

THE LEGAL STATUS OF THE CANADIAN SOLDIER 1914-19

It is always an absorbing occupation to ruminate on the relations and implications of facts, however diverse in kind or separated in origin and time. So it may be interesting to reflect on the connection that exists between the 2nd Battalion, P.P.C.L.L., now fighting in Korea as part of the 29th Commonwealth Brigade, and a lengthy legal memorandum, spiked in a crumpled file cover, and bearing date 18 September, 1916. The Princess Pats are on active service in 1951 as part of a British Commonwealth Force resisting Communist aggression in Asia. The eighteen page memorandum, thirty-four years in the files, (1) played a part in this latest example of the impressive evolution and devolution of the British Commonwealth and Empire that beginning with Durham and Howe, was formulated by Laurier, Borden and Balfour, and hastened by the Great Wars of 1914-1919 and 1939-1945. This nearly ephemeral Empire, now shorn of political subordination, has retained a web of invisible community as light as gossamer. The 29th Brigade in Korea is testimony to its present strength; the long memorandum is evidence of its past development. This memorandum defined a concept previously uncertain, namely, the independent legal status of the Canadian Soldier serving abroad and is one of the little known steps on the Canadian climb to Dominion status.

The advance to Dominion Status which Canada made between 1914 and 1919 is illuminated by the contrast between the Declaration of War by Sir Edward Grey, effective throughout the Empire and the signature of the Peace Treaty by Sir Robert Borden, for Canada alone. Advance came swiftly and easily in those years. This celerity was due primarily to the respect won by the magnificent fighting ability of the Canadian Army Corps whose prestige made any serious resistance to Borden's claims for international recognition virtually impossible. Thus, the legal status of the men of the Corps was obviously important. The greater their independence the greater the amount of prestige Canada could extract from their victories. However it was not until after two years of war that this status was investigated, understood and defined. By the interesting inconsequence of British institutions, this understanding came about accidentally because the Prime Minister of Canada wanted to replace one Cabinet Minister by two others.

In September, 1916, Sir Robert Borden, then Prime Minister of Canada, was nursing a painful problem. He was slowly, reluctantly, but perceptibly being pushed to a decision to re-organize the Department of Militia and Defence; a decision which, when taken, he was certain would humiliate the Militia Minister, Major-General the Hon. Sir Sam Hughes, Borden's most colorful, most loyal and most exasperating colleague. Considering Sir Sam's sensitivity this decision might lead to the Minister's resignation. But the Prime Minister had become convinced that the administration of the Canadian Army overseas was so chaotic that a drastic re-organization was imperative; and this re-organization Sir Sam seemed unable or unwilling to effect.

In 1914 the Militia Minister had performed prodigies of organization and improvisation. His energy had made possible the landing of the First Contingent on Plymouth Hoe, armed and equipped, seventy-one days after the declaration of war. It was a wonderful feat. However, by 1916, despite his positive qualities of energy, imagination and leadership, his continual indiscretions had made him a political liability to the Prime Minister. He was on bad terms with most of his colleagues. He was violently unpopular in Quebec, with those imperialists whom he had alienated by the Bruce Report, and in military circles, suspicious of political favouritism and aroused by the Ypres Letter incident. (2) "It had become essential", writes Sir Robert in his MEMOIRS, "to curtail the activities of Hughes and to place in the hands of a responsible Minister in London, the disposition of all

(1) P.A.C., E. L. Newcombe to Sir R. L. Borden, Confidential memo., 18 Sept. 1916
Overseas Ministry File (OMF) No. 8.

(2) VINCE, Capt. D. M. A. R.; "The Overseas Sub-Militia Council . . .";
in C.H.R., March, 1950.

such "matters affecting the welfare of the Canadian army as were properly the subject of the civil authority . . . finally I determined to appoint a Minister of Overseas Forces who would take over certain well defined duties and thus relieve the Government from the unfortunate results of Hughes' visits abroad." (3)

A lawyer, Sir Robert realized that before alterations were made in the method evolved for the control of the C.E.F., it was necessary to be absolutely certain the contemplated changes lay within the constitutional powers of the Dominion Government. Accordingly, either in preparation for action or to buttress decision, he consulted the Deputy Minister of Justice, Edmund Leslie Newcombe (later Mr. Justice Newcombe of the Supreme Court of Canada). Mr. Newcombe was requested directly and in confidence, to give an opinion on the nature of the legal relations existing between the Canadian Expeditionary Force and the Government. In Newcombe's long memorandum in reply those distinctions were first drawn which clearly established the status of the Canadians in the C.E.F. as "volunteer Militia on active service, employed in defending their country abroad." (4) Thus any Imperial legal ties on the Canadian forces were eliminated. Apparently this important and significant distinction was drawn only accidentally as a necessary legal support for the main purpose of the memorandum—which purpose appeared in its last paragraph. This recommended: "the establishment of a Canadian Ministry of War in London, charged with the administration of the overseas forces." (5)

Like the Prime Minister, Newcombe was a Nova Scotian, a graduate of Dalhousie University, a Conservative, and a barrister. Born in Cornwallis, N.S. in 1857; he had been graduated from Dalhousie,—B.A., 1878; and was awarded a degree in law by Harvard in 1881. By 1893, the year in which he was appointed Deputy Minister of Justice by yet another Nova Scotian, Sir John Thompson, he was a well-known Halifax barrister, a Governor and Lecturer of his University. (6) He was a pleasant person—"Always ready and courteous, a gentleman to his finger tips" (7)—and it was a pleasure to do business with him. Fond of shooting, and regarded as a "mighty hunter" he was considered to be "deliberate in pleading and careful in counsel." (8) It was said of him that "so well does he invariably consider his points that he is never found spending one day in undoing what he did the day before." (9) He was worthy of the Prime Minister's confidence and capable of a clear, concrete opinion. This was desirable for, by 1916, the legal position of the Canadian soldier abroad was abstruse and complicated.

In the hectic August days of 1914 Sir Sam Hughes had discarded the prepared mobilization scheme in a single night-lettergram. In this he had sent the word "to every officer commanding a unit in any part of Canada to buckle on his harness and get busy." (10) One consequence was "that in a short time we had the boys on the way . . . Under that plan the contingent was practically on the way to Europe before it could have been mobilized under the ordinary plan." (11) Another result was that there was no time for careful thought about the status of the contingent. But while there was no long time for consideration: ". . . the status of the volunteers, and of the force as a whole, early attracted the attention of the authorities at Ottawa, because it was important that all should be legally subject to military law. There was no doubt

(3) BORDEN, Henry (ed) *Robert Laird Borden His Memoirs* (Toronto, 1938), II, 567.

(4) DUGUID, Col. A. F., *Official History of the Canadian Forces in the Great War 1914 - 1918* (Ottawa, 1938), I, Appendix 8.

(5) Newcombe to Borden, 18 Sept., 1916, OMF, No. 8.

(6) V. MORGAN, H. J., *The Canadian Men and Women of the Time*, (Toronto, 1912), 849.

(7) *Loc. cit.*

(8) *Loc. cit.*

(9) *Loc. cit.*

(10) *Debates, House of Commons*, 26 Jan., 1916, I, 292.

that corps of the Active Militia placed on active service in Canada could be brought under military law by Order in Council as provided in the Militia Act, but there was doubt whether the overseas expeditionary force contemplated would fulfil the qualification of the said Act as to defence:—

The Governor in Council may place the Militia, or any part thereof, on active service any where in Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency . . .

A request was therefore made on 5th August that the King should bring the volunteers under sections 175 and 176 of the Army Act, which was met when His Majesty on 9th August ordered the Governor General to raise the troops for service as an expeditionary force. Consequently every recruit for that force, when attested, was cautioned that he would be subject to the Army Act." (12).

"In the first call for volunteers . . . it had been declared "the force will be Imperial and have the status of British regular troops". (13) This declaration was natural enough. In the mobilization plan which the Minister had brushed aside there was no provision for administrative organization or political control once a force left Canadian shores. The Canadians who had formed British Regiments of Foot in 1812-1814 had become part of the Regular Army. So had the volunteers who had fought in the Crimea and through the Indian Mutiny and the men of the 100th Foot (Royal Canadians) on embodiment in 1858. Even the contingents sent to South Africa had been paid and administered by the Imperial authorities "after their arrival there, Canada merely making up the difference between the Imperial scale of pay and her own." (14)

That this notion of Imperial Service still lingered in 1914 is clear from the phrases in the night-lettergram of August 6; "force will be Imperial . . . status of British regular troops." (15) Not until 1916, when Newcombe wrote his memorandum, "was it realized that the C.E.F. was not, in fact, "Imperial"—i.e. raised by His Majesty beyond the limits of the United Kingdom and of India to form part, for the time being, of the regular forces; and paid and maintained from an annual vote by the Parliament of the United Kingdom. It was, PER CONTRA, a force raised by order of the King in one of His Overseas Dominions, to form part, for the time being, of the Armies of the British Empire, and paid for and maintained with monies voted by the Parliament of Canada." (16).

Newcombe, to reach this understanding, naturally began his analysis by looking at "the statutory provisions under which (the Canadian Forces) . . . are raised, equipped and maintained." (17) These were soon found for they rested in the British North America Act, 1867, Section 15; the Militia Act, 1906, as supplemented by the Army Act and the War Measures Act, 1914; and the "provisions of the Appropriations Bills sanctioned by Parliament during the three sessions . . . since the war began." (18) Of necessity, his investigation also involved "examination of the various Orders-in-Council or regulations passed by the Governor General in Council in the execution of his delegated powers of legislation."

(11) *Loc. cit.*

(12) DUGUID, *op. cit.*, I, 22.

(13) *Ibid.*, I, 25.

(14) STACEY, Col. C. P., *The Military Problems of Canada* (Toronto, 1940), 68.

(15) DUGUID, *op. cit.*, I, 22.

(16) *Ibid.*, I, 25.

(17) Newcombe to Borden, 18 Sept., 1916, OMF. No. 8.

(18) *Ibid.*

The British North America Act and the War Appropriations Acts Newcombe dealt with quickly. The B.N.A. Act, Section 15, made explicit for Canada the implicit principle of British law that the "prerogative of command of the colonial forces remains in His Majesty." But "the exercise of the command is delegated to the Governor General by his Commission, and must doubtless be exercised subject to the statutory provisions by which it is regulated, and upon the advice of the King's Privy Council for Canada." (19) Thus the B.N.A. Act was disposed of in a sentence.

Next the Appropriations Acts were dismissed in a paragraph:
 "... It may be observed here, so that the further consideration of the case may not be involved with any question of financial dispositions, that the . . . Acts . . . authorize . . . the payment . . . [of] the expenses which may be incurred by or under the authority of the Governor-in-Council during the respective fiscal years for the *Defence and security of Canada and the conduct of naval or military operations in or beyond Canada.*"

These two sets of statutes analysed, Newcombe investigated the Militia Act more thoroughly. After considering the relevant sections of the Act—2, 10, 16, 17, 22, 23, 25, 28, 69, 72, 74, 144-146—*Seriatim*, he summarized their contents: "It will be observed that there are special provisions for time of war; the Governor-in-Council is authorized to place the militia on active service beyond Canada for the defence thereof, and the command and period of service are specially regulated. The Act was intended to be adequate for the purpose of raising and despatching a force to defend the country abroad."

Continuing this investigation of the statutes, Newcombe then delved into the Army Act of the United Kingdom, made applicable to Canada by Section 74 of the Militia Act. The Army Act provided for two classes of colonial forces: "... There may be colonial forces raised by the Government of a colony, and forces raised in a colony by direct order of His Majesty *to serve as part of the regular forces.*" Since forces in the latter class were "paid and maintained by moneys voted annually by the Imperial Parliament," they were, in fact, "Imperial forces, although raised and serving in a colony." Hence this class could not encompass the troops of the C.E.F.

Up to this point Newcombe's argument had run clear and unhindered. Here, however, he was forced to consider the question of extra-territoriality since in 1916 it was generally held that the British North America Act did not confer powers of jurisdiction outside the territorial limits of Canada. He escaped this restriction by reference to Section 177 of the Army Act which included the words:

"... Where any force of volunteers, or of Militia or any other force, is raised in India, or in a colony, any law of India or the colony may extend to the officers, non-commissioned officers and men belonging to such force, whether within or without the limits of India or the colony . . ."

Newcombe observed:

"This section is important, not only as indicating the law which is to be applied to colonial forces, but as enacting constitutional provisions enlarging the powers of colonial legislatures. Under the ordinary constitutional powers such as are evidenced by the British North America Act, extra-territorial legislative authority is probably not conferred; but it will be observed that Section 177 of the Army Act declares in terms that where a force is raised in a colony any law of the colony may extend to the officers, non-commissioned officers and men of the force, whether within or *without the limits of the colony*, and I apprehend that this section has, upon the face of it, application only to military forces raised in a colony *by colonial authority*; and, moreover, that it does not apply to such forces as are raised by His Majesty's order at Imperial expense would seem to be

manifest by the provisions of Section 175 (4) and 176 (3) above quoted.
" Section 177 therefore affords adequate sanction for any of the provisions of the Militia Act which might fail by reason of their extra-territorial application "

He concluded that: ". . . assuming the Canadian Expeditionary Force to have been aptly enrolled for the purpose, it stands subject to the Militia Act and the King's Regulations, in the same manner and to the same degree, whether during the period of training in Canada, in Great Britain or upon service at the Front in connection with His Majesty's regular forces, as if all these operations were being carried out within Canada." (20) This conclusion, Newcombe thought, "is not affected by any of the regulations or provisions which have been sanctioned by His Royal Highness under the War Measures Act."

He did think, though, that there "evidently was, at the beginning of the war, some misapprehension of the legal situation in respect of the project of affording military aid." After detailing the various cables which had passed between the Secretary of State for the Colonies and the Governor General, and the Orders-in-Council pertinent to the C.E.F., Newcombe:

" . . . observed as an inference from this correspondence that His Majesty apparently acceded to the request of this Government to order the raising of the troops which were in contemplation at the time, and which were defined by Mr. Harcourt to consist of one division, in order to supply authority which it was suggested might be lacking in the absence of such an order. Obviously it was not intended that His Majesty's Government by reason of this order should assume the responsibility incident to the raising of a colonial force by order of His Majesty under Sections 175 and 176 of the Army Act, nor was it then contemplated that any force should be raised of the dimensions now authorized. It had been suggested that the provisions of the Militia Act might be defective, but that the Dominion desired to provide a force, and His Majesty's Government had replied by the advice that Canadian Ministers should take the necessary legislative and other steps. There was no room for reasonable doubt as to the application of Sections 175 and 176 of the Army Act, if the force were raised, because these sections make apt provision and operate of their own force without any order of His Majesty . . . It will be observed, moreover, that the order communicated by Mr. Harcourt's despatch of 9th. August was to the effect that the troops offered by Canada should be raised *by the Governor General of Canada for service as an expeditionary force*, and that more suggestions were made as to terms of attestation. The order was therefore intended to operate as a supposed necessary direction to set in motion the local provisions for the raising of a force on behalf of the Dominion, and not as a measure of direct Imperial responsibility.

" I have endeavoured to show that the apprehended difficulty was non-existent, because, subject of course to the necessary appropriation, the ~~sanction~~ for the contemplated force already existed under the provisions of the Militia Act and the Order-in-Council of 6th August, passed in the execution of the statutory powers. It may be said, moreover, if there could be any possible doubt as to the legality of the Order-in-Council of 6th. August, that the doubt is removed by the War Measures Act which sanctioned antecedent executive measures."

Only one obstacle now remained in Newcombe's way if he was to establish the independent status of the Canadian soldier. That was the attestation oath. There was some difference in wording between the oath as prescribed for the Militia and that prescribed for the C.E.F. but he did not consider the discrepancy essential:

(20) *Ibid*

" It cannot I imagine be said that a militia force is any the less a militia force because it is denominated an Overseas Expeditionary Force, and it seems to be quite obvious that the preliminaries of attestation prescribed or in use for the expeditionary force are merely an adaption of the requirements of the Militia Act to the case of volunteers engaging to serve for the special purpose of the existing war.

" There is only one attestation, and that defines the engagement of the recruit from the time he joins until he is regularly discharged, whether in Canada, in the United Kingdom or at the seat of war."

Having breached the last of the legal barriers, Newcombe dealt summarily with the inconsistencies which had been expressed in a contrary view by the Militia Department:

" I might observe here that if the force raised for service Overseas occupy the dual capacity which is incident to the view which seems to have been entertained at the Militia Department; if it consists of units of the active militia while in Canada, and of something different when it goes Overseas, and if there be no authority in the Governor-in-Council to despatch the force Overseas as a militia force, it is difficult to realize by what authority these troops could ever be sent out of Canada. They could not, being a militia force, be despatched under their constitution by order of the Imperial authorities; and they could not, upon the above hypothesis, be despatched by the Governor-in-Council; they would, moreover, as a colonial force raised by order of His Majesty, be independent of local administrative control. But if by any means they may be legally sent abroad, and if from the moment of going abroad they become nothing but a colonial force raised by order of His Majesty, they pass from that moment from under the jurisdiction of this Government, and neither the Governor-in-Council nor the Minister of Militia could constitutionally exercise any control over them."

These equivocations were resolved by one sentence: "*All difficulties disappear, however, when the force is attributed to its proper place under the law as a force of volunteers, or of militia or any other force, raised, equipped and paid by Canada under the authority of the Militia Act and sent abroad to serve with His Majesty's forces for the defence of the country, subject to substantially identical provisions for such a case, contained in Section 74 of the Militia Act, and in Sections 175, 176 and 177 of the Army Act.*" (21) Basing his opinion on this view of the status of the Canadian Expeditionary Force, Newcombe declared that: "If the view which I submit be adopted the relations of the force to the Government of Canada, as well as to the Imperial Government, become clear, or at all events, as clear as anything governed by a variety of statutory provisions, and affected by constitutional limitations can usually be."

This important distinction made, the path was clear to deal with the main issue—the control of the Forces overseas. He began by listing the functions of the Minister of Militia, as defined in Section 5 of the Militia Act: "There shall be a Minister of Militia and Defence, who shall be charged with and be responsible for the administration of militia affairs . . . including the initiative in all matters involving the expenditure of money." Newcombe was clear that all expenditures for the Forces, everywhere, "must be appropriated by Parliament and paid by the authority of the Governor-in-Council, subject to the provisions of the Militia Act and the Consolidated Revenue and Audit Act." Appointments, promotions, and discharge or retirement were "vested solely in the Crown, exercisable in the case under consideration by the Governor General of Canada, upon the advice of his Council." On the question of command Newcombe was specific: ". . . all military power must be based upon and emanate from the civil power; and the commands of the Sovereign to the Army can only be conveyed to the

(21) *Ibid*

Commander-in-Chief through the channel of responsible ministers and the army is then brought into accord with the civil institutions . . . "

He thought that: "Perhaps except for the fact that the theatre of war is so remote from Canada, and the delays or misunderstanding incident to the transmission of messages at such a distance so great, it would not be found necessary to devise any means other than those already established by law for the purpose of working out these constitutional principles in their application to the Canadian Force." He conceded, "it may seem expedient and perhaps essential to the proper exercise of this command" that corps and divisional commanders should be named by His Majesty's Government; but, "Apart from such dispositions as may result from considerations which point to the desirability of mutual reliance and confidence as between the general officers directing operations, it would seem that all appointments and promotions in the Canadian force should be sanctioned by the executive authority of Canada." This opinion was suited to the rising nationalism of the country and to the policy of the Government. To exercise this control of promotion and policy Newcombe considered that, due to the magnitude of the overseas forces, "some provisions should be made to bring the Government of the country more immediately into touch with the theatre of actual operations." "The War Measures Act", he observed, "affords a means of accomplishing this, and moreover of modifying the law or of enacting any legislative provisions which may be necessary to provide for the very special situation which has arisen."

Newcombe then made the recommendation Sir Robert Borden was to follow: "Details affecting matters of discipline should perhaps be suggested and considered in consultation with the military advisors of the Government, but if I may venture to suggest, I should think that the executive or administrative requirements of the case would be best satisfied by the establishment of a Canadian Ministry of War in London, charged with the administration of the Overseas forces, to be held by a member of this Cabinet, assisted if thought advisable by a council of Competent experts, whose advice would be considered by the Minister in submitting his recommendations to the Governor General in Council for approval. This would, in my humble suggestion, afford the most satisfactory means which can be devised for exercising the authority of this Government with despatch and in harmony with the policy of the administration; and it would moreover provide a ready agency of communication as between His Majesty's Government and the Government of Canada by which the joint service could be articulated."

This recommendation was accepted. Its implementation led to the appointment of Sir George Perley as Minister of Overseas Military Forces of Canada, to the Cabinet crisis of October-November, 1916 and to the resignation of Sir Sam Hughes.

But Newcombe's memorandum had more extensive repercussions. His clear exposition of the independent status of the Canadian soldier helped to establish the independence of the Dominion within the Commonwealth, led to international recognition of that independence at Versailles, and to its steady elaboration in the years since 1919. Once understand Canadian troops overseas as "Canadian volunteer Militia on active service . . . defending their country abroad" and the control of an army—as much a sign and symbol of independence as control of foreign relations—becomes immediately possible. Between 1916 and 1919 this possibility became actuality through that vigorous assertion, expansion and consolidation of Canadian military administrative autonomy which marked the portfolios of Sir George Perley and Sir Edward Kemp (22) and which was exemplified in the appointment of a Canadian Officer—Lieutenant-General Sir Arthur Currie—to command the Canadian Corps.

(22) Sir Albert Edward Kemp, P.C., KCMG, Minister of Overseas Military Forces, October, 1917 — March, 1920.

This consolidation of military autonomy, given impetus and emphasis by the sheer fighting prowess of the Corps, was Borden's most formidable argument for representation at Versailles. How this argument was accepted; how his desires were gratified; how this gratification led to Balfour's definition and universal recognition of Dominion Status; all this is history. Since that time another war has raged and the links of Empire remain as obviously weak as they are potentially strong. Thirty-two years now separate Versailles' Hall of Mirrors from Korea's barren hills where a nationally independent battalion of Canadian Light Infantry are fighting as part of the 29th Commonwealth Brigade. The background of the P.P.C.L.I.'s jointure in this Brigade is virtually the entire, multi-coloured, still-unfinished tapestry which depicts the steady, constitutional development of the British Commonwealth and Empire. In that tapestry as in that development Newcombe's yellowed legal memorandum has its small but significant place.

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