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Research Essay

Training on Rules of Engagement in Domestic Operations

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PUBLIC VIOLENCE

Canada is considered by many people to be a safe and relatively non-violent country. There have however, been incidents of public disorder serious enough to require the aid of the military to quell. Although most Canadians would recognise the names of recent events such as the ongoing unrest in Northern Ireland, past incidents at Kent State, the FLQ Crisis and Oka, there is in fact a long list of similar events. In addition to being common, many of these events had significant impacts in the countries concerned. In England, the Gordon Riots of 1780 led to the creation of the position of Home Secretary, a person responsible for, among other things, "the preservation of public order in Britain."¹ In Canada, the Riel Rebellion of 1885 brought French and English segments of the country together and effectively "united the Dominion".² Wide spread use of the Army in support of US Marshals in the United States in the mid 19th century lead to the Posse Comitatus Act in 1878. This Act now prohibits the use of the US Regular Army in law enforcement activities "without authorisation by the constitution or by an act of Congress."³

The study of public violence has identified a number of processes that play important roles in the outbreak of violence however, the process that will be dominant at any given time cannot be determined.⁴ This does little to prepare the Canadian Forces for possible intervention. It is suggested that public violence is related to changes in social

¹ Anthony Babington, Military Intervention in Britain (London: Routledge,1990) 31.

² Desmond Morton, A Military History of Canada (Edmonton: Hurtig Publishers, 1990) 101.

³ Robin Higham ed, Bayonets in the Street (Yuma: Sunflower UP, 1969) 36.

⁴ James Rule, Theories of Civil Violence (Berkley: University of California Press, 1988) 268.

relationships and therefore will continue as society evolves.⁵ It is therefore safe to assume that Canada has not seen the end of public violence or the need to employ the Canadian Forces in Canada against fellow Canadians.

One characteristic of almost all major instances of public violence is the involvement of the Army. In Canada the Army has been used to put down rebellions, ethnic confrontations, election violence, strikes, prison violence and terrorism.⁶ The use of the Armed Forces on domestic operations continues today. In the past two years large portions of the Canadian Forces have been involved in support to the civilian authorities. This support has included humanitarian assistance to fight floods, forest fires and ice storms. In the case of the Red River Flood of 1997 and the Ice Storm of 1998, in addition to humanitarian support, assistance to law enforcement agencies was provided.⁷

As the force of last resort, the Army should be requested only after events have exceeded the capability of the civilian authorities.⁸ In these cases, failure for the Army is not an option. The Army must ensure that the situation is returned to a level compatible with the abilities of the civil authority, at all costs. This could, at times, necessitate the use of deadly force against fellow citizens. This use of military force on behalf of the

⁵ James Rule, 266.

⁶ Judy Torrance, Public Violence in Canada (Kingston: McGill-Queen's UP, 1986) Appendix.

⁷ National Defence Headquarters, "Operation Assistance Lessons Learned." Dispatches. Volume 4 Number 4, (Kinston: Army Lessons Learned Centre, January 1998) 23. Interview with J.G. Taylor, Manager, Emergency Preparedness Ontario, 21 October 1998. During the Ice Storm assistance was requested by and approved for the law enforcement agencies in Quebec, but not in Ontario. This caused confusion in Ontario as some police, military and civil authorities, on seeing the Prime Minister discuss the matter on TV, believed that blanket approval for assistance to the police in both provinces had been granted.

⁸ *National Defence Act* R.S., c. N-4, s. 1. sect 279. This section provides an example request for military assistance for use by a provincial Attorney General. The wording of the request states in part "...that a riot or disturbance of the peace beyond the powers of the civil authorities..."

civil authorities is referred to as Aid of the Civil Power. Aid of the Civil Power is one of four types of support provided during domestic operations. The other three are the local provision of services, assistance to law enforcement agencies and support provided under the Emergencies Act.⁹

Several pieces of legislation ensure that any use of the military in Aid of the Civil Power is anything but simple. In Canada, principally federal statutes contained in the *Criminal Code of Canada* govern the use of force. Meanwhile, under the *Canada Act*, the provinces are responsible for the maintenance of public order.¹⁰ The authority, which allows the provision of armed assistance to civil authorities, is found in the *National Defence Act*, the *Emergencies Act* and several Orders in Council. To complicate matters, soldiers' conduct is in large part governed by Queen's Regulations and Orders.

The instrument of the application of force in Aid of the Civil Power is usually a soldier, armed with his personal weapon, operating under the supervision of his military chain of command. As this employment is considerably different from normal war-fighting, it is incumbent upon the military leadership to ensure that all soldiers are properly prepared for the possibility of using deadly force against their fellow countrymen. At the present they are not.

This paper will show that the dynamics of civil disorder and violence, combined with the complicated legal framework governing the use of force in Canada require that

⁹ NDHQ, DCDS "Instruction 2/98" (Ottawa: DND, 1998) 2.

¹⁰ Torrance, 212.

soldiers receive specific training prior to engaging in domestic operations. The paper starts by examining several domestic operations that required or allowed the use of force are then examined. This is followed by a review of the legal framework that governs the use of force in Canada. Finally, suggested training requirements are presented.

DOMESTIC OPERATIONS

Members of the Canadian Forces regularly carry loaded weapons in the performance of their duty. For the most part, they undergo rigorous training both in weapons handling and the circumstances under which they can use their weapons, although this has not always been the case.¹¹ The execution of these duties, however, is more often than not performed outside Canada. As a result, any use of force although subject to scrutiny will not face the same detailed examination as if that force had been used in Canada against Canadians.¹² To complicate matters, the rules governing the use of force vary between international and domestic operations. From an individual point of view these differences are important.

Two recent domestic operations will show that Canadian soldiers were not fully prepared to fulfil their duties as peace officers. These operations were Operation Salom (the Oka crisis), and Operation Assistance (the Red River flood). In the Oka crisis we saw soldiers placed in a volatile situation with little preparation and no rules of engagement. During the Red River Flood 'CF elements performed low level tasks in

¹¹ Government of Canada, "Dishonoured Legacy: The Lessons of the Somalia Affair" (Public Works and Government Services Canada, 1997) Chapter 22-1.

¹² NDHQ "Use of force in CF Operations" (Ottawa: DND, 1997) Art 301.2.

support of law enforcement operations – without authority – from an early point in [the operation].¹³

In the 1970s and 1980s, events conspired to create a tense and dangerous situation on a number of Indian reservations south of Montreal. The main issues were gambling and smuggling. Events came to a head in the summer of 1990, when Mohawk Warriors moved to protect gambling activities in Kahnawake and the town of Oka challenged the Kahnawake reserve's claim against land wanted for a golf course.¹⁴ A stand off between police and an estimated 50 to 70 heavily armed hard-core members of the Warrior Society followed; this included barricades and bridge closures. The Army was committed on 17 August, having been warned for operations one week earlier. The Army was given four tasks; remove the barricades at both sites, restore freedom of movement across the Mercier Bridge, remove strong points, and restore public order and security. These tasks had been discussed and agreed to by the provincial government prior to the official request for assistance.¹⁵

The troops committed to this operation received no rules of engagement or training in the situations in which they would be authorised to use deadly force.¹⁶ The Chief of the Defence Staff, General John de Chastelain, decided at the start of the crisis that military would follow two fundamental principles. These were first, that only minimum force would be used, and second, that any use of force would have to be

¹³ NDHQ "Operation Assistance Lessons Learned" Dispatches, January 1998: 23.

¹⁴ Sean Maloney "Domestic Operations: the Canadian Approach" Parameters, Autumn 1997: 145.

¹⁵ Interview with Col J. Morneau, 25 Sept 1998.

¹⁶ Morneau interview.

initiated by the Mohawks.¹⁷ Lieutenant-General Kent Foster, the Commander of the Army and the Region commander, announced these limitations to the press. He stated that the Army would not be the first to use force to resolve the situation. In effect, he stated that a soldier would be the first to take a bullet.¹⁸ Brigadier-General Armand Roy, the Brigade Commander, blamed the standing legislation for this decision to take the first bullet.¹⁹ This was Brigadier-General Roy's interpretation of the requirement in the NDA to use minimum force.²⁰ In this belief General Roy was incorrect. In the NDHQ manual, "Canadian Forces Operations", under the heading of Negotiations and Warnings, the following is provided:

While in no way negating the inherent right of self-defence and without assuming an unacceptable tactical risk, commanders should make every effort to control the situation through measures short of using force, including the use of personal contact and negotiation.²¹

This statement shows that given the regulations extant in 1997, force could have been used at Oka and that the soldiers' right to self-defence would have allowed them to take action on an individual basis. This is supported by the *Criminal Code* which states in part "one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition

¹⁷ Douglas Bland, Chiefs of Defence: Government and the Unified Command of the Canadian Armed Forces, (Toronto: Brown Book Company, 1995) 199. While not rules of engagement as we would know them today, this guidance from the CDS may have filled the same role during the Oka crisis.

¹⁸ Morneau interview.

¹⁹ Brigadier-General Roy, "Operation Salon" Canadian Defence Quarterly, April 1991: 17.

²⁰ *National Defence Act*, Part XI.

²¹ NDHQ, "Canadian Forces Operations", (Ottawa: DND, 1997) Art 503.

of it."²² This is not to say, however, that the decision to restrict each soldier's right to use force was not correct. Based on the strategic end-state desired by the government and considering the protection offered to each soldier by their equipment, vehicles, and defensive works, the decision to allow the natives to use force first was sound.

In the spring of 1997, severe flooding along the Red River resulted in the call out of the Canadian Forces to assist provincial authorities in Manitoba. The formal request for assistance was received on 19 April 1997 and support was provided starting on 21 April 1997.²³ 'What started out as a request for one hundred soldiers to help fill sandbags quickly escalated within two weeks to a Joint Force operation involving approximately 8,500 CF personnel, 2,850 vehicles, 131 water craft and 34 aircraft drawn from across the country.'²⁴ Initially, support included satellite surveillance of the flood waters, strategic airlift to bring troops and equipment to the flood zone, movement control of ground forces, the construction and maintenance of dikes and the transport by helicopters and boats of law enforcement and government officials in the flood area.

It was this final task that concerned the senior commanders on the ground. The very fact that soldiers, albeit unarmed, were in the company of law enforcement officials was seen as a provision of Aid of the Civil Power. As such, the Joint Force Commander

²² *Criminal Code*. R.S., c. C-34, s. 1. Sect 37.

²³ Operation Assistance Lessons Learned, 3.

²⁴ Operation Assistance Lessons Learned, 1.

did two things. First, he asked NDHQ for rules of engagement in order to protect his soldiers. Second, he attempted to convince the provincial leaders that they should officially ask for support under Part XI, Aid of the Civil Power, of the NDA. The Honourable V.E Toews, Attorney General of Manitoba, did this on 2 May 1998.²⁵ In his letter he specifically stated that all assistance provided must be from unarmed troops. This caveat was probably based on the perception of the civilian leaders that armed assistance equated to martial law.²⁶ This of course was not the case. The powers that one would associate with martial law are found in the Emergencies Act. It is only under the provisions of this Act, which are vague as to the actual role of the military, that one could see 'direct and active involvement in enforcing the law.'²⁷ This is based on the premise that any situation requiring the proclamation of the Emergencies Act would be by its nature extreme and exceptional.²⁸

The request for assistance combined with a refusal from NDHQ to provide rules of engagement for the operation caused some difficulties for the Joint Force Commander.²⁹ NDHQ advised that soldiers were only authorised to use force in self-defence to protect themselves or law enforcement personnel.³⁰ In his letter of 3 May

²⁵ Letter Attorney General of Manitoba 2 May 1997.

²⁶ Operation Assistance Lessons Learned, 23.

²⁷ Use of Force, 3-2.

²⁸ DCDS 2/98, 3/20.

²⁹ Ivan Taylor "Observations on Operation Assistance from 1 Canadian Mechanized Brigade Group" (Ottawa: Joint Staff Operational Research Team, May 97) paragraph 83.

³⁰ Lieutenant-Colonel B. Herfst, Presentation to Advanced Military Studies Course 1, 8 October 1998. Lieutenant-Colonel Herfst states that "[s]elf-defence is not a legal authorization to use force..." Therefore by the definition of rules of engagement found in the CF manual "Use of Force in CF Operations" self-defence cannot be considered rules of engagement.

1998, Major-General Jeffries (the Joint Force Commander) provided his guidance on assistance in support of provincial law enforcement. In his letter, he stated that although all soldiers now enjoyed the powers of a peace officer, they were to refrain from exercising some of these powers. They were to avoid arresting, detaining or searching civilians. In addition, he emphasised that all support would be provided by unarmed soldiers; it was specifically prohibited for military police personnel, who were armed, from assisting civilian police.³¹ The Commander's Guidance was passed down the chain of command with several scenarios designed to prepare soldiers for their new tasks. This guidance was minimal at best and probably matched the threat at the time. However a change in the threat level, which was anticipated in the worst case scenario, could have left soldiers in dangerous situations for which they were not equipped or prepared.

In the end, the main concerns of the military were that "unarmed soldiers [would] perform some of the more confrontational functions of a police officer, thus placing them potentially at risk, and putting soldiers into situations where they would not [to] perform the mandated responsibilities of a police officer, thus leaving them liable [to civil prosecution]." ³² To ensure there were no misunderstanding of the rules, under which his soldiers would be operating, Major-General Jeffries wrote to the Chief of Winnipeg Police Services and the Commanding Officer of D Division the RCMP (Manitoba) explaining the situation. Major-General Jeffries provided for the information of the police the same guidance that he had provided to his own chain of command. This was

³¹ Letter Commander Joint Task Force 3 May 1997.

³² Operation Assistance Lessons Learned, 24.

meant to ensure that the police did not expect a level of support from the military that could not be provided.³³

While soldiers were called out to support the civil authority in Oka and Winnipeg, in neither case were they provided with adequate rules of engagement or an explanation of their duties and responsibilities as peace officers. Although nothing untoward occurred in either case, unlike Kent State, it could have. A review of the incidents at Kent State shows the possible effects of using armed force in domestic operations.

Kent State is a large university in northeastern Ohio. It is one of four large public universities in Ohio that experienced student violence in the spring of 1970.³⁴ The student demonstrations against the war in Vietnam that occurred from 1 to 4 May 1970 were not unique to Kent State, however, the military response certainly was.

Events began on the evening of 1 May with students rioting in the bar district of the town of Kent. This riot continued through the centre of town resulting in broken windows and a large bonfire³⁵. At the same time, three companies of Ohio State National Guardsmen were dealing with a strike by truck drivers to the west of Kent. These Guardsmen were well trained; many for duty in Vietnam. As well, most had experience in civil disorder; in the previous two years some 8,000 Guardsmen had been called out to deal with race riots, student disorder and a penitentiary riot in Ohio.³⁶ A review of the

³³ Letter Commander Joint Task Force 3 May 1997.

³⁴ Jame A. Michener, Kent State, What Happened and Why (New York: Random House, 1971) 7.

³⁵ Michener 53 and 126.

³⁶ Michener 229.

strike by the truck drivers shows that the Guardsmen were properly briefed for their duties and executed them in a professional manner.³⁷ That particular strike ended in a peaceful manner.

The situation at Kent State continued to fluctuate during the weekend. The request for deployment of the Guardsmen to Kent came at 5:27 PM on Saturday, 2 May.³⁸ That night, students on campus burned the Army ROTC building. By Sunday morning, however, things appeared to have calmed down considerably. In fact by midafternoon on Sunday the campus had taken on a carnival atmosphere, where soldiers, students and citizens mixed freely³⁹.

By noon on Monday everything would change. Although gatherings on campus had been banned, thousands of students were in the vicinity of the Victory Bell at lunchtime⁴⁰. During the Guard's attempt to disperse the crowd, 28 Guardsmen fired a total of 55 rounds resulting in the deaths of four students and the wounding of a further nine.⁴¹ No courts marital or civil proceedings were ever taken against any of the Guardsmen. This decision was based on Ohio State law, which states:

³⁷ Michener 129.

³⁸ Michener 216.

³⁹ Michener 255.

⁴⁰ Michener 328.

⁴¹ Michener 340.

Members of organized militias when engaged in suppressing a riot or in dispersing or apprehending rioters...are guiltless for killing, maiming, or injuring a rioter as a consequence of the use of such force...⁴²

It was never clear if an order to fire was given. However, there is a strong belief among some that the lives of the Guardsmen were in danger that day. Regardless of why the shooting started, it is clear that the situation deteriorated rapidly and even with trained troops mistakes were made with the resulting dire consequences.

It could be argued that an incident like Kent State could not happen in Canada. The shootings there were by reservists, albeit trained and experienced. In Canada, normally only regular troops are capable of being called out for domestic operations.⁴³ What Kent State shows is that even trained troops when faced with difficult and volatile situations can take actions, that may or may not be justified but clearly have dire results and consequences.

These three cases show that force continues to be used in controlling civil

⁴² Michener 411. A further point that deserves mention is the fact that Ohio is one of the few States that allows troops to use live ammunition in the curbing of riots. This is similar to Canadian law which states in the Sect 32 of the *Criminal Code*, "Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds, (a) is necessary to suppress a riot...".

⁴³ *National Defence Act*, Part XI, Sect 276. This section discusses the liability to serve of members of the reserve force.

disobedience in the assistance of law enforcement agencies. They also show that military forces are often placed into difficult situations on short notice. The results of these three events were very different. Kent State ended in the death of several students and no legal action against the soldiers. The stand off at Oka ended peacefully however if any one person was to be killed or wounded it was sure to be a soldier. Finally, in Winnipeg, although the military was seen as the saviour of the day, soldiers were placed in potentially dangerous positions without all of the legal protection to which they were entitled. All cases clearly show that everyone who is involved in domestic operations must be aware of the legal framework in which they operate.

The military can never be positive when the civil authorities will call upon them or the role they will be asked to fill. It is likely to assume, however, that the military will be needed at the millennium to deal with Y2K problems. In fact, the Canadian Forces are preparing contingency plans to deal with what could be a disaster that dwarfs the Red River flood and the ice storm of January 1998. One possible role is assistance to law enforcement agencies. The lack of preparation for Oka and Winnipeg clearly shows the need for training tailored to meet this potential task.

LEGAL FRAMEWORK

Lieutenant-Colonel Ken Watkin, a military lawyer, has written that any discussion of the legal basis of the use of force in Canada should begin with a review of the *Canadian Charter of Rights and Freedoms*. He suggests that section 7 of the *Charter* can be interpreted to mean that 'in order for soldiers to gain the protections and justifications

offered by the law, they must ensure that they operate according to the law.’⁴⁴ While the focus of lawyers may start at the *Charter*, the start point for members of the Canadian Forces should be the *National Defence Act*, enacted in 1955.⁴⁵ The provision for and control of armed forces in Canada are found in regulations contained in this *Act*. Part XI of the *Act* provides the legal basis for provision of armed support to the provinces for the maintenance of public order. Specifically, service must be provided ‘in any case in which a riot or disturbance of the peace, beyond the powers of the civil authorities to suppress, prevent or deal with and requiring that service, occurs or is, in the opinion of an attorney general, considered likely to occur.’⁴⁶ The *Act* allows the Chief of the Defence Staff to decide the scope and nature of the support that is provided.⁴⁷ The *Act* also contains the Code of Service Discipline, a set of laws that governs the conduct of all members of the Armed Forces.⁴⁸ The other set of laws that govern members of the Canadian Forces is of course the *Criminal Code of Canada*. These two sets of law do not conflict. In fact the offences listed in the *Criminal Code* are contained in the *National Defence Act*. For serious crimes committed in Canada, however, the civil courts will take precedence over military courts in hearing the case. In the end, soldiers on domestic operations will be held accountable in accordance with the *Criminal Code* and the additional offences listed in the *National Defence Act*.

⁴⁴ Captain Ken Watkin, “Legal Aspects of Internal Security: A Soldier’s Protections and Obligations Part I”, *Canadian Forces JAG Journal*, (Ottawa: Volume 1, 1986) 56 (Although this paper was written as a captain and Part II was written as a major, Lieutenant-Colonel Watkin's present rank will be used throughout.)

⁴⁵ Sean Maloney, 136.

⁴⁶ *National Defence Act*, Part XI.

⁴⁷ *National Defence Act*, Part XI, sect 278.

⁴⁸ *National Defence Act*.

Queen's Regulations and Orders supplement the *National Defence Act*. Chapter 23 of *Queen's Regulations and Orders* expands upon Part XI of the *National Defence Act*. Clear direction is given with regards to how the Chief of the Defence Staff must respond to a request to call out the Canadian Forces and how those forces will be controlled. While called out in Aid of the Civil Power, members of the military will have 'all the powers and duties of constables ... but they shall act only as a military body and are individually liable to obey the orders of their superior officers.'⁴⁹ The above phrase is designed to protect individuals with the power of a constable while ensuring that they will not act directly for the civil authority.⁵⁰ The powers of a constable equate to the powers of a peace officer.⁵¹ "Peace officer status permits members of the CF [Canadian Forces] to enforce the law, to use force while doing so...[and] protects them from criminal and civil liability..."⁵² These legal phrases are fine. However, there is some doubt as to whether a soldier or officer would know how to interpret these phrases or what their impact would be on individual members of the military.

Being called out under Part XI is but one way in which soldiers can acquire the powers of a peace officer. As Lieutenant-Colonel Watkin explained, due to changes in the *Criminal Code* in July 1976, allowed that certain duties, either ordered or performed through military custom also granted the powers of a peace officer. Such duties include the maintenance or restoration of law and order and the apprehension of persons who

⁴⁹ *National Defence Act*, sect 282.

⁵⁰ Government of Canada, "Queen's Regulations & Orders" (Ottawa: undated electronic version) Art 23.11 note (B).

⁵¹ *Criminal Code*, sect 2.

⁵² DCDS 2/98, F1/1.

have escaped from lawful custody or confinement.⁵³ This method of gaining the powers of a peace officer is expanded upon in Chapter 22 of Queen's Regulations and Orders, Military Police and Reports on Persons in Custody. This Chapter states in part "it must be noted that members of the Canadian Forces, other than specially appointed members [Military Police] are only peace officers where they are performing the duties...as a result of a specific order...therefore members cannot assume for themselves the status of peace officers simply by performing such a duty..."⁵⁴

There are several other pieces of legislation that affect the use of force by the Canadian Forces. These include the *Emergencies Act*, Canadian Forces Armed Assistance Directions, Canadian Forces Assistance to Provincial Policing Directions, an Order in Council (P.C. 1975-131) directing support to federal penitentiaries, and the *Fisheries Act*. Under the provisions of the *Fisheries Act*, officers and men of the Navy are granted the status of fisheries officers and as such may be authorised to use force in the enforcement of the *Fisheries Act* and the *Coastal Fisheries Protection Act*.⁵⁵

Although the Canadian Forces are legally authorised to use force, up to and including deadly force, in some circumstances, there are limits to their powers. The limits are contained in the *Criminal Code* of Canada. The fundamental tenet of the *Criminal Code* regarding the use of force are that 'every one who is authorised to use

⁵³ Watkin Part I, 59. A complete list of the tasks that would automatically grant the powers of peace officer is contained in this reference.

⁵⁴ Queen's Regulations and Orders 22.01 (1) (d)

⁵⁵ *Fisheries Act*. R.S., c. F-14, s. 1.

force is criminally responsible for any excess thereof...⁵⁶ and any force must be the minimum necessary considering the circumstances.⁵⁷ The *Criminal Code*, in sections 25 to 42, also provides direction to peace officers and those legally assisting them on the application of force in certain circumstances such as the apprehension of fleeing suspects and the protection of property. This direction is expanded upon and clarified in case law. That is, various courts, including the Supreme Court of Canada, will provide legally binding opinions in response to appeals to the court. Lieutenant-Colonel Watkin discusses several cases that clearly impact on the actions of soldiers on domestic operations. One such case is based on the phrase ‘if he [a peace officer] acts on reasonable and probable grounds’ found in subsection 25(1) of the *Criminal Code*. The case of the Queen versus Jewers concerned the demand for a breath sample. The demand was made based on the police officer's belief on reasonable and probable grounds that the accused had committed the offence of impaired driving.⁵⁸ The outcome of the case, as argued by Mr Justice O’Hearn, meant that ‘a soldier cannot act on speculation but rather must base his actions on what the “ordinary, prudent and cautious man” might do in the same circumstances.’⁵⁹ This is but one example of how the actions of a soldier will not only be subject to close scrutiny by the public and the media, but will be examined in minute detail by the Canadian legal system.

While the *Criminal Code* limits the use of force in some cases it permits it in others. Section 27 allows:

⁵⁶ *Criminal Code*, Sect 26

⁵⁷ *Criminal Code*, Sect 2

⁵⁸ Watkin Part I, 65.

⁵⁹ Watkin Part I, 66. For a complete discussion of the case.

Every one is justified in using as much force as is reasonably necessary

(a) to prevent the commission of an offence

(i) for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone: or

(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).⁶⁰

Between the legal language of the Code and the clarification of case law, it is unlikely that any soldier can operate comfortably on domestic operations without specific training in this area. Lieutenant-Colonel Watkin and the Canadian Forces manual "Use of Force in CF Operations support this contention.⁶¹ To operate effectively during domestic operations, there are several important questions that a soldier should be able to answer. For example, what crimes fall into the category of arrest without a warrant? What is serious injury? What are reasonable grounds? What is a manifestly unlawful order? If a soldier does not have answers readily available to these questions, it would suggest that training in the rules governing the use of force in Canada is certainly required. As stated by Lieutenant-Colonel Watkin, the legal knowledge required to

function effectively as a peace officer is 'normally beyond the general knowledge of most soldiers.'⁶²

CURRENT TRAINING

At present, only the Navy and Joint Task Force 2 conduct training on rules of engagement for domestic operations. The Army conducts no training for domestic operations, even though it is a mandated task in the 1994 White Paper. This Army policy is based on the belief that training for high-intensity combat operations adequately prepares soldiers for domestic operations.⁶³ Due to the special nature of Joint Task Force 2 and the circumstances in which that unit would be employed, it will not be discussed further. However, the Navy's philosophy with regards to boarding parties is germane to this issue.

Naval boarding parties fill two roles. The first is in support of fisheries officers inspecting foreign fishing vessels in Canadian waters. In this capacity, naval personnel assist in the enforcement of the *Fisheries Act*. In the execution of these duties, arrest, inspection, search and the use of disabling fire may be authorised.⁶⁴ The second role is the enforcement of embargoes mandated by the United Nations. Regardless of the rationale for employment, all Canadian warships have a trained boarding party. The training is three weeks in length and covers weapons handling, rules of engagement and possible engagement scenarios. All members of boarding parties must take the course.

⁶² Watkin Part I, 73.

⁶³ Major Shane Brennan, Train for Domestic Operations Canadian Forces College, Exercise New Horizons, 1997-98, 3.

⁶⁴ *Fisheries Act*.

Further, a Canadian ship must have a boarding party that has been assessed and approved as part of the operational work-ups for the ship. Without this, the ship is not granted operational status. This training is considered essential by all ship's captains interviewed.⁶⁵

The Canadian Forces Use of Force manual provides some direction on training required for domestic operations. The direction, however, is neither clear nor specific. In Chapter 3, Use of Force in Domestic Operations,⁶⁶ there is no discussion of the requirement to train for rules of engagement, although the need for rules of engagement on the various types of operations is enunciated. In other chapters, the need to train for rules of engagement is only discussed in the broadest terms. For example paragraph 213.10 states in part ‘the [rules of engagement] summary card...cannot be used in isolation and must be supported by the appropriate training.’ In paragraph 215.1, Commanders are directed to ‘ensure their subordinates are trained on the meaning and applications of the rules of engagement for assigned missions, and for any subsequent changes.’ Additionally, paragraph 113.3 states that a Commander must provide mission-specific examples for all hostile acts for which rules of engagement are required. All of this direction appears to be written to support international operations vice domestic operations. In any case, there is no indication of the standards required for rules of engagement training.

⁶⁵ Discussion with AMSC 1 Naval Officers 22 Sep. These officers included Captains (N) J.S. Dewar, J.P.A. Guindon, and Commander D. Rouleau.

⁶⁶ Use of Force, Chapter 3.

NDHQ Instruction DCDS 2/98 provides some direction to the Environmental Commanders to conduct training for domestic operations. The direction is however, vague. It states in part, ‘force generators are responsible for conducting use of force training...as judged necessary and prudent...and with strict emphasis on the policy and legal limitations which apply...’⁶⁷ This could be interpreted to mean that if training was deemed to be necessary then the legal aspects of the use of force would be covered. However, the decision to undertake that training is not a certainty. Annex C to DCDS Instruction 2/98 explains that one of the duties of the Chief of the Defence Staff is to order rules of engagement for domestic operations.⁶⁸

In preparation for international operations, a unit is provided with rules of engagement and a briefing from the appropriate NDHQ desk officers on the mandate and any restrictions the Chief of the Defence Staff may have placed on the Canadian version of Coalition rules of engagement. Detailed briefings and scenario training follow for all members who will deploy. This training is vital to ensure that all soldiers are familiar with the rules of engagement and any confusion or weaknesses with the rules are exposed.⁶⁹ For some reason, this type training is not conducted for domestic operations where the potential legal liability to our soldiers is greater.

CONSTRUCTED SELF-DEFENCE

⁶⁷ DCDS 2/98, 9.

⁶⁸ DCDS 2/98, C3/4.

⁶⁹ LCdr Guy Philips, “Rules of Engagement: A Primer” The Army Lawyer Jul 93, 27.

Based on the NDHQ response to Major-General Jeffries' request for rules of engagement during Operation Assistance and the total lack of such rules for the Oka crisis, there appears to be a belief that rules of engagement and the full powers of a peace officer are not required in Canada. It appears that the senior leadership of the Canadian Forces believes the right to self-defence will provide sufficient protection to soldiers. This idea has at times expanded into the concept of constructed self-defence. In the words of Mr Justice McGillivray, "the defence of property which would justify killing can only arise where the one in possession of the property was able to bring himself within s. 34 [self-defence section of the criminal code]".⁷⁰ This concept means that soldiers need no rules of engagement so long as they are willing to place themselves in harm's way. That is, if they place themselves between the perpetrator of a crime and the intended target they will then be protecting themselves and not the person or property at risk.

An example of this concept is a soldier guarding a weapons shipment. Under Canadian law, deadly force cannot be used to protect property, even if that property is a shipment of restricted weapons. However, if the guard places himself between the thief and the weapons, then he can claim self-defence and as a result use reasonable force to protect himself. As a consequence, he will at the same time be protecting the weapons. If this same soldier enjoyed the powers of a peace officer, he would, in certain circumstances, be able to use force to stop the fleeing suspect and one could argue that

⁷⁰ Major Ken Watkin, "Legal Aspects of Internal Security: A Soldier's Protections and Obligations Part II", Canadian Forces JAG Journal, Volume 2, 1986, 21.

force could be used to stop the commission of a crime. This use of the powers of a peace officer would be much more attractive to soldiers who want to do the right thing.

Lieutenant-Colonel Herfst raises concerns about the concept of constructed, or in his terms, justified self-defence. He states, "[t]he fact that it [constructed self-defence] is not an authorization to use force as such illustrates the tortuous task we set for ourselves when we rely on a complicated...argument to set up a legal framework where we can give a more positive spin to it and tell our soldiers that using force in self-defence is permitted as an inherent or self-evident right."⁷¹

A similar example was put forward by Lieutenant-Colonel Watkin. In his example, a soldier was tasked to protect an aircraft. Although the aircraft may be necessary for the defence of Canada, it is still property and as such force cannot be used to protect it from harm. The case law that Lieutenant-Colonel Watkin cites indicates that although lethal force can be accepted in certain cases of protection of property it is not likely to be extended to what the military would term Vital Points.⁷² In addition, it must be clear to all soldiers that any use of force in self-defence can only be justified if that force is the minimum amount necessary and was not intended to cause death or serious injury.⁷³

⁷¹ Herfst, 3.

⁷² Watkin, Part II 24

⁷³ Herfst, 3.

The theory of constructed self-defence potentially places Canadian soldiers at unnecessary risk. It appears to be the easy way out for the Department of National Defence. The law, as expressed in the *Criminal Code* and the *National Defence Act*, was written to provide the powers of a peace officer to soldiers. It was foreseen that soldiers would have to be used to replace peace officers, that is, some situations would degrade to such a point that the civil authorities could no longer cope. In such a case, soldiers would be acting in the capacity of peace officers and as such should enjoy the powers and responsibilities of those they replaced. The reason that military leaders would commit their forces to domestic operations without the powers of a peace officer and proper rules of engagement is not clear. Is it because our soldiers do not have the ability to act in accordance with Canadian Law? This should not be the case, for with proper, structured training, our soldiers are committed to do similar work in foreign countries under the flag of the United Nations or NATO. Regardless of the reasoning, a change is required. Soldier, for their own protection and the protection of the Canadian Forces, must be trained for the application of force in domestic operations.

There is no doubt that soldiers at present do not have the training to fill all of the roles and tasks of peace officers, be they military police or civilian police. The training in the application of the continuum of force that is required by police candidates is extensive. Training for military police is approximately 14 weeks before they are sworn in as peace officers. For most civilian police the training is six months with a further six

months on probation.⁷⁴ This training covers more subjects in greater detail than would be expected of a soldier preparing for domestic operations. However, they provide an indication of the seriousness with which training must be provided to those that may be required to use force.

TRAINING REQUIREMENT

Soldiers require a basic level of knowledge concerning the use of force. They must know the circumstances in which force may, and more importantly, those in which force may not be used. They must have sufficient understanding of the law to know what crimes allow for arrest without a warrant. They must know the duties and responsibilities of a peace officer and the assistance a peace officer can demand of others in the execution of those duties. Finally, all soldiers must understand their inherent right of self-defence, and its limitations, and when that right can be over ruled by the military chain of command. The only way in which soldiers can acquire this knowledge is through structured training. The training needed is similar to that presently mandated for, and practised prior to international peacekeeping and enforcement missions. As stated by Lieutenant-Commander Philips, 'troops need to train with...ROE [rules of engagement] to develop the necessary familiarity with them...Waiting for a crisis situation...would be too late.'⁷⁵

Soldiers must be given the legal basis for the operations in which they are about to take part. They must understand certain legal principles such as, protection of persons

⁷⁴ Interview, Major G. Gagnon, Area Provost Marshall, Land Force Western Area, 24 September 1998.

⁷⁵ Philips, 27.

and property, self-defence, minimum force, powers and responsibilities of a peace officer, and accountability for individual actions. Soldiers must be given clear rules of engagement and have an opportunity to discuss those rules in detail. Finally, scenarios must be used to ensure that the rules are understood and that there is no doubt in the minds of the soldiers as to how the rules are to be applied. This format works extremely well for international operations. However, it took the incidents in Somalia to force this structured training into the Canadian Forces. Today's soldiers are better educated than ever before. Soldiers have shown that they have the intellectual ability to operate under complicated rules of engagement, on international operations, where the defence of certain property is allowed. There is no reason to believe that they could not comprehend the nuances of Canadian law.

There are serious consequences awaiting the Canadian Forces as well as individual soldiers if force is improperly applied during a domestic operation. The Canadian Forces would likely face the same level of scrutiny as was seen during the Somalia Investigation. This would be nothing compared to the position a soldier would find himself. Removed from the military justice system, he would be prosecuted by civilian courts in Canada. If a soldier used force inappropriately because he lacked the necessary training, who would be responsible? Clearly, the individual remains responsible for his actions, however, how would the chain of command react to its failings. It is the duty of the chain of command to adequately prepare soldiers prior to operations, be they international or domestic. To do otherwise places our soldiers and the chain of command in a morally indefensible position.

CONCLUSION

There have been many instances of public disorder and violence in Canada since before Confederation. Based on contemporary theories of civil disobedience and violence there is every reason to believe that we have not seen the end of such activities. The reaction by the military to Aid of the Civil Power requests has been inconsistent. Canadian soldiers have been committed to situations with great potential for violence without the proper training or rules of engagement. Fortunately for all concerned no serious problems have occurred yet.

However, Somalia and Kent State remain as examples of the possible dire consequences of the use of force, although for very different reasons. Events of this type are preventable. With proper training and rules of engagement soldiers can adequately perform in demanding and tense situations. This requirement is clearly stated in the Canadian Forces Operations manual.

It must be recognized that members of the CF generally lack the in-depth knowledge and training in terms of the Criminal Code and other legislation that professional peace-enforcement officers have. The use of force directive issued to a TFC [Task Force Commander] of a domestic operation must therefore contain comprehensive and specific direction concerning the legal and political underpinnings for the use of force. In particular, numbered ROE [rules of

engagement] providing for both the use of non-deadly force and, if appropriate, deadly force must be issued.⁷⁶

Soldiers have shown the ability to apply complicated rules of engagement in high-profile operations in Bosnia and Haiti. We should expect no less from them in Canada.

Time is not on our side. There is a strong possibility that soldiers will be called out in support of Y2K. It is not hard to imagine law enforcement agencies that will be strained to the breaking point. The Canadian Forces must be prepared to assist in all areas. To do so will require the proper training. That training should be formalised and structured on the current system used to prepare for international operations. Additional training would be required to educate soldiers on the legal nuances and issues identified by Lieutenant-Colonels Herfst and Watkin, particularly the use of force to protect property, including concept of self-defence. This training is an achievable goal that would adequately prepare soldiers to execute their duties during domestic operations. We should not, however, wait until January 2000 to implement the program. We must start now if we hope to be successful.

⁷⁶ Canadian Forces Operations 5-12.

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