PLATT vs. THE QUEEN

No. 1/63 OTTAWA, 14 March, 1963.

WILLIAM ALLAN PLATT
(Major, ZC 2502, Canadian Army)

APPELLANT;

v.

HER MAJESTY THE QUEEN

RESPONDENT.

ON APPEAL FROM A GENERAL COURT MARTIAL HELD AT ARMY H.Q.

Conduct to the prejudice — Transportation of articles between countries of Indo-China — Application for commission to be issued by Judge Advocate General — Refusal to subpoena witnesses unless party seeking issue of subpoena undertakes to call such persons — Proof of military impropriety — Promulgation of orders — Judicial notice as to what good order and dicipline require.

The appellant was convicted of conduct to the prejudice of good order and discipline, having organized and participated in the improper transportation of gold, or parcels he considered to contain gold, between Laos and South Viet Nam.

At the close of the case for the prosecution, a motion was made for dismissal of the charges on the ground there was no evidence to support them. The court disallowed this motion and directed that the trial proceed. Counsel for the accused then made an application to the Judge Advocate General that evidence be taken on commission, and the court adjourned until the Judge Advocate General dealt with that application. The Judge Advocate General refused the application and the court, on resuming, was asked by counsel for the accused to accept in evidence the material that he had placed before the Judge Advocate General. Counsel for the accused also asked that on the basis of that material, fifteen persons whom he named be subpoenaed to appear before the court martial. The Judge Advocate ruled that the material might not be introduced.

Counsel then asked that the named persons be subpoenaed to give evidence. The Judge Advocate required the defence counsel to give an undertaking that if the witnesses were subpoenaed, they would be called by him. The defence counsel reluctantly gave the undertaking, although not agreeing to examine any witness in chief. Subsequently defence counsel amended his undertaking by saying that if not all of the fifteen persons were subpoenaed, he did not undertake to call any person who might be subpoenaed. The Judge Advocate then suggested to the court that it adjourn in order to ascertain whether all persons named could

either be ordered to attend or would attend voluntarily. The court thereupon adjourned and upon reassembly, the president stated: "The court has ascertained that not all the witnesses named by the defence will be made available." The Judge Advocate then advised the court that the application to subpoena the witnesses should be denied, since the undertaking by the defence counsel to call any particular person as a witness was contingent upon all the witnesses named being made available.

Defence counsel did not call any evidence, and the court convicted the accused.

Evidence for the prosecution was that the accused engaged in a transaction of a nature alleged in the charge sheet. A number of other persons were charged with offences similar to those of which the accused was convicted, and those charges were all disposed of in Viet Nam. Certain other persons charged with trafficking in drugs were brought to Ottawa for trial; the accused was the only person charged with a much less serious offence. His trial was directed to be held in Ottawa.

The only military order forbidding the transportation of articles into or out of Viet Nam which was left to the court for consideration, was one issued in Viet Nam on the 16th day of May, 1961. An exhibit before the court showed that the accused at that time was on strength of Laos, and not of Viet Nam. The Judge Advocate left it to the court to consider whether it was proved beyond a reasonable doubt that the accused, as being a member of the rear party for Laos on 16th May 1961, was under the command of Saigon and whether in that event the order of 16th May was properly promulgated to the accused.

The Judge Advocate also suggested to the court that, in determining whether the actions of the accused connoted military impropriety, they might take into consideration the order of 16th May 1961 as being indicative of the view of the acting commanding officer of the Military Component in Viet Nam that conditions were such as to warrant him making the statement in the order issued by him that transportation of parcels would have extremely serious consequences for the individual and for Canada.

The Judge Advocate directed the court in accordance with a Note to article 103.60 of Queen's Regulations that the court might apply its general military knowledge as to what good order and discipline required in the circumstances, and so come to the conclusion whether the conduct complained of was to the prejudice of both good order and discipline.

HELD:

The appeal should be allowed.

(Per NORRIS and BERNIER JJ.): The application for the commission and material in support thereof and the ruling of the Judge Advocate General should

have been placed before the court. The court was under a duty in accordance with the National Defence Act to secure witnesses whose attendance could reasonably, having regard to the exigencies of the service, be procured, and the request for whose attendance was not deemed frivolous or vexatious. The court had a duty to ensure that the trial was fairly conducted, and to discharge this duty it was necessary that the court have before it the ruling of the Judge Advocate General and the material before him when he gave that ruling. Only then could the members of the court intelligently consider an application to subpoena the witnesses.

The ruling by the Judge Advocate that defence counsel must give an undertaking to call any witnesses who were subpoenaed was incorrect, and this incorrect ruling could reasonably have affected the president of the court and led him to the erroneous conclusion that the matter of subpoenaing witnesses was discretionary. The president of the court said nothing about the exigencies of the service making it unreasonable to procure the witnesses and had said that not all the witnesses named by the defence "will be made available" — where the proper question before him was whether their attendance could reasonably be procured.

The offence was alleged to have been committed in Viet Nam and the appropriate military authorities could have directed that the trial take place there. They chose to move the accused from that place to Canada, and it would appear that the Judge Advocate General should willingly have taken such steps as were necessary to have the evidence of witnesses in Viet Nam made available for the accused by directing that a commission issue. It would have been better to make the order sought, leaving it to the prosecutor and the Judge Advocate at the trial to comment as might appear desirable upon the evidence given on commission.

Since neither the commission issued nor was the accused returned to Viet Nam for trial, there was a special duty on the court to see that the accused suffered no prejudice in that regard. The court accordingly should have applied the provisions of Section 155 of the National Defence Act liberally in order to protect the accused from injustice. The court did not do so.

Substantial injustice was occasioned to the accused by the refusal of the Judge Advocate General to order a commission, by the fact that the president of the court did not announce what witnesses were not to be made available, by the president of the court failing to make adequate investigation as to whether arrangements could be made for the witnesses asked for by defence counsel to attend at trial, and because of the inability of the accused either to present the evidence by way of commission or present the witnesses in person.

There was no evidence before the court that any orders affecting the accused involving the transportation of goods between countries were duly promulgated to him by the commanding officer of the unit at which he was serving. On the contrary, the evidence was that the accused was under command at Laos and

not at Viet Nam where the order was promulgated. The Judge Advocate erred in not advising the court that there was no evidence that the order was promulgated to the accused.

In so far as impropriety at large was concerned, the fact that an officer of the rank of lieutenant colonel considered that conditions were such as to warrant him making the statement contained in the order, was not sufficient to brand what was done as conduct to the prejudice of good order and discipline.

The Judge Advocate misdirected the court by telling them that they might apply their general military knowledge as to what good order and discipline required. It could not be said that a prohibition against the transport of gold in Viet Nam was a matter of general service knowledge as such transport was not *per se* illegal. Conduct to the prejudice of good order and discipline could not be inferred from the circumstances, and accordingly there was no evidence upon which the accused could have been properly convicted.

(Per CAMERON P.): It was only necessary to consider the fact that there was no proof of the promulgation of the order and that conduct to the prejudice of good order and discipline could not be inferred from the circumstances. That conclusion having been reached, it was not necessary to consider the other matters urged before the appellate tribunal.

R. K. Laishley, Esq., Q.C., for the appellant.

Major D. H. Harrison for the respondent.

Before: Cameron P., Norris and Bernier JJ.

The judgement of Norris J., and of Bernier J. was delivered by:

NORRIS J.: This is an appeal from a conviction by a General Court Martial held at Number 13 Personnel Depot, Ottawa, Ontario, from the 14th to the 29th days of May, 1962. The charges on the original charge sheet dated the 11th day of April, 1962, were as follows:

> The accused, No. ZC2502 Major Platt, William Allan, 13 PD attached for all purposes, No. 1 Army Administrative Unit, Canadian Army (Regular), is charged with having committed the following offences:

First Charge
Sec. 83 N.D.A.
(Alternative to
Second Charge)

BEHAVED IN A SCANDALOUS MANNER UNBECOMING AN OFFICER

Particulars: In that he, while a member of the MCCD Indo-China, in the months of October and November 1961, organized and participated in the

improper transportation of gold, or of parcels he considered to contain gold, between Laos and South Viet Nam, such organization and participation involving the use of other members of the MCCD of subordinate rank, namely ZD 3262 Captain Anderson, C.A., SF 99769 Corporal West, G.A., and SE 103444 Sergeant Fournier, J.R.R.

Second Charge
Sec. 118 N.D.A.
(Alternative to
First Charge)

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE

Particulars: In that he, while a member of the MCCD Indo-China, in the months of October and November 1961, organized and participated in the improper transportation of gold, or of parcels he considered to contain gold, between Laos and South Viet Nam such organization and participation involving the use of other members of the MCCD of subordinate rank, namely: ZD 3262 Captain Anderson, C.A., SF 99769 Corporal West, G.A., and SE 103444 Sergeant Fournier, J.R.R.

On the 11th day of May, 1962, the first charge was deleted, the second charge being the only charge to be proceeded with.

At the opening of the Court, counsel for the accused made a plea in bar of trial on four grounds, which may be summarized as follows:

1. That the court was without jurisdiction as a decision had been made on the 27th day of November, 1961, to release the accused and not to proceed with any disciplinary action, that such decision had been communicated to the accused on the 28th day of December, 1961, and that on the 10th day of January, 1962, he advised the appropriate authority that he had no objection to his proposed release.

2. That the convening order for the General Court Martial had been issued without proper and adequate preliminary steps having been taken in accordance with military law and, in particular, that the Commanding Officer of the accused did not address his mind to the previous good conduct of the accused.

3. That the charge as framed does not disclose a service offence.

4. That the accused was not provided with the assistance of a legal officer before the convening of the Court Martial and this was a failure to provide protection to the accused in accordance with the provisions of the Canadian Bill of Rights.

As to the third ground, viz., that the charge as framed does not disclose a service offence, defence counsel agreed (transcript page 9) that this was not a proper plea in bar of trial. In this connection, defence counsel asked for particulars and these were refused. This ground of objection was argued substantively later in the proceedings as part of the grounds for acquittal.

After argument, the plea in bar of trial was disallowed on all grounds.

In my opinion, while I do not agree with all the grounds on which the Judge Advocate based his decision or all the grounds urged before us by counsel for the respondent, there was not error in the result and the plea was properly disallowed. This disposes of grounds 1 to 6 of the grounds of appeal hereinafter set out.

After the plea in bar was disallowed, the accused pleaded not guilty to the charge and the trial proceeded.

At the close of the case for the prosecution, a motion was made by counsel for the accused for dismissal of the charges on the ground that there was no evidence to support them, and after hearing him and the prosecutor as well as the Judge Advocate, the Court disallowed the motion and directed that the trial proceed. Counsel for the accused then made an application, for submission to the Judge Advocate General, that evidence be taken on commission and that the Court stand adjourned until after the Judge Advocate General had dealt with the matter. The Court was adjourned and the Judge Advocate General thereafter refused the application for a commission. Counsel for the accused then applied for leave to file with the Court the material which he had placed before the Judge Advocate General and that, on that material, fifteen witnesses whom he named be subpoenaed to appear before the Court. The Judge Advocate then ruled that the material might not be introduced. The relevant parts of the transcript are as follows (transcript pp. 204, 206 and 208):

Judge Advocate (p. 204)

> Are you ready to proceed Mr. Laishley?

Defence Counsel

> Yes sir. As the court is probably aware by hearsay, the application for a commission has been denied and apart from filing the material, on which I applied, and the answers made by the Judge Advocate, I do not propose and indeed I cannot call any evidence.

Judge Advocate

> Mr. Laishley, you speak of filing material. As the application was not, and indeed could not be, directed to this court, I do not think the court can receive the material.

Defence Counsel

> It is my submission that the court ought to in order to discharge its full responsibility under the National Defence Act and regulations.

Defence Counsel (p. 206)

> My application to file the material is that it becomes part of the record. If the court were to come — this is another phase — if the court were to come to the conclusion that the accused in this case had been deprived for any reason, of making a full answer — and I say for any reason — it may be force of circumstances. It may be no one's fault. We are not condemning anyone but if the court were to come to a conclusion that the accused has been deprived of making his full answer in violation of the mandatory requirement, then I submit it is a proper reason to acquit the accused and therefore it is of the utmost importance that the material be on file so that the court can determine whether or not the accused acted reasonably to try and put his defence before the court.

Judge Advocate (p. 208)

> There appears to me to be three phases in this, Mr. Laishley, and perhaps I may deal at the outset with your application to file the material relating to the disposal of your application for a commission to issue. That is not a matter of which this court can take cognizance. The only thing before this court was your application for an adjournment so that you might, pursuant to section 155, apply to the Judge Advocate General and file material with him as to why he should appoint a Commissioner. That having been done, you tell us that the application has been refused. We would not be back today if it had not been refused. You surely cannot suggest that this court is competent, let alone should, is competent to reject the decision of the Judge Advocate General, it being a matter which they cannot receive in law. That being so, the material filed with the Judge Advocate General cannot be considered by this court. You say then that the court would be left to conjecture as to this material filed, as to the reasons for the refusal. I direct this court now that they have no concern with the material filed or the reasons for the refusal and it is not a subject upon which they could conjecture. It is not a subject having anything to do with the issue before this court and your application to file the material submitted to the Judge Advocate General, together with his reply thereto, is hereby denied.

The application for the Commission, the material in support thereof and the ruling of the Judge Advocate General should have been placed before the court for reasons which will be indicated hereafter.

The Judge Advocate also ruled that unless counsel would undertake that all these witnesses would give evidence after having been called, they would not be subpoenaed. Defence counsel, on being pressed by the Judge Advocate, stated that, if the witnesses were subpoenaed, he would undertake to produce them as witnesses, but would not undertake to examine all of them in chief.

The submission of defence counsel as to these witnesses, the undertaking which was exacted by the Judge Advocate and the relevant discussion thereon appear at pp. 209, 210, 212, 213, and 214:

Judge Advocate (pp. 209 and 210)

> On the question of the subpoena of witnesses, section 154 of the National Defence Act deals with the duty, pre-trial, and after the assembly of the court, to procure witnesses for the defence. I have not understood you to say that pre-trial any attempt was made by you or any other person on behalf of the accused to have witnesses attend at the court martial. In the absence of such allegation I can only conclude that no such attempt was made. If it were made —

Defence Counsel

> I can answer that.

Judge Advocate

> If you will, please.

Defence Counsel

> The prosecutor and I discussed — the first time I saw the prosecutor — discussed the question of a commission.

Judge Advocate

> I am not speaking of the commission.

Defence Counsel

> No, but my answer simply is this. I felt that perhaps I would be unreasonable to ask for the witnesses to be brought here, and that the reasonable course to pursue was the commission, and at the very first, and perhaps only personal interview that I had with the prosecutor, we discussed that and perhaps I had better not go further than that; but I certainly felt it, and have always felt, that a commission would not be denied. But maybe I was being too optimistic, but I did feel that it was too onerous a task to ask the witnesses to come here, and the expeditious way was the commission. That is the reason.

Judge Advocate

> Well, in any event, whatever led you to the decision not to apply to have witnesses come from Indo-China, I take it that no such application was made to the convening authority or to anybody else. There is also the matter, of course, that at the outset of this trial I asked the accused whether he wished to apply for an adjournment on the ground that he had not had sufficient time to prepare his defence, and you indicated that no such application for adjournment was made. Now, at this stage I have given my ruling as to the admissibility of the papers relating to the commission. You may certainly, if you wish, apply to this court here and now, to have certain named witnesses attend to give evidence, and I am quite prepared to advise the court that they must apply section 154 of the National Defence Act. In other words, unless it appears to them that the request was frivolous or vexatious, then they must have the witnesses attend. Do you apply to have any named witnesses come before this court to give evidence ?

Defence counsel then gave the names of fifteen witnesses and the following discussion took place:

Judge Advocate (p. 212)

> From the places named, of course, a subpoena would not issue but it is not also dispositive of the matter because the great number of these are there. I think I am correct in saying that all except five people are either military or in the government service of Canada. The military people can be ordered to attend and I expect that for the people in the government service of Canada the same arrangements could be made for them to attend. The others I am completely at a loss on, at the moment, but nevertheless your request is before the court. I am sorry to have to put this again to you, Mister Laishley, but I wish to be quite clear on this in my own mind. The application is that all of the persons appear as witnesses. The undertaking is that if they are procured by the President or the convening authority they will, in fact, be called.

Defence Counsel

> Mister Judge Advocate, I direct my mind to that. I have never known — and I have had some experience in courts, but I have never known that the right to subpoena a witness is conditioned on an undertaking to call him. I don't understand that philosophy at all. That aspect escapes me.

Judge Advocate

> I am going under the terms of section 154 of the National Defence Act.

Defence Counsel

The term there is "attendance".

Judge Advocate

Just one moment, Mister Laishley. I would like to read an excerpt from that section:

> "After the assembly of the court martial the president shall take all necessary action to procure the attendance of the witnesses whom the prosecutor and the accused person requests be called and whose attendance can, having regard to the exigencies of the service reasonably be procured, but nothing in this subsection shall require the procurement of the attendance of any witnesses, the request for whose attendance is deemed by any such commanding officer, authority who convenes a court martial or president to be frivolous or vexatious."

You and I may differ on the interpretation of that section but I am, rightly or wrongly, ruling that this requires an undertaking by counsel that these witnesses be called. I have laboured this point with you as I am convinced that you cannot have spoken to those people at all.

Defence Counsel

I do not read into this anything more than the civil counterpart of being able to obtain a subpoena served; and I am being forced to go into court, and I cannot read anything more into this regardless of the words used, and I don't know of any interpretation to the contrary, where in our civil administration of justice the fact that one subpoenas a witness to give evidence that the witness having been subpoenaed and having been made available does not in any way compel counsel to put that witness in the witness box. If that were to be so it would be an abuse of the process of the courts, and, for this reason I submit it is fundamental. I never had an opportunity of seeing these witnesses nor has the accused. The accused was returned to Canada at the end of November. At that time he was not facing any charge when he might have been able to see the witnesses. He didn't indeed face any charge until the end of March, and since that time no one can say this with any degree of sincerity that he has had an opportunity of interviewing these witnesses. I have not had an opportunity of interviewing these witnesses nor has his assisting officer. If I were to say categorically that I will call a certain witness and undertake not only that he be subpoenaed but to put him in the witness box and ask him whether or not he knew anything about the case and also ask him whether his recollection is good, bad or indifferent. Indeed, some of these witness' recollections may be hazy and there may be certain other problems. If counsel were

to put him in the witness box — however, I would like to say this — counsel is entitled to know and indeed owes a duty to the court to know or to presume to know what his witness is going to say and to deal with it, and if this witness did not recollect, it would be an abuse of the process of the court, of the authority of the court, to put such a witness in the witness box. It is just so fundamental that the right to interview, the right to subpoena, in this instance, Mister Judge Advocate, I find myself in very peculiar circumstances. I would do this: I would say I would put him in for cross-examination; I might not ask him any questions for he may not know what I already know, but I would produce the body.

Judge Advocate

However, if these people appear you will produce them as witnesses, but you don't undertake to examine them in chief. Is that a correct understanding ?

Defence Counsel

I may say this is the furthest I have ever been required to go in any court of law.

Judge Advocate (To prosecutor) (p. 214)

Do you wish to say anything, Major Fay ?

Prosecutor

No, sir, not at this time.

Judge Advocate

I think one of the difficulties with which I am faced is not knowing whether, having regard to the exigencies of the service, the attendance of these people can reasonably be procured and this is something I would have to advise on.

Defence Counsel

I want it clearly understood that I appreciate this. I feel it was reasonable. I really feel, although it is not mandatory, but I feel that an effort be made to co-operate in this situation which we find ourselves and I feel I ought to ask for this; that a reasonable course was a commission.

Judge Advocate

Mister President: Would you grant me an adjournment for a half-hour ?

President

The court will adjourn.

The undertaking should not have been required and the application that the witnesses be subpoenaed should have been dealt with on its merits free from any question of undertaking.

After the adjournment, the court re-assembled and the following interchange took place:

Judge Advocate (p. 125)

Mr. President, I am grateful for the opportunity of adjournment and unless Mr. Laishley has anything further, I am prepared to advise you on his application.

Defence Counsel

Mr. Judge Advocate, I have given this quite anxious thought and also have discussed it with my client which, of course, I did not have an opportunity to do when I was on my feet. I still adhere to the undertaking which I gave but I want it distinctly understood that my undertaking exists provided the court calls all the witnesses that I have indicated. That is, I don't want to be put in the position that the court informs me or selects certain witnesses or calls certain witnesses and says others cannot be obtained or something of that nature and my undertaking still exists, I want all the witnesses, my undertaking goes for all the witnesses.

Judge Advocate

Mr. President, my advice, although the matter is one for you to determine, my advice is that the application should be denied in view of the statement just made by counsel, the qualification, if I may term it such to his undertaking.

Defence Counsel

I don't feel there was any qualification. I listed 14 or 15 witnesses, I said if these witnesses are called, I will undertake to put them in the witness box but not examine them necessarily because of my inability to interview them. So, I just wanted it to be abundantly clear. I don't think it is a qualification, I don't want any misunderstanding.

Judge Advocate

Neither do I. I take it for example, if the court were unable to procure the attendance of a Vietnamese national or a Laotion national, that you would consider your undertaking was no longer binding.

Defence Counsel

That is correct because the court would then be selecting the witness.

Judge Advocate

Not at all, but, in any event, you are quite clear as to what the situation is ?

Defence Counsel

Yes.

Judge Advocate (p. 216)

My advice remains unchanged, Mr. President, that in view of the fact that counsel for the defence has said that he will not undertake to put anybody on the stand as a witness unless the attendance of all of them can be procured, my advice, somewhat tentatively for a reason I will explain in a moment, is that his application should be denied. Now, I say my advice is tentative because you are in no position to tell at the moment whether all the witnesses can in fact - the attendance of all the witnesses can be procured. I do not suggest that you should consider the request of defence counsel frivolous or vexatious. There is nothing before you which would give rise to a suspicion that this is the case. There is the duty upon you by section 154 to procure the attendance of the witnesses whom the accused personally requests be called. I suggest, Mr. President, that pursuant to my advice, you may wish to adjourn this court so that you may ascertain perhaps in conjunction with the convening authority upon whom the duty also devolves so that you may ascertain whether all witnesses named by counsel for the defence can be procured to attend before this court martial. I have given my tentative advice because it is quite apparent that compulsory process cannot issue as against persons now resident in foreign countries, particularly in Laos and in South Viet Nam. It would then be a matter of them attending voluntarily. This may be the case, it may be that they will but I think you have no alternative, Mr. President, but to see whether all persons named can either be ordered to attend or will attend voluntarily. I don't know how long it will take, sir, perhaps you are in a better position to decide how long the adjournment should be than I am.

President

I am sure this will involve a discussion with other departments because there are members of other departments involved other than the Department of National Defence and I would hesitate to say how long it will be called but the court will adjourn to re-assemble at the call of

the president after I have had an opportunity to discuss this with the convening authority and to determine the availability of these witnesses.

ADJOURNMENT

At 1107 hours on the 28th day of May, 1962, the court adjourns until recalled by the president.

On the 28th of May, 1962, the court having re-assembled, the president made the following statement:

President

The court has ascertained that not all of the witnesses named by the defence will be made available.

The Judge Advocate made the following ruling:

Judge Advocate

Mr. Laishley, I have some advice to give to the president consequent upon this information. It is this: that as your undertaking to call any particular person as a witness was contingent upon all the witnesses named by you being made available, and as we are told that not all can be made available, my advice to the president is that your application must be denied. Will you proceed, please.

Defence counsel stated that he had no evidence to call. The prosecutor and defence counsel and the Judge Advocate then addressed the court, after which on the 29th day of May, 1962, the accused was found guilty on a special finding as follows:

President

The court find the accused guilty, except that the accused was a member of "an MCCD, Indo-China", not "the MCCD, Indo-China", and except that the organization of the improper transportation of gold, or parcels he considered contained gold, did not involve the use of other members of the MCCD of subordinate rank, namely, ZD 3262 Captain Anderson, C.A., SF 99769 Corporal West, G.A., and SE 103444 Sergeant Fournier, J.R.R.

After defence counsel had addressed the court in mitigation of punishment the following sentence was passed:

President

The court sentences the accused, ZC 2502 Major William Allan Platt to a severe reprimand and a fine of five hundred dollars ($500.00).

The grounds of appeal before this Court were as follows:

1. The action of the Adjutant-General in ordering my release was a decision by competent authority not to proceed with any charge disclosed in the investigation which was completed before the end of November, 1961. This decision is a bar to the prosecution against me in the absence of any new evidence.

2. The convening order for my trial by general court martial was issued without the mandatory steps having been complied with.

3. There was no proper investigation of the charges against me by my commanding officer as required by article 107.02 of Queen's Regulations.

4. There was no investigation of the charge or charges as soon as practical after the alleged commission of the offence as required by article 107.05 of Queen's Regulations.

5. There was no independent and voluntary decision by the commanding officer of No. 1 Army Administrative Unit, to which I was attached, whether or not to proceed with the charge as required by article 107.04 (2) of Queen's Regulations.

6. It was established conclusively on the evidence that the commanding officer of No. 1 Army Administration Unit, who was purporting to investigate the charges against me, was previously unknown to me, and that he did not consider my previous good conduct and record of service, which was in itself a sufficient ground to decide not to proceed with the charges against me.

7. The Judge Advocate General improperly refused to order a commission to take evidence of witnesses I was unable to call due to their being outside of Canada, and thus deprived me of making a full answer and defence to the charge.

8. The decision of the president of the court as announced by him that not all of the witnesses asked for by me would be made available without giving any indication as to which witnesses were not to be made available, and without any reasons for the decision, is a direct contravention of section 154 of the National Defence Act and a denial of natural justice.

9. The president of the court failed to comply with section 154 of the National Defence Act in that he failed to make adequate investigation with respect to whether or not arrangements could be made for the witnesses asked for by me to attend at my trial.

10. The court failed to allow me to make a full answer and defence to the charge, contrary to article 112.57 of Queen's Regulations.

11. I was denied the right to freely communicate with my witnesses, either personally or through my counsel, contrary to article 111.61 of Queen's Regulations.

12. The Judge Advocate General misdirected the court as to the necessary proof of "improper".

13. The Judge Advocate misdirected the court in respect of conduct to the prejudice of both good order and military discipline in the circumstances of this case.

14. By reason of the fact that I was tried by this court in the City of Ottawa, when the offence with which I was charged was committed in Indo-China and all the witnesses necessary for me to call in support of my defence were in Indo-China, and because of my inability to either present the evidence by way of commission before this court or present the witnesses in person, I have been deprived of a fair hearing in accordance with the principles of fundamental justice, contrary to section 2 (e) of The Canadian Bill of Rights Act, Statutes of Canada (1960) Chapter 44.

15. Upon such further and other grounds as the transcript of evidence and proceedings disclose and this honourable court permit to be argued.

Grounds 1 to 6 having been disposed of, grounds 12 and 13 will be dealt with together first and grounds 7 to 11 and 14 together thereafter.

Certain of the facts leading up to the charge are of importance. The accused who was at that time an officer of the MCCD stationed in Indo-China, engaged in a transaction which formed the basis of the charge but in respect of which it is not necessary to go into detail. It was common ground between counsel on the appeal that a number of other persons were charged for offences similar to those of which the accused was charged and those charges were all disposed of in Viet Nam. Certain other persons charged with trafficking in drugs were brought to Ottawa for trial. The accused was the only person charged with the much less serious offence whose trial was directed to be held at Ottawa.

From the finding it will be noted that the sole issue on this trial was as to whether or not the accused, being a member of a MCCD — Indo-China, organized and participated in the improper transportation of gold or of parcels he considered to contain gold between Laos and South Viet Nam.

As to grounds 12 and 13, the Judge Advocate made it clear at pp. 247 and 248 of the transcript that the impropriety on the part of the accused which was charged did not arise from a breach of the law of Viet Nam. He also made it clear that the only military order with which the court need be concerned with was as to whether or not there was a breach of Exhibit "L" which appears at

pages 280 and 281 of the transcript. Relevant parts of that order, to which was attached Exhibit "M", being Weekly News Letter Number 14/61, read as follows:

"3. MISUSE OF DIPLOMATIC PRIVILEGES

a. All personnel are warned that it is illegal to transport articles or packages in or out of Viet Nam which are not personal or commission property. If anyone travelling by courier or schedule aircraft in or out of Viet Nam is approached and asked to transport small parcels by anyone outside the Canadian Delegation, they will refuse such requests and report the incident without delay to HQ MCCD.

b. Transportation of parcels in or out of Viet Nam for persons other than members of the Canadian Delegation is a violation of Viet Nam Law and would have extremely serious consequences for the individual and Canada".

Exhibit "L" was issued at Viet Nam on the 16th day of May, 1961. Exhibit "M", being attached to order Exhibit "L", shows in paragraph 4 that at that time the accused was on the strength of the MCCD at Laos, *not* at Viet Nam. As to this matter, the Judge Advocate directed the court as follows:

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"Counsel for the defence has pointed out, however, that Exhibit "M" shows Major Platt as being "on strength MCCD Laos". In the face of this, he asks, how could anyone conclude beyond a reasonable doubt that on the very date Exhibit "M" was issued the accused was under command of Saigon ?

"If you do find it proved beyond a reasonable doubt that the rear party on the 16th of May, 1961, was under the command of Saigon, you will turn to the question of whether Exhibit "L" was properly brought home to the accused, that is promulgated in accordance with regulations."

In addition to the breach of that order, the Judge Advocate directed the court in the following terms that there was another ground of impropriety:

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"What, then, are you entitled to consider in determining whether the transportation was improper having regard to the conditions obtaining in the country and the needs of military good order and discipline under those conditions ? You may take into consideration the statement in Exhibit "L" issued by the commanding officer of the Military Component in Viet Nam that transportation of parcels into Viet Nam for persons other than

members of the Canadian Delegation would have extremely serious consequences for Canada. Your consideration of this is not, in the context, contingent on finding that the order was promulgated to the accused. Rather, you will be concerned solely with the fact that an officer of the rank of lieutenant colonel who was acting commanding officer of the Military Component in Viet Nam considered that conditions were such as to warrant him making that statement in an order issued by him. . . ."

With regard to this last ground of impropriety, it may be noted that this was mentioned for the first time by the Judge Advocate and it had not been suggested in the case for the Crown that impropriety might be proved other than by breach of an order. It is clear that the order Exhibit "L" was not a standing order of which the accused might be presumed to have knowledge.

Queen's Regulations (Army), Regulation 1.21, reads as follows:

"1.21 — NOTIFICATION BY RECEIPT OF REGULATIONS, ORDERS, AND INSTRUCTIONS

Subject to subsection two of section forty-nine of The National Defence Act (see article 1.20) all regulations, orders, and instructions issued to the army shall be held to be published and sufficiently notified to any person whom they may concern if:

(a) they are received at the unit or other element at which that person is serving; and

(b) the commanding officer of the unit or element takes such measures as may to him seem practical to ensure that the regulations, orders and instructions are drawn to the attention of and made available to those whom they may concern. (See article 4.26—"Circulation of Regulations, Orders, Instructions, Correspondence, and Publications".)"

There was no evidence before the court that the provisions of this regulation were complied with. There is no evidence beyond a reasonable doubt that the order was brought to the attention of the accused in any way. There *is* evidence that he was under command at Laos and not at Viet Nam where the order was promulgated. The Judge Advocate dealt with this matter as follows:

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"In these circumstances, can you say that beyond a reasonable doubt Exhibit "L" was promulgated to the accused ? If you cannot, then the impropriety of transporting the packages cannot arise by reason of the contravention by the accused of the orders contained in Exhibit "L"."

It is clear, therefore, that the Judge Advocate erred in not advising the court that there was no evidence that the order was promulgated to the accused.

As to the possibility of what might be called impropriety at large, the fact that as the Judge Advocate said (from the quotation from page 252):

> " . . . an officer of the rank of lieutenant colonel who was acting commanding officer of the Military Component in Viet Nam considered that conditions were such as to warrant him making that statement in an order issued by him."

is not sufficient to brand what was done as conduct to the prejudice of good order and discipline. There is no evidence that the lieutenant colonel referred to had any opinion about the order or that it was not an order which was merely passed on to him to promulgate. It does not, in its terms, indicate any military offence. There is nothing to show that what the officer did (apart from any breach of the order, which was not promulgated) should have been known by him to be to the prejudice of good order and discipline.

The Judge Advocate clearly misdirected the court when he said, at page 256 of the transcript:

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>
> "And the last Note which I wish to read to you, which is Note (G):
>
> '(G) When an accused is charged under section 118, the service tribunal may apply its general military knowledge as to what good order and discipline require under the circumstances, and so come to a conclusion whether the conduct, disorder, or neglect complained of was to the prejudice of both good order and discipline'."

This note, which is appended to article 103.60, depends for its existence on article 101.04 which was deleted on October 1, 1959. The appropriate article as to judicial notice is that contained in the Rules of Evidence, Rule 16 (2), which states that the court may take judicial notice of

> "(a) matters of general service knowledge".

It could not be said that a prohibition against the transport of gold in Viet Nam is a matter of "general service knowledge", such transport not being *per se* illegal. In the case of an alleged contravention of section 118 (3) of the National Defence Act, Note (D) to article 103.60, Queen's Regulations (Army), indicates the necessity for proof of promulgation of the order contravened. As there is no proof of promulgation of the order and as conduct to the prejudice of good order and discipline cannot be inferred from the circumstances, there was no evidence upon which the accused could have been properly convicted.

As to grounds 7 to 11 and 14 of the Grounds of Appeal, the relevant provisions of section 155 of the National Defence Act are as follows:

> "155. (1) Where it appears to the Judge Advocate General, or to such person as he may appoint for that purpose,
>
> (a) that the attendance at a trial by court martial of a witness for the prosecution is not readily obtainable because the witness is ill or is absent from the country in which the trial is held, or that the attendance of a witness for the accused person is not readily obtainable for any reason, . . .
>
> the Judge Advocate General, or such person as he may appoint for that purpose, may appoint any officer or other qualified person, in this section referred to as a "commissioner", to take the evidence of the witness under oath.
>
> "155. (3) Where in the opinion of the president of a court martial, a witness whose evidence has been taken on commission, should in the interests of justice appear and give evidence before the court martial and that witness is not too ill to attend the trial and is not outside the country in which the trial is held, the president may require the attendance of that witness."

In my opinion, this is a necessary procedural section to ensure that in the interests of justice all relevant evidence may be brought before the court. It is the duty of the court to see that this is done and the Judge Advocate General may not be taken to have been given power under this section to restrict in any way the limits of that duty. This is made clear by the provisions of subsection (3) of section 155 and the mandatory provisions of section 154, which read as follows:

> "154. (1) The commanding officer of the accused person, the authority who convenes a court martial, or, after the assembly of the court martial, the president, shall take all necessary action to procure the attendance of the witnesses whom the prosecutor and the accused person request to be called and whose attendance can, having regard to the exigencies of the service, reasonably be procured, but nothing in this subsection shall require the procurement of the attendance of any witnesses, the request for whose attendance is deemed by any such commanding officer, authority who convenes a court martial or president to be frivolous or vexatious.
>
> (2) Where a request by the accused person for the attendance of a witness is deemed to be frivolous or vexatious, the attendance of that witness, if his attendance, having regard to the exigencies of the service, can reasonably be procured, shall be procured if the accused person pays in advance the fees and expenses of the witness at the rates prescribed in regulations, and if at the trial the evidence of the witness

> proves to be relevant and material, the president of the court martial or the authority who convened the court martial shall order that the accused person be reimbursed in the amount of the fees and expenses of the witness so paid.
>
> (3) Nothing in this section limits the right of the accused person to procure and produce at the trial at his own expense such witnesses as he may desire, if the exigencies of the service permit."

On matters pertaining to the fairness of the trial in connection with which the production of evidence is a most important part, the accused was entitled to the considered decision of the five members of the Court advised by the Judge Advocate and such decision should not be governed by the ruling of one military officer — no matter what his rank or attainments might be.

For the purpose of ensuring that the accused did not suffer injustice it was necessary that the Court should have before it the ruling of the Judge Advocate General and the material before him when he made that ruling. The members of the Court with such material before them could then intelligently consider the application made under section 154.

Counsel for the respondent stated before this Court that it was not argued that the Judge Advocate General was *persona designata* under the provisions of section 155. It is not necessary for me — in the view I take of the disposition of this appeal — that I should make any finding as to what direct recourse, if any, there is from an adverse ruling under section 155 and I do not do so.

The Judge Advocate on the trial expressly disavowed any suggestion that the application that the witnesses be subpoenaed was frivolous or vexatious (p. 216). There is nothing in the ruling of the President to indicate that the exigencies of the service prevented the attendance of these witnesses and it is difficult to see how, under the circumstances of this case, any such suggestions could have been made.

The wording of the President's ruling as to the calling of witnesses should be particularly noted. He stated that the Court

> "has ascertained that not all of the witnesses named by the defence *will* be made available".

Nothing is said of the exigencies of the service. The wording of the provision of section 154 is that the president shall take all necessary action to procure the attendance of witnesses . . . whose attendance *can*, having regard to the exigencies of the service, reasonably be procured. He apparently considered that the matter was discretionary and his decision could reasonably have been affected by the incorrect ruling of the Judge Advocate that he was entitled to insist that if the witnesses were called, defence counsel must examine them in chief.

Section 59 of the National Defence Act provides that an accused person may be tried in or out of Canada. The offence is alleged to have been committed in Viet Nam and all the witnesses were there. The appropriate military authorities could have directed that the trial take place in Viet Nam. They chose to move the accused from that place to Canada for the purpose of trial. The offence having been alleged to have been committed in Viet Nam, the witnesses being there and the accused having been moved so many thousands of miles away from that place for trial, one would have thought that the Judge Advocate General would have willingly taken such steps as were necessary to have the evidence made available for the accused by directing that a commission issue.

The attitude which learned judges or other authorities to whom application is made for an order that commissions to take evidence issue has been stated in the case of Rex v. Rispa — 1915 26 C.C.C. 94. The judgement of Middleton J.A. appears at that page, as follows:

> "Middleton J. said that the charge against the accused was serious. His defence was an alibi. It was most unsatisfactory that evidence on an issue of this kind should be given on Commission; but to deprive the accused of the Commission might prevent his being able to obtain the evidence at all; and nothing could be worse than to have it supposed that there was in New Jersey evidence which might support the defence of the accused and that he had been denied the opportunity of placing it before the court. It was better to make the order sought leaving it to the Crown counsel and the judge at the trial to comment as might appear desirable upon the evidence being given on Commission."

With respect, I think that the judgement admirably states the approach which should have been followed on the application for the commission and the position of the Judge Advocate General in relation to the court.

As a further alternative, the army authorities might have returned the accused for trial in Viet Nam where the witnesses were — once they had decided to proceed with the Court Martial.

As none of these courses was followed, there was an especial duty on the Court to see that the accused suffered no prejudice in that regard. The Court must remain in control of all matters pertaining to trial. Its power is paramount to see that justice be done. The Judge Advocate General, having refused to direct that a commission issue and the military authorities not having returned the accused to Viet Nam for trial it was the duty of the Court to take such steps by applying the provisions of section 154 of the National Defence Act liberally as would ensure the protection of the accused from injustice. This the court did not do.

In my opinion, there was substantial injustice to the accused in respect of grounds 12 and 13 and grounds 7 to 11 and 14 and applying the principles set

out in the judgement of the Lord Chancellor in Woolmington v. Director of Public Prosecutions (1935 A.C. 462 at 481 and 482), in the judgement of the Supreme Court of Canada in Rex v. Comba ((1938) S.C.R. 396) and in the judgement of Middleton J.A. in that case in the Ontario Court of Appeal (1938 O.R. 200), the conviction cannot stand.

Counsel for the respondent argued that we should regard the accused as prejudiced by his failure to testify. In the view I take of the evidence and the course of the trial, I do not agree with this submission following the judgement of Middleton J.A. in Rex v. Comba (supra) at page 205.

For the reasons stated, I would allow the appeal, set aside the findings of the court martial and, as was done in Rex v. Comba, direct that a finding of not guilty be recorded.

CAMERON P.: I have had the advantage of reading the opinion of Norris J.A., concurred in by Bernier J.A. I concur in the result, namely, that the appeal should be allowed, the findings of the court martial should be set aside and that a verdict of not guilty should be recorded. I do so on the grounds stated in the opinion of Norris J.A. that:

> As there is no proof of promulgation of the Order and as conduct to the prejudice of good order and discipline cannot be inferred from the circumstances, there was no evidence upon which the accused should have been properly convicted.

Having reached that conclusion, I do not find it necessary to consider the other matters later referred to therein, and express no opinion in regard thereto.