



National Défense
Defence nationale

the **CODE** of **SERVICE** **DISCIPLINE** and **Me**

*A guide
to the military
justice system for
Canadian Forces
members*

Office of the Judge Advocate General

Cabinet du Juge-avocat général



Canada

This booklet has been designed to provide general information on disciplinary proceedings under the *Code of Service Discipline*, focusing on the rights and entitlements of CF members under the *Canadian Charter of Rights and Freedoms* and the *National Defence Act*.

What is the "Code Of Service Discipline"?

The *Code of Service Discipline (CSD)* is the basis of the Canadian Forces (CF) military justice system. The *CSD* is designed to assist military commanders in maintaining discipline, efficiency, and morale within the CF. It is found in Part III of the *National Defence Act (NDA)*. The *CSD*:

- sets out who is subject to the military justice system
- establishes service offences for which a person can be charged
- establishes who has the authority to arrest and hold CF members in custody
- establishes service tribunals and their jurisdiction to conduct trials of persons charged with service offences
- establishes processes for the review and appeal of findings and sentence after trial

Why do we have a CSD?

The need for a separate justice system to enforce disciplinary standards in the military has a history that dates back to the earliest organized military forces. More recently, the Supreme Court of Canada, in the 1992 *Généreux* case, recognized the continuing need for a separate system of military justice. The Court stated that Canada depends on the CF to defend against threats to our security and the military must be able to enforce discipline effectively and efficiently in order to maintain its readiness. Accordingly, breaches of discipline must be dealt with speedily and will often result in more severe punishments than what a civilian might receive for the same conduct. The Supreme Court acknowledged that military tribunals are designed to meet the disciplinary needs of the CF and that the ordinary courts would generally be inadequate to serve the particular needs of the military. For example, both summary trials and courts martial can be held wherever forces are deployed.

When am I subject to the CSD?

If you are a member of the Regular Force you are always subject to the *CSD*, both inside and outside Canada.

If you are a member of the Reserve Force, you are subject to the *CSD*:

- while undergoing drill or training (whether you are in uniform or not)
- whenever you are in uniform
- while on any military duty
- 24 hours a day, 7 days a week during any period of full time service (Class "B" or "C" service)
- whenever you are present on defence property
- whenever you are in a vehicle, ship or aircraft of the CF

What offences can I be charged with under the CSD?

The *CSD* establishes a number of offences that are uniquely military in nature (eg. absence without leave and insubordinate behaviour). The *CSD* also incorporates all offences under the *Criminal Code*, all other federal statutes and, in certain circumstances, foreign laws. The list of offences with which you can be charged under the *CSD* is found in Chapter 103 of the *Queen's Regulations and Orders (QR&O)*. *QR&O* are available at your ship's office or unit orderly room and can also be accessed on the Defence Information Network (DIN) and the Internet.

Under the CSD, when can the military police arrest me?

The military police have jurisdiction to arrest all persons who are subject to the *CSD* both inside and outside Canada, including civilians who accompany the CF outside Canada (eg. family members posted overseas with a CF member).

MP personnel may detain or arrest without a warrant any person subject to the *CSD*, regardless of the person's rank or status, when that person:

- has committed a service offence
- is found committing a service offence

- is believed to have committed a service offence
- is believed to be about to commit a service offence
- has been charged with having committed a service offence

Who else can arrest me under the CSD?

If you are an officer, the following persons have the power to arrest you without a warrant:

- any officer of equal or higher rank
- any officer of lower rank if you are engaged in a quarrel, fight or disorder

If you are a non-commissioned member (NCM), the following persons have the power to arrest you without a warrant:

- any officer
- any NCM of higher rank
- any NCM of equal or lower rank if you are engaged in a quarrel, fight or disorder

Finally, any CF member with a warrant for arrest issued under the provisions of the *NDA*, or any member called upon to assist, can arrest another person subject to the *CSD*.

What about after I have left the CF?

It is possible that you can be charged or arrested even if you have ceased to be subject to the *CSD* (eg. after your release from the CF), as long as you were subject to the *CSD* at the time you allegedly committed a service offence.

Also, anyone who is a deserter or absent without leave from the CF can be arrested without warrant by any civilian police officer or, if no police officer is available, by any other CF member.

Limitation periods

A limitation period is a specified period of time within which a charge must be laid. In general, the limitation period begins the instant conduct occurs that may be subject to a charge. If a charge is not laid within the applicable

limitation period, the authority to try the accused for the offence charged is lost. Generally there are no limitation periods under the *CSD*.

With respect to service offences, the general rule is that anyone subject to the *CSD* at the time of the alleged commission of a service offence, can at any time be charged, dealt with, and tried under the *CSD*. There are two exceptions to this rule:

- If the offence is punishable under *NDA* sections 130 or 132 (i.e. an offence under another federal statute or foreign law) and would have been subject to a limitation period if it had been dealt with other than under the *CSD*, then that other limitation period applies
- Summary trials must begin within one year of the date on which the offence is alleged to have been committed. The summary trial does not have to be completed within one year; it only has to begin within that time. A trial begins when the accused is brought before the presiding officer and the presiding officer takes the oath and causes the charges to be read

What happens when I have been arrested?

When you are arrested, the *Canadian Charter of Rights and Freedoms* and *QR&O* require that you be informed:

- that you have the right to retain and instruct legal counsel without delay and be provided an opportunity to do so
- that you have the right to not say anything that may incriminate you
- of the reason for your arrest
- that you have the right to free and immediate legal advice from military defence counsel or any civilian duty legal counsel that may be available in your area
- of any legal aid plans that are available

The *CSD* provides that anyone arrested shall be released as soon as practicable, unless it is determined by the person who arrested you that you should be kept in pre-trial custody taking into consideration all the circumstances of the situation, including:

- the seriousness of the alleged offence
- the need to identify who you are

- the need to secure or preserve evidence
- the need to ensure that you will appear at trial
- the need to prevent you from committing further offences
- the necessity to ensure your own safety or the safety of any other person.

It is not necessary that you be formally charged with a service offence before military authorities can hold you in custody.

What happens if I am held in custody?

If you are to be held in pre-trial custody, you will normally be kept in cells in a unit or base guardroom. You may be placed in civilian custody if it is not practical to keep you in military custody. You will be informed of the name and rank of the person who ordered that you be held in custody and the reason(s) why you are being held.

Within 24 hours of your arrest and being placed in custody, you will be given the opportunity to express your views concerning your release to a custody review officer (your commanding officer (CO) or an officer designated by your CO).

Within 48 hours of your arrest and being placed in custody, a custody review officer will determine whether you will be released or kept in custody. For certain serious offences, termed "designated offences", the custody review officer must keep you in custody.

If you are kept in custody, you are entitled to a hearing before a military judge as soon as practicable to determine whether you are to be retained in custody. During that hearing, you are entitled to be represented by military legal counsel from the Directorate of Defence Counsel Services at no expense to you, or by a civilian legal counsel at your own expense.

What is a charge?

A charge is a formal accusation that a service offence has been committed. A charge is not considered to be "laid" until it has been written out in a Record of Disciplinary Proceedings and has been signed by a person who is authorized to lay charges under the *CSD*. A copy of the charge must be given to the accused person.

Who can lay charges against me?

The following persons have the authority to lay charges under the *CSD*:

- a CO
- any officer or NCM who has been authorized by the CO to lay charges
- a military police investigator with the CF National Investigation Service (NIS)

How do I know if I have been charged?

If you are charged with a *CSD* offence, you will generally be brought in front of a charging authority. That person will inform you that you have been accused of having committed an offence and will read the particulars of any charges against you. Additionally, a written copy of the charges will be provided to you.

Who decides whether my charges should proceed to trial?

The initial decision whether or not to proceed with a charge is made by a CO or superior commander. In the case of a charge laid by the NIS, if the CO or superior commander decides not to proceed, the NIS can have the charge referred through the chain of command to the Director of Military Prosecutions (DMP) where it will be reviewed for trial by court martial. The DMP can forward that charge, or any other charge supported by the evidence, for trial by court martial.

Certain serious offences cannot be tried by summary trial and such charges are automatically forwarded through the chain of command to DMP.

How will I know the case I have to meet?

Officers exercising summary trial jurisdiction have a duty to ensure that the accused and the assisting officer are provided a copy of, or given access to, any information that will be relied on at summary trial, or which tends to show the accused did not commit the offences charged.

Types of information that could be provided to the accused and the assisting officer include:

- a copy of any statement made by the accused
- a copy of any documentary evidence
- a copy of any written statement made by a witness
- a copy of any unit or military police investigation report made, or where applicable, relevant portions of the report which would include portions that would be relied upon at a summary trial or that would tend to show that the accused did not commit the offence charged
- where physical evidence exists, access to the evidence

The information must be provided in sufficient time to permit the accused to consider it in making an election and to properly prepare the accused's case prior to the summary trial. Should additional information subsequently come to light that will be relied on at the summary trial or which tends to show the accused did not commit the offence charged, it must immediately be provided.

It is important to note that there is no corresponding duty on the part of the accused to provide information.

What are the differences between a summary trial and a court martial?

Summary trials are designed to deal with relatively minor service offences that are important for the maintenance of military discipline and efficiency at the unit level. Summary trials allow a unit CO, delegated officer, or superior commander to effectively administer discipline and return the member to duty as soon as possible. The procedures of a summary trial are less formal than at courts martial (eg. the *Military Rules of Evidence* do not apply and there is no right to be represented by a lawyer at summary trials). Summary trial powers of punishment are more limited than the powers of punishment of courts martial.

Courts martial are formal military courts established under the *National Defence Act* that are presided over by military judges. A military prosecutor is assigned to prosecute each case and the accused is represented by defence counsel, either military or civilian. Courts martial are designed to deal with offences that are more serious in nature and they are conducted according to the *Military Rules of Evidence* and procedures similar to those used in civilian criminal courts. The powers of punishment of courts martial vary depending on the type of court martial and the offences charged.

What are "powers of punishment"?

The term "powers of punishment" refers to the penalties that can be imposed once a person has been convicted of a service offence by a service tribunal. The powers of punishment at a summary trial depend on the status of the presiding officer who conducts the trial:

- a commanding officer can award up to 30 days detention; reduction in rank by one rank; a reprimand; a fine up to 60% of one month's pay and minor punishments (such as confinement to barracks and stoppage of leave)
- a delegated officer can award a reprimand, a fine up to 25% of one month's pay, and minor punishments
- a superior commander can award a severe reprimand, a reprimand, and a fine of up to 60% of one month's pay

Note: Any NCM sentenced to detention is reduced to the rank of Private for the period of detention and is paid as a Private during that time. Upon completion of the period of detention the member will be reinstated to their previous rank and pay rate, unless reduction in rank was part of the sentence. Officers cannot be sentenced to detention.

The maximum punishment a court martial can award for the most serious offences is imprisonment for life with no eligibility for parole before 25 years. Other punishments a court martial can award include imprisonment for lesser periods, dismissal from the CF (with or without disgrace), detention up to 90 days, reduction in rank, forfeiture of seniority, reprimands, fines and minor punishments.

Note: Any NCM or officer sentenced to imprisonment is not automatically reduced in rank. Reduction in rank is a separate punishment. Any person sentenced to imprisonment forfeits all pay and allowances for the duration of their prison term. There is no status for rank. All prisoners are treated as inmates.

Who decides if my charges will be heard by summary trial or court martial?

In many cases, you make the choice. The majority of charges laid under the CSD can be tried either by summary trial or court martial and, when required, you will be offered an opportunity to "elect" or choose which type of trial you want. lieutenant-colonels/commanders and above can only be tried by court martial.

In situations where you have the right to elect court martial, the officer presiding over the trial will tell you that you are being given the choice. From that point you will be given at least twenty-four hours to consult with legal counsel and decide whether or not to elect trial by court martial.

If you are given the option to elect trial by court martial and you refuse to make a choice, you will be deemed to have elected trial by court martial.

When won't I have the option to choose trial by summary trial or court martial?

There are two circumstances under which you will not be offered an election for trial by either court martial or summary trial - in the case of minor charges that should be tried by summary trial and for very serious charges that are only tried by court martial.

You may be tried by summary trial without an election if you have been charged with any the following *CSD* charges and the circumstances are "sufficiently minor":

- insubordinate behaviour
- quarrels and disturbances
- absence without leave
- drunkenness
- conduct to the prejudice of good order and discipline (relating to military training, maintenance of personal kit, quarters or workspace, or dress and deportment)

An offence will be considered "sufficiently minor" when, in the judgement of the officer who will conduct your summary trial, a fine of 25% of your basic monthly pay or a lesser punishment (eg. a smaller fine or minor punishments) would be appropriate for your offence, if you are found guilty. In other words, if you are not offered an election to be tried by court martial, the maximum punishment that can be awarded at summary trial is a fine of 25% of one month's pay. This means that you cannot be sentenced to detention if you have not been given the option to elect trial by court martial.

You will not be offered an election for the most serious *CSD* charges such as negligent performance of duty and many *Criminal Code* charges. Charges such as these cannot be tried by summary trial and are

automatically sent through the chain of command to prosecuting authorities for consideration for trial by court martial.

What is my assisting officer's role?

You are entitled to be assigned an assisting officer as soon as possible after a charge has been laid against you. An assisting officer is an officer or, in exceptional circumstances, an NCM above the rank of sergeant.

You have the right to request a particular service member to act as your assisting officer. That person must be appointed unless the exigencies of the service do not permit the appointment or the member is unwilling to act as your assisting officer.

Your assisting officer is responsible to ensure you are fully informed of all procedures and entitlements you have under the *CSD*, including the opportunity to get legal advice, from either the Directorate of Defence Counsel Services or a civilian lawyer, when you are offered a choice of trial by either summary trial or court martial. If you do not wish to use the free services of DDCS, you have the right at any time to consult or hire a civilian lawyer at your own expense.

Your assisting officer can also help you to prepare and present your case at summary trial. However, assisting officers are not lawyers and they cannot provide you with legal advice or act as your defence counsel at a court martial.

When am I entitled to legal advice from the Directorate of Defence Counsel Services?

The Directorate of Defence Counsel Services (DDCS) is mandated to provide independent legal advice and representation to persons facing proceedings under the *CSD*. You are entitled to get legal advice from a lawyer in DDCS in four circumstances:

- If you are arrested or detained by military police or other military authorities, you are entitled to contact legal counsel. At the time of your arrest or detention you must be informed of this right and provided the opportunity to call the DDCS toll-free number to obtain free legal advice (you will be given the toll-free number at the time you are informed of your rights)

- If you are being held in pre-trial custody, you are entitled to be represented by military defence counsel during any custody hearings before a military judge
- If you are charged under the *CSD* and are offered an election between trial by summary trial or court martial, you have the right to get legal advice about your election using the DDCS toll-free number
- Where your charges are referred to trial by court martial, you are entitled to have military defence counsel appointed to represent you

If you do not wish to use the free services of DDCS, you have the right at any time to consult or hire a civilian lawyer at your own expense.

Who are the lawyers in DDCS?

The lawyers in DDCS are military legal officers assigned to provide legal advice and services to members facing proceedings under the *CSD*. While they are posted to DDCS these legal officers work under the direction of the Director of Defence Counsel Services and they are not required to perform any other duties. All military defence counsel are members of a provincial law society and are under the same professional obligations as civilian defence counsel to represent the interests of their clients and provide independent legal advice.

The absolute confidentiality of all consultations between CF members and military defence counsel is protected by law under "solicitor/client privilege".

Who will know about my charges?

Criminal charges in civil courts are a matter of public record. Similarly, the public will have access to your Record of Disciplinary Proceedings which sets out the offences with which you have been charged, the findings and any punishment awarded at summary trial, as well as the results of any subsequent review of your summary trial. Both courts martial and summary trials are normally open to the public.

Where will my trial be held?

Summary trials and courts martial are usually held at the base or unit where you are serving at the time charges are laid. If you are with a unit deployed

on operations, both summary trials and courts martial can be conducted in operational theatres or aboard ship. In some cases your trial may be held elsewhere (eg. because you were serving at another unit at the time of the alleged offence or most of the witnesses are located at another unit).

Who presides over a summary trial?

Summary trials may be conducted by superior commanders, COs or "delegated officers" (officers to whom a CO has delegated powers of punishment). When conducting a summary trial these officers are referred to as "presiding officers".

At the start of all summary trials, the presiding officer must swear an oath to administer justice according to law without partiality, favour or affection. In order to assure fairness of the trial process, in all but a very few circumstances an individual who was involved in the investigation or the laying of charges against you cannot preside at your summary trial.

Who decides the case at a court martial?

There are two types of court martial: General (GCM) and Standing (SCM). Selection of the type of court martial depends on the maximum punishment for the offence. For offences that are punishable by a maximum of imprisonment for life, GCM is the norm (unless both parties consent to go before a SCM). For offences that are punishable by imprisonment for less than two years or a punishment that is lower in the scale of punishments or are punishable by summary conviction under any Act of Parliament, SCM is the norm. In all other cases, the accused person has the right to choose between trial by GCM or SCM.

Both types of court martial are presided over by a military judge. In a SCM, the military judge conducts the trial sitting alone. In a GCM, the military judge presides over the trial with a court martial panel. A panel performs a function similar to a jury in a civilian court and is made up of five CF members. If the accused person is an officer, all the panel members will be officers. If the accused is an NCM, two members of the five-member panel must be NCMs of the rank of Warrant Officer or above. Panel members are selected at random from throughout the CF by the Court Martial Administrator working in the office of the Chief Military Judge. Court martial panels render the verdict (guilty or not guilty). The presiding military judge is responsible to make all other judicial rulings and determine sentence.

What can I do to get the findings of my trial reviewed?

If you have been convicted at summary trial, you are entitled to apply to a Review Authority to have the guilty finding or sentence imposed on you reviewed. The grounds and procedure for requesting review are set out in *QR&O* article 108.45. The Review Authority is normally the next superior officer to whom the presiding officer is responsible in matters of discipline. The Review Authority is required to seek the advice of a legal officer before making a final determination on a request for review.

If you have been convicted before a court martial, you may appeal to the Court Martial Appeal Court, a division of the Federal Court. A panel of three civilian judges hears each appeal.

How long does a CSD conviction stay on my conduct sheet?

There are provisions in Defence Administrative Orders and Directives (DAOD 7006) for the automatic removal of certain entries pertaining to CSD convictions from a CF member's Conduct Sheet after a specified period of time.

In addition, you may apply for a pardon of a conviction under the *Criminal Records Act*. If a pardon is granted, all mention of your conviction in respect of the pardoned offence will be removed from your personal records, including your Conduct Sheet (DAOD 7016).

Where can I get more information?

“**The Code of Service Discipline and Me**” is for general information purposes only. For specific information on the *CSD*, readers should refer to Part III of the *National Defence Act* and the regulations contained in Volume II of *QR&O*:

- Investigation of Service Offences – *QR&O* 106
- Preparation, Laying and Referral of Charges – *QR&O* 107
- Summary Proceedings – *QR&O* 108
- Application to Referral Authority for Disposal of a Charge – *QR&O* 109

Both the *NDA* and *QR&O* are available at your unit orderly room or ship’s office. They can also be accessed on the Defence Information Network (DIN) and the Internet.

For general information on summary trials, consult the Office of the Judge Advocate General publication “**Military Justice at the Summary Trial Level.**” (B-GG-005-027/AF-011)

For general information on investigating and charging, consult the Office of the Judge Advocate General pamphlet “**The Investigation and Charging Process in the Military Justice System.**”

For accused and Assisting Officers, refer to “**Guide for Accused and Assisting Officers (Pre-trial Proceedings at the Summary Trial Level)**” (A-LG-050-000/AF-001)

If you are seeking general information about the military justice system, consult the most recent version of “**The Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Justice in the Canadian Forces**” which is available on the Judge Advocate General’s web site (www.forces.gc.ca/jag).

You are encouraged to consult with your supervisor if you have any questions about the *CSD* and how it applies to you.