

# 1

## Modest Beginnings

Military law secured a solid foundation in Canada between Confederation and the end of the nineteenth century. Since changes to British military law indirectly influenced Canadian military law, the Militia Act and regulations issued under its authority supplemented and incorporated British statutory authorities. Although fiscal restraints imposed by Parliament placed practical limits on training and delayed creation of a proper instructional cadre within the Canadian militia during the last decades of the nineteenth century, military law became a serious subject for study at provisional and permanent military schools. Canadian officers and other ranks learned about military law through lectures and courses by seconded British officers, through reading in various official and private publications, as well as through actual practice in battalions or companies. Restricted legislatively from employment beyond the territories of Canada, the militia suppressed armed uprisings against the authority of the central Dominion government, aided the civil power, and deterred possible invasion. In spite of remarkably few resources and acknowledged organizational weaknesses, the Canadian militia attained at least a working knowledge of military law and regulations.

The early evolution of Canadian military law remained closely connected with major developments in British military law during the nineteenth century. Demands for reform in Great Britain primarily came from opposition to the infliction of corporal punishment within the armed forces, in particular flogging and branding. In an emotional campaign advocating total abolition, the popular press and influential persons within the British Parliament depicted the practices as demeaning and inhuman.<sup>1</sup> Public pressure became so strong that the British government under Sir Robert Peel appointed a royal commission in 1835 to examine the whole system of military punishments. The commissioners heard testimony and took evidence from the Duke of Wellington, experienced military officers, and the principal opponents of flogging.<sup>2</sup> The royal commission's

conclusions recommended some restrictions on quantity and severity, but rejected the suggested complete elimination of flogging. Service authorities remained firmly convinced that corporal punishment was essential for the proper maintenance of military discipline.

Although the issue remained unresolved for several decades afterward, vocal outcries against flogging following the Crimean War eventually forced the appointment of another royal commission. In late 1867, the JAG warned that a motion in the British House of Commons was imminent, and he wished "to prevent any vote which the Authorities at the Horse Guards consider would be very prejudicial to the service by the appointment of a Commission."<sup>3</sup> Growing public outrage against flogging and other objectionable punishments could not be ignored any longer. Over protests from military authorities, the British government imposed restrictions on corporal punishment. From 1868 onward, flogging required proper sentence from a court martial, and then only for offences on active service involving mutiny or insubordination accompanied by personal violence.<sup>4</sup> While curbing the worst abuses associated with military law, the political decision left the British armed forces without their familiar means of enforcing discipline.

The royal commission, chaired by Colonel John Wilson Patten, explored alternative forms of punishment such as fines, imprisonment, and discharge of convicted soldiers. Between March 1868 and April 1869, the commissioners heard testimony from distinguished members of the legal profession and senior military officers, including His Royal Highness the Duke of Cambridge, the commander-in-chief of the British Army. A final report concluded that the existing court martial system worked sufficiently well under the new conditions, but found the sources of military law too complicated, guidance and instruction for officers insufficient, and certain procedures unfair.<sup>5</sup> The Duke of Cambridge, who took a sincere interest in the reform of military law, questioned whether the restrictions on flogging were having a negative effect on discipline within the army. Court martial returns showed that cases resulting in sentences of imprisonment were reaching alarmingly high numbers at home and abroad.<sup>6</sup> The trend may have only reflected the greater visibility of proceedings that had been previously handled informally at the discretion of individual commanding officers. But the actual amount of punished crime within the armed forces somewhat startled military authorities. The royal commission's main recommendations seemed to offer practical improvements in the existing military justice system to the satisfaction of the War Office and the Duke of Cambridge.

Officials began taking steps toward consolidating the numerous legislative sources behind British military law into a single service code. Charles Clode, a civilian lawyer employed in the War Office who devoted much

attention to general questions of administration and military discipline, acknowledged that the Mutiny Act required revisions in light of the royal commission's findings.<sup>7</sup> In fact, the proposed alterations were so extensive that a more comprehensive statute, which incorporated both the Mutiny Act and the Articles of War, appeared preferable. Accordingly, the secretary of state for war asked Sir Henry Thring, the parliamentary counsel, to draft a suitable bill for submission to the British Parliament. Between 17 May and 26 July 1878, a select committee, chaired by Sir William Harcourt, examined the bill and heard oral testimony from a number of witnesses, including Thring, Clode, the Duke of Cambridge, and George Osborne Morgan, Great Britain's JAG.<sup>8</sup> Despite working under unreasonably wide terms of reference, Harcourt's committee agreed that the draft bill was a great improvement over existing legislation. In 1879, the Army Discipline and Regulation Act came into force, replaced two years later by the Army Act.<sup>9</sup> Like the previous Mutiny Act, the Army Act received annual approval from the British Parliament after 1881.

Although the Army Act silenced the harshest critics of the military justice system for the time being, military authorities disparaged what they perceived as encroaching civilian influence over military law. The British JAG was a political appointee who advised service authorities, the government, and the sovereign on points of law concerning military matters and courts martial.<sup>10</sup> During the nineteenth century, he sat in the British House of Commons, was a member of the Privy Council, and usually came and went with the political party in power. Proposals were occasionally put forward to extend the JAG's duties and responsibilities beyond simply the advisory role.<sup>11</sup> These proposals proved more popular among members of Parliament than military authorities. Under the existing system, the adjutant general, Major General Sir Garnet Wolseley, was responsible for the administration of military discipline within the army, and he personally opposed a suggested formal right of appeal to the JAG or some other civil legal authority: "Those who know how difficult it is to maintain discipline in an army – especially in an army constituted as ours is upon almost purely civilian principles with a Parliament always on the watch to check and find fault with the conduct of those in military authority – know also how essential it is the soldier should learn to look to his officer alone for justice."<sup>12</sup>

Unfortunately, some officers and soldiers coming before courts martial did not share Wolseley's faith in the impartiality of the military hierarchy. The Duke of Cambridge noted that defendants were increasingly hiring solicitors or barristers to represent them at trial.<sup>13</sup> The intervention of legally trained civilians at various levels of the military justice system demanded a higher standard of knowledge and proficiency in law among military officers.

The royal commission recommended the preparation of an official textbook on military law, issued by authority, for the general reference of the armed forces. Standard works on military law and courts martial by such authors as Captain Thomas Simmons, Major General Charles Napier, and Major General George D'Aguiar were still in use, but they were hopelessly outdated.<sup>14</sup> To be of any practical value, handbooks and manuals needed to stay current with constant changes in the statutes and regulations. Many irregularities in the application and administration of military law were undoubtedly due to some overreliance on old books. Charles Clode, who argued that military law could only be understood in its historical context, produced his own book through a private publisher, pending issue of an official manual.<sup>15</sup> The legitimacy of military law, he asserted, rested upon a separate and parallel development to the common law. A committee, which assembled at the Horse Guards on 2 May 1877 under instructions from the secretary of state for war, endorsed preparation of an official textbook, designed to enable all ranks to understand more clearly the connection between civil and military law and to promote more uniformity in courts martial.<sup>16</sup> The parliamentary counsel's efforts, however, overtook the endeavour. Colonel Robert Carey, a deputy judge advocate, wrote a book explaining the principles behind the Mutiny Act and Articles of War, but it was never published outside the War Office because the new statute superseded these authorities.<sup>17</sup> Instead, military authorities used the opportunity to suggest a more ambitious and comprehensive manual that drew upon extensive civil legal experience.

The first official British *Manual of Military Law* was prepared and arranged under the direction of the parliamentary counsel. The process began in July 1879 when the secretary of state for war asked Thring to produce rules of procedure for the new statute and to incorporate them into a textbook that would include the Act and explanatory notes on military law.<sup>18</sup> The original intention was to publish two versions of the manual, one for use in orderly rooms and another abridged and portable form to be taken into the field. Gerald Fitzgerald, a member of the parliamentary bar, acted as general editor, and several authors wrote individual chapters. Contributors included Thring; Fitzgerald; Henry Jenkyns, the assistant parliamentary counsel; Courtney Ilbert, legal member of the Council of the Viceroy of India; Lieutenant Colonel Blake; Albert Meysey-Thompson of the Inner Temple; and William Selfe of Lincoln's Inn. They referred extensively to the books by Simmons and Carey in writing the manual's chapters. At Thring's suggestion, the JAG added notes to and thoroughly revised the draft manuscript on the basis of the recently enacted Army Act.<sup>19</sup> The finished product then received approval from the Duke of Cambridge.

The War Office officially published the *Manual of Military Law* in 1884. Its fourteen chapters and appendices dealt authoritatively with the history

of military law, military crimes and punishments, powers of arrest, courts martial, the law of evidence, English criminal law applicable to soldiers, the relation of civil courts to courts martial, billeting, constitution of the Crown's military forces, enlistment, the soldier's relation to civil life, the law of riot and insurrection, as well as the laws and customs of war.<sup>20</sup> The *Manual of Military Law* was available for purchase through Her Majesty's Stationery Office and received a wide public circulation. Republished in several editions in subsequent years, the book became an invaluable source on military law for officers, soldiers, and civilian lawyers involved with military justice in Great Britain and self-governing colonies like Canada.

In contrast to the interest in military law in Great Britain, the Canadian variant attracted less attention. The scale of Canadian public inquiry never matched that of the British royal commissions. Beyond matters of fiscal responsibility and blatant political patronage, the Dominion Parliament seldom showed any sustained interest in military matters. Flogging, which was less common in Canada, hardly caused the level of emotional debate exhibited in Great Britain. British commanders of troops in North America faced a major problem with desertion, particularly when labour markets in the United States offered the attractions of high wages and steady employment.<sup>21</sup> Flogging proved a poor deterrent because severe punishments merely gave dissatisfied soldiers another reason to run away. Military authorities recognized the dilemma. A memorandum, issued for the guidance of officers in understanding the Army Discipline and Regulation Act, stated that maximum punishments were to be the exception rather than the rule and were only to be imposed "when the offence committed [was] the worst of its class, and [was] committed by an habitual offender, or [was] committed under circumstances which require[d] an example to be made by reason of the unusual prevalence of that offence in the force to which the offender belong[ed]."<sup>22</sup> The voluntary nature of enlistment in the Canadian militia further militated against stern punishments. Aggrieved or disgruntled men simply chose not to re-enlist at the end of their three-year engagements.

Officers and non-commissioned officers in the small Canadian militia relied upon other means of persuasion and control. The British criticized Canadians for frequently forgetting "the line of demarcation which should exist between the officer and soldier, and without which no discipline can be properly carried out."<sup>23</sup> They overlooked the issue of whether the separation was even viable among part-time soldiers who were comparatively well educated by the standards of the day, integrated into their general civic and social communities, and more often related to each other through family, business, and political connections. The Canadian public, of which many officers and soldiers formed an influential part, disdained the abuses and outdated practices associated with traditional militaries. In

this regard, the Canadian militia considered itself superior to the British and other European standing armies.

Although still subject to the Army Act and relevant QR&O in force within the British Army when called out on training and active service, the militia ordered its affairs to suit particular Canadian circumstances. The Militia Act of 1868 authorized four classes of men liable for military service, different types of volunteer and reserve militia, separate military districts, and an annual paid drill of no more than sixteen days, subject to parliamentary vote.<sup>24</sup> In practice, arrangements and organization fell far short of the legislation. While acknowledging the regional and cultural differences within the new Dominion, Colonel Walker Powell, a Canadian officer who eventually became adjutant general, felt confident that “a system will be reached, calculated to meet the necessities of the country, and be within the resources of the people.”<sup>25</sup> The militia mobilized with some success during the Fenian scares and the Red River Rebellion. In 1870, the Department of Militia and Defence published *Regulations and Orders* for the active militia, based on practical experience in the field.<sup>26</sup> These superseded previous regulations issued on an interim basis by the adjutant general and promoted greater uniformity among Canadian military forces. In terms of discipline and organization, the Canadians compared themselves favourably to the Territorial Army in Great Britain.<sup>27</sup> The Militia Act and its accompanying regulations sought to bring the militia as close as possible to the standard of volunteer British troops to meet the Dominion’s minimal defence needs.

The militia still relied heavily upon British command and legal expertise. The general officer commanding the Canadian militia was a British officer with the rank of major general, appointed by Queen Victoria in consultation with the Duke of Cambridge, the War Office, the Colonial Office, and the Canadian government.<sup>28</sup> The effectiveness of individuals in this position usually corresponded with their professional competence and astuteness in working within the volatile Canadian political culture. The general officer commanding the militia held a warrant from the Crown to convene and confirm courts martial within Canada, but he usually consulted the governor general and the civilian minister of militia and defence, who in turn made known the concerns of the Canadian cabinet and the Department of Justice. Colonel Powell, who served as adjutant general under successive British generals until his retirement in 1896, was responsible for overall supervision and administration of military law within the militia. Since no permanent military staff existed, civilian clerks, such as Benjamin Sulte, handled the administrative routine within the department on behalf of the adjutant general and the minister of militia and defence. Each military district had a deputy adjutant general and a brigade major. Although most matters dealing with courts martial and

discipline were handled within Canada, difficult cases or legal questions were referred to the War Office and the JAG in London for advice. The system combined tangible Canadian involvement with the benefits of British professional expertise.

British assistance was indispensable in the progressive development of the Canadian militia as a professional military force. The late nineteenth century saw the transition from older traditions of amateurism to a growing sense of professionalism among British and Canadian officers.<sup>29</sup> Education, ability, and experience gradually took precedence over financial means, social background, and personal connections. The War Office formally abolished the purchase of commissions in 1869. Thereafter, prospective officers were required to achieve their qualifications through merit and demonstrated knowledge in the art of war and regimental duties. The introduction of formal instruction in military law resulted from a general effort to instill a higher degree of professionalism among officers. In a lecture to cadets at the Royal Military College at Sandhurst, General Sir Henry Murray emphasized the importance of the subject:

Formally a notion used to prevail that Courts Martial in their proceedings and decisions were to be governed rather by honour than law – now this altogether is a mistake; honour, it is true is a noble influence, but it is rather of a capricious nature – each Gentleman seems to exhume the right of having his own code of it. Whereas law goes doggedly to its point – one counsel may represent it in a particular light and another counsel may show it in a different one, but still there remains the law founded on experience and reflection as a safe path to the administration of justice. For this reason I think that the study of military law is an important branch of education in any candidate for a Commission in the Army.<sup>30</sup>

Professional qualification required an appropriate knowledge of military law. With every increase in rank, an officer was expected to have a better level of understanding.<sup>31</sup> Self-study and formal courses of instruction, tested by written examinations, guaranteed a minimum knowledge. Not all officers in the Canadian militia eagerly embraced the concept of professionalism that the study of military law entailed, but those who took advantage of the available opportunities became more proficient soldiers.

As long as British regular troops remained in Canada, the militia enjoyed substantial facilities for training and education. In 1864, fearing an attack on Canada after tense relations with the Americans over seizure of the British steamer *Trent* during the American Civil War, the British attached military schools of instruction to British regiments on garrison duty in Ontario and Quebec.<sup>32</sup> Although originally provisional, the schools soon expanded in number and location, becoming more or less

permanent institutions. British instructors provided officers and non-commissioned officers from the Canadian militia with a structured course of study, which imparted a basic knowledge of military law and relevant regulations.<sup>33</sup> Successful graduates from the military schools obtained certificates of qualification allowing them to act as company or battalion commanders.

Some militia officers took full advantage of British instruction. Two chapters in a handbook compiled by Major Thomas Scoble for the guidance of Canadian volunteers on active service dealt with the Militia Act, the QR&O, and the Articles of War.<sup>34</sup> Although little original thought was evident in the small work, Scoble sought to share with a wider audience the teaching he had received at the military school in Toronto. Such books were important because many militia officers were too busy with their own civil and business affairs to take the necessary time to attend British military schools. Geographical distance and other constraints always worked against greater participation in formal instructional courses with the British regiments, and other ways of learning more about military law were required.

Regardless of proximity to a major urban area or a British garrison, many militia officers independently read and studied books and regulations available locally to increase their professional knowledge of military law. Libraries and the private holdings of individuals who took an interest in military matters were the main sources. Officers bought books by mail order directly from publishers or borrowed from friends and neighbours. British and American veterans who settled in Canada with their families after retirement or discharge often possessed first-hand knowledge, if somewhat dated, about military law and discipline. Militia officers who read newspapers probably also had some awareness of leading foreign legal authorities, such as Dr. Francis Lieber's code for the Union army during the American Civil War, the 1864 Geneva Convention, or even Prussian regulations and orders with regard to military occupation during the Franco-Prussian War.

Individual study in military law often lagged behind other military subjects that seemed more interesting and soldierly, and less complex. Militia officers, if they studied at all in their spare time, usually gravitated toward reading about tactics or strategy. It was easy to ignore military law in an unregimented and unsystematic environment that left much to individual choice and preference. Officers who had an interest in military law and the regulations studied the subject, whereas those who did not never bothered. When some expertise in military law was actually demanded, many militia officers crammed from relevant regulations and books.

The presence of British troops in Canada generally meant that British books were most readily available. Captain Alexander Tulloch, a garrison

instructor with the 69th Regiment in Halifax, published a set of lectures on military law to “facilitate the study of a subject which some officers consider rather a dry one.”<sup>35</sup> Tulloch remarked that up-to-date books on military law were scarce in Canada; in the preparation of his book, he consulted staff college lecture notes and published works by Thomas Simmons, Charles Clode, and Major Charles Gorham.<sup>36</sup> British officers like Tulloch often brought books with them for their own use and then left some of these behind with friends and acquaintances when transferred again overseas. After concluding the Treaty of Washington with the Americans, the British government decided to withdraw its remaining regular troops from Canada, except for small garrisons at the naval fortresses of Esquimalt and Halifax.<sup>37</sup> The Canadian militia assumed sole responsibility for its own military training and education.

Although British military schools closed following the withdrawal of imperial troops, the Dominion government was eager to open comparable Canadian military schools of instruction as soon as possible. Plans called for various schools in all arms of the forces but organizational problems, limited funds from Parliament, and a country-wide economic depression meant that only two schools of gunnery, attached to artillery batteries at Kingston and Quebec, were initially established. The British government made available to the Canadian militia two Royal Artillery officers, Lieutenant Colonel George French and Lieutenant Colonel Thomas Strange, to organize and command the batteries. Both men had extensive operational and administrative experience. Strange was previously an artillery instructor and superintendent at the Royal Military Academy at Woolwich, the British Army’s main educational institution for the Royal Artillery, over a five-year period.<sup>38</sup> The academic program at Woolwich was particularly intensive because the intellectual demands of the artillery were higher than in other military branches. Officers were required to demonstrate a good knowledge of mathematics, geometry, and other scientific subjects beyond the typical military topics.<sup>39</sup> As a result, the Royal Artillery was generally more selective in its choice of recruits. More than any other branch, the artillery represented the intellectual side of the army, and Canada drew immediate benefits for its own military training and organization.

Under the supervision of French and Strange, the curriculum at the Canadian gunnery schools resembled the curriculum at the Royal Military Academy. The gunnery schools offered long and short courses of instruction, lasting twelve and three months respectively. Enrolments were small, and the quality of instruction was kept very high.<sup>40</sup> The courses provided officers and other ranks from the militia with a thorough grounding in technical, military, and administrative duties. In regard to military law, non-commissioned officers and drivers mostly concentrated on the practical development of discipline through drill and attention to interior

economy, whereas officers learned about the *Militia Regulations*, the QR&O, and the Articles of War, as applied under Canada's Militia Act. Questions for officers in the short and long course examinations at Quebec in November 1874 expected a detailed knowledge of courts martial, grievance procedures, punishments, framing of charges, types of evidence, and the rules governing arrest.<sup>41</sup> If successful in the written examinations and practical exercises, officers obtained first or second class certificates, depending on their final aggregate marks.

Although a select few secured engagements with the permanent batteries, the majority of graduates were expected to return to their battalions or companies to act as instructors during training and drill in camp. Printing presses at the gunnery schools distributed to the militia 1,800 copies of examination questions and 1,000 copies of an artillery manual with a section on discipline.<sup>42</sup> The gunnery schools represented the only truly efficient military schools in the country at the time. Like the Royal Military Academy that taught both engineering and artillery officers, the gunnery schools accepted officers from other branches. An infantry short course, offered at the Quebec school, required officers to pass written examinations on the Militia Act, the QR&O, and interior economy.<sup>43</sup> The gunnery schools, which received the prefix "Royal" in 1880, offered good quality instruction in military law for a select number of motivated militia officers.

The opening of the Royal Military College of Canada at Kingston in June 1876 furnished additional opportunities for formal military legal instruction. Despite misgivings within his own political party, Liberal Prime Minister Alexander Mackenzie accepted the need for an institution in Canada to educate young men for military service.<sup>44</sup> Whether Mackenzie saw the college as a preferable alternative to the militia schools or as a foundation for a future Canadian army was not clear. And given the limited employment available in the militia as it was then organized, the Royal Military College struggled for legitimacy in the early years. From the beginning, the Royal Military College of Canada emulated the United States Military Academy at West Point rather than Sandhurst or Woolwich.<sup>45</sup> The curriculum comprised a mixture of civil and military subjects with a strong emphasis on engineering. Even so, the War Office offered a small number of commissions in the British Army on a competitive basis to cadets with the highest standing in each year.

With few prospects of professional military careers, remaining cadets entered civil vocations or government service. Graduates of the Royal Military College of Canada were under no obligation to serve in the active militia, and some chose not to. On the one hand, the Royal Military College provided little more than a publicly subsidized education for the sons of better families within the Dominion; on the other hand, it produced a well-disciplined and educated body of men with an intimate appreciation

of military concerns. Cadets received instruction in military administration and law in the third and fourth years of the Royal Military College's four-year academic program.

Instruction in military law at the Royal Military College of Canada initially started slowly. The predominantly British instructional staff was small. Lieutenant Colonel Edward Hewett, RE, the college's first commandant, regretted that some instruction in military administration and law, which cadets should have received in 1878 under the military college's regulations, was postponed until the next term because the instructor, Major Edgar Kensington, RA, was required to teach mathematics and artillery.<sup>46</sup> Notwithstanding, examiners remarked that results from final examinations indicated that cadets gained as much information on military law as the short instructional time allowed.

Military law received better coverage with minor staff changes in the following year. Cadets in the fourth and fifth classes learned about laws relating to soldiers, the history of British military law, military crimes and punishments, courts martial, and rules of evidence.<sup>47</sup> The focus was still primarily British rather than Canadian. Wolseley's popular *Soldier's Pocket-Book for Field Service*, privately published in Great Britain and the United States, and widely available in Canada, was used as a textbook.<sup>48</sup> The book was a forerunner to the British Army's later published *Field Service Regulations*. The appointment of a dedicated professor in military history, military administration, and law greatly improved the standing and teaching of the subject, although the Canadians chose not to create a separate Department of Law as existed at West Point.

A Royal Artillery officer, seconded from his regiment by the War Office, filled the professorship. Major Douglas Jones, RA, arrived at Kingston in the summer of 1879. Besides considerable experience in teaching military administration and law as a former instructor at Woolwich, he was knowledgeable about recent changes in British legislation and regulations. Major Jones broadened legal instruction at the Royal Military College of Canada to include comparisons between military and civil law, preliminary steps before trial, court martial procedure, the Militia Act and regulations applicable to the Canadian militia, courts of inquiry, and martial law.<sup>49</sup> The increased scope and sophistication of the course were now more in line with similar instruction in Great Britain. Examination questions at the Royal Military College at Sandhurst and for entry of militia officers into the British Army required candidates to have a wide range of knowledge on the content and administration of military law.<sup>50</sup> The course at the Royal Military College of Canada included British military law with a strong Canadian emphasis.

At Hewett's suggestion, Major Jones prepared notes on military law for the cadets to use. This publication received a wider circulation outside the

Royal Military College of Canada and became recommended reading for serious militia officers.<sup>51</sup> But changes necessitated by introduction of the new Army Act soon diminished its value as a reliable reference source. Consequently, Jones revised and expanded his notes into a full textbook on military law in 1882.<sup>52</sup> His classes consisted of lectures, followed by reading from the textbook and questions put to the students by him. The textbook provided greater detail on particular topics. This method of teaching, said Jones, “gain[s] the full attention of the Cadets to my lectures, which I should fail in doing had they to be busily engaged in taking copious notes, and enables me to proceed more rapidly.”<sup>53</sup> Although a conscientious teacher, Major Jones held strong opinions on certain controversial military issues, and he resigned from the Royal Military College of Canada in 1884.

Major Edward Nash, another British artillery officer, became professor of military history, military administration, and law on 14 August 1884. Major Nash may not have possessed the same work ethic as Jones, but he was just as capable as his predecessor. His classes were taught in a thorough and comprehensive manner. Nash reported steady improvement from the cadets in their comprehension of military administration and law.<sup>54</sup> Among the chief reasons for establishing the Royal Military College in the first place was to produce a class of officers familiar with staff duties, a field generally recognized as lacking within the Canadian militia. Good regimental staff officers required a sound knowledge of military law and regulations. Besides the cadets, a select number of officers from the militia attended a special long course of instruction at the Royal Military College of Canada. Nash lectured on various aspects of military administration and law to both groups until his voluntary retirement. The professorship then remained vacant until Major Eustace Edwards, RA, became professor of artillery, military administration, and law in early 1891.<sup>55</sup> Courses at the Royal Military College of Canada provided good quality instruction in military law for militia officers and cadets, some of whom subsequently entered British and Canadian service.

The British officers who headed the Canadian militia exerted pressure for the creation of infantry and cavalry schools of military instruction, in addition to the Royal gunnery schools and the Royal Military College of Canada. Parliament’s drastic reductions in funds allocated to the militia after 1876 delayed the opening of military schools in other arms and restricted paid training to twelve days every two years instead of annually. Lieutenant General Edward Selby-Smyth, the general officer commanding the militia, questioned the prevailing attitude toward defence in Canada:

It is sometimes asked by a class of persons of peculiar habits of thought –  
“Why spend money on military establishments?” “Who are you going to

fight?" It is hardly necessary to answer; happily we may have no one to fight, but military expenditure is a description of insurance that every country has to pay against loss by war, the amount of insurance in a great measure depending upon the value of the property, the risk, and the means of the insurer.

It is a mistake, frequently made that an army is maintained solely for the purpose of fighting with somebody. No doubt it should be in a fit state to do so if required, but it is much more a guarantee for peace instead of war, for the nation that is able to back its opinions is pretty certain to prevail over the weak country that has no power beyond simple argument, be that ever so sound and sensible, but wanting the unanswerable logic of force to support it.<sup>56</sup>

Severe fiscal restraint restricted the militia to such an extent that its potential effectiveness was in doubt. A military force without discipline and training, Selby-Smyth asserted, was little more than an armed mob. He and his successor, Major General Richard Luard, repeatedly stressed the importance of military education in the professional development of officers and non-commissioned officers. Although proposals for reductions in size of the active militia and application of consequent savings to a smaller permanent force remained politically unpalatable, the Dominion government redistributed limited funds for more military instruction.

Military law constituted an important subject at the military schools. Examining boards and provisional schools were held in various parts of the country close to fairly large population centres. Examinations for second class militia certificates in May 1878 asked questions on the constitution of different types of courts martial, disciplinary powers of commanding officers, procedures and responsibilities in using troops to aid the civil power, and the nature of courts of inquiry.<sup>57</sup> Candidates answered in either English or French and required at least a score of fifty percent to pass. Questions for first class certificates in Montreal the next year demanded a detailed knowledge of the Militia Act, punishments for certain offences, enrolment and terms of service, as well as duties in relation to aiding the civil power.<sup>58</sup> As candidates were not allowed to bring books into the examination, the answers reflected a remarkably good grasp of the subject-matter. In Quebec, officers were also compelled "to attend as supernumeraries on District Courts Martial, and to make special reports as to how the proceedings were carried out."<sup>59</sup> Wherever possible, this type of practical observation reinforced theoretical instruction.

The long-awaited permanent schools of military instruction adopted long and short courses of instruction with a military law component. The deputy adjutant general suggested that before first and second class certificates were granted at the infantry schools, candidates should demonstrate

a knowledge of the Militia Act and its accompanying regulations, the Army Act, the QR&O, powers of commanding officers, and courts martial.<sup>60</sup> In January 1884, permanent military schools – three infantry and one cavalry – opened at Toronto, Fredericton, St. John's, and Quebec City. Amendments to the militia regulations stipulated that officers required qualification, either through certificates obtained at a military school or before a board of officers, within a year of appointment to the active militia. In the absence of a British system of promotion examinations, the demand for qualification ensured at least a minimum standard of professional competence in military law within the Canadian militia.<sup>61</sup> As the permanent military schools of instruction swung into full operation, more and more qualified officers and non-commissioned officers returned to rural and city corps.

Under the tight fiscal regime imposed by the Dominion's Parliament, the militia was authorized to perform paid training of sixteen days for artillery and twelve days for all other arms every two years. The Militia Act required officers to read the conditions of service to soldiers upon mustering and to inform them that they were now subject to military law. Already restricted by the brief time available, training in camp involved instruction in a range of theoretical and practical subjects. A nucleus of trained officers who graduated from the Royal Military College of Canada and the permanent military schools of instruction set a disciplined example for the rest of the company or battalion.

For guidance, officers referred to the pocket-sized *Militia Orders and Regulations*, the latest published in 1883, and other official or semi-official books on hand. Current information on military law and courts martial was available in the British *Manual of Military Law*; a book in French by Major Joseph Taschereau; and sections on discipline, courts martial, offences, complaints, and defaulters in Lieutenant Colonel William Otter's popular guide for the administration of an infantry formation.<sup>62</sup> Although instruction was far from uniform, most soldiers gained some sort of familiarity with military law and certainly learned enough to recognize the difference between right and wrong within the military environment. The general availability of published manuals and regulations shifted the onus onto the individual to read and know what was expected of him. In general, city corps were in a much better state than their rural counterparts because literacy was more widespread, and money from interested patrons and businessmen enabled the purchase of additional books and supplies. The militia's conduct during the North-West Rebellion highlighted the progress and the problems with putting military law into practice during active operations.

In 1885, after Louis Riel and his supporters fought a number of engagements with the North-West Mounted Police and declared a provisional

government at Batoche, the Dominion government raised and dispatched military forces under the command of the general officer commanding the militia, Major General Frederick Middleton. The North-West Field Force divided into three columns: Middleton proceeded against Riel and Gabriel Dumont, the rebel military leader, in the direction of Batoche; Lieutenant Colonel Otter relieved Battleford and engaged defiant natives under Chief Poundmaker north of the town; and Major General Strange, recalled from retirement near Calgary, moved to Edmonton and thence to besieged Fort Pitt along the North Saskatchewan River. Unlike the earlier Red River expedition, the military forces in 1885 were completely under Canadian control and administration. Major General Middleton received directions directly from the Dominion government in Ottawa, which gave him considerable latitude to conduct operations in the field as he saw fit.<sup>63</sup> The large-scale internal security operation represented Canada's first major national military experience since Confederation.

The number of punished offences during the North-West Rebellion was relatively low. The short campaign involved considerable movement and marches, troops were concentrated in camp when not deployed in combat, temptations of towns and settlements were far away, and liquor was prohibited in the North-West Territories. Lieutenant John Preston attributed an apparent lack of offences within the Midland battalion to the strictly enforced ban on alcohol: "Our Battalion had been recruited largely in the towns of the Lake Ontario waterfront, from hard-bitten sailors and dock workers, who, if liquor had been generally available, would sometimes have been in trouble; but without anything strong to drink they were the finest and best-behaved and most loyal troops possible; and the same was generally true of all our rank and file."<sup>64</sup>

Clear instructions and decisive action by officers and non-commissioned officers to prevent crime reinforced expected behaviour. Common infractions against service discipline such as insubordination, negligent performance of duties, falling asleep during guard duty, improper up-keep of equipment, misappropriation of supplies, and accidental shootings were handled in a summary fashion in accordance with the scale of punishments under the Army Act. In the field, summary punishments were usually preferred to more formal legal proceedings, even for obstinate or repeat offenders.<sup>65</sup> Facilities for imprisonment were limited, and every convicted soldier removed from active service placed an added burden on the other troops. Available documentary evidence suggests that no general courts martial were held during the North-West Rebellion.<sup>66</sup> A shortage of officers with sufficient experience to sit on courts martial undoubtedly played a part, but soldiers also committed few serious offences that required trial by court martial under the regulations. Major General Middleton observed "an almost total absence of such Military crimes as are

usual with Regular Troops."<sup>67</sup> Canadian troops preserved a commendable degree of discipline, certainly far above what could have been expected from their limited training and organization in the years before the Rebellion.

The downside of using hastily recruited and, at best, partially trained amateur soldiers was, however, never far from the surface. Deployment during the North-West Rebellion underscored Selby-Smyth's earlier warning about the relationship between discipline and control. Incidents of looting and plundering by Canadian troops were more prevalent than the minister of militia and defence was willing to admit in Parliament.<sup>68</sup> Existing law and custom allowed armies to destroy private property in the course of military operations and to requisition necessary supplies from local inhabitants. The march of General William Sherman's Union army across the southern United States during the American Civil War provided the most immediate precedent. Orders from Major General Middleton, read out after drill practice, prohibited troops from entering houses or farms on the line of march, except those authorized to collect provisions for the quartermaster.<sup>69</sup> Despite the threat of severe punishment, soldiers still seized goods and livestock for personal gain without apparently distinguishing between property belonging to supporters of the rebels and that belonging to the settlers they were sent to protect. At Battleford, complaints about unofficial requisitions became so frequent that Lieutenant Colonel Otter acknowledged that "stringent means must be taken to remedy it."<sup>70</sup> Punishment under military law was a deterrent against unauthorized activities. Parliamentary inquiries into allegations of looting during the Rebellion, including the questionable seizure of furs by the major general himself, eventually led to Middleton's resignation in 1890 and his return to Great Britain.

Unlike Sherman, Middleton was not willing to pursue a deliberate campaign of terror and retribution without some sort of provocation from the rebels. The occasion never arose because Riel refused Dumont's request to adopt guerilla tactics against the field force.<sup>71</sup> The rebels fought in the accepted ways of the day, respected flags of truce, and with the exception of the Frog Lake massacre, treated most prisoners reasonably well. In return, Middleton and the North-West Field Force handled the rebels and defiant Natives with fairness and respect. Dumont later claimed that Canadian troops had killed helpless defenders during the storming of Batoche.<sup>72</sup> Whether true or not, these alleged acts were committed in the heat of battle and under very confused circumstances. Unless some particularly brutal or malicious conduct was involved, military law generally did not hold soldiers responsible for killings during operations. Refusing quarter to other combatants, while deplorable, was not technically a crime under the existing mid-nineteenth century explication of the laws and customs of war. Before marching away from Batoche, Canadian soldiers destroyed

gunpowder and ammunition, but they left Métis women and their belongings untouched.<sup>73</sup> In general, the North-West Field Force respected the status of non-combatants and seldom killed prisoners after capture.

Upon conclusion of the 1885 North-West Rebellion, the Canadian militia returned again to a state of restricted funding and little interest in military law. Enthusiasm for the achievements of the North-West Field Force was short-lived. The Royal Military College of Canada and the military schools of instruction received modest increases in expenditures, but Parliament kept a tight leash on the militia's budget. In 1886, Major James Pennington Macpherson published, with Middleton's endorsement, a book on military law aimed at presenting "those portions of the law which every officer ought to know, and which he might find himself called upon to administer."<sup>74</sup> Macpherson remarked that recent British books on the subject were available. For example, Colonel John Boughey, the assistant adjutant general in Great Britain and a former professor of law and military administration at Sandhurst, revised numerous editions of a standard textbook on military law.<sup>75</sup> Yet none of the British books covered the Canadian Militia Act or the *Militia Regulations and Orders* issued under its authority. Macpherson's work was tailored to a Canadian audience and included questions and answers on several themes, a large section on evidence, related forms, and advertisements for the Royal Military College of Canada and the military schools of instruction.

Recruitment problems necessarily had an influence on the administration of military law in Canada. On the occasion of Queen Victoria's Jubilee in 1887, all soldiers convicted of desertion, fraudulent enlistment, and absence without leave were released from prison, and the balance of their sentences were remitted.<sup>76</sup> Soldiers serving sentences in Canada were pardoned. But without formation of a suitable permanent force, the militia remained unable to attract and retain suitably qualified officers and other ranks for any protracted length of time. While Macpherson's book and the *Militia Regulations and Orders* were useful references, insufficient numbers of suitably trained and experienced officers severely restricted commanding officers from holding regimental or district courts martial, courts of inquiry, and boards.<sup>77</sup> Consequently, many improprieties and offences went uninvestigated and unpunished, to the detriment of overall discipline within the militia.

Extreme measures were required when the situation finally reached crisis proportions. Major General Ivor Herbert, who became the general officer commanding the militia in late 1890, cited large personnel losses in the military schools of instruction owing "to the more serious forms of military crime, and the necessary action of military law."<sup>78</sup> Almost half the entire establishment had prematurely deserted, been discharged, or been tried before courts martial. The ineffectiveness of local arrangements more

and more often forced the militia headquarters in Ottawa to intervene directly in the administration of military justice at the district level. Major General Herbert's tough stand on discipline was reflected in the total number of courts martial in the militia during these years: 128 in 1891, 161 in 1892, 176 in 1893, 130 in 1894, and 118 in 1895. Drunkenness, desertion, and breaking out of barracks were the most common charges.<sup>79</sup> Authorities resorted to military law to deal with major problems afflicting the militia and its permanent component, in the face of Parliament's continued frugality and the Dominion government's refusal to implement Major General Herbert's suggested reforms for the permanent force. In 1894, the deputy adjutant general in British Columbia downheartedly remarked: "We must just go along as we are doing – The Govt are so hard up it is terribly hard to get anything out of them."<sup>80</sup> The strict application of military law allowed the militia to preserve its essential core capabilities in the interim until more money was forthcoming.

Despite organizational and disciplinary problems, the militia was used on several occasions to provide aid to the civil power. These events included riots and labour strikes, as well as the protection of polling stations and officials during rancorous civic elections. Under existing Dominion legislation, maintenance of law and order was a provincial responsibility. Only a mayor, magistrate, or similar public official could call out the militia.<sup>81</sup> It was left to commanding officers to collect any resulting costs directly from municipalities. The duty was unpopular among the militia because some bills remained outstanding when municipalities refused to pay after the immediate emergency subsided; furthermore, relatives, friends, and neighbours were often on the opposing side, and prosecution in civil courts was a possibility facing officers and soldiers who used excessive force resulting in death or injury.<sup>82</sup> In cases of intentional or accidental shootings, civil courts appeared quite willing to assert common law jurisdiction over members of the militia.

To avoid such problems, officers required a precise knowledge of the applicable sections in the *Militia Regulations and Orders* and general criminal law. In a presentation outlining the militia's rights and responsibilities in aiding the civil power, Lieutenant Colonel Henry Smith, the officer commanding in Military District Number 1, counselled that a wise officer or soldier "will do as little as possible, and will do nothing without a positive order from a justice of the peace."<sup>83</sup> The sage words became especially important after the subject was dropped entirely from the revised *Militia Regulations and Orders* in 1898. Thereafter, officers and soldiers relied solely upon the Militia Act and their own knowledge of military law to avoid trouble during operations in support of civil authorities. Aid to the civil power, whether on the picket line or during times of insurrection, accentuated the defensive nature of the militia.

Since Canadian military forces at the time existed primarily to defend Canada against the unlikely possibility of invasion from the United States or another foreign power, the Militia Act made no provision for use of the militia overseas or in other parts of the British Empire. In 1885, Prime Minister Macdonald had turned down a request from the British government for inclusion of Canadian troops on a relief and punitive expedition from Egypt into the Sudan.<sup>84</sup> Imperial supporters denounced the decision, but political considerations within the Dominion precluded unconditional participation in Great Britain's small colonial wars. Canada's contribution to imperial defence, Macdonald argued, was better served by the maintenance of a creditable military force within the Dominion. In the event of war, the Canadian militia was available for the defence of Halifax, thus freeing up imperial troops for service elsewhere or bolstering the existing garrison until the arrival of British reinforcements.<sup>85</sup> The British reluctantly accepted that the Canadian cabinet now possessed the final say over where and when the militia was deployed. Canadians who wished to serve outside Canada were required to join the British armed forces. In 1889, Wolseley stated that the likelihood of British and Canadian forces ever serving together overseas was "so remote that the question of their relation together to each other seems hardly likely to arise."<sup>86</sup> As long as the Canadian government remained diffident about sending military forces abroad, intricate questions of military law were avoided.

Legislative changes in other colonies, however, highlighted the ambiguity of existing arrangements. On the parliamentary counsel's advice, the War Office adopted the view that colonial forces were subject to military law in the same way as regular troops because when volunteers and regulars acted together, they constituted a unified body.<sup>87</sup> In this respect, the Canadian militia and other colonial military forces were in an analogous position to volunteers in the British Territorial Army. Although section 177 of the Army Act appeared to cover the relationship in an adequate manner, the British JAG questioned the assumption that a colony would place its military contingents exclusively under British military law when they were sent abroad.<sup>88</sup> Colonial defence legislation differed in subtle ways from the Army Act, and certain colonies might not willingly put aside their own statutes. A volunteer law passed by the legislature of Natal, in South Africa, applied the Army Act to military forces acting in conjunction with imperial troops, "but only so far as the law of the Colony has not provided for the government and discipline of such a force."<sup>89</sup> In other words, the colonial statute took precedence over the Army Act, unless some particular deficiency required application of the imperial legislation. Since the change in emphasis would have far-reaching ramifications if Canada and the other self-governing colonies decided to follow Natal's lead, Wolseley suggested minor amendments to imperial and colonial defence legislation.

The War Office consulted the parliamentary counsel for his advice on this important point. Proposed amendments to the 1895 Army Act made regular troops serving with colonial forces liable to be tried for offences against colonial officers, soldiers, and institutions.<sup>90</sup> There was still some question whether colonial officers could lawfully exercise powers of command and discipline under the Army Act over regular troops by virtue of superior rank in the colonial forces. After careful consideration, Sir Courtney Ilbert, the parliamentary counsel, concluded that “the subject-matter is difficult and raises delicate questions, and it would not be desirable to initiate legislation upon it without proof of necessity.”<sup>91</sup> The potential pitfalls were enormous; issues of military law trespassed into the political realm of imperial defence cooperation and the relationship of Great Britain with the self-governing colonies. With this in mind, Wolseley asked the JAG “to define ... the actual questions he wishes settled by regulations.”<sup>92</sup> Meanwhile, British diplomats consulted representatives from the self-governing colonies directly. Canadian prime minister Wilfrid Laurier and other delegates agreed at a colonial conference in 1897 to institute uniformity in military law throughout the British Empire.<sup>93</sup> Although simple modifications to Canada’s Militia Act appeared sufficient to meet the new arrangements, the decision offered to remove the main obstacle to Canadian military forces serving with imperial troops anywhere in the world.

Of course, Canadians already served with British regular troops within Canada. Under a warrant issued in January 1887, imperial officers no longer took precedence over colonial regimental officers in Canada.<sup>94</sup> The exemption, perhaps unique at the time among the self-governing colonies, solved the problem of finding suitably qualified officers to sit on courts martial. Utilizing officers from the Canadian militia avoided the apparently frowned-upon Australian practice of temporarily appointing civilian judges and magistrates.<sup>95</sup> The practical arrangement also made employment of mixed bodies of imperial and colonial troops easier. In 1897, Major General William Gascoigne, the general officer commanding the militia, exchanged a permanent force infantry company from Fredericton with a company of regular troops from the Royal Berkshire Regiment, then stationed in Halifax, with the consent of the Canadian and British governments.<sup>96</sup> It was intended that courts martial assembled in either formation would comprise both British and Canadian officers. But, as Gascoigne pointed out to the War Office, Canada’s Militia Act still restricted imperial officers from sitting on courts martial convened to try members of the militia.<sup>97</sup> British officers could serve only on courts martial involving imperial officers or other ranks. Even though the British JAG was asked for an opinion on whether the limitation also applied to imperial and Canadian forces acting together, the question remained unresolved until the next year when a Canadian officer from the permanent force became

president of a court martial to try a member of the Royal Artillery.<sup>98</sup> Through actual practice, imperial and Canadian officers were now clearly equal under military law.

Only the weaknesses of Canada's own military organization restricted further employment of the Canadian militia with British military forces. Although the Dominion had agreed in 1888 to the desirability of a defence scheme, no progress had been made in concrete terms. In 1896, the Colonial Defence Committee in London lamented that "Canada alone of the many parts which make up the British Empire, is absolutely without organization for utilizing its splendid personnel in war."<sup>99</sup> Canadian permanent force officers and non-commissioned officers had travelled to Great Britain since Major General Herbert's tenure as general officer commanding for instructional purposes with imperial regiments; but too few Canadian officers were trained properly in staff duties and military law within the militia. The twelve days of training allowed every year under Parliament's existing estimates were recognized as insufficient.

Major General Edward Hutton, a British officer with previous service with colonial forces in New South Wales, became general officer commanding the Canadian militia on 11 August 1898. Hutton observed that the standard of efficiency, discipline, and organization of the Canadian militia was "not equal to that which my experience with similar troops in other parts of the Empire had led me to expect."<sup>100</sup> In his view, reforms and training were urgently needed to turn the dilapidated militia into an effective fighting force for deployment with British and other colonial military forces. Wolseley, who became commander-in-chief after the Duke of Cambridge's resignation, was attempting a similar overhaul of the British Army, and he petitioned the queen to transfer responsibility for discipline from the adjutant general back to the commander-in-chief because the existing system "could not be carried out with an army in the field."<sup>101</sup> The probability of colonial and British troops soon fighting together added further weight to Wolseley's arguments. Both Wolseley and Hutton believed that military law required uniform and consistent application among all forces, whether imperial or colonial, to be truly effective. Hutton's efforts, however, upset colonial sensibilities in Canada. The British officer was abruptly forced to resign after tussles with Frederick Borden, the Liberal minister of militia and defence, which included an untimely letter written by Hutton to the press advocating dispatch of a Canadian contingent to South Africa before the Dominion government had made up its mind. In spite of Hutton's impudence, Canadian troops eventually went, under the jurisdiction and disciplinary provisions of the Army Act, to fight the Boers and preserve the British Empire.