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EXERCISE/EXERCICE NEW HORIZONS

**‘ACTIVE SERVICE’: AN IRRELEVANT CONCEPT FOR  
THE CONTEMPORARY CANADIAN MILITARY**

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## ABSTRACT

Most Canadian military professionals are likely at a loss to explain the notion of ‘active service’ even though it figures prominently in our core defence legislation. As such, this paper seeks to provide a better understanding of this term with a view to influencing a much-needed, comprehensive redrafting of the *National Defence Act*. A review of the evolution of Canadian military response shows that despite a clear understanding in the past, the government has become inconsistent in its application of the law as concerns placing the Canadian Forces on active service. Furthermore, the contemporary situation suggests that there is no longer a need for this terminology as it has been superseded by the more meaningful concept of ‘special duty service’. As a result, this paper recommends that, unless new legislation is passed to revitalize them, sections 31 and 32 of the *National Defence Act* should be removed as irrelevant.

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## INTRODUCTION

Still heavily rooted in the last major rewrite of 1950, the current version of the *National Defence Act (NDA)*<sup>1</sup> has not surprisingly become somewhat of a disjoint ‘statutory scrapbook’ of amendments. As Dr. Chris Madsen of the Canadian Forces College has pointed out:

A major overhaul of defence legislation in Canada appears long overdue. Historically, efforts in this direction have taken place every forty to fifty years: in 1868, 1904, and 1950. In spite of limited amendments before the Somalia affair, the National Defence Act remained largely unchanged from the time it was introduced by Brooke Claxton five decades ago to the more substantial amendments introduced at the end of 1997 in response to the Somalia inquiry’s report. The Canadian Armed Forces and Canadian society have changed considerably since the National Defence Act was originally drafted.<sup>2</sup>

One area of the *NDA* that merits attention is the notion of ‘active service.’ While pervasive throughout the act, sections 31 and 32 (reproduced at Appendix 1) provide the main focus. Elsewhere in the act, the term is used to differentiate Reserve Force service, specify offences related to operations, and clarify the application of the Code of Service Discipline and conditions of enrolment and release. Beyond a simple definition that can be guessed at from the above, the problem lies with the application of the term to the various circumstances faced by the Canadian Forces (CF) today. Indeed, the question is: who in the CF is on active service and under what circumstances? Despite being a part of the defence lexicon since at least 1868, the context in which the term ought to apply has considerably changed in the past 139 years.

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<sup>1</sup> *National Defence Act*, R.S., 1985, c. N-5 [statutes on-line]; available from: <http://laws.justice.gc.ca/en/ShowFullDoc/cs/N-5///en>; Internet; accessed 24 March 2007.

<sup>2</sup> Chris Madsen, *Another Kind of Justice – Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press, 1999), 154-155.

Therefore since the time is right for proposing changes to the *NDA*, we should either clarify or eliminate such ambiguous notions as ‘active service’. As such, this paper will show that sections 31 and 32 of the *NDA* should be removed as they have become meaningless in the context of the modern realities of CF service. Part I of the discussion will examine the evolution of military response in Canada, contrasting in particular the internally focussed formative years of the Canadian military in the mid-19<sup>th</sup> century through to its broadly engaged present. Part II will provide an analysis of the current situation highlighting the ambiguity in applying the concept of active service and its irrelevance to the conditions of service for CF members, and consider possible action for rectifying it.

## **PART I: THE EVOLUTION OF CANADIAN MILITARY RESPONSE**

### **THE COLONIAL DEFENCE PERIOD**

#### **Pre-Confederation Roots**

Throughout the British colonial period leading up to Confederation in 1867, the ever-looming potential of an American invasion necessitated a flexible but lean approach to defence. British regular troops provided the primary means for securing territorial defence and were augmented as required by companies of locally raised militiamen. The practice of universal compulsory militia service was well established, with all males from 16 to 60 years of age required to muster annually in parish or county ‘sedentary’ militia

companies and compelled to serve if called out on active service.<sup>3</sup> According to a Canadian Forces historical report written by J.M. Hitsman, provincial authorities raised militia battalions by voluntary enlistment and by ballot to provide additional forces to defend against invasions or other emergencies.<sup>4</sup>

In 1855 colonial defence arrangements changed in a fundamentally new way. When many of the British troops garrisoning Canada left for the Crimean War the provinces realized the need to take greater responsibility for their own defence and security. Consequently, the united Provinces of Canada passed a new *Militia Act* in 1855 that formally created an “active volunteer militia” comprising infantry, cavalry, and artillery corps yet retained the sedentary militia as a basis for mobilization.<sup>5</sup> The distinction ‘active’ meant that the companies, troops, and batteries of these corps would—even in peacetime—be uniformed, equipped, and paid to train for 10 to 20 days annually. They would also be liable to be called out in the event of emergencies.<sup>6</sup>

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<sup>3</sup> Library and Archives Canada, “Department of Militia and Defence fonds,” [http://mikan3.archives.ca/pam/public\\_mikan/index.php?fuseaction=genitem.displayItem&lang=eng&rec\\_nbr=17&](http://mikan3.archives.ca/pam/public_mikan/index.php?fuseaction=genitem.displayItem&lang=eng&rec_nbr=17&); Internet; accessed 4 March 2007.

<sup>4</sup> J.M. Hitsman, *Report No. 6 – Canadian Militia Prior to Confederation*, Report Prepared for the Canadian Forces Headquarters Directorate of History, Department of National Defence, (Ottawa: n.p., 30 June 1966): 31-33, 55-58, 61-64 [report on-line]; available from <http://www.forces.gc.ca/dhh/downloads/cfhq/cfhq006.PDF>; Internet; accessed 24 March 2007.

<sup>5</sup> Department of National Defence [or DND], Canadian Forces Headquarters Directorate of Training, *Introduction to the Study of Military History for Canadian Students*, Colonel C.P. Stacey, ed., 6<sup>th</sup> ed., 4<sup>th</sup> rev., (Ottawa: DND, n.d.) [handbook on-line]; available from [http://www.forces.gc.ca/hr/dhh/downloads/Official\\_Histories/Intro\\_MilHist\\_e.PDF](http://www.forces.gc.ca/hr/dhh/downloads/Official_Histories/Intro_MilHist_e.PDF); Internet; accessed 24 February 2007, 11.

<sup>6</sup> Hitsman, *Report No. 6 ...*, 132.

## The Militia Act, 1868

Following Confederation the new Dominion of Canada drafted its first defence legislation in 1868. Largely based on that of the former united Provinces of Canada, the new *Militia Act* divided the militia into four elements summarized as follows:

The Reserve Militia was merely a new name for the traditional sedentary militia in which most physically fit males aged 18-60 were obligated to serve if called upon. The Active Militia had three components: the Volunteer units of cavalry, artillery and infantry that trained on a part time basis; a Regular Militia that might be formed from men aged 18-40 who, in the event of an emergency, either volunteered or were balloted for service; companies of Marine Militia consisting of men employed as sailors on the Great Lakes or the Atlantic Coast.<sup>7</sup>

The institution of the “regular militia” merely recognized the established structure that activated men, on a voluntary basis or by ballot if necessary, to serve full-time for protracted periods (of weeks to months or longer) in response to emergencies.

The act clearly specified how the militia would be called out. According to article 60, senior commanders had the authority to, “... upon any sudden emergency of invasion or insurrection, or imminent danger of either, call out the whole or any part of the Militia within his command ....”<sup>8</sup> The government could also initiate a call out under article 61:

Her Majesty may call out the Militia or any part thereof for actual service, either within or without the Dominion, at any time, whenever it appears

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<sup>7</sup> S.F. Wise, *Report No. 15 – Attempts to integrate Canada’s Armed Forces before 1945*, Report Prepared for the Canadian Forces Headquarters Directorate of History, Department of National Defence (Ottawa: n.p., November 1967), 3. [report on-line]; available from <http://www.forces.gc.ca/dhh/downloads/cfhq/cfhq015.PDF>; Internet; accessed 24 February 2007.

<sup>8</sup> *Militia Act*, 31 Victoria 1868, c. 40, in *Statutes of Canada Passed in the Session Held in the Thirty-First Year of the Reign of Her Majesty Queen Victoria, Being the First Session of the First Parliament of Canada*, Part Second from 12<sup>th</sup> March 1868 (Ottawa: M. Cameron, 1868); 63-89 [statutes on-line]; available from [http://www.canadiana.org/ECO/PageView?id=5c94cace7682e43a&display=9\\_08050\\_1\\_2+0002](http://www.canadiana.org/ECO/PageView?id=5c94cace7682e43a&display=9_08050_1_2+0002); Internet; accessed 13 April 2007.



advisable so to do by reason of war, invasion or insurrection, or danger of any of them ....<sup>9</sup>

Particular senior officers were also compelled to call out the militia "... with their arms and ammunition in aid to the Civil Power in case of riot or other emergency requiring such services..." upon request from the appropriate local civil authorities.<sup>10</sup>

In article 61 and in various others throughout the act, the term "**actual** service" is used seemingly to denote service on duty for defence and security services other than parades, drill, or training—i.e. to indicate when armed and in harms way. Indeed under article 68 the government committed to caring for the family of an officer or man killed "in actual service" or to compensating a member who suffers a permanent disability "... arising from injuries received or illness contracted on actual service...."<sup>11</sup>

### **Establishment of the Permanent Force**

Several events leading up to 1871 finally convinced the Canadian government of the need for a permanent military force. In 1866 the militia was called out on several occasions to repel Fenian invaders; while ultimately successful, the adjutant-general's report of that year concluded that:

... continuous service of a Volunteer Militia for any length of time is not applicable to a country like Canada, where there are no idlers in the community, and where all are in receipt of daily wages. The whole force which has been retained on active service during the busiest season of the year, both commercially and agriculturally, has served at great individual inconvenience. Many men have sacrificed wages more than twice the

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<sup>9</sup> *ibid.*, art. 61.

<sup>10</sup> *ibid.*, art. 27.

<sup>11</sup> *ibid.*, art. 68.

amount of pay received from Government, rather than seek to withdraw from their duty.<sup>12</sup>

When the Red River Rebellion flared up in 1869 the government dispatched an expedition comprising one battalion of British regulars and two battalions of hastily assembled volunteer militiamen from Ontario and Quebec. A further series of Fenian raids in the 1870-71 period, also required call-outs of the militia.<sup>13</sup> Finally, after signing the 1871 Treaty of Washington with the United States, the British withdrew the bulk of their forces from Canada.

The establishment of a Canadian regular army took root over the next 12 years. At first, two full-time artillery batteries were organized to take over former British installations and to direct militia training.<sup>14</sup> The 1883 *Militia Act* subsequently ended the requirement to annually muster the sedentary militia and officially instituted the Permanent Active Militia of 750 full-time infantry, artillery, and cavalry soldiers.<sup>15</sup>

### **Late-19<sup>th</sup> Century Colonial Defence & Security**

The North-West Campaign of 1885 provided the first test of the Canadian militia to organize and conduct combat operations on its own. When Louis Riel declared a provisional government at Batoche on 19 March 1885, the government raised and

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<sup>12</sup> *Report on the State of the Militia of the Province of Canada for 1865-1866* (Ottawa: n.p., 1866): 8, quoted in Hitsman, *Report No. 6 ...*, 167-168.

<sup>13</sup> Department of National Defence [or DND], *Canadian Military Heritage* vol. 3: 506; on-line; <http://www.cmhg.gc.ca/cmh/en/default.asp>; Internet; accessed 4 March 2007.

<sup>14</sup> Wise, *Report No. 15 ...*, 5-6.

<sup>15</sup> DND, *Canadian Military Heritage* vol. 3, 546.

dispatched the North-West Field Force to reassert Canadian control.<sup>16</sup> Consisting of the permanent force augmented by 8,000 militia volunteers, the force was “... very much an improvised army...” with barely adequate training.<sup>17</sup> Despite these shortcomings, the force vanquished the rebels and confirmed the militia’s ability to suppress major insurrections. Benefits for those who actively served included medals and land scrip.<sup>18</sup>

After 1885 as the militia focused on internal security duties serious concerns arose for those volunteering to serve. Problems with equipment, patronage, and pay in particular plagued the non-permanent militia; furthermore as the *Canadian Military Heritage* points out:

If [a militiaman] left for weeks or months in the field, his employer might not guarantee that he would have a job upon his return. He would also be leaving his family to public assistance agencies hastily formed for this purpose. If harm befell him, his family was not assured of a pension.<sup>19</sup>

A reorientation towards external affairs eventually overshadowed these concerns.

## Section Summary

Canadian colonial defence evolved considerably during the 19<sup>th</sup> century. While still forming the basis for mobilization in law, the old system of universal compulsory service eventually gave way to the establishment of a sizable “active volunteer militia” and a small permanent force. The *Militia Act* of 1868 clarified the conditions of service

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<sup>16</sup> Madsen, *Another Kind of Justice* ..., 22-23.

<sup>17</sup> DND, *Introduction to the Study of Military History* ..., 18.

<sup>18</sup> Veterans Affairs Canada, “Reference Paper: The Origins and Evolution of Veterans Benefits in Canada, 1914-2004,” (March 2004); available from <http://www.vac-acc.gc.ca/providers/sub.cfm?source=councils/vaccfac/reference>; Internet; accessed 8 April 2007.

<sup>19</sup> DND, *Canadian Military Heritage* vol. 3, 557.

and the authorities for calling out the militia in response to crises. It also differentiated “actual service” for duty on operations, from routine drill and training activities.

The government called out the militia on numerous occasions in the latter half of the century. Not only did it effectively thwart the Fenian raids and suppress two major insurrections in the West, but:

Between 1867 and 1898 the militia acted on 67 occasions to support the civil authorities and twice in penitentiaries. Called on by local authorities, soldiers responded with varying degrees of good grace, since each had to abandon his occupation and renounce his wages for an indeterminate period of time.<sup>20</sup>

Nevertheless, a significant shift in Canadian military response was about to occur.

## **IMPERIAL INTEGRATION & FOREIGN WARS**

### **The Boer War**

Towards the turn of the century, Canada began to more closely align itself with the interests and ambitions of the British Empire. In 1899 under pressure from patriotic British subjects, the Cabinet under Prime Minister Laurier agreed to send a contingent of troops to the Boer War, a decision it took without involving Parliament.<sup>21</sup> Volunteers recruited from both the Permanent and Non-Permanent Active Militia and including untrained civilians, deployed under rather unique arrangements:

Britain would assume control of the troops when they landed in South Africa and would be responsible for paying them ... Although the

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<sup>20</sup> DND, *Canadian Military Heritage* vol. 3, 573.

<sup>21</sup> Michael Dewing and Corinne McDonald, *International Deployment of Canadian Forces: Parliament's Role*, rev. ed. Background Paper PRB 00-06E Prepared for the Parliamentary Information and Research Branch of the Library of Parliament (Ottawa: Library of Parliament, 18 May 2006): i [report on-line]; available from <http://www.parl.gc.ca/information/library/PRBpubs/bp303-e.htm>; Internet; accessed 16 March 2007.

proposal had not been debated in Parliament, the government announced its readiness to equip a maximum of 1,000 volunteers and pay the costs of transporting them to South Africa ... The order to mobilize these volunteers came on the 14<sup>th</sup> [of October 1899].<sup>22</sup>

Approximately 2,500 men eventually served in the Canadian contingents dispatched to South Africa before 1902; an additional 5,000 Canadians served there in British units.<sup>23</sup>

Recognizing its responsibility to support those who served, the government established the Canadian Patriotic Fund to provide assistance to the injured and the families of those killed.<sup>24</sup>

## **The Great War**

Canada's wholehearted participation in World War I reflected an even deeper alignment with British imperial interests. Britain declared war on 4 August 1914 and the Canadian government automatically responded by issuing an order in council to the same effect later that day. When reconvened two weeks later, Parliament debated the issue as a motion within "an Address in reply to the Speech from the Throne" which was quickly adopted.<sup>25</sup> During the previous decade Canada had already taken measures in preparation to meet its imperial obligations:

The Militia Act of 1904 empowered the Governor in Council to call up part or all of the militia for active service either in Canada or externally. According to the 1911 mobilization plans, which were drawn up to reflect

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<sup>22</sup> DND, *Canadian Military Heritage* vol. 3, 577.

<sup>23</sup> DND, *Introduction to the Study of Military History* ..., 20.

<sup>24</sup> VAC, "Reference Paper: The Origins and Evolution ...."

<sup>25</sup> Michel Rossignol, *International Conflicts: Parliament, the National Defence Act, and the Decision to Participate*, Background Paper BP-303E Prepared for the Research Branch of the Library of Parliament (Ottawa: Canada Communications Group, August 1992): 1-2; [report on-line]; available from <http://www.parl.gc.ca/information/library/PRBpubs/bp303-e.htm>; Internet; accessed 14 March 2007.

British views, Canada could, in circumstances deemed critical by its government, send a contingent made up of an infantry division and a mounted brigade to fight ....<sup>26</sup>

Although ardently supported by a majority of the public, mobilization under the Militia and Defence Minister, Sam Hughes, quickly became a “bureaucratic nightmare.” Setting aside the existing plan, Hughes created a new structure of numbered battalions into which volunteers were recruited, “... opting as he told Parliament, ‘for improvisation.’”<sup>27</sup> So rather than call up militia units for service in the Canadian Expeditionary Force, “The procedure followed in 1914 was that individual militia regiments were called upon to provide volunteers for the C.E.F. units being raised in their areas.”<sup>28</sup>

The government put in place substantial veterans benefits programs to assist almost a million soldiers who had served during the war. Most significantly the new *Pension Act* of 1919 allowed for limited pensions in cases of death and disability as a result of war service. However,

For able-bodied veterans, Ottawa's plan for re-establishment offered only limited help. There was a small clothing allowance, but the main benefit was a war service gratuity, which varied in amount according to the duration and location of the veteran's service, either at home or overseas.<sup>29</sup>

A distinction was thus made concerning the nature of one's service, with those having served closest to the front receiving larger benefits.

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<sup>26</sup> DND, *Canadian Military Heritage* vol. 3, 609.

<sup>27</sup> *Far From Home: Canada and the Great War* [3 DVD set] (Toronto: Norflicks Productions, 1999), disc 1, chap. 4.

<sup>28</sup> DND, *Introduction to the Study of Military History* ..., 26.

<sup>29</sup> VAC, “Reference Paper: The Origins and Evolution ....”

## The Second World War

As a more independent nation Canada took a different approach to activating its military forces for World War II. Having taken some precautionary measures as early as 25 August 1939, the government immediately ordered the Canadian military on active service when Germany invaded Poland on 1 September.<sup>30</sup> Although Britain declared war on the 3rd, Prime Minister Mackenzie-King waited until Parliament was reconvened on the 7th before taking action on a Canadian declaration of war. Nevertheless, the government authorized the creation of the Canadian Active Service Force for mobilizing an overseas contingent through voluntary enlistment.<sup>31</sup> Subsequently, the government announced its intentions to Parliament and passed a motion in support, just as had been done in 1914, and on 10 September an order in council declaring war was issued.<sup>32</sup>

Over a million Canadians served in uniform during the war. Having learned from past experience and anticipating the extent of the re-establishment and rehabilitation effort required, the government significantly improved upon veterans programs during and after the war. Despite extending *Pension Act* benefits, however:

... an important qualification was made. By this change an enduring distinction was made between coverage under the ‘insurance principle’ and ‘compensation principle.’ Thenceforth, those serving outside the country were covered by the insurance principle, which provided coverage on a round-the-clock basis for disability or death incurred during military service, regardless of cause. By contrast, under the compensation principle, those serving inside Canada would be pensionable only for death or disability that could be directly linked to their military service.<sup>33</sup>

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<sup>30</sup> Rossignol, *International Conflicts ...*, 13-14.

<sup>31</sup> Madsen, *Another Kind of Justice ...*, 77.

<sup>32</sup> Rossignol, *International Conflicts ...*, 2-3.

<sup>33</sup> VAC, “Reference Paper: The Origins and Evolution ....”

Nevertheless, a comprehensive program of veterans benefits packaged as *The Veterans Charter* was established under the newly formed Department of Veterans Affairs.<sup>34</sup>

### **Section Summary**

Canada's reaction to foreign wars in the first half of the 20<sup>th</sup> century changed with its increasing independence from Great Britain. Reluctant to fully support imperial ambitions in South Africa, the government nevertheless decided without Parliamentary consultation to raise contingents and turn them over to the British. Better prepared to fulfill imperial obligations for the First World War, the Canadian government did not hesitate to declare war and raise troops for overseas service in support of Britain. While the government delayed its decision to participate in the Second World War until discussed in Parliament, it exercised the same executive prerogative as in 1914. Despite the differences between the wars, Canada proved willing and able to mass mobilize.

## **A NEW ERA: COLLECTIVE DEFENCE**

### **A Major Shift in Policy**

After World War II Canadian defence policy significantly shifted to embrace the new era of collective defence. In signing on to the United Nations Charter in 1945 and North Atlantic Treaty in 1949, Canada accepted that more proactive measures to maintain peace were needed.<sup>35</sup> However, this required an important change to the *NDA*.

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<sup>34</sup> *ibid.*

<sup>35</sup> DND, *Introduction to the Study of Military History ...*, 40.



Among the many amendments the 1950 *Canadian Forces Act*, the government enabled the participation of the military in collective defence actions with the addition of a new sub-section 31(1)(b). This permitted the armed forces to be "... placed on active service not only when Canada's security was threatened, but also when collective action was taken under the United Nations Charter, the North Atlantic Treaty or other collective defence arrangement."<sup>36</sup> During the debate members expressed concern that there was little role for Parliament other than to be sitting within 10 days of the government's decision after the fact. The government reaffirmed this position thereby maintaining a strict interpretation of the *NDA*'s active service provisions.<sup>37</sup>

### **A 'Special' Korean War Commitment**

The Canadian government endeavoured to meaningfully respond to the United Nations' request for military forces when the Korean War broke out on 25 June 1950. Although not officially placing them on active service (and requiring the recall of Parliament), Prime Minister St. Laurent ordered the commitment of three destroyers on 12 July and an air force transport squadron on 25 July before announcing on 7 August the decision to raise the Canadian Army Special Force (CASF), an army brigade, for service in Korea.<sup>38</sup> When the House resumed sitting on 29 August, the government introduced the new legislation that would enable it to keep these commitments, and on 9 September

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<sup>36</sup> Rossignol, *International Conflicts ...*, 14.

<sup>37</sup> *ibid.*, 14.

<sup>38</sup> H.W. Thomas, *Report No. 62 – Canadian Participation in the Korean War, Part I: 25 June 50 – 31 Mar 52*, Report Prepared for the Army Headquarters Historical Section, Department of National Defence (Ottawa: n.p., 21 May 1953), 14-16; [report on-line]; available from <http://www.forces.gc.ca/dhh/downloads/ahq/ahq062.pdf>; Internet; accessed 12 March 2007.

issued Privy Council (P.C.) Order 1950-4365 authorizing active service in Korea. But by refusing to table a direct resolution to authorize the deployments, the government thus retained its ‘free hand’ to deploy the military without direct Parliamentary involvement.<sup>39</sup>

The government exercised a unique approach in establishing the CASF. It was formed by the enlistment of volunteers into newly created units that were initially part of the (regular) Army Active Force. Intending, however, to disband the CASF at the end of the Korean conflict, the government later authorized (under the requisite provisions of the newly amended *NDA*) the embodiment of the CASF units within the Special Force—the only time this ever been done.<sup>40</sup> Consequently, owing to the temporary conditions of their enlistment, members were extended benefits under the Veterans Charter but not provided with housing or education benefits for their dependents.<sup>41</sup>

## **NATO Service**

Canadian defence response posture changed again when Canada agreed in the fall of 1950 to contribute to a NATO “integrated force” in Europe.<sup>42</sup> In May 1951 the Defence Minister, Brooke Claxton, announced the formation of the 27th Canadian Infantry Brigade Group to this end. Initially recruited from the Reserve Force, the

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<sup>39</sup> Rossignol, *International Conflicts* ..., 8-9 and 15-16.

<sup>40</sup> Thomas, *Report No. 62* ..., 17-26.

<sup>41</sup> VAC, “Reference Paper: The Origins and Evolution ....”

<sup>42</sup> R.B. Oglesby, *Report No. 51 – The 27<sup>th</sup> Canadian Infantry Brigade Group, February 1951 – May 1952*, Report Prepared for the Army Headquarters Historical Section, Department of National Defence (Ottawa: n.p., 6 May 1952), 2; [report on-line]; available from <http://www.forces.gc.ca/dhh/downloads/ahq/ahq051.pdf>; Internet; accessed 12 March 2007.

members of the brigade became part of the Regular Force, “under Active Force terms and conditions of service and thus eligible for service anywhere.”<sup>43</sup>

Anticipating the need for rapid reaction to an attack from the Soviet Union, the government placed Canadian military forces assigned to NATO duty on active service under P.C. 1951-5598. Through a series of subsequent orders in council, the CF has remained continuously on active service for NATO since then;<sup>44</sup> the latest version, P.C. 1989-583 issued on 6 April 1989 clearly states:

... for the purpose of fulfilling Canada's obligations under the North Atlantic Treaty, to place,  
 (a) officers and non-commissioned members of the regular force of the Canadian Forces on active service anywhere in or beyond Canada; and  
 (b) officers and non-commissioned members of the reserve force of the Canadian Forces on active service anywhere beyond Canada.<sup>45</sup>

Obviously a broad interpretation of this order is possible.

### **Peacekeeping: The Early Years**

Following the Korean War and initial NATO deployments, Canada increasingly embraced a role as the world's pre-eminent peacekeeper. In response to the Suez Crisis of 1956, Prime Minister Pearson proposed the creation of the first United Nations (UN) peacekeeping force. Under the mandate of the UN Charter, Canada dispatched elements of the regular forces, eventually exceeding 1,000 troops.<sup>46</sup> Further peacekeeping

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<sup>43</sup> *ibid.*, 3.

<sup>44</sup> Rossignol, *International Conflicts ...*, 16-17.

<sup>45</sup> Privy Council, *Order Placing Members of the Canadian Forces on Active Service for the Purpose of Fulfilling Canada's Obligations Under the North Atlantic Treaty*, SI/89-103; <http://laws.justice.gc.ca/en/showdoc/cr/SI-89-103///en?page=1>; Internet; accessed 24 February 2007.

<sup>46</sup> Robert L. Boyer, “Canada and the United Nations Emergency Force: 1956-1967,” *Canadian Army Journal* 9, no. 1 (Spring 2006): 3-4 [journal on-line]; available from

missions followed in a similar fashion. Each time the government formalized its commitment; as Parliamentary policy analyst Michael Rossignol points out:

... it became the practice to issue orders in council whenever a significant number of Canadian military personnel participated in specific missions, such as in U.N. peacekeeping operations. Examples are: P.C. 1956-1712 for the Suez peacekeeping mission in 1956; P.C. 1960-1080 for the Congo operation in 1960; and P.C. 1964-389 for the Cyprus mission in 1964.<sup>47</sup>

By 1964 a number of death and disability cases had arisen from peacekeeping but were ineligible for war veterans benefits under the *Pension Act*. As a result the government issued the *Special Duty Area Pension Order* that provides, according to CF Administrative Order 56-18, "... that special pension provisions will apply to members of the CF serving in certain areas outside Canada when those areas have been designated by the Governor in Council as Special Duty Areas."<sup>48</sup> In essence, once a special duty area has been designated, any injury or death occurring in that area regardless of circumstances will entitle members or their survivors to pension benefits in accordance with the *Pension Act*. Thereafter, each time CF members deployed to a new conflict area the government issued an order in council designating that area as a special duty area. However, prior to 1991 Canadian peacekeepers were still not considered *bona fide* veterans and thus received little else in the way of veterans benefits.<sup>49</sup>

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[http://www.army.forces.gc.ca/caj/documents/vol\\_09/iss\\_1/CAJ\\_vol9.1\\_02\\_e.pdf](http://www.army.forces.gc.ca/caj/documents/vol_09/iss_1/CAJ_vol9.1_02_e.pdf); Internet; accessed 16 April 2007.

<sup>47</sup> Rossignol, *International Conflicts ...*, 17.

<sup>48</sup> Department of National Defence, Canadian Forces Administrative Order 56-18, "Pension – Special Duty Area," para. 3 [orders on-line]; available from [http://www.admfincs.forces.gc.ca/admfincs/subjects/cfao/056-18\\_e.asp](http://www.admfincs.forces.gc.ca/admfincs/subjects/cfao/056-18_e.asp); Internet; accessed 25 February 2007.

<sup>49</sup> VAC, "Reference Paper: The Origins and Evolution ...."

## **Section Summary**

A major revision of the *NDA* in 1950 permitted the activation and deployment abroad of CF elements for collective defence purposes. This enabled a timely response to the Korean conflict, the establishment of a standing response force in Europe to counter Soviet aggression, as well as participation in dozens of UN peacekeeping missions. However, inconsistency in the government's approach to 'activating' military forces questions the legitimacy of the process. Further ambiguity is apparent in the 'blanket' active service authorization for NATO duty. Finally, while special duty area orders provided access to pension benefits for thousands of CF members on peacekeeping missions abroad, veterans benefits programs in general had not adjusted to collective defence realities.

## **POST-COLD WAR REALITIES**

### **Peace-enforcement: The Difficult Years**

At the end of the Cold War Canada again shifted its defence focus to participate in more assertive 'peace-enforcement' as sanctioned by UN Security Council resolutions. The 1990-91 Persian Gulf War provided the first opportunity to exercise this approach. Faced with a more determined aggressor than in the typical peacekeeping scenario, the UN Security Council passed a number of resolutions authorizing a robust military intervention by a coalition of member nations. According to Rossignol:

Since the measures taken against Iraq, like those against North Korea in 1950, did not require Canada to declare war, it was not necessary for Parliament to debate a declaration of war. It was also within the powers of

the government, without recalling Parliament, to authorize other actions taken by Canada shortly after Iraq's invasion of Kuwait.<sup>50</sup>

On 10 August 1990 the government authorized the deployment of a naval task group to the Gulf, but without issuing an order in council until 15 September, only nine days before Parliament was scheduled to reconvene. After lengthy discussion on the process, a motion was finally passed in the House of Commons on 23 October approving the deployment of CF elements to the Arabian Peninsula.<sup>51</sup> In response to a UN resolution sanctioning the use of force on 15 January 1991, the government recalled Parliament to debate and pass motions reaffirming CF participation in the hostilities.<sup>52</sup>

Generally similar circumstances prevailed for a host of other peace-enforcement missions during the 1990s. For example, when the opposition attempted to force a debate over the mission to Somalia in 1992, the government re-iterated its entitlement to exercise its prerogative in sending troops without a preliminary debate. The Kosovo mission in 1998 likewise generated concerns about the lack of Parliamentary involvement in committing the CF to combat.<sup>53</sup> Moreover, despite being one of the most demanding of the late-20<sup>th</sup> century, the mission in the former Yugoslavia appears to reflect the most striking disconnect between government commitment and Parliamentary oversight.<sup>54</sup>

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<sup>50</sup> Rossignol, *International Conflicts ...*, 11-12.

<sup>51</sup> *ibid.*, 18-19.

<sup>52</sup> Dewing & McDonald, *International Deployment of Canadian Forces ...*, vi-vii.

<sup>53</sup> *ibid.*, vii-x.

<sup>54</sup> *ibid.*, xix-xxii.

## **Response to 9/11**

Following the horrific terrorist attack on the United States on 11 September 2001, Canada demonstrated firm resolve in coming to the aid of her closest ally. On 7 October 2001, Prime Minister Chretien responded to American requests for military assistance by instructing “the chief of defence staff to issue a warning order to a number of units of our Armed Forces to ensure their readiness.”<sup>55</sup> The next day the defence minister announced the commitment of a significant Canadian military contribution to the US-led coalition in South-West Asia.<sup>56</sup> While the government had good cause to invoke NATO’s Article 5 in response to the attack, this was never done; however, weeks later the minister linked the CF commitment to the UN Charter’s Article 51.<sup>57</sup> Despite thousands of Canadians having been deployed in support of this mission—the most dangerous since the Korean War—no order in council placing elements of the CF on active service in Afghanistan has yet been issued.

## **Continental Defence & Security**

Closer to home Canada has played an active role in maintaining continental defence and security. Since the signing of the North American Air Defence (NORAD)

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<sup>55</sup> “Chretien: Cdn troops ‘will do Canada proud,’” *CTV.ca*, 7 October 2001 [news report on-line]; available from [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1025062429054\\_20471629](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1025062429054_20471629); Internet; accessed 13 April 2007.

<sup>56</sup> Department of National Defence, “Minister's Speeches Archive – Speaking Notes for the Honourable Art Eggleton Minister of National Defence Press conference: Canadian military contributions - National Defence Headquarters Ottawa, Ontario, October 8, 2001,” [http://www.dnd.ca/site/newsroom/view\\_news\\_e.asp?id=518](http://www.dnd.ca/site/newsroom/view_news_e.asp?id=518); Internet; accessed 13 April 2007.

<sup>57</sup> Department of National Defence, “Minister's Speeches Archive – MND Statement in the House of Commons – Ottawa, Ontario, November 19, 2001,” [http://www.dnd.ca/site/newsroom/view\\_news\\_e.asp?id=517](http://www.dnd.ca/site/newsroom/view_news_e.asp?id=517); Internet; accessed 13 April 2007.

Agreement in 1957, Canadian air force elements have been continuously engaged in monitoring and responding to airborne threats to the continent, including the physical interception of foreign aircraft. Similarly, Canadian naval elements conduct coastal patrols to enforce sovereignty and protect Canadian offshore economic interests. Moreover, the Land Force maintains ‘immediate response units’ or IRUs for emergency contingencies. While the activities of these elements are normally somewhat routine, they all can involve higher risk when active response is required.

### **Humanitarian & Domestic Operations**

CF members have also increasingly been employed on a variety of foreign humanitarian assistance and internal domestic operations over the years. Although both the *Emergencies Act*<sup>58</sup> and the *NDA* prescribe the manner in which the CF gets committed to this latter type of mission, the process is less clear for those of the former. While in most cases occurring under benign circumstances, others have involved heightened levels of danger as a result of hostile environments or the potential for violence, in particular ‘aid to the civil power’ situations; strangely, no orders in council have been issued to activate the CF for these types of missions. Engaged in the most continuous domestic operations, CF search and rescue elements must remain highly responsive to civil emergencies and also face an inherently higher than normal level of risk.

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<sup>58</sup> *Emergencies Act*, 1985, c. 22 (4<sup>th</sup> Supp.) [statutes on-line]; available from <http://laws.justice.gc.ca/en/ShowFullDoc/cs/E-4.5///en>; Internet; accessed 24 March 2007.



## Section Summary

Confronted by the realities of the post-Cold War world, Canada has taken a more comprehensive approach to military response. Although tens of thousands of CF members have served on a variety of overseas operations since 1989, the government continues to respond inconsistently in activating the CF for international crises. Inconsistent as well has been Parliamentary oversight of other high-risk CF activities in spite of the active service provisions of the *NDA*.

## PART II: ANALYSIS OF THE CURRENT SITUATION

### CLARIFYING OR CONFUSING THE CONCEPT?

As demonstrated in Part I, ambiguity remains over the applicability of the active service provisions of the *NDA*. Two recent Parliamentary research documents have attempted to clarify the situation. Commenting on concerns about the dispatch of CF elements to the Persian Gulf War, Rossignol highlights the fact that parliamentarians had difficulty understanding the concept of active service for the CF.<sup>59</sup> In reply he suggests:

In fact, placing the military on active service is done for bureaucratic reasons. Some Canadians may have the impression that the Canadian military cannot become involved in combat operations or cannot be deployed until they are on active service, but in fact active service is important for other reasons.<sup>60</sup>

These important other reasons will be explained in the next section. Rossignol later asserts that as a result of P.C. 1989-583, all CF personnel continue to be on active service at all times to meet NATO commitments. But if so, active service effectively becomes a

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<sup>59</sup> Rossignol, *International Conflicts ...*, 15.

<sup>60</sup> *ibid.*

meaningless concept, especially considering the conditions of service for those on NATO duty over the past few decades. Nevertheless, he continues to argue that:

Although Canadian military personnel were already on active service for NATO duties, it became the practice to issue orders in council whenever a significant number of Canadian military personnel participated in specific missions, such as in U.N. peacekeeping operations.<sup>61</sup>

Finally he claims that active service can be ordered retroactively after the CF has been deployed.<sup>62</sup> However this would essentially negate the purpose of section 32 of the *NDA* if in fact it exists to permit Parliament to be informed of operational deployments of the CF in a timely manner (i.e. within 10 days if not sitting).

Seeking to clarify Parliament's role in the deployment of the CF, Dewing and McDonald state:

As a matter of Canadian constitutional law, the situation is clear. The federal Cabinet can, without parliamentary approval or consultation, commit Canadian Forces to action abroad, whether in the form of a specific current operation or future contingencies resulting from international treaty obligations.<sup>63</sup>

They then support the argument that "blanket" active service orders (such as P.C. 1989-583) limit the effectiveness of section 32, and also that government application of active service orders has been inconsistent, particularly when considering both offensive and non-offensive missions.<sup>64</sup> Moreover they contend that, "Active service status is not a prerequisite to the deployment of military forces within or outside of Canada, or to the

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<sup>61</sup> *ibid.*, 17.

<sup>62</sup> *ibid.*, 18.

<sup>63</sup> Dewing & McDonald, *International Deployment of Canadian Forces ...*, 1.

<sup>64</sup> *ibid.*, 3.

liability of CF members to serve.”<sup>65</sup> Observing that since 1990 several attempts have been made by opposition members to introduce reforms to the military deployment decision process, they note as well an increase in efforts to involve parliamentarians in it.<sup>66</sup> Yet regardless of other activities that transpire to keep elected officials involved, sections 31 and 32 remain in law. If the government does not comply with them then they have essentially become meaningless as a mechanism for informing Parliament about important defence and security decisions.

### **OTHER IMPORTANT REASONS**

The previous section mentioned two other important reasons for active service. The most significant relates to the extension of *Pension Act* benefits under the ‘insurance principle’ as opposed to the ‘compensation principle.’ This concept took root in the early days of World War II when orders in council were issued to extend pension benefits to Canadians serving in uniform during the war. According to the 2004 Veterans Affairs reference paper the result was that:

... those serving outside the country were covered by the insurance principle, which provided coverage on a round-the-clock basis for disability or death incurred during military service, regardless of cause. By contrast, under the compensation principle, those serving inside Canada would be pensionable only for death or disability that could be directly linked to their military service.”<sup>67</sup>

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<sup>65</sup> *ibid.*, 2 (see note 6).

<sup>66</sup> *ibid.*, 7-10.

<sup>67</sup> VAC, “Reference Paper: The Origins and Evolution ...”

As previously mentioned, the government continues to amend the *Special Duty Area Pension Order*<sup>68</sup> to cover special duty area service. In 1998 the Standing Committee on National Defence and Veterans Affairs recommended that hazardous duty within Canada also be included under the special duty area provisions.<sup>69</sup> The government apparently listened:

July 2003 amendments were made to the *Pension Act* and the *Royal Canadian Mounted Police Superannuation Act* to create a new category of service, Special Duty Operations, in which individuals would be eligible for disability pension coverage under the insurance principle ... to cover operations that are not geographically limited and that expose members to conditions of elevated risk, either inside or outside Canada ... It was anticipated that this provision would improve the benefits and extend peace of mind to those engaged in such hazardous operations as search and rescue, disaster relief, and anti-terrorism operations.<sup>70</sup>

Moreover, a ‘New Veterans Charter’<sup>71</sup> has been established with the coming into force of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, 2005. This latest legislation provides all CF members (according to their particular circumstances) with a comprehensive program of veterans services similar to those limited to only war veterans in the past. It also introduces the much more meaningful term ‘special duty service,’ defined as: “... service as a member in a special duty area

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<sup>68</sup> *Special Duty Area Pension Order*, SOR/2001-496 [statutory instruments on-line]; available from <http://laws.justice.gc.ca/en/showtdm/cr/SOR-2001-496>; Internet; accessed 24 February 2007.

<sup>69</sup> See recommendation 55 of Standing Committee on National Defence and Veterans Affairs, *Moving Forward – A Strategic Plan for Quality of Life Improvements in the Canadian Forces* (Ottawa: n.p., October 1998) [report on-line]; available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=117&Lang=1&SourceId=36210>; Internet; accessed 18 April 2007.

<sup>70</sup> VAC, “Reference Paper: The Origins and Evolution ...”

<sup>71</sup> Veterans Affairs Canada, “The New Veterans Charter for CF Veterans and their Families – Minister’s Corner,” [http://www.vac-acc.gc.ca/clients/sub.cfm?source=forces/nvc/min\\_corn](http://www.vac-acc.gc.ca/clients/sub.cfm?source=forces/nvc/min_corn); Internet; accessed 18 April 2007.

designated under section 69, or as a member as part of a special duty operation designated under section 70, during the period in which the designation is in effect.”<sup>72</sup>

Dewing and McDonald echo the ‘other important reasons’ for active service noted by Rossignol, claiming that:

Active service status does ... have implications for soldiers in terms of: coverage for benefits under the *Canadian Forces Superannuation Act*; the timing of release from the forces; the application of the Code of Service Discipline to reserve members in certain circumstances; and the applicability or aggravation of certain military offences.<sup>73</sup>

While to some extent the latter implications could be covered by a simple swap of terminology in the *NDA* (i.e. ‘special duty service’ for ‘active service’), the first contention is no longer valid (notwithstanding the apparent mistake in naming the appropriate act). As described above, CF members do not need to be placed on active service in accordance with section 31(2) of the *NDA* to be covered for pension benefits arising from military service; the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* has nullified this requirement.

## **THE WAY AHEAD**

The preceding analysis demonstrates that the context and the concept of active service have significantly changed since 1868; as such the term has become meaningless. Although the term ‘special duty service’ could be introduced into the *NDA* to replace ‘active service’ in relation to disciplinary and release provisions under broader conditions

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<sup>72</sup> *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, 2005, c. 21, s. 2(1) [statutes on-line]; available from: <http://laws.justice.gc.ca/en/c-16.8/index.html>; Internet; accessed 24 February 2007.

<sup>73</sup> Dewing & McDonald, *International Deployment of Canadian Forces ...*, 2 (see note 6).

of hazardous circumstances, the problem of government inconsistency in the application of sections 31 and 32 remain.

A solution has already been suggested. Introduced as a private member's bill in 1994, *Bill C-295, The Peacekeeping Act*<sup>74</sup> proposed to place greater Parliamentary control over peacekeeping missions by requiring a debate and a vote in the House of Commons to approve all such missions in advance of deployment. The bill was defeated at second reading<sup>75</sup> probably for the considerable restraints it would have placed on the government's long-established executive prerogative. Such legislation would certainly reinforce the need for sections 31 and 32 in the *NDA*; absent it (or something similar), the active service provisions of the *NDA* should therefore be removed as irrelevant.

## CONCLUSION

Canada's first defence legislation, the *Militia Act* of 1868 established a clear and distinct meaning for the term active service. Whether reporting for routine drill and training, or called out in response to an emergency, a Canadian militiaman of the 19<sup>th</sup> century became active when he put on his uniform, shouldered his weapon, and subjected himself to military discipline regulations. Over the decades as a small permanent force took shape and external events drew thousands of Canadians into foreign conflict, the concept of active service got distorted. While obliged to inform Parliament about its

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<sup>74</sup> House of Commons, *Bill C-295, Peacekeeping Act*, 42-43 Elizabeth II, 1994 [government bills on-line]; available from: [http://www2.parl.gc.ca/content/hoc/Bills/351/Private/c-295/c-295\\_1/351231bE.html](http://www2.parl.gc.ca/content/hoc/Bills/351/Private/c-295/c-295_1/351231bE.html); Internet; accessed 25 March 2007.

<sup>75</sup> House of Commons, *Hansard*, 19 June 1995: 2510 [transcript on-line]; available on-line at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=Hansard&doc=221&Language=E&Mode=1&Parl=35&Ses=1#14183>; Internet; accessed 25 March 2007.

military response to crises, successive governments in the 20<sup>th</sup> century continue to act inconsistently in following the active service provisions of the *NDA*.

The concept has also become insignificant as a result of veterans benefits modernization. Once limited to war service only, the ‘insurance principle’ for pension benefits now encompasses all special duty service involving heightened levels of risk. As a result, CF members no longer need to be placed on active service to be eligible. Therefore, without legislation that would make the government more accountable to Parliament for its military response decisions, the active service provisions of sections 31 and 32 of the *NDA* have become meaningless and should be eliminated.

This paper has provided a broad historical perspective on the concept of active service. Further research could explore the policy response options raised since 1990 that might suggest more acceptable legislation to control the government’s military response that satisfies the people, provides meaning to the military, and informs the actions of the government. After all,

This ‘remarkable or paradoxical trinity,’ as it has been called, is Clausewitz’s framework, or model, for understanding the changeable and diverse nature of war. The forces that comprise it—blind emotion, chance, and politics—function like ‘three different codes of law, deeply rooted in their subject and yet variable in their relationship to one another.’ They, in turn, correspond to three representative bodies—the character and disposition of the populace, skill and prowess of the military, and wisdom and intelligence of the government.<sup>76</sup>

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<sup>76</sup> Antulio Echevarria II, “War, Politics, and RMA—The Legacy of Clausewitz,” *Joint Force Quarterly* no. 10, (Winter 1995-96): 78 [journal on-line]; available from [http://www.dtic.mil/doctrine/jel/jfq\\_pubs/1810.pdf](http://www.dtic.mil/doctrine/jel/jfq_pubs/1810.pdf); Internet; accessed 20 April 2007.

**APPENDIX 1: NATIONAL DEFENCE ACT, SECTIONS 31 & 32<sup>77</sup>**

31. (1) The Governor in Council may place the Canadian Forces or any component, unit or other element thereof or any officer or non-commissioned member thereof on active service anywhere in or beyond Canada at any time when it appears advisable to do so

- (a) by reason of an emergency, for the defence of Canada;
- (b) in consequence of any action undertaken by Canada under the United Nations Charter; or
- (c) in consequence of any action undertaken by Canada under the North Atlantic Treaty, the North American Aerospace Defence Command Agreement or any other similar instrument to which Canada is a party.

(2) An officer or non-commissioned member who

- (a) is a member of, serving with, or attached or seconded to, a component, unit or other element of the Canadian Forces that has been placed on active service,
- (b) has been placed on active service, or
- (c) pursuant to law has been attached or seconded to a portion of a force that has been placed on active service,

shall be deemed to be on active service for all purposes.

32. Whenever the Governor in Council places the Canadian Forces or any component or unit thereof on active service, if Parliament is then separated by an adjournment or prorogation that will not expire within ten days, a proclamation shall be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit on the day appointed by the proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day.

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<sup>77</sup> *National Defence Act*, R.S., 1985, c. N-5 [statutes on-line]; available from: <http://laws.justice.gc.ca/en/ShowFullDoc/cs/N-5///en>; Internet; accessed 24 March 2007.



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