offence and date of trial was 45 days. The Sgt. stated that orders were given for the soldiers to clean their equipment. Apparently, as Ferll had leather equipment, the Sgt. ordered him to clean the equipment of another soldier who was sick and excused of duty. Ferll refused, stating that "It was too much bullshit." When warned regarding his behaviour, he continued to use obscene language. The accused did not cross-examine the Sgt. The second witness for the prosecution was Sgt. Thatcher of the 14th Canadian Battalion who substantiated Sgt Byce's statement, stating that he heard the accused make the claim of too much bullshit, and that "when checked again for using obscene language, the accused replied that he didn't give a God Damn wherever he went." Sgt Thatcher also stated that the Ferll's manner was insolent. The accused again

[182] F. Ferll. *Courts Martial Records* (Library and Archives Canada: RG150 – Ministry of the Overseas Military Forces of Canada, Series 8, File *, Microfilm Reel Number T-8651).

declined to cross-examine the witness. Both witnesses signed the transcript beneath their statements.

The only defence presented was a statement by Ferll, stating that he did not think it was right for him to be ordered to clean another soldier's equipment. "I used profane language on account of Sgt. Byce using rough words to me." He explained that he had been 'ruptured' for the past three months and had not been with his own company. He had applied to the medical officer several times to have an operation, but was consistently denied. He claimed that the statement he made to Sgt. Byce was "You don't need to speak so rough to me." There are several pieces of information lacking from this case. As mentioned, there is no specification of who the prosecutor was; the units of the three members of the court are unclear, thus they may not be Canadian; Ferll's illness is not documented, nor is his original unit or any counsel he may have had. He was found not guilty of the first charge and guilty of the second, and sentenced to one day F. P. (field punishment) no. 2; the finding and sentence where both confirmed by the confirming officer.

The transcript of this case demonstrates that the accused had enough time to prepare for his defence, as he likely would have been arrested and charged immediately following the incident; that the court consisted of three officers; and he had the opportunity to defend himself. Furthermore, the court's findings followed the pleas submitted by the accused. There is no evidence that this case deviated from the proscribed procedures.

Lieutenant Henry N. Aldous[183] of the 1st Canadian Divisional Ammunition Column was tried at Mont St. Eloi, 15 May 1917, by general court martial for "When on Active Service, Drunkenness, in that he on 21st March, 1917, was drunk." There was also an alternate charge: "When on Active service, Conduct to the prejudice of Good Order and Military Discipline in that he on 21st March, 1917, was playing cards with N.C. Officers and men." Aldous pleaded guilty to the charges, thus a transcript of the trial was not available. The court consisted of several officers: the President (Brigadier General F. C. U. Loois, 2nd Canadian Infantry Brigade) the three members of the court (Lt.-Colonel. M. Rae. 4th Canadian Infantry Battalion; Capt. A. P. Bennett, 12th Bde., 1st Canadian Divisional Artillery; Capt. C. V. Ghearer, 3rd Brigade., 1 Canadian Divisional Artillery; Lt. A. C. Hersey, 12th. Bde., 1st Canadian Divisional Artillery), the waiting members (Capt. A. T. Paterson, 2nd Bde. 1st Canadian Divisional Artillery; Capt. J. K. M. Green, 1st Canadian Divisional Ammunition Column), the Judge Advocate (Major C. H. Roberts, 1st Canadian Headquarters Staff), and the Prosecutor (Capt. W. E. Stenoy, Headquarters, 1st Canadian Divisional Arty.). Although there were no witnesses presented at the trial, the summary of evidence documents the investigation conducted into this case. The first witness, Cpl. Neville, was one of the men with whom Aldous played poker, who stated that Aldous was drunk. The second witness, Lt. Savage, claimed to have seen Aldous drunk that night; the third, Dr. Blackman stated he saw Aldous drunk that night and that Aldous offered him some liquor. The summary continues listing another third witness, Pte. Parrish, a cook who stated that Dr. Blackman called him to go to his cook house, where he found Lt. Aldous and two Non-Commissioned Officers; he also claimed that

[183]Henry N. Aldous. *Courts Martial Records* (Library and Archives Canada: RG150 – Ministry of the Overseas Military Forces of Canada, Series 8, File 649-A-1361, Microfilm Reel Number T-8651).

Aldous was drunk. The fourth witness, Pte. Hifferman was playing cards with Aldous and found that he was "acting in a peculiar manner, but I considered him fit for any duty." The fifth witness, Capt. Dowsley, who had given Aldous orders regarding ammunition, found that Aldous was under the influence of liquor and was in no condition to follow those orders. A character reference, presented by a Major who knew the accused for sixteen years prior to the war, stated that the accused lived with the Major for sometime in 1916 and was a cheerful worker. Aldous was severely reprimanded and there is some mention to a reduction in rank. This case in particular illustrates the extent of investigations prior to trials, and further demonstrates that courts martial were attended by the necessary personnel. There is no evident deviation from procedures.

The court martial case-file for W.J. Alexander[184] of the 5th Canadian Mounted Rifles was tried on 4 &7 May 1918, charged with "When on active service absenting himself without leave in that he, in the HILL 70 [word unclear] of the front line on the evening of 22nd of April 1918 when on patrol duty absented himself from the patrol at about 9 pm without permission and remained absent until about 2am 23rd April 1918;" Alexander pleaded not guilty. The transcript does note that there was a friend of the accused present: Lt. S. Machian. The court consisted of the President (Major F.G. Taylor, D.S.O. 1st CMR Battalion) and three members (3 Lts all from CMR [Canadian Mounted Rifles]). The first witness, a Cpl (name may be Hughes), stated that on April 22nd 1918, he warned the accused of a patrol. The accused was on the patrol when the witness handed command over to another Lance Cpl. at 830pm. At about 200am the next day (23 April) the witness saw the accused in a dugout on the line. The witness was cross-

[184] W. J. Alexander, *Courts Martial Records* (Library and Archives Canada: RG150 – Ministry of the Overseas Military Forces of Canada, Series 8, File 649-A-11530, Microfilm Reel Number T-8651).

examined, but there is underlining of the paragraph which makes deciphering it impossible (almost appears as though it may have been crossed out). The second witness was a L/Cpl., who took over command of the patrol. He stated that he noticed the accused missing sometime during the patrol, but the documented time is unclear. The third witness, L/Cpl. Warren, who was mentioned in the statement of the first witness as being in the rear of the patrol, stated that "a few shells came over but did not drop very close. Just then I saw the accused run past me muttering something about a steel helmet, accused was going back toward Mud Alley [name which refers to the line in the area]." The witness stated that he reported the absence to the L/Cpl. (second Witness) and that the accused never returned to the patrol. The witness was cross-examined by the accused, however the following statement is unclear; there is mention about the accused running past and a steel helmet. The witness was also cross-examined by the court; the witness stated that the accused was the only one on patrol without a steel helmet.

The prosecution was followed by the defence, with the accused giving a statement. He stated that he had lent his helmet to another soldier a few days prior, and that soldier had lost it. He tried to find another and when he returned to try and find his patrol, it had gone. He reported to a Cpl. (name seems to read Anderson) and was put on gas guard. He was arrested the next night. The accused was cross-examined by the prosecution, and stated that he reported the loss of his helmet as soon as he had been told the other soldier had lost it. When cross-examined by the court the accused stated he did not know who to ask for permission to leave the patrol to get a helmet. The second witness for the defence was the soldier to whom the accused had lent the helmet. He stated that he had left the helmet for the accused; when the accused could not find it, the

witness returned to where he had left it but could not find it. This witness was cross-examined by the prosecution, but his response is unclear. He was cross-examined by the court as well and responded that he did not see the accused on the night in question. The statement was followed by a "Rebuttal Evidence for Prosecution", listing a fourth witness. Cpl. Anderson stated that the first time he saw the accused on the night in question was at 200am, 23 April "when he came to my dug out to go on gas guard, I had just sent for him on hearing that he was not with the patrol." The witness was cross-examined by the accused and responded that Pte. McCrae told him the accused was not with the patrol. He was also cross-examined by the court and responded that he was in his dug out between 1000pm-1100pm with Sgt. Hughes, and did not see the accused until 200am. Another statement was made by a Cpl. named Hughes (there seems to be a rank in brackets, but it is unclear); however, his statement was not listed as a witness. He claimed that he was in the dugout between 1000pm-1100pm and did not see the accused until 200am. Cpl. Anderson was brought before the court again and confirmed that the accused was not on gas guard until 200am. Another witness, a Pte. McCrae made a statement, but it is unclear. It does mention shelling and seeing the accused at 200am. Alexander was found guilty and sentenced to fourteen days FP no. 1. The sentence and finding were confirmed. This case clearly demonstrates the interaction between the prosecution and the defence, as well as the court in the process of the trials, and further substantiates the presumption that procedures were followed.

Pte. Anterieux,[185] of the 14th CEF was tried by field-general court martial on 14 January 1916, on the charge of "When on active service Desertion." Anterieux pleaded

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[185] Anterieux, *Courts Martial Records* (Library and Archives Canada: RG150 – Ministry of the Overseas Military Forces of Canada, Series 8, File 649-A-1886, Microfilm Reel Number T-8651).

not guilty to the charge; however, the transcript is illegible. The accused was found "Not guilty of desertion but guilty of absence without leave" for which he was sentenced to twelve months imprisonment with hard labour. However, the sentence was commuted to ninety days FP no. 1. The President is listed as Major Cartwright F. L. of LSH. The two members are listed as a Captain of the 15th Battalion and one of the 16th. This particular case illustrates the problems evident in using statistics to calculate the percentage of those sentenced to death for capital crimes; this particular case would not have been counted in the statistics as Anterieux was not found guilty of desertion. As a guilty verdict of a lesser sentence for which the accused was not charged was common practice in military law, there were many soldiers charged with desertion but found guilty of lesser crimes. Therefore, the percentage of soldiers executed for desertion would be a great deal smaller than what has been presented by historians like Babington.

Pte. J. A. V. Ashby[186] of the 25 CEF was tried on 10 July 1918, on the charge of "When on active service stealing goods the property of a comrade" and "When on active service, conduct to the prejudice of good order and military discipline. Being wrongfully in possession of goods, the property of a comrade." Ashby pleaded not guilty to both charges. The court consisted of a President, Major C. G. McLaughlan of the 21st Canadian Battalion, and four members: Capt. A. R. MacKedie of the 18th Canadian Battalion, Cpt. W. A. Livingstone, Medical Officer of the 25th Canadian Battalion, Lt. S. G. Harrison of the 27th Canadian Battalion, and Cpt. A. D. Crease of the 29th Canadian Battalion. The first witness (rank and name unclear) stated that one private was missing

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[186] A. V. Ashby. *Courts Martial Records* (Library and Archives Canada: RG150 – Ministry of the Overseas Military Forces of Canada, Series 8, File 649-A-12115, Microfilm Reel Number T-8651).

kit and found that Ashby was in possession of it. The witness was cross-examined but only by the court and stated that kits were marked with the owners name when turned in to CQMS (Company Quartermaster Sergeant). The second witness, an unknown Pte., was the owner of the missing kit. He had turned his kit in to CQMS and when the kit of the platoon was returned, he could not find his. He stated that he could identify his flashlight by two dents which were located on the side. He later found his flashlight in the possession of the accused who claimed he had found it two weeks prior. The witness addressed this issue with his platoon commander (may be first witness) who approached the accused. The accused was found to be in possession of the witness' kit. The witness was cross-examined by the court but his response is unclear. The third witness, whose name and rank are unclear, stated that he was in the same billet as the accused when the owner of the kit came to inspect it. He recounted that the accused claimed he had found the flashlight. The following witness was the accused, and stated that he found the kit on the side of the road; since no one was around he took it with the intention of finding its owner. When he returned to his billet, it was dinner time so he went for dinner. That was when the owner of the kit recognized it and approached the accused. The accused was found guilty of the second charge and sentenced to six months imprisonment with hard labour.

Sgt. J. C. Alvis[187] was tried on 11 October 1918, on the charge of "Without reasonable excuse allowing to escape a person committed to his charge." Alvis pleaded not guilty to the charge. Included in the file was a conduct sheet stating that John Clifford Alvis was awarded the Military medal on 9/7/17. The transcript of the trial revealed that

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[187] J. C. Alvis, *Courts Martial Records* (Library and Archives Canada: RG150 – Ministry of the Overseas Military Forces of Canada, Series 8, File 649-A-12138, Microfilm Reel Number T-8651).

there was a prosecutor, Lt. G. F. Price of the Canadian Infantry Base Depot, and that there was a friend of the accused, Lt. M. MacRae of the 25th Canadian Battalion. The president was Major C. E. Welch from the East. Lawes [?] Regiment, and the members were: Cpt. H. B. Porter [regiment illegible due to the stroke through it], Lt. G. D. Williams, and Lt. W. B. Williams, both from the Welsh Regiment (*i.e.*, not Canadian). Following presentation of witnesses, the prosecution presented information regarding the accused: he enlisted on 8 November 1915 at 29 years old. He served two months at the front at the time of the trial and was 31 years old. This was followed by a statement made by the accused in mitigation of the punishment. He stated that:

> This is the first time that I had been on escort duty. My service in France has been in the line, except the past 3 (three) months, when I have been in hospital. This is the first occasion that I have had any charge of any kind whatsoever [following word unclear] against me. I was promoted Sergeant on 9th April/1918. I am certain that had I been supplied with handcuffs for the prisoner, I would have had no trouble. I urge that the condition [word unclear] such when I arrived at the Rail-head as [word unclear] extremely difficult for me to supervise the safe guarding of the prisoner. I don't remember being informed that Para. 6 of the instructions issued to me would not apply in my case.

The file also included written orders given to Alvis: the paragraph which Alvis claimed he did not realize applied to his case read: "You will obtain hand-cuffs from the Provost Sergt. (signing receipt for same) and your prisoner will remain handcuffed to his escort during the whole of the journey."

The first witness for the prosecution was Lt. G. F. Price (who was also the prosecutor) who stated that he was the Assistant Adjutant of the Canadian Infantry Depot and that when he gave the orders to Alvis, he stated that Para. 6 did not apply. The

witness was cross-examined, and responded that Para. 6 was not erased because the decision had not been made regarding whether the prisoner (Pte. Good) required handcuffs. The second witness was a Regimental Sergeant Major (the name is unclear) who stated that Alvis reported to him that the prisoner had escaped, at which time the witness placed the accused under arrest. The witness was not cross-examined. The third witness was Sgt. J. W. Gibson of the PPCLI who stated that he handed the prisoner to the accused at about 0700 on October 4th; the witness was not cross-examined. The fourth witness, Pte. Bratten of the 2nd Canadian Infantry stated that he was detailed as one of the escorts for the prisoner, was guarding him during the night, when they were accommodated for the night somewhere where lights were not allowed, until he handed over the duty to another Pte. (Cameron) at about 1230am. At about 400am, the accused awoke and found the prisoner missing. The witness was not cross-examined. The fifth witness was Pte. Cameron of the 13th Canadian Infantry Battalion who stated that he was detailed for the escort and guarded the prisoner during the night until 300am, when Alvis took over the duty. At about 400 am Alvis woke the Privates and stated that the prisoner was missing. This witness was cross-examined and responded that, although the accommodations were dark and crowded, the prisoner was asleep when the accused relieved Pte. Cameron.

The first witness for the defence was Alvis, who stated that handcuffs were unavailable when he was given custody of the prisoner. When they arrived at the railhead, no one met the train and he could not find any police. The only shelter he could find was a YMCA canteen, which was occupied by men proceeding on and returning from leave. No lights were permitted due to enemy aircraft. He arranged the relief

schedule for the escort and took his duty at 300am. At about 330am he noticed movement from the direction of the prisoner, who was about four feet from him. The accused stated that he was between the prisoner and the door, and that he found the prisoner missing when he lit a match. He stated that the other occupants continuously moved about in an effort to keep warm. He claimed that the escort could not search until daybreak due to the darkness, and that they then searched for about five hours. He stated that "Had I been supplied with handcuffs, I am sure I would have had no trouble. I did all in my power to take proper care of the prisoner who has since been arrested." The accused was cross-examined and stated that he kept the escort as close to the prisoner as possible due to the crowded nature of the 'marquee'. The second witness, apparently the Quarter Master, Sgt. Taylor, stated that he was with the escort, that the Provost Sgt. of the depot base (where the prisoner had been transferred into the custody of the accused) was away on duty and that the attending Corporal informed him that there were no handcuffs, but that there should be no problem since the "prisoners were not too bad." He also stated that there were no accommodations for prisoners at the railhead. The witness was cross-examined and responded that there were no prisoner accommodations at the railhead. The third witness, Cpl Hanson of the Canadian Infantry Base Depot stated that the accused asked for a set of handcuffs but that there were none available. This witness was not cross-examined. Alvis was found guilty and sentenced to be reduced to the rank of Corporal.

These cases support the claim that courts martial procedures were meticulously followed and also illustrate what was available for analysis within the primary source material. Although these cases do not prove that procedures were always or generally

followed by all courts martial during the Great War, they do present reasonable doubt regarding the assertion that courts martial were arbitrary and without procedure. These cases illustrate the need for further, multiple and comparative analyses of the Canadian court martial cases in order to develop accurate conclusions regarding the process and procedures of courts martial during the Great War.

There is, furthermore, one concern, made evident in the particular trial of Alvis: the deliberations of the court and justification of the finding are absent and unclear. In this particular case Alvis did everything in his power to secure the prisoner and, through no apparent fault of his own, the prisoner managed to escape. Given that there were no handcuffs, no prisoner accommodations, and no light in the marquee where the escort was staying, why did the court find Alvis guilty? The most convincing conclusion is that it was for disciplinary and exemplary reasons: the prisoner was Alvis' responsibility. There was no apparent sympathy from the court. Thus, this poses significant questions regarding military law and its theory. This is reminiscent of World War One satires in which courts martial were held for a soldier, charged and found guilty of cowardice, who was knocked unconscious during an attack and failed to move forward. This was intimately related to the issue of capital courts martial of the twenty-five Canadians specifically, and the British executions in general: responsibility.

The issue of responsibility has never been addressed within the historiography, only the assertion of an arbitrary and unjust courts martial system. That the people executed for desertion may have been suffering from shell shock and thus not legally responsible for their actions was not the focus of the historical research; this was particularly evident in Godefroy's conclusions. But the concept of responsibility, both

within the legislation and within the theory itself, was wholly absent. If a crime occurred, such as in the specific case of Alvis, who was held responsible for the escape of a prisoner, or of Butler, who was held responsible for the murder of another soldier, how was the responsibility of the accused constructed? Evidently, *actus rea* was the only factor taken into consideration, and *mens rea* was not recognized as contributory to a case.

The issue of responsibility was also significant when considering shell shock and the punishment of those suffering from it; if responsibility for a crime was only constructed through the criminal act itself, unless the person was found to be mentally insane, then milder and more subtle forms of shell shock, even if recognized as a medical condition, would not have been considered as a lawful defence. As the procedures made no mention of a medical examination to determine the mental health of any defendant, the apparent procedure was that the court would make a determination as to whether the defendant was fit to stand trial. The current construction of capital courts martial and military law during the Great War, particularly in regards to the issue of shell shock, has failed to recognize or establish the construction of responsibility within the legal system, as well as the theoretical context of military law. This only becomes evident with reconstruction of the actual procedures and the critical analysis of actual trials and their case files.

Assessment of Courts Martial

Following the war, the British government established a committee "to enquire into the law and rules of procedure regulating Military Courts martial, both in peace and war, and to make recommendations."[188] The committee consisted of six members of parliament and seven military officers, including the Judge Advocate General (JAG) and the Deputy Judge Advocate General (DJAG). Its report is a significant document in the history of military law and courts martial during the Great War, because it detailed and assessed the legal system and its application, using a variety of evidence, including the testimonies of many people who "have been temporary officers or soldiers, and many are in civil life connected with the active practice of the Law. They were, therefore, 'well qualified to express opinions as to the merits or defects of our Court martial system in comparison with civil courts, and as to the fairness of military tribunals'."[189] These witnesses included a retired Judge of the Indian High Court, King's Counsel, Members of the Junior Bar, and English and Scottish Solicitors.[190] The committee also heard the statement of Lieutenant-Colonel J. A. Galloghy, the JAG of the United States Army who provided "valuable information as to the disciplinary code of that Army."[191] The information collected, as well as the recommendations and findings of the committee, prove to be imperative to the historical debate as to the 'fairness' of the courts martial.

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[188] United Kingdom, Ministry of Defence, *Report of the Committee Constituted by the Army Council to Enquire into the Law and Rules of Procedure Regulating Military Courts Martial* (London: HMSO, 1919), 2.

[189] *Ibid.*

[190] *Ibid.*

[191] *Ibid.*

The report contained twenty-four sections: military law, legal knowledge of officers, arrest, civil offences, delay, summary of evidence, preparation of defence, provision of copy of charge, counsel, publicity of trials, courts and their composition, independence of courts martial, prosecutor, evidence, recording of proceedings, form of record, decision of court, announcement of finding and sentence, confirmation, promulgation, punishments, suspension of sentence acts, right to a copy of proceedings, and appeal. The assessment addressed diverse issues of concern following the war, many since forgotten. However, certain sections are pertinent to historical arguments regarding courts martial in the Great War, particularly sections on the legal knowledge of officers, the preparation of defence, counsel, and appeal. The section on military law discussed simplification of the code and its circulation in handbooks. The section on punishment addressed matters of drunkenness and the minor punishments for officers, and as such do not contribute to the historical discussion of military law and executions during the war.

The committee opened its report by stressing that the exponential increase in courts martial trials during the war was "an inevitable result of the enormous expansion of the Army during the European War," and that the deaths of senior, experienced officers early in the war, as well as the necessity for reinforcements causing a level of inattention to legal training, complicated and rendered the application of military law more difficult.[192] Regardless of these difficulties, the committee found the "the work of Courts martial during the war has been well done."[193]

The legal knowledge of officers involved in courts martial has been a substantial factor in the historical criticism levied regarding military law during the Great War, with

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[192] *Ibid*, s. 1-2.
[193] *Ibid.*, 3.

accusations of incompetence and ignorance of the law, alongside claims of hostility towards those with actual legal experience. However, this committee found nothing to support these assertions, stating that the appointment of barristers and solicitors as 'Court martial Officers' was beneficial and the system should be made permanent, allowing for legal advice to be available during trials.[194] The committee's report on the issue of legal knowledge does not support the arguments present within the historiography.

In regards to the preparation of defence, the committee found that, although most soldiers were familiar with their rights, some were not; as such, they recommended that a printed card should be displayed in every guard room explaining the soldier's rights.[195] The committee also found that those who elected to defend themselves should be required to do so in writing and that the accused be specifically asked if he had been given the opportunity to prepare for his defence, and that his response be documented.[196] This assessment also ran counter to the current historiography that characterized a barbaric and arbitrary legal system in which people could not defend themselves effectively. The finding of the committee in regards to the defence of the accused supports the argument that the procedures were indeed followed.

In the section on counsel, the committee specifically addressed the argument "that in some instances superior authorities have actively discouraged officers from appearing on behalf of accused persons."[197] The committee's response to these allegations implied that there was no official or non-official sanction for such practices and that "serious notice should be taken of any such practice. An officer should feel himself at perfect

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[194] *Ibid.*, s. 9-10.
[195] *Ibid.*, 44-45.
[196] *Ibid.*, 47.
[197] *Ibid.*, 54.

liberty to defend any man of his unit or company if asked to do so."[198] The committee's response to these allegations demonstrated that no system, including the military legal system, was beyond manipulation; however, the perception presented within the historiography, that this was systematically practiced, seems unsubstantiated.

The final section of concern for this thesis was also the largest in the report and the most significant to the historical debate. The issue of appeals within the historical debate implies that, if these men would have had the opportunity to appeal, they would not have been convicted of their crimes, due to some injustice which occurred during the trial. This is the only historical ground to make an argument in favour of pardons for those executed. In response to suggestions that all cases tried by courts martial or in cases of death sentences, appeals should be available, the committee included the process for appeal in civil court within its overall assessment. It stated that "In the case of a man convicted upon indictment, unless he himself takes some action, there is no review of the proceedings. Whatever informality, error of fact or illegality may have occurred, only the formal record of conviction remains."[199] As the committee stated "A soldier is in a better position."[200] The confirmation process of every trial ensured a greater level of legitimacy and 'justice' due to systematic review and approval of the finding and sentence throughout the military command structure.[201] In regards to capital punishment:

> Abroad a certain number of death sentences were carried out. In each case they were only carried out after personal consideration by, and upon the orders of, the Commander-in-Chief, and after the Judge-Advocate-General, or his Deputy, had advised on their legality.[202]

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[198] *Ibid.*, s. 55.
[199] *Ibid.*, s. 97.
[200] *Ibid.*, 99.
[201] *Ibid.*, 99-105.
[202] *Ibid.*, s. 106.

Essentially claiming that the execution of soldiers was justified according to military law and the courts martial, and that legal experts of the time supported this, renders the arguments of injustice even more questionable.

The committee recognized the purpose of military punishments, quoting the Duke of Wellington: "I consider all punishments to be for the sake of example, and the punishment of military men in particular is expedient only in cases where the prevalence of any crime, or evils resulting from it, are likely to be injurious to the public interests."[203] The committee itself stated "The essence of military punishments is that they should be exemplary and speedy. … An exemplary punishment speedily carried out may prevent a mutiny from spreading or save an Army from defeat."[204] This was the deterrence argument emphatically endorsed by a committee composed of members of parliament and military law experts supporting the military law as applied during the war.

This report, far from vindicating the process of courts martial during the war, provides strong evidence counter to the general thesis presented within the historiography. What this report presents is reasonable doubt regarding the arbitrariness of courts martial during the war.

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[203] Duke of Wellington, 1813. Quoted in *Report*, s. 109.
[204] *Report*, s. 110.

Conclusion

Like so many aspects of Canadian history, the study of military law during the Great War is strongly based in British history. As the legislation governing the Canadian Expeditionary Force was British, the legal system was British, the commanders, until late in the war, were British, and the courts martial were in many ways dominated by the British, the inevitable conclusion was that Canadian military law was British. Although the British historiography on this subject said little if anything about the Canadians during the war, usually only in respect to Vimy Ridge, the conclusions apply equally to the Canadian case. The historical study of military law in the Great War has been focused on capital courts martial in an effort to demonstrate the illegitimacy of the convictions and to secure posthumous pardons for those executed for crimes of desertion and cowardice. This is especially evident in the works of Babington, Putkowski and Sykes, and Godefroy. However, in studying history, context and perspective are everything. Understanding how the particular, and the peculiar, fit within the scheme of the period is essential to accuracy and understanding.

The arguments presented within the historiography have relied significantly on the understanding of shell shock and psychology; however, this construction is more political than historical. Doing so is an injustice to the historicism of these events.

The Canadian element begins with establishing the legal status of the Canadian Expeditionary Force. The Canadian soldiers were regulated by British legislation, the *Army Act* applied to them, and that status did not remain stagnant throughout the war; it was challenged. The legal status of Canadian soldiers during the Great War became

another aspect of Canada's sovereignty over its own affairs; it was one more step along the road to independence begun in 1867.

The context for the executions of Canadian and British soldiers during the Great War consisted of the theory upon which military law was founded, alongside the theory of civil law. Both were significantly similar, premised on deterrence and accepting capital punishment as a punishment. They differed, however, in scope and purpose: the civil law focused on justice and peaceful resolution of conflicts, while the purpose of military law was to secure discipline. This difference is fundamental to the construction and analysis of military law, both historically and in the present day. It was only in 1997 that capital punishment was removed as an acceptable form of punishment in Canada's *National Defence Act*. Furthermore, a civilian cannot be charged and tried for having rusty tools, talking back to his/her boss, or not going to work; a soldier can. The purpose of employment in the civilian sector is to make a profit for the business; the purpose of service in the military is to fight, defend, protect, live as a collective and, if need be, to make the ultimate sacrifice.

Another contextual necessity when analysing courts martial is a re-construction of the legislation and procedures of the trials themselves. Courts martial did not occur within a vacuum devoid of procedure and law; it was not by definition arbitrary or haphazard. Courts martial were legislated by the British parliament, applicable to all soldiers and officers, clearly established what constituted a crime, how it was tried, and what the appropriate punishments were. Inquiries conducted during this time period found that the function and procedures of the trials were acceptable.

The history of Canadian military law during the Great War requires significantly more attention and development. Hopefully, the index provided by Library and Archives Canada is simply incomplete, and the case files of the twenty-five Canadians remain available for review and analysis. A greater focus on responsibility within military law is needed, and this will clarify a significant gap within our understanding of the legal system which governed so many Canadian lives.

This preliminary survey documents how systematic the clearly established procedures and guidelines were, based on a theory of military law developed through centuries by philosophers, lawyers and generals. The analysis and re-construction of specific trials demonstrates reasonable doubt regarding the assertions of the arbitrariness of courts martial presented within the historiography. The report of the post-war committee on courts martial further reinforces that doubt. The only way to fully understand the history of military law and Canadian courts martial is to objectively analyse the evidence available and avoid developing political conclusions which are not supported by the historical evidence.

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